

COMMONWEALTH OF MASSACHUSETTS

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

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 9

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

PAULA PIETRELLA FAYE LEROUX

APPEARANCES

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

FOR: The Plaintiffs Marcia Rhodes, et al.

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

FOR: The Defendant Zurich American Insurance Company

ANTHONY R. ZELLE BRIAN McDONOUGH Attorneys At Law 4 Longfellow Place, 35th Floor Boston, MA 02114

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

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

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

INDEX

Table with columns: WITNESS, DIRECT, CROSS, REDIRECT, RECROSS. Includes entries for Nicholas Satriano (Resumed) and Harold Rhodes.

EXHIBITS

Table with columns: NO., DESCRIPTION, PAGE. Includes entry for Harold Rhodes Asset Spreadsheet.

P R O C E E D I N G S

(In court at 9:35 a.m.)

THE COURT: All right, let's get to work.

Mr. Satriano, you may return to the stand. Good morning. You remain under oath, as you know.

Mr. Zelle, you may proceed. I guess it's day three, isn't it?

THE WITNESS: Yes, your Honor.

THE COURT: All right. I'm keeping track. All right, go ahead.

NICHOLAS SATRIANO, Resumed.

CROSS-EXAMINATION BY MR. ZELLE, (Continued):

Q Mr. Satriano, when we finished yesterday, we were talking about factors that you consider in investigating a claim and attempting to -- an effort to undertake to evaluate claims. Are there some other factors you'd like to mention?

A Yes.

Q Please go right ahead.

A One other factor would be the injured party's pre- and post-accident mental, physical and emotional condition.

Q Can you explain how that's assessed by you?

A That would be assessed at the time of the deposition. We would look at factors -- I would look at factors as

to that person's ability with respect to the injury, how they're coping with the injury, if there are any residual sequela with respect to any emotional damage, any relationship issues, also their physical condition and the like.

Q And in the materials that you were provided by Mr. Deschenes in connection with the Rhodes case, did you have all the documentation that you needed to undertake an assessment of the pre-accident and post-accident physical and mental and emotional factors?

A No.

Q What was it that you did to obtain -- in an effort to obtain that information?

A We wanted the scheduling of an independent medical examination performed by a physiatrist.

Q Do you look at the pre- and post-accident level of social interaction of a plaintiff and loss of consortium plaintiffs?

A Yes. That would be another factor.

Q Why is that considered?

A Again, you are attempting to get a picture of the injured person, as well as their family members, to put a value on what is going on in their life today. For example, you're looking at the degree. If you have a

rather gregarious couple, if they were out, if they were socially active within their community, certainly now there could be -- obviously, that would change, or it may not change, and for that reason you'd look at those issues, to see how their lives have been affected.

Q Apart from taking depositions, is there any other way that you would go about seeking that type of information?

A The deposition would be really a very good way because you could explore that area with your counsel.

Q Any other factors you'd like to mention?

A Yes. Another area would be the family's ability and/or responsibility towards resolve, their resolve to recovery, what I call.

Q What did you have to assess in the Rhodes file, in the materials that you received from Mr. Deschenes, as to the efforts by the family to recover?

A There was not much information. There was some medical information but really nothing with respect to that area.

Q And other than the IME and depositions, is there anything else that you would typically do to develop that type of information?

A Again, the deposition, and the IME especially, would really tell us, because that would be the specialty of the physiatrist to comment on the ability or the opportunity for recovery or as close to rehabilitation and return as possible.

Q What was your understanding at the time of your review of the materials provided March of 2004 as to what recovery, if any, had been made by Mrs. Rhodes in terms of her physical recovery?

A I could not make that determination because Mrs. Rhodes had -- I simply didn't have enough information. Mrs. Rhodes also had suffered some setbacks.

Q How do you translate your assessment of these factors into a number?

A Essentially, what I do is I gather both my personal experience, I would meet with counsel and discuss and take into consideration counsel's input as well. We would also factor into, or I would factor into the relationship to jury verdict reports and information and research like that, and also discuss this with my supervisor.

Q In connection with the Rhodes case, did you ever get any jury verdict research or settlement value research?

A No.

1 Q Why didn't you do that?
 2 A It was too soon.
 3 Q When you say "too soon," could you explain that a
 4 little more?
 5 A Sure. We were still waiting for information. We were
 6 still developing information.
 7 Q Directing your attention --
 8 THE COURT: I'm sorry. It was too soon as of
 9 when?
 10 MR. ZELLE: As of the March --
 11 THE WITNESS: March, your Honor.
 12 THE COURT: As of the March meeting you're
 13 referring to?
 14 THE WITNESS: Yes.
 15 THE COURT: Okay.
 16 (By Mr. Zelle)
 17 Q As of the time of the March meeting, had GAF agreed to
 18 permit Mr. Conroy to become directly involved?
 19 A No.
 20 Q Was GAF's opposition to Mr. Conroy's direct
 21 participation reflected in communications you received
 22 from Mr. Bartell?
 23 A Yes.
 24 Q What did you think about the assertion by Mr. Bartell

1 THE COURT: When?
 2 THE WITNESS: I believe I did that in
 3 February in answer to his letters.
 4 MR. ZELLE: That letter was not copied to Mr.
 5 Hohn, therefore, it has not been identified as a -- or
 6 it's not been produced because it's within -- there
 7 were -- to the extent Mr. Bartell was certainly
 8 adversarial to AIG on some issues, he was also counsel
 9 for GAF, the insured, and this court has determined --
 10 THE COURT: So you're saying that his telling
 11 Bartell that there indeed is no issue of coverage is
 12 something that you consider to be privileged?
 13 MR. ZELLE: No, but there's other
 14 communications in that letter.
 15 THE COURT: Okay.
 16 MR. ZELLE: But we have it through testimony,
 17 your Honor. We didn't produce the letter and I'm not
 18 offering the letter.
 19 THE COURT: Okay.
 20 (By Mr. Zelle)
 21 Q During the meeting in March, was there discussion
 22 concerning Mr. Conroy's direct involvement thereafter?
 23 A Yes.
 24 Q And what was your understanding as to GAF's position as

1 that a determination as to whether -- I shouldn't say
 2 determination.
 3 What did you think about the position
 4 reflected in Mr. Bartell's letters that GAF could not
 5 even consider the question of Mr. Conroy's involvement
 6 before National Union confirmed that it would provide
 7 indemnification benefits for GAF?
 8 A I did not know what Mr. Bartell was speaking about. I
 9 believe the word I used yesterday was "puzzled." Mr.
 10 Bartell raised issues as to whether or not I was going
 11 to provide a written exclamation that coverage is going
 12 to be provided. Coverage was never an issue. I never
 13 raised that issue with Mr. Bartell or anyone else.
 14 Q When you say "coverage is not an issue," you're
 15 speaking to the limited coverage for GAF as opposed to
 16 other coverage that might be available for other
 17 parties, other defendants; is that right?
 18 A Yes. My answer would be relegated to coverage just for
 19 GAF under the excess policy.
 20 THE COURT: So why didn't you write Bartell
 21 and say coverage has never been an issue, I don't know
 22 what you're talking about?
 23 THE WITNESS: At some point I did, your
 24 Honor.

1 of March 5?
 2 A They were still resisting Mr. Conroy's involvement.
 3 Q Why did you want Mr. Conroy -- strike that.
 4 In the November telephone conference, did you
 5 explain to those on the telephone call why you wanted
 6 Mr. Conroy to become directly involved?
 7 A Yes.
 8 Q What did you say?
 9 A I indicated that I wanted Mr. Conroy to set up an
 10 immediate channel of communication to Mr. Pritzker.
 11 Q Why did you think that would be of benefit to moving
 12 the case forward?
 13 A I thought that was a great idea in moving -- just that,
 14 moving the case forward, and Mr. Conroy would have
 15 indicated to Mr. Pritzker that we were on the job and
 16 moving forward and hopefully a response would have been
 17 shortly coming.
 18 Q During the time period that you were involved with the
 19 Rhodes claim, or was it your general practice to
 20 request a formal, written tender?
 21 A Yes.
 22 Q And was there any written policy at AIG that applied to
 23 the Excess Claim Unit that there be formal, written
 24 tenders?

1 A No.

2 Q Did your supervisor require you to obtain a formal,
3 written tender?

4 A Yes.

5 Q Did you have an understanding of the reasons that you
6 wanted formal, written tenders?

7 A Yes.

8 Q What were the reasons?

9 A The reason was so that in receiving information
10 regarding the tender, you are in a position to
11 understand what is being tendered and what relationship
12 it has to the duty to defend.

13 Q When did Ms. Fuell first inform you that the Zurich
14 policy limits would be available to use to make an
15 offer to the plaintiffs?

16 A January 23, 2004.

17 Q Was that by telephone?

18 A Yes.

19 Q And what did you do? What did you say?

20 A I said I understood what she was saying to me, but I
21 also told her that I needed this in writing.

22 Q Was there any further communications before there was
23 an exchange of e-mails in mid-February?

24 A Yes. Ms. Fuell and I discussed the duty to defend.

1 Did I read that correctly?

2 A Yes.

3 Q Does that statement reflect the concern that you had
4 throughout the time from January 23 until the time you
5 left for Iraq?

6 A Yes, sir.

7 Q Is that consistent with Ms. Fuell's statements to you
8 concerning the defense obligation?

9 A No.

10 Q Did the concern that you had with respect to the
11 ongoing defense obligation delay the review of
12 materials that you had received from Mr. Deschenes?

13 A No, it did not.

14 Q Did it delay the review of materials received from --
15 that AIG received from Crawford?

16 A No, it did not.

17 Q Did the opposition by GAF to your efforts to associate
18 in Mr. Conroy delay your efforts to investigate the
19 claim?

20 A Yes.

21 Q And how did that delay your efforts?

22 A Quite simply, it delayed Mr. Conroy from obtaining the
23 information that I needed to offer a number on this
24 case for settlement.

1 Ms. Fuell had indicated to me that GAF -- excuse me --
2 Zurich was not relinquishing the duty to defend.

3 Q And was that reflected in the e-mail communication in
4 mid-February?

5 A Yes.

6 Q Did you have any concern regarding Zurich's position
7 relative to the continuing defense obligation?

8 A Yes.

9 Q Despite what representation had been made by Ms. Fuell?
10 Yes.

11 Q What was the basis of your concern?

12 A The text of the Bartell letters.

13 Q I'm going to show you a document. It's a letter dated
14 March 29, 2004. It's Exhibit 33.

15 If you look at Exhibit 33 -- do you have
16 that, Mr. Satriano?

17 A I do.

18 Q I'd like you to look at the second page of the letter.
19 It's Bates numbered ZA0951.

20 A Yes.

21 Q It's after the indented paragraph. It says: Based
22 upon the express language of this policy endorsement,
23 this formal tender of coverage limits ends Zurich's
24 duty to defend.

1 Q I'd like to direct your attention now, Mr. Satriano, to
2 testimony that was presented on direct exam. It was
3 actually what was shown on a video clip, or at least
4 some of that.

5 I'll to try to make this as straightforward
6 as I can, but as I'm referring to the deposition shown
7 here and your deposition testimony back in I believe it
8 was August, it's important that you listen carefully to
9 the questions, specifically the time periods.

10 Do you have any recollection today as to
11 whether in March of '04, at the meeting, you expressed
12 any opinion as to what the value of the case would be
13 if it went to trial?

14 A Yes.

15 Q What's your recollection today?

16 A That I did not.

17 Q I'm going to direct your attention -- do you have a
18 copy of your transcript there?

19 A I don't know. Is it part of the exhibits?

20 Q I don't know if you have it or not. I think it was
21 marked as an exhibit. The transcript that went along
22 with the video clip, is that marked as --do we know
23 what exhibit that is?

1 THE COURT: The video is 83A.
 2 MR. ZELLE: Okay. If you don't mind my
 3 working off the same copy as the witness, your Honor.
 4 THE COURT: You may.
 5 (By Mr. Zelle)
 6 Q You were asked at your deposition, and again it was
 7 part of the video clip -- this is on page 177, at the
 8 bottom, line 20. The question is: Did you express
 9 your opinion if the case, what the value would be if
 10 the case went to a verdict?
 11 And your answer was -- why don't you just
 12 read the first two sentences, if you would?
 13 A My answer is: I may have. We were -- I mean, we were
 14 starting to talk numbers here. I don't recall. I
 15 didn't ever agree with where they were.
 16 Q I think you misread that. It says: I didn't ever
 17 disagree.
 18 A Disagree -- excuse me, I'm sorry -- with where they
 19 were.
 20 Q Mr. Satriano, when you were referring to numbers, can
 21 you tell us what you were referring to?
 22 A Yes.
 23 Q What numbers were those?
 24 A The numbers were the \$19.5 million settlement demand

1 numbers that Mr. Deschenes said were averages of his
 2 jury verdict and settlement research?
 3 A I didn't have an -- I didn't have sufficient
 4 information for which to -- I may have, yes.
 5 Q Do you have any recollection as to what it was you said
 6 about those numbers?
 7 A In my deposition, I may have indicated that I did not,
 8 I believe, disagree with those numbers.
 9 Q My question is this. At the March 4 meeting, did you
 10 say I don't disagree with those numbers?
 11 A No.
 12 Q Let me again direct your attention to the testimony
 13 that was presented to this court by the videotape. If
 14 you'd look at page 178, it's a continuation of that
 15 answer. Can you just read beginning at line 3 the
 16 remainder of what was offered as evidence.
 17 A (Reading): It was a question of we had to agree on the
 18 way to get there basically and that is what was most
 19 important. It was pretty obvious that these ranges are
 20 not, you know, are not unreasonable ranges given the
 21 facts and circumstances, but it was just a question of
 22 how best to proceed.
 23 Q What did you mean when you're saying it was a question
 24 of a way to get there of how to proceed?

1 offered by Mr. Pritzker. The other number was the \$5
 2 million request to go to mediation, and the other
 3 numbers were Mr. Deschenes's average of the settlement
 4 value, I believe at 6 million plus, and the verdict
 5 value, verdict average, at 9-plus something million.
 6 Q Did you during the course of this meeting say anything
 7 about the number 19.5 million, the settlement demand?
 8 A I did.
 9 Q What did you say?
 10 A I said that it was too high.
 11 Q Were there other people who made comments about that
 12 number?
 13 A Yes.
 14 Q What were their comments?
 15 A Everyone essentially joined that this was too high of a
 16 number.
 17 Q Did you make any statement during the meeting about the
 18 \$5 million number that was said to be a admission price
 19 for mediation?
 20 A Yes.
 21 Q What did you say about number?
 22 A Again, I disagreed with that number. I simply said I
 23 wasn't going to pay it.
 24 Q At the March 4 meeting, did you say anything about the

1 A The numbers that we were speaking about were just that,
 2 they were just numbers. The important part here was
 3 going forward and how to proceed to Mr. Pritzker's --
 4 how to proceed in response to Mr. Pritzker's settlement
 5 demand package. That was the crux of what we were
 6 doing.
 7 Q During the mediation, did you say on March 5 that the
 8 numbers that Mr. Deschenes identified were not
 9 unreasonable?
 10 A No.
 11 MS. PINKHAM: Objection. Did you ask him
 12 about mediation?
 13 MR. ZELLE: I'm sorry.
 14 Q I meant to say during that meeting on March 5, did you
 15 express an opinion, any opinion, about the numbers that
 16 Mr. Deschenes identified?
 17 A No.
 18 Q Did you say that those ranges, did you say on March 5
 19 that those numbers were not unreasonable?
 20 A No.
 21 Q During the presentation of your deposition by way of
 22 videotape, I'm going to direct your attention -- this
 23 is on page 186.
 24 The question is: Who says what -- this

1 begins on line 9: Who says what about the fact that no
 2 one had responded to the August 13, 2003 settlement
 3 demand.
 4 Do you see that?
 5 A Yes.
 6 Q And you have a lengthy answer. I'm going to cut down
 7 to the end of that answer. It begins on page 187, line.
 8 Would you just read from there to the end.
 9 A (Reading): The demand was so high, so it was sometimes
 10 -- well, it's ridiculous. It's way too high. You
 11 know, maybe the evaluation was 8 to 10 or 8 to 12, but
 12 certainly not 16. So I don't care if we don't answer
 13 it at 16. I don't care if it goes to 50.
 14 Q Would you read the next question?
 15 A (Reading): Question: What was your feeling in this
 16 case for this claim?
 17 Q And would you read the answer? Is there an answer
 18 there? Just read the answer.
 19 A There is no answer.
 20 Q The question was: What was your feeling about the 8 to
 21 \$10 million range?
 22 A The question was: What was your feeling in this case
 23 for this claim?
 24 Q Let me show you your whole transcript.

1 A I informed Rich about the status of the case, what we
 2 were doing and our strategy going forward regarding
 3 depositions, IMEs, and so on and so forth.
 4 Q Did you say anything to him about settlement value or
 5 range of settlement?
 6 A No, I did not.
 7 Q Prior to the March 5, 2004 meeting, did you think that
 8 mediation would have been productive?
 9 A No.
 10 Q Why not?
 11 A We simply did not have sufficient information. We
 12 needed more information.
 13 MR. ZELLE: I don't have anything further,
 14 your Honor.
 15 THE COURT: Mr. Goldman.
 16 MR. GOLDMAN: Thank you, your Honor.
 17 CROSS-EXAMINATION BY MR. GOLDMAN:
 18 Q Good morning.
 19 A Good morning.
 20 Q I just want to go over your discussions with Kathleen
 21 Fuell and your recollection of those discussions. Did
 22 you review your deposition transcript in preparation
 23 for your testimony today?
 24 A Yes.

1 MR. ZELLE: I just need to ask, has what's
 2 been marked as 83A a complete copy of what was shown on
 3 the video?
 4 MS. PINKHAM: Yes.
 5 MR. ZELLE: So the question was asked and not
 6 answered on the video?
 7 MS. PINKHAM: If that's what it says, yes.
 8 (By Mr. Zelle)
 9 Q The question is, this is on page 187 and begins on line
 10 16: Was that your feeling in this case for that claim?
 11 What was your answer?
 12 A The answer was: No.
 13 MR. ZELLE: Bear with me for one second, I'm
 14 almost through, your Honor.
 15 (By Mr. Zelle)
 16 Q Before you left for Iraq in mid-March, did you bring
 17 your supervisor up to speed on the case?
 18 My question, Mr. Satriano, did you bring your
 19 supervisor up to speed on your active cases before you
 20 left for Iraq?
 21 A Yes, I did.
 22 Q And who was your supervisor?
 23 A Richard Mastronardo.
 24 Q And what did you tell him about this case?

1 Q And do you recall testifying in your deposition that
 2 you did not remember whether Kathleen Fuell was on
 3 either of the two telephone conferences you had with
 4 Greg Deschense, the broker, and Mr. Manning?
 5 A If that's what I said, I don't recall it.
 6 Q You don't recall it. Let me show you -- if I might
 7 hand you a complete copy of the transcript here. I
 8 draw your attention to page 83.
 9 A 83?
 10 Q Yes. Tell me when you've found it there.
 11 A Yes.
 12 Q And starting on line 17, if I might just read with you.
 13 The question is: Okay. And now did you say you think
 14 you spoke with Mr. Manning or Mr. Hahn in the summer of
 15 2003?
 16 The answer is: I believe we had at least two
 17 telephone conversations, two teleconferences, and the
 18 people present at those telephone conferences were Mr.
 19 Manning, Mr. Hahn, and Mr. Deschenes, myself, and I'm
 20 not sure who else might have been on that.
 21 Does that refresh your recollection as to
 22 what you testified to in your deposition?
 23 A Yes.
 24 Q So at the time of your deposition, would it be fair to

1 say you did not remember if Ms. Fuell was on either of
2 those telephone conferences?

3 A I guess so. I said I'm not sure who else may have been
4 on them.

5 Q In fact, you also testified in your deposition at
6 different times, did you not, that you had no
7 independent -- you're sure you did talk to Ms. Fuell at
8 some time during this claim but that you had no
9 independent recollection of those discussions.

10 Do you recall testifying to that?

11 A Again, if that's what I said in my deposition.

12 Q If I can draw your attention to page 207 of the
13 transcript.

14 A I'm there.

15 Q Actually, just turn back on page, page 206, starting at
16 line 17. The question was: Mr. Satriano, you
17 testified earlier today you spoke to a woman by the
18 name of Kathleen Fuell from Zurich American; is that
19 correct?

20 Answer: Yes.

21 Question: You testified she had participated
22 in a telephone conference with other representatives of
23 the defendant; is that correct?

24 Answer: No. She may have. I don't know

1 a telephone conversation with Kathleen Fuell? And my
2 answer on line 16 is: Yes.

3 Q Correct.

4 A Okay.

5 Q And then on page 208, you're asked: Other than
6 documents you reviewed today, you have no independent
7 knowledge of the contents of that telephone
8 conversation correct?

9 A Yes. My answer was: That would be correct, to that
10 question.

11 Q Now, you never reviewed the Zurich insurance policy,
12 did you?

13 A I do not believe I did.

14 Q In fact, you never asked for it either, did you?

15 A No. My recollection is that I did ask for it.

16 Q I would ask you to turn to page 143 of the transcript
17 of your deposition.

18 A I'm there.

19 Q Before we go there, did you ever ask at any time during
20 your investigation of this claim for copies of
21 insurance policies that might insure either GAF or any
22 of the other defendants?

23 A Again, I may have with Mrs. Fuell.

24 Q You think you asked Ms. Fuell for that?

1 specifically if she did or didn't. The first or second
2 one, I have no recollection of that.

3 Does that refresh your recollection as to
4 what you testified to in your deposition?

5 A Yes.

6 Q And if I could ask you to turn to page 208, line 16,
7 they're discussing the telephone conference you had
8 with Ms. Fuell regarding the tender. The question
9 there is: Okay. But other than the documents reviewed
10 today, you have no independent knowledge of that
11 contents of that telephone call; is that correct?

12 And your answer was: That would be correct.

13 A I'm confused as to what you want. You're saying the
14 question two down that I probably had a conversation
15 where I said I did and answered yes?

16 Q Right.

17 A On page 207?

18 Q Page 208.

19 A But the one I'm talking about was 207 that I did, if
20 you look at the question.

21 Q It says you did have a conversation, correct?

22 A No, no. Line 12, you're confusing it. Line 12, it
23 says: So it's your testimony, based on documents that
24 you have seen today, that you believe you probably had

1 A That I don't recall. That would be typically the type
2 of information that I would ask the primary insurer.

3 Q Do you recall testifying in your deposition that you
4 didn't because essentially you were inexperienced on
5 the job at the time you were handling this claim?

6 A Well, you need to direct me to that one.

7 Q Let's look at page 143, line 6. Do you recall being
8 asked and giving this answer:

9 At any point after the two teleconferences
10 did you ask anybody on the defense team if they had
11 made an investigation into whether there were other
12 primary policies that may provide coverage for the
13 Rhodes claim?

14 Answer: As I do my job now, after having
15 done many more months and years of experience as a
16 complex director, if I'm going to talk to you and you
17 were my defense counsel or a representative of the
18 insured and my file is thin, I would say to you I need
19 you to provide me correspondence, any sort of material
20 that would have generated copies of policies, any
21 coverage letters or denials or reservations, or any
22 correspondence between you and perhaps coverage counsel
23 hired by you, so I probably have requested stuff like
24 what are you asking and I would definitely --

1 A You're not reading right. It's "so I would probably."
 2 You skipped "would".
 3 Q (Reading): So I would probably have requested stuff
 4 like what are you asking and I would definitely, I
 5 would have that as part of my routine now. Back when I
 6 started, having, you know, again, learning the job as
 7 well, coming out from the standpoint not a practicing
 8 attorney but sort of an insurance person, I have
 9 absolutely no recollection as to whether or not I asked
 10 that.
 11 Did I read that correctly?
 12 A Yes.
 13 MR. ZELLE: Would you finish reading.
 14 MR. GOLDMAN: You wish me to finish reading?
 15 Q (Reading): I may have asked though, you know, perhaps
 16 being too hard on myself. But I know as I sit here
 17 today, I know if I'm requesting stuff, I would say give
 18 me litigation stuff, give me insurance stuff, give me
 19 letters regarding coverage or coverage analysis, things
 20 like that.
 21 Have I read that correctly?
 22 A Yes.
 23 Q So you do not know whether back in 2003 and 2004 you
 24 asked for other insurance policies or not, do you?

1 A Please repeat your question?
 2 Q You testified yesterday I think that you never, during
 3 the time you worked on the claim, you never were able
 4 to make a determination, other than the Zurich policy,
 5 there was any other insurance for any of the defendants
 6 in this claim; is that correct?
 7 A I'm not understanding your question.
 8 Q Well, let me break it down. Did you ever learn, other
 9 than your policy and the Zurich policy, whether there
 10 was any additional insurance for GAF?
 11 A I don't believe there were other GAF policies out there
 12 or policies that named GAF specifically as an insured
 13 other than the business auto policy, the primary auto
 14 policy.
 15 Q And did you ever learn during the time you handled the
 16 claim whether Penske had additional coverage for this
 17 accident other than the Zurich policy?
 18 A I don't recollect. There probably was a primary policy
 19 for Penske.
 20 Q Okay. So you found about that.
 21 A No, I did not, because I stated that I did not have
 22 that information provided to me.
 23 Q Did anyone tell you there was another policy for
 24 Penske?

1 A My recollection is that I did.
 2 Q When you testified in your deposition, you had no
 3 recollection one way or the other, correct?
 4 A I know what I said, counsel, in my deposition and I
 5 admitted that's what I said. Now I'm answering your
 6 question.
 7 Q And when you testified in your deposition, you were
 8 under oath?
 9 A Yes.
 10 Q Same oath you're under here today?
 11 A Yes.
 12 Q And you were trying your best to tell the truth, right?
 13 A Counsel, I was telling the truth.
 14 Q Now, if I could ask you to look at Exhibit 66L
 15 A I'm there.
 16 Q That's a report that you received during the time you
 17 worked on this claim; is that correct?
 18 A Say again?
 19 Q That's a report you that received sometime during the
 20 time you were working on this claim; is that correct?
 21 A Yes.
 22 Q And you testified earlier that you never determined
 23 whether there was any additional insurance for any of
 24 the defense; isn't that correct?

1 A That there was not a policy for Penske?
 2 Q No, that there was another policy for Penske other than
 3 the Zurich and AIG policies.
 4 A I don't recall. Perhaps Mr. Hohn, in some discussions
 5 that we had. I don't specifically recall.
 6 Q Now, with regard to DLS, you had no information whether
 7 DLS had any other available insurance other than the
 8 Zurich policy and your policy?
 9 A Again, same answer that I just gave you.
 10 Q Okay. Well, I'd like you to look at Exhibit 66L, which
 11 is a report of Mr. Chaney of Crawford, dated November
 12 13, 2003. And in the section under "summary," right on
 13 the first page there, that indicates, does it not, that
 14 -- I'm sorry. I was directing you to the first page.
 15 It's the second page of the report. I'm sorry.
 16 That indicates, does it not, that DLS has no
 17 coverage due to agency error; is that correct?
 18 A Where are you referring to, please
 19 Q In the paragraph right around the middle of the page,
 20 starting with "This report is presented as a
 21 reflection."
 22 A Yes, I'm there.
 23 Q Okay. So if we go down further in that paragraph, it
 24 says: DLS has no, we repeat, no coverage for this

1 accident due to an agency error. Is that correct?

2 A What it says here, it says: Of note, we notice nowhere

3 is it mentioned that it appears that DLS has no, we

4 repeat, no coverage for this accident due to an agency

5 error.

6 Then it goes on to state: This may be

7 actionable by them under the agent's E&O coverage, if

8 such exists. This information comes via phone

9 conversation last December between Tim Corrigan and

10 DLS's personal counsel.

11 Q Right. And you don't know whether Mr. Corrigan or

12 DLS's personal counsel communicated that to Mr. Chaney,

13 do you?

14 A I know nothing other than what's printed on this paper

15 here.

16 Q But what's printed on the page is an indication from

17 Crawford that DLS has no available insurance other than

18 the policies that we're here about today; is that

19 correct?

20 A Again, it's another conclusion by Crawford contained

21 within their report.

22 Q And would it be fair to say, sir, that if no policy

23 existed, no one could provide you with such a policy?

24 MR. ZELLE: I'll stipulate to that one.

1 (By Mr. Goldman)

2 Q Now, let's go to your level of comfort or discomfort

3 with what you were provided with after Zurich reached

4 up to AIG in November of 2003.

5 During the teleconference, you asked for the

6 documentation that the others on the call had; is that

7 right?

8 A Yes.

9 Q And they sent that to you; isn't that correct?

10 A I received information, I testified, from Mr.

11 Deschenes, and I may have received some information

12 from Mr. Penick. So your answer, your question would

13 not be correct that "they sent me," no. That's the

14 information that I received.

15 Q Do you recall testifying in your deposition that as of

16 February you had probably reviewed all the material you

17 thought was necessary to complete your investigation?

18 A Again, if it's in my deposition, please point it out

19 and I'll refer to it.

20 Q Okay. Let's look at page 148 of your deposition.

21 A I'm there.

22 Q Line 4, do you recall being asked these questions and

23 giving this answer:

24 As of February 2004, had you reviewed all the

1 materials you thought were necessary for you to

2 complete your investigation in the case?

3 Answer: Probably. I mean, it was always

4 evolving. There was always more. I think -- the other

5 part of that discussion was whether or not to proceed

6 without -- I don't believe we had taken Mrs. Rhodes'

7 deposition at that point, and there was a conversation

8 as to whether or not one should proceed to mediation

9 with or without the deposition.

10 So, you know, I mean, there had to be some

11 more stuff or current medicals and things like that,

12 that is, the specials were climbing, you know, by the

13 week, obviously we wanted to review any current

14 information generated from plaintiffs.

15 Was that your testimony in deposition?

16 A Yes.

17 Q And then by the time of the March 2004 meeting, you

18 felt sufficiently comfortable with the facts of the

19 case so that you were able to make a reasonable

20 determination as to what the best strategy was to

21 follow; is that correct?

22 A Is that a question or is that in the deposition?

23 Q That's a question.

24 A Repeat the question, please.

1 Q Yes. By March of 2004, did you feel sufficiently

2 comfortable with the facts of the case so that you felt

3 that you had all the information you needed to make a

4 reasonable determination as to what the best strategy

5 was to follow?

6 A Well, your question presupposes two things. I mean,

7 one, if there was a need for more information; and,

8 two, if what was identified as the best strategy going

9 forward.

10 Number one, there was not enough information,

11 there was not sufficient information and information

12 remained.

13 Number two is, yes, the goal that was a

14 product of that meeting was that we were going to plot

15 a strategy forward to respond to Mr. Pritzker.

16 Q Well, what you decided at the March meeting was there

17 was some discussion as to whether to take Mrs. Rhodes'

18 deposition, right?

19 A Yes.

20 Q And Mr. Conroy was at the meeting, right?

21 A Yes, he was.

22 Q And Mr. Deschenes was at the meeting, right?

23 A Yes.

24 Q And the jury was out as to whether Mr. Conroy thought

1 you should take Mrs. Rhodes' deposition; isn't that
 2 right?
 3 A No.
 4 Q No?
 5 MR. MASELEK: Objection.
 6 THE COURT: It's overruled.
 7 A Mr. Conroy -- well, we were discussing the need for the
 8 deposition and our requirements with respect to
 9 depositions.
 10 (By Mr. Goldman)
 11 Q And was the jury out as to whether Mr. Conroy thought
 12 you ought to take Mrs. Rhodes' deposition?
 13 A Mr. Conroy was --
 14 THE COURT: I'm not sure if the term "the
 15 jury was out" is going to be the most helpful. So why
 16 don't you --
 17 (By Mr. Goldman)
 18 Q Had Mr. Conroy expressed a strong opinion as to whether
 19 Mrs. Rhodes' deposition ought to be taken?
 20 A Yes.
 21 Q Okay. Had he expressed a strong opinion as to whether
 22 Mrs. Rhodes' deposition ought to be taken before any
 23 mediation?
 24 A Yes.

1 Q Do you recall testifying to this?
 2 Who indicated putting up a \$5 million offer
 3 on the table to jumpstart mediation?
 4 Answer: As I recall this meeting, it
 5 probably, you know, it probably was suggested by
 6 everybody but me because it was more my \$3 million. So
 7 I thought that, there again, recognizing in that \$2
 8 million is a lot money, it wasn't something, I mean
 9 much less 5 million, that we were going to say Mr.
 10 Pritzker, notwithstanding his reputation -- I certainly
 11 didn't think we needed to give him \$5 million to come
 12 to a table and mediate a case which he had an interest
 13 in mediating, at least I felt that way, so I was
 14 against it.
 15 So I would have said that we were -- probably
 16 everybody in that room, except for Bill and myself
 17 probably, I wouldn't say advocated because that's a
 18 pretty strong word, but I probably suggested that that
 19 be the position that we take.
 20 Oh, the other difference of opinion was with
 21 respect to whether we proceed without taking her
 22 deposition.
 23 Question: Well, tell me about that.
 24 That was really up in the air. I mean, that

1 Q Do you recall testifying in your deposition that the
 2 jury was out with respect to whether Mr. Conroy thought
 3 it was a good idea to take the deposition before the
 4 mediation?
 5 A Counsel, again, if it's in my deposition testimony,
 6 then that's what I said.
 7 Q Well, let's see now. You had your deposition, and that
 8 was more closer in time to the March 2004 meeting than
 9 today, right?
 10 A Yes.
 11 Q And if I could ask you to turn to page 180 of your
 12 transcript.
 13 A What page?
 14 Q 180, 1-8-0.
 15 A Okay.
 16 Q Now, I'm not going to read all of this out loud. I'd
 17 just ask you to read from pages 180, line 7 through the
 18 end of 181 and then I'll just read aloud the relevant
 19 parts, but I don't want to be misleading if I ask you
 20 about parts of it without you understanding the
 21 contents of it.
 22 A I need a moment.
 23 Okay. What lines would you like me to refer
 24 to?

1 exclusively. I reserved that decision. I was going to
 2 get a lot of input from Bill on that and quote,
 3 unquote, the jury was out with respect to whether Bill
 4 thought that was a good idea.
 5 Have I read that correctly?
 6 A Yes. Why do you stop?
 7 THE COURT: I think he can stop when he wants
 8 to.
 9 MR. GOLDMAN: I'll read the rest for the
 10 court, your Honor. Actually, it might be helpful.
 11 (By Mr. Goldman)
 12 Q (Reading): The lawyers, you know, the lawyers in the
 13 trenches would make the decision. I would not take
 14 that away from them. Whatever my counsel would have
 15 suggested to me is probably what I would have
 16 recommended anyhow. But they were discussing the pros
 17 and cons of doing it with or without Mrs. Rhodes. So
 18 those were the two differences of opinion that we
 19 talked about.
 20 Have I read that complete answer now?
 21 A Yes.
 22 Q Just going back to something. You said that you
 23 believed -- that you asked Ms. Fuell for a copy of the
 24 Zurich policy?

1 A Yes.
 2 Q Let me just ask you to look at page 129 of your
 3 deposition
 4 At line 8. Do you recall being asked this
 5 question and giving this answer?
 6 Did you ask Ms. Fuell for a copy of any of
 7 the documents that contained her analysis of the Rhodes
 8 claim?
 9 Answer: I'm sorry, I don't recall. I don't
 10 think so.
 11 Question: Why would you have asked for the
 12 primary policy?
 13 Sometimes just to have it in my file.
 14 Question: Do you have a recollection of
 15 making a request in the Rhodes claim?
 16 Answer: No.
 17 Is that your testimony?
 18 A I don't have a recollection.
 19 Q Now, sir, when you first started working on the Rhodes
 20 claim, that was in June of 2003?
 21 A Yes.
 22 Q And that was when you first started working at AIG,
 23 right?
 24 A Yes.

1 Q And you had never been employed by an insurance company
 2 before that; is that correct?
 3 A No. I mean, yes, it is. I'm sorry.
 4 Q Just to be clear. Is it correct that you have not
 5 previously worked for an insurance company?
 6 A No. I had been in private practice and we represented
 7 insurance companies, but I have never been employed
 8 prior to that by an insurance company.
 9 Q And you graduated from law school in 1989?
 10 A I did.
 11 Q And that was Hofstra University Law School?
 12 A Yes.
 13 Q And you worked for, what, about six years or so in the
 14 District Attorney's Office; is that correct?
 15 A Yes.
 16 Q And among the other things you did, you worked as a
 17 solo practitioner for two or three years; is that
 18 correct?
 19 A Yes.
 20 Q And during the time you were a solo practitioner, the
 21 only involvement you had with insurance cases was just
 22 covering cases for other lawyers from time to time?
 23 A No, insurance defense cases.
 24 Q Now, you said during your direct examination that you

1 were very upset with Mr. Deschenes during the November
 2 2003 teleconference; is that correct?
 3 A Yes.
 4 Q But by the time of the March meeting, that is, March of
 5 '04, you were comfortable with Mr. Deschenes, weren't
 6 you?
 7 A What do you mean by "comfortable"?
 8 Q You thought he was doing a good job.
 9 A I wouldn't go that far, no.
 10 Q Well, do you think he was serving everybody involved
 11 well?
 12 A I, I -- how could I answer that question?
 13 Q Well, let me ask a different question then, if you
 14 can't answer that one.
 15 Is it true that you were not dissatisfied
 16 with the work that Mr. Deschenes had done?
 17 A I was personally dissatisfied. As I explained before,
 18 I was personally dissatisfied that the first
 19 opportunity that I had spoken with primary defense
 20 counsel there was a request for money. There
 21 previously had not been any status reports or any
 22 contact. I also clarified and stated that, again,
 23 globally, considering what we were trying to do at that
 24 meeting and since Zurich had reached up to me, what I

1 was attempting to do was to bring the camp together, to
 2 move forward with a strategy. And I also expressed
 3 that it was not productive for me to singularly attack
 4 or discredit Mr. Deschenes in front of any of the
 5 members of the group.
 6 Q Do you recall testifying in your deposition that
 7 bringing in Mr. Conroy should not be interpreted as
 8 your dissatisfaction with the handling of the case.
 9 That quite to the contrary, everyone knew what they
 10 were talking about and everyone was well served about
 11 this case.
 12 A Yes. I recall stating that in my deposition.
 13 Q Now, I'd just like to go through a few -- you said that
 14 you never authorized -- well, I don't know if you said
 15 that. But, in fact, you never authorized any
 16 settlement offer in this case; is that correct?
 17 A That's correct.
 18 Q And would it be correct that you never sought authority
 19 within AIG before, to make a settlement offer?
 20 A Yes.
 21 Q And you had no authority yourself to make a settlement
 22 offer, is that correct, without getting authority from
 23 someone senior to you; is that correct?
 24 A Yes.

1 Q All right. Now, I just want to go through the
 2 communications. You said in January 23, 2004, Kathleen
 3 Fuell told you that the Zurich policy limits were
 4 available to AIG, should AIG wish to make an offer to
 5 settle the case. In other words, that a settlement
 6 offer could include \$2 million from Zurich, and if it
 7 was accepted, Zurich would pay.
 8 A What I recall is that Kathleen Fuell offered up the \$2
 9 million, yes.
 10 Q And then that was confirmed in an e-mail on February
 11 13, 2004; is that correct?
 12 A Yes.
 13 Q Now, sir, are you familiar with any case law of any
 14 sort, or any other authority, to say that e-mail
 15 correspondence is not binding on the party that sends
 16 it?
 17 A No.
 18 THE COURT: Let me just be clear. Did you
 19 understand, once Fuell spoke with you, that you had the
 20 Zurich \$2 million to work with in making any offer of
 21 settlement?
 22 THE WITNESS: Yes, your Honor.
 23 THE COURT: So as of that date, you knew that
 24 you had the Zurich 2 million and whatever you offered

1 Q November, right. And following that you really
 2 mobilized. Is that a fair characterization of what you
 3 did?
 4 A Not in my present world, but, yes, I became involved.
 5 Q In the world of an excess insurance claims person,
 6 would that be a fair characterization?
 7 A Yes.
 8 Q Okay. And you did everything that you could to learn
 9 about the facts of the case; is that correct?
 10 A Yes.
 11 Q And you did everything you could to try to evaluate the
 12 case; is that right?
 13 A Well, that was the ultimate goal for which I was
 14 becoming involved in; so, yes, we were taking steps to
 15 move forward to the place we needed to be.
 16 Q And you did everything you could to develop what you
 17 thought was the best tactful strategy to move the case
 18 towards resolution; is that correct?
 19 A Yes.
 20 Q And you did all those things, in fact, right? You
 21 developed the best strategy you could during the time
 22 that you were still working on the claim, right?
 23 A But for the interruption as a result of my deployment,
 24 I did what I felt was appropriate and what I felt that

1 you could rely upon the 2 million having been done.
 2 THE WITNESS: Yes, your Honor.
 3 THE COURT: All right. And you had that
 4 based on her oral representation to you.
 5 THE WITNESS: Yes, your Honor.
 6 THE COURT: As of January 23, then, when she
 7 spoke with you, you knew that you had the Zurich 2
 8 million effectively in AIG's pocket with regard to a
 9 settlement offer?
 10 THE WITNESS: Yes, sir. The only decision
 11 that was unresolved was the duty to defend.
 12 (By Mr. Goldman)
 13 Q But if you thought a settlement offer was appropriate,
 14 you would have gone ahead and made the settlement
 15 offer; isn't that correct?
 16 A No.
 17 Q Now, November 19, before the \$2 million were available
 18 to you -- I'm sorry. And you had no authority to make
 19 the settlement offer; is that correct?
 20 A Yes.
 21 Q Now, the November 2003 meeting, you felt that Zurich
 22 and the broker and the insured were reaching up to you
 23 to ask for your involvement, right?
 24 A November, yes.

1 we needed to begin doing. It certainly wasn't
 2 accomplished.
 3 Q And the decision at the time, shortly before your
 4 deployment, which was still in place at the time of
 5 your deployment, was to try to get the case in
 6 mediation without making any settlement offer first; is
 7 that correct?
 8 A Partially correct. I mean, again, the case was to --
 9 the goal was to respond to Mr. Pritzker. The mediation
 10 issue was unresolved; but, yes, I did not want to pay
 11 him to come to mediation.
 12 MR. GOLDMAN: No further questions.
 13 THE COURT: Ms. Pinkham?
 14 REDIRECT EXAMINATION BY MS. PINKHAM:
 15 Q Mr. Satriano, could you turn back to the deposition
 16 testimony that was shown via video that's contained in
 17 Plaintiffs' Trial Exhibit Volume No. 3 at 83A, please?
 18 A I don't think I have 83A. I have 83A, but it says the
 19 videotape deposition. That's what we were looking for
 20 before.
 21 MR. ZELLE: Your Honor, I think, in fairness,
 22 that if she's going to be questioning him about his
 23 video testimony, it shouldn't be the excerpt version
 24 that was offered. He should have an opportunity, at

1 least on cross-examination, to be confronted with his
2 entire answers.

3 THE COURT: If there's any issue as to the
4 rule of completeness, we can deal with it, but you may
5 proceed.

6 (By Ms. Pinkham)

7 Q Mr. Satriano, in response to Attorney Goldman's
8 questions, you testified that if something is in your
9 deposition transcript, then that's what you said; isn't
10 that true?

11 A Yes.

12 Q And in response to some of Mr. Zelle's questions, he
13 was asking you to explain what you meant, not what you
14 said; isn't that true?

15 A I don't recall. I guess so.

16 Q In any event, you testified that you were telling the
17 truth in your deposition, correct?

18 A Yes.

19 Q And in the interest of putting everything in context,
20 let's look again at the testimony that is on page 177
21 of your transcript.

22 MR. ZELLE: Is he looking at his transcript
23 or is he looking at the excerpts?

24 MS. PINKHAM: The excerpts that were marked

1 A Answer: Same thing. General discussion about,
2 obviously, the -- excuse me, the jury verdict value
3 would be higher if it were to go to verdict. And that
4 would be probably what some individuals felt it would
5 come up to be if it went to a verdict.

6 Q And the next question I asked you was: Did you express
7 your opinion if the case, what the value would be, if
8 the case went to a verdict? And your answer was?

9 A (Reading): I may have. We were -- I mean, we were
10 starting to talk numbers here. I don't recall. I
11 didn't ever disagree with where they were. It was a
12 question of we had to agree on the way to get there
13 basically. And that is what was most important. It
14 was pretty obvious that these ranges are not -- you
15 know, are not unreasonable ranges, given the facts and
16 circumstances. But it was just a question of how best
17 to proceed.

18 Q And that was your complete answer to the question that
19 I had asked you, Mr. Satriano?

20 A Well, that's where it stops. Hold on.

21 Q And you're now looking at the full copy of your
22 transcript on page 178 to confirm that that was the
23 complete answer that you gave in response to my
24 question?

1 as Exhibit 83A.

2 (By Ms. Pinkham)

3 Q I just handed those to you Mr. Satriano?

4 A Yeah, but you just referred to the transcript.

5 Q Have you found page 177, Mr. Satriano?

6 MR. ZELLE: One moment.

7 (By Ms. Pinkham)

8 Q You're looking through the completed document
9 transcript right now?

10 A I'd like to have both out. Okay.

11 Q Okay. On page 177, at line 3, I asked you a question.
12 The question was: The \$6 million figure that was
13 identified as a settlement range, where did that number
14 come from?

15 And your complete answer was? Could you read
16 that, please, Mr. Satriano?

17 A The answer was: I have no clue. As I sit here,
18 probably it was discussed by the principals there in
19 terms of it may be in the Massachusetts in that
20 particular venue of -- certainly not a number that I
21 had picked out of -- out of a specific number.

22 Q And the next question that I asked you was: Same
23 question for the \$9.696 million jury verdict. And your
24 answer was?

1 A Yes. And it was, to that question, yes.

2 Q All right. And so the range that you were referencing
3 in response to my question was the 6 million and the
4 \$9.6 million range; was it not, Mr. Satriano?

5 A It wasn't a range, Ms. Pinkham. It wasn't a range.
6 There were two numbers.

7 Q And the two numbers that you were referencing in your
8 testimony at page 178 was the \$6 million and the \$9
9 million verdict value that Mr. Deschenes had provided;
10 isn't that so?

11 A Yes, these two numbers.

12 Q Okay. Could you turn to the next page of 83A for me,
13 Mr. Satriano? If you like, you can stick with the full
14 copy of the transcript on page 182.

15 A Okay. Where would you like me to go?

16 Q Are you on page 182?

17 A Okay.

18 Q At line 10, I started to ask you a question and then I
19 struck it. Do you see that?

20 A Yes.

21 Q And then I asked you this question: Did any of the
22 representatives from GAF express their opinion on the
23 value of the case and what strategy should be followed?
24 Could you read your complete answer for me,

1 Mr. Satriano?
 2 A (Reading) I don't specifically recall. I don't think
 3 people -- again, we really weren't -- there was -- I
 4 don't believe there was any colloquy about these
 5 numbers. The numbers that -- the six and this nine
 6 thing, I think it was just, sort of, you know, it's a
 7 pretty accurate range, or at least a range not to
 8 disagree with. Obviously you want north of that and I
 9 want south of that, but still it's a range from
 10 anywhere, say, from eight on that we were discussing
 11 this case. But I don't recall a colloquy about it.

12 It is really more -- once we get to the meat
 13 of the matter, it was these two issues about how best
 14 to proceed in mediating the deposition that we were
 15 going to do.

16 I also -- I believe as a collateral issue,
 17 they were kind of comfortable by now, especially with
 18 Mr. Bartell sitting there, Bill's relationship to the
 19 file, having brought him in and understanding that, you
 20 know, I guess, sometimes lawyers will get a little
 21 territorial, and I have seen this before when I bring
 22 in excess counsel. A lot of them don't understand how
 23 to interpret that. And by bringing in Bill, it was no
 24 way to be interpreted as my dissatisfaction with the

1 the court was going to be of influence with respect to
 2 that, it could have simply been settled by saying,
 3 "Gone to the pretrial and say, look, we recognize we
 4 have a settlement demand out there. We also recognize
 5 that." Or, "Judge, we have not formally responded to
 6 this."

7 But, frankly, that could have been obviated
 8 by just saying to the judge and Mr. Pritzker standing
 9 there and saying, "Hey guys, do you want to go to
 10 mediation? Are you interested in mediation?"

11 I don't think the judge would have given two
 12 cents about the letter at that point, you know, so
 13 there were a lot of different ways to handle it. The
 14 demand was so high, so it was -- sometimes it's --
 15 well, it's ridiculous. It's way too high, you know.
 16 Maybe the evaluation was 8 to 10, or 8 to 12, but
 17 certainly not 16. So I don't care if we don't answer
 18 it at 16. I don't care if it goes to 50.

19 And that's the answer.

20 Q Okay. And you were telling the truth at the time that
 21 you gave that testimony in your deposition?

22 A Yes.

23 Q Mr. Satriano, you testified that it would have been
 24 helpful to you to have Mrs. Rhodes' deposition in order

1 handling of the case. Quite the contrary, everyone
 2 knew that they were -- what they were talking about.
 3 And everybody was well served about this case.
 4 However, Bill was brought in to augment the team. And
 5 as I have indicated, I think it was important for Bill
 6 to be there to speak to Greg and to meet the client,
 7 and so on and so forth.

8 Q And that was your complete answer to that question?

9 A Yes, it was.

10 Q Could you turn to the transcript, page 186, please?

11 A Okay.

12 Q All right. And at line 9 -- are you ready?

13 A Yes.

14 Q And at line 9, I asked you this question: Who said
 15 what about the fact that no one had responded to the
 16 August 13, 2003 settlement demand?

17 And your full answer, could you read that
 18 into the record, please?

19 A (Reading): I don't recall specifically. Maybe it was
 20 Mr. Deschenes. I mean, I don't recall specifically.
 21 It was just a question of -- again, the onus was
 22 getting Mr. Pritzker to come to the table.

23 If there was going to be a benefit to
 24 mediating this case, we had a pretrial coming up. If

1 to determine whether she had potential jury appeal. Do
 2 you remember that testimony?

3 A Yes.

4 Q And, Mr. Satriano, you had some expectation, did you
 5 not, that Mrs. Rhodes, given the fact that she was
 6 rear-ended by an 80,000 pound truck and paralyzed, was
 7 going to present as a sympathetic witness to the jury?
 8 A I understand that the facts and circumstances would
 9 have -- you could certainly draw that conclusion, yes,
 10 but I didn't know Mrs. Rhodes.

11 Q But nonetheless, you didn't have to meet her in order
 12 to understand that a woman who had been paralyzed in a
 13 rear-ender was going to be sympathetic to a jury.

14 A Sure. Sure.

15 Q And you also had the opportunity to review Jane
 16 Mattson's life-care report, or life-care plan; did you
 17 not?

18 A Yes.

19 Q And could you turn to Exhibit 11 for me, Mr. Satriano?
 20 It's in plaintiffs' binder number 1.

21 A Yes.

22 Q Could you turn to page 6 of Jane Mattson's life-care
 23 plan for me.

24 A And the first line indicates that Jane Mattson, Ph.D.,

1 met with Marcia Rhodes at her home in Milford,
 2 Massachusetts, on September 24, 2003, correct?
 3 A Yes.
 4 Q So when you reviewed this report, you understood that
 5 your own expert had already met with the plaintiff?
 6 MR. ZELLE: Objection. The defense expert.
 7 (By Ms. Pinkham)
 8 Q The defense expert had already met with the plaintiff?
 9 A Yes.
 10 Q Did you ever call Ms. Mattson and ask her how she
 11 thought Mrs. Rhodes would present to the jury and
 12 whether she had jury appeal?
 13 A No.
 14 Q Could you turn to the next exhibit for me, please, Mr.
 15 Satriano, Exhibit No. 12.
 16 Are you there?
 17 A Yes.
 18 Q Mr. Satriano, this document, an October 9, 2003 letter
 19 from the law firm of Morris & Mahoney to Jody Mills,
 20 was included on AIG's supplemental privilege log. Do
 21 you recall reviewing this letter?
 22 MR. ZELLE: Your Honor, I can't find it in
 23 the binder here.
 24 MS. PINKHAM: It's Exhibit 84.

1 Did you ever contact the lawyers at Morris,
 2 Mahoney & Miller and ask them how they thought Mrs.
 3 Rhodes would present to the jury?
 4 A No.
 5 Q In fact, on the second page of Exhibit 12, there's a
 6 reference to Mr. Rhodes' deposition. Do you see that?
 7 A Yes.
 8 Q And the paragraph entitled "Appearance and Demeanor"
 9 has been redacted; has it not?
 10 A Yes.
 11 Q Could you turn to Exhibit 84 for me, please, Mr.
 12 Satriano. It's a Plaintiffs' Trial Exhibit Volume No.
 13 3.
 14 A 83?
 15 Q I'm sorry, 84. I apologize.
 16 A That's the privilege log.
 17 Q Yes.
 18 A Okay.
 19 Q Could you turn to page 24 for me.
 20 A What page?
 21 Q 24.
 22 A Okay.
 23 Q Are you there?
 24 A Yes.

1 THE COURT: I'm sorry, is Exhibit 12 or
 2 Exhibit 84?
 3 MS. PINKHAM: The privilege log is Exhibit 84
 4 and the letter is Exhibit 12.
 5 THE COURT: But the privilege log is not his
 6 problem; that's counsels' problem. So why don't you
 7 ask this witness.
 8 (By Ms. Pinkham)
 9 Q Do you recall seeing this letter, Mr. Satriano?
 10 A I don't recall.
 11 Q Did you have an understanding of who Morris, Mahoney &
 12 Miller represented?
 13 A No.
 14 Q You did not have an understanding that Morris, Mahoney
 15 & Miller represented Mr. Zalewski and his employer,
 16 Driver Logistics Services?
 17 A Oh. Okay, yes. That's fine.
 18 Q And you'll see in the first sentence of Exhibit 12
 19 indicates that since our last status report, we have
 20 attended the interview, the plaintiff, with our life-
 21 care planner. Jane Mattson.
 22 While we were at the plaintiffs' residence,
 23 we were able to speak with both the plaintiff and her
 24 husband.

1 Q Starting with the document that's been numbered 175.
 2 On the privilege log, do you see that's an August 11,
 3 2003 letter from Lawrence Boyle of Morrison, Mahoney &
 4 Miller?
 5 A Yes.
 6 Q And that apparently was a 6-page document summarizes
 7 defense strategy, damages and liability analysis?
 8 A That's what the log says.
 9 Q And all of the rest of the items on page 24 are
 10 communications from either Morris, Mahoney & Miller or
 11 Corrigan, Johnson & Tutor to Crawford & Company. Do
 12 you see that?
 13 A Not number 52.
 14 Q You're right. All the rest of the ones underneath 175,
 15 which is the first one you looked at?
 16 A From 175 down to 199.
 17 Q Did you have an understanding, when you became involved
 18 in the case after Zurich reached up to you, that
 19 Corrigan, Johnson & Tutor represented Penske?
 20 A Yes.
 21 Q Could you focus on Item No. 180 for me, please.
 22 A Okay.
 23 Q This is a transmittal from Lawrence Boyle at Morris,
 24 Mahoney & Miller to Crawford & Company, correct?

1 A Okay.

2 Q And the subject matter is identified as "Defense
3 Strategy, Damages and Liability Analysis," correct?

4 A Yes.

5 Q And in the first column it indicates, in parentheses,
6 "Jury Verdict Research attached." Do you see that
7 reference?

8 A Yes.

9 Q And so apparently, based on AIG's privilege log,
10 Attorney Boyle provided 26 pages of jury verdict
11 research to Crawford & Company. Is that how you would
12 interpret this document?

13 A The log or the actual letter?

14 Q The log. I don't have the letter, so I can only go by
15 what it says on the log.

16 A I don't know what this log is. What its purpose was,
17 was way after I left.

18 Q But nonetheless, you would agree with me, would you
19 not, that based on AIG's supplemental privilege log,
20 that AIG had possession of 26 pages of jury verdict
21 research prepared by Lawrence Boyle of Morris, Mahoney
22 & Miller?

23 MR. ZELLE: Objection, your Honor. The real
24 issue here is when. There's no question that AIG had

1 I'm just an ATM, which is what you want me to be. I
2 mean, I have to do my own research. I've explained
3 that. Merely because research was undertaken by any of
4 these defense attorneys does not correlate to the fact
5 that I am going to all of a sudden adopt this research.
6 I don't think, Ms. Pinkham, you have an appreciation
7 for just how difficult my job is. I have to look at
8 information --

9 MS. PINKHAM: Your Honor --

10 Q Mr. Satriano, the questions that I ask --

11 A -- and I have to take that information --

12 THE COURT: Allow him to answer why he's not
13 an ATM. Go ahead.

14 A I have a responsibility not only to the insured, but I
15 have a responsibility to you and Mr. Pritzker. And
16 most importantly, I have a responsibility to the
17 Rhodeses. We're talking about not making them whole
18 again, because I can't do that. But we're talking
19 about giving them something and maybe that's the
20 freedom of decision as a result of the money. I don't
21 take that responsibility lightly. I take my time.
22 Maybe that sounds corny to you, but I take my job
23 seriously. Because we cannot bring Mrs. Rhodes back to
24 the position she was in before that accident. You

1 it. The question is whether it was during the time Mr.
2 Satriano was involved.

3 THE COURT: She may ask him.

4 A That's exactly what I want to say to you; yes, that
5 there's no indication of when this was received.

6 Q Nonetheless, you can tell from the privilege log that
7 by September 16, 2003, before there had even been a
8 reach-up to AIG as the excess carrier, that defense
9 counsel were involved in doing jury verdict research,
10 correct?

11 A I guess, sure.

12 Q And that was well before the time when you said it
13 wasn't even useful to do jury verdict research as of
14 March of 2004, correct?

15 A Merely because -- counsel, because these attorneys
16 thought it useful to do their jury research verdict
17 [sic] does not necessarily mean that I thought it was
18 useful. I mean, that's like saying you were prepared
19 to give an opening statement and you didn't even work
20 on it.

21 I mean, I had the opportunity to review my
22 own material, to develop my own information, and to
23 make a call on what jury verdict research or anything
24 else that I had gotten. I mean, that presupposes that

1 laugh and you snicker, but that's what my job is. And
2 I consider that a very important job, and I take my
3 time with that and I research and I bring individuals
4 in that can assist me.

5 Merely because this work was done by other
6 attorneys does not necessarily mean that my opinion in
7 saying that it was too soon should be adopted or that
8 I'm lying. Frankly, I resent that.

9 Q Are you done with your answer, Mr. Satriano?

10 A Yes, and I hope you've listened.

11 MS. PINKHAM: Your Honor, I would move to
12 strike everything after the first sentence.

13 THE WITNESS: Because it's the truth?

14 THE COURT: Denied. Mr. Satriano, I've given
15 you some leeway, but you've used it up.

16 THE WITNESS: Thank you, your Honor.

17 THE COURT: The last comment will be
18 stricken, but his explanation, which I allowed before,
19 I will allow. You may proceed.

20 (By Ms. Pinkham)

21 Q Mr. Satriano, you just explained that you took your
22 time on the Rhodes case; isn't that true?

23 A No, Mrs. Pinkham. I take my time to carefully
24 investigate the case as it should be done as a

1 professional.

2 Q Okay. And you took the time to become fully informed

3 of the facts in the documents while you were involved

4 in the claim, correct?

5 A Yes.

6 Q And throughout your involvement in the claim from April

7 of 2003 to mid-March of 2004, you had never gotten to

8 the position where you sought settlement authority for

9 any figure for the Rhodes claim; isn't that true?

10 A Yes, that's correct.

11 Q And prior to you leaving in mid-March of 2004, you

12 denied the insured's request for any contribution to a

13 settlement offer to the Rhodes family; isn't that true?

14 A It's not as nefarious as you put it. The decision was

15 not to contribute because it wasn't appropriate to pay

16 Mr. Pritzker to mediation.

17 Q But Mr. Satriano, you've referenced the payment to Mr.

18 Pritzker a number of times. Wasn't it your

19 understanding that the discussion of the March 5, 2004

20 meeting was that the insured wanted to make an offer to

21 the plaintiffs?

22 A No, and that's an important distinction. To me it was

23 always paying Mr. Pritzker, as Mr. Deschenes indicated,

24 an admission fee to coming to mediation.

1 offer; oh, Mr. Pritzker needs a good-faith offer.

2 Perhaps it got lost in the translation, but

3 that was not my understanding. It was a payment. We

4 heard Mr. Deschenes described it at that. That is

5 consistent with what my understanding was and is as I

6 sit here today.

7 THE COURT: So you're telling me that you

8 understood that the attorneys were proposing that you

9 basically give a check for \$5 million to Ms. Rhodes, to

10 Mr. Pritzker, on the first day of mediation as the

11 price in order to continue to have further discussions?

12 That's what you understood the attorneys were asking?

13 THE WITNESS: Yes, your Honor, completely.

14 THE COURT: And did you have any discussion

15 about your understanding of this?

16 THE WITNESS: Mr. Pritzker never contacted me

17 directly, nor did I --

18 THE COURT: Try my question. Did you have

19 any discussion with anyone from GAF or anyone else at

20 that meeting as to ask them to corroborate your

21 understanding of what they were saying as to this \$5

22 million offer?

23 THE WITNESS: Yes. I wanted Mr. Conroy to

24 set up a channel of communication and contact Mr.

1 THE COURT: You understood that the \$5

2 million was to be paid to Mr. Pritzker as the price of

3 mediation?

4 THE WITNESS: Your Honor, as I sit here

5 today, yes. As I said, back then, yes.

6 THE COURT: Meaning that you understood that

7 the attorneys were asking you to pay him \$5 million

8 just for the ability to mediate?

9 THE WITNESS: It was confusing. It was told

10 to me that Mr. Pritzker would not come to mediation

11 without a \$5 million payment. Now, no, do I think he

12 was going --

13 THE COURT: I'm sorry. A \$5 million payment

14 or a \$5 million offer?

15 THE WITNESS: Therein lied [sic] the

16 conflict. I was told that Mr. Pritzker would not come

17 to mediation unless he was paid \$5 million. Of course

18 I did not think he was depositing that money into his

19 personal account, but the bottom line was he wanted a

20 payment to show up at a mediation. That's how and what

21 was explained to me. And that is why I felt that to be

22 an improper strategy and something that would have

23 absolutely no benefit to GAF and would not be a good

24 starting point. It was not discussed to me as an

1 Pritzker.

2 THE COURT: Again, try my question. Did you

3 ever say to Mr. Deschenes, to the effect: Mr.

4 Deschenes, you're saying you want me to give a check

5 for \$5 million to Ms. Rhodes in order for us to

6 commence mediation as opposed to making a \$5 million

7 offer as the first offer to commence mediation?

8 THE WITNESS: I'm sorry. Yes, your Honor, I

9 did.

10 THE COURT: All right. In all your years as

11 a defense attorney and involved in insurance before the

12 March meeting, had you ever heard of anybody paying a

13 sum of that amount up front before even mediation

14 begins?

15 THE WITNESS: Your Honor, yes. As despicable

16 as a practice it is, in excess, you deal with very

17 high-level cases and some very high-level attorneys

18 that will do that. And in each case, my answer is

19 vehemently I will not.

20 THE COURT: All right. You may proceed.

21 (By Ms. Pinkham)

22 Q Mr. Satriano, could you turn to page 179 of your

23 deposition transcript for me. You should refer to the

24 full one for me, please.

1 A Yes, go ahead.

2 Q On line 2 of page 179, I asked you: What was the
3 difference of opinion on how to respond to the
4 plaintiffs' demand?

5 Could you please read your answer into the
6 record.

7 A Sure. (Reading): What I alluded to before regarding
8 the mediation, there was a difference of opinion on how
9 we were going to get Mr. Pritzker to come to the
10 mediation table. And the thought process was, we were
11 going to basically offer him \$5 million as an incentive
12 to come; and basically recognizing the fact that this
13 was a serious case, and we, therefore, we wanted his
14 participation, as well as Mr. Rhodes and Mrs. Rhodes,
15 of course, and the difference of opinion was that I
16 felt that that was not a correct approach to take.

17 Q Could I interrupt you for a minute, Mr. Satriano. You
18 used the word "offer" in that answer; did you not?

19 A What line?

20 Q At line 9: And the thought process was, we were going
21 to basically offer him \$5 million as an incentive to
22 come.

23 A That's my word, yes, in there.

24 Q Could you then complete the rest of your answer. It

1 yesterday. I think you testified that this is a
2 narrative summary that is a common type of memo at AIG?

3 A It's called a narrative memo, essentially.

4 Q And this is the narrative memo that one of your
5 successors on the Rhodes claim prepared. Is that your
6 understanding?

7 A Yes. It was prepared by Mr. Warren Nitti.

8 Q And the date of the narrative memo that's been marked
9 as Exhibit 45 is August 3, 2004?

10 A Yes, that's correct.

11 Q Could you turn to page 4 of Exhibit 45 for me, please.

12 A Okay.

13 Q And under "Witness Testimony, Fact Witness" it reads:
14 Marcia Rhodes Plaintiff. Plaintiff Marcia Rhodes will
15 be deposed on August 4, 2004.

16 Do you see that reference?

17 A Yes.

18 Q And can you look through the rest of the fact witness
19 testimony and see if there's any reference to Rebecca
20 Rhodes' deposition in this document.

21 A No, there's not.

22 Q Could you turn to page 7 for me, please.

23 A Okay.

24 Q And under "Expert Witnesses" item number 3 references

1 starts on line 17.

2 A (Reading): I certainly felt that, you know, other than
3 our word to come to mediation, Mr. Pritzker would need
4 no further sort of incentive. And I was against
5 bringing any sort of precondition to the mediation
6 table before he would come. I don't recall whether or
7 not Mr. Pritzker ever wanted that or not. I'm not sure
8 to be honest with you, but I certainly was not in
9 agreement that it should be done at all. And that was
10 the difference of opinion. The difference of opinion
11 was in the tactical approach to how we were going to
12 get this case to go to mediation.

13 That was it.

14 Q All right. And in that answer, you testified that you
15 weren't even sure whether Mr. Pritzker had made that
16 demand for \$5 million; isn't that true?

17 A As you asked me the question, yes. Of course.

18 Q Mr. Satriano, could you turn to Exhibit 45 for me,
19 please.

20 THE COURT: Exhibit 45?

21 MS. PINKHAM: Yes.

22 A Okay.

23 (By Ms. Pinkham)

24 Q Mr. Satriano, we looked at this document briefly

1 physiatrist. Doctor Joseph Hanak. Dr. Hanak is from
2 Tufts University. He will examine Rhodes and opine on
3 her capability to achieve a higher level of function
4 and independence, supporting Dr. Mattson's testimony.

5 Did I read that correctly?

6 A Yes, you did.

7 Q Mr. Satriano, are you aware that this narrative memo
8 was prepared by Mr. Nitti before he obtained settlement
9 authority to go to mediation?

10 A I'm not aware of that. No, I don't know what occurred.
11 I wasn't here.

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

14 THE COURT: Any further questions of counsel?

15 MR. ZELLE: A couple, your Honor.

16 THE COURT: Okay. Within the scope.

17 MR. ZELLE: Pardon me?

18 THE COURT: Within the scope.

19 RE-CROSS-EXAMINATION BY MR. ZELLE:

20 Q Do you know -- you looked at Exhibit 12 that was a
21 letter from Morris, Mahoney & Miller. Do you know
22 whether that was among material sent to you while you
23 were working on the case?

24 A No, I do not.

1 Q Can you explain why -- you indicated you understood in
2 the end of January 2004, that you had Zurich's money in
3 your pocket, so to speak. Can you explain to the court
4 why you wouldn't spend that money before you had a firm
5 understanding as to what Zurich's position was
6 concerning the continuing defense obligation?
7 A Again, it's simply not done. If the issue on the duty
8 to defend and the responsibility to defend was not
9 resolved, essentially we could be buying a defense.
10 And again, that issue needed to be resolved.
11 Q There was testimony --
12 THE COURT: I'm sorry. I've now lost you
13 again.
14 Are you saying that you did not consider
15 yourself free to include the \$2 million in a settlement
16 offer as of January 23?
17 THE WITNESS: Yes, your Honor, in that those
18 two obligations go hand in hand. You want to secure
19 not only an understanding of the fact that the money is
20 available for settlement purposes, but in hand and
21 hand, you have to ensure that the duty to defend is
22 either going to remain with the primary carrier or if
23 you're prepared to accept that defense.
24 It can get extremely muddled if you start

1 you can always come up with a number to put on a claim,
2 based on the information you have, in contrast to the
3 process that you seek to accomplish by getting all
4 available information before you put up a number?
5 MS. PINKHAM: Objection.
6 THE COURT: Sustained as to the form.
7 (By Mr. Zelle)
8 Q Let me put it this way: Is it possible to put up a
9 number on a claim -- in your practice, are you ever
10 required to put up a number on a claim before you have
11 all of the information you would like to have?
12 A Yes.
13 Q Did you perceive that necessary in this case?
14 A No, it was not.
15 Q Why not?
16 A It was not because trial was not imminent. To answer
17 your question in the other extreme, sometimes we're
18 notified that trial is the next day.
19 Q Did you believe that you had enough information in
20 March that the damages were clear enough in your mind,
21 particularly the future damages, to put a number on it?
22 A No.
23 Q Now, you talked, in response to some of Mr. Goldman's
24 questions, about needing the deposition for mediation,

1 making offers with money; then all of a sudden they'll
2 say, "Well, wait a minute, we're not going to continue
3 to defend. You guys have offered a million of our 2
4 million and now, guess, what, you're the primary payers
5 of the defense."
6 And that's why it's excellent practice, and
7 you have be crystal clear on both obligations before
8 you can undertake a negotiation, as what's being
9 suggested with that \$2 million.
10 THE COURT: Then why did you go to the March
11 4 or 5 meeting without Zurich being present?
12 THE WITNESS: Without Zurich being present?
13 Your Honor, I had no idea Zurich wasn't coming. I was
14 surprised --
15 THE COURT: When you got there, you realized
16 they weren't.
17 THE WITNESS: But it was not enough to,
18 again, stop the meeting and not go forward with the
19 meeting. Again, the process of the meeting -- the
20 point of the meeting was to introduce Mr. Conroy and
21 also to discuss this situation about the mediation.
22 (By Mr. Zelle)
23 Q Can you explain, Mr. Satriano, whether it is -- let me
24 put it this way. Why don't you explain why it is that

1 and I would like you to explain why it would be helpful
2 -- we previously talked about why it would be helpful
3 to have in assessing the settlement value. Can you
4 explain why you would want to have that before
5 mediation?
6 A Sure. You'd want that information before mediation as
7 well because you're going and entering the mediation
8 knowing that particular person as best as possible.
9 It's my practice to request that at the mediation
10 family members be present. Certainly, Mr. and Mrs.
11 Rhodes or their daughter have been present. But you'd
12 know this information ahead of time because you would
13 have had discussed it in depth with your counsel. You
14 have an opportunity to review the information
15 beforehand.
16 Q You used the term in your deposition, "the jury is
17 out." Did that mean you were undecided when you used
18 that term?
19 A Yes.
20 Q All right. At the time of the March meeting, were you
21 undecided as to whether you would condition going to
22 mediation on the completion of the plaintiffs'
23 deposition?
24 A Yes.

1 Q You wanted to have the deposition completed, but you
 2 didn't -- did you ever say that you wouldn't go to
 3 mediation without having the deposition completed?
 4 A No.
 5 MR. ZELLE: That's all I have.
 6 THE COURT: Mr. Goldman?
 7 MR. GOLDMAN: Yes.
 8 RE-CROSS-EXAMINATION BY MR. GOLDMAN:
 9 Q Mr. Satriano, is there anything in your insurance
 10 policy that says that you will be responsible for
 11 defense costs if you make an offer that includes AIG
 12 money?
 13 A I don't believe so.
 14 Q And --
 15 MR. ZELLE: I think you said AIG money. You
 16 meant Zurich's money?
 17 MR. GOLDMAN: No. I meant AIG's money.
 18 A No. Wait a minute. That's different. AIG's money
 19 would not be offered without first an exhaustion of the
 20 primary numbers.
 21 (By Mr. Goldman)
 22 Q Right. But often in a case which requires a settlement
 23 offer in excess of the primary, the offer needs to be
 24 made as a package, right? With the primary money and

1 know, by making this offer, could we have an
 2 understanding that I don't waive any rights with regard
 3 to who's got the obligation to defend? You could have
 4 done that, right?
 5 A Counsel, it's not done that way. It's not that
 6 informal. Ms. Fuell and I enjoyed a fine working
 7 relationship with one another, but it's not done like
 8 that, saying, "Okay, hey, by the way, if I do this."
 9 It's got to be done more formally.
 10 Q And you knew that from your six months of experience
 11 working at AIG, right?
 12 A I knew that, based upon my experience and also the
 13 experience of my supervisor, who, incidentally, was at
 14 AIG a lot longer than me as well.
 15 Q But there was nothing stopping you from doing that
 16 other than that you, from your experience and your
 17 supervisor, it wasn't done that way, right?
 18 A Well, my experience and my supervisor was of sufficient
 19 motivation enough for me.
 20 MR. GOLDMAN: No further questions.
 21 THE COURT: Any further questions of counsel?
 22 MS. PINKHAM: No.
 23 THE COURT: All right. I've got a few.
 24 What is the relationship between AIG and

1 the excess money combined, you make that total offer to
 2 the plaintiff.
 3 A Right, that's what I'm saying. The primary money is
 4 exhausted.
 5 Q Right. So, now, is there anything in your insurance
 6 policy that says that if that happens, if we have a
 7 case such as this one, where it's fairly clear at some
 8 point in time that the exposure exceeds the primary
 9 limit and an offer is made, a combined offer with the
 10 primary money and excess money is made, AIG now has an
 11 obligation to defend the insured.
 12 A No, I don't believe there's anything like that in the
 13 policy.
 14 Q Now, did anyone from Zurich ever tell you that if you
 15 made an offer, just by virtue of making the offer, that
 16 that would cause AIG to have an obligation to defend?
 17 A No.
 18 Q Did you ask at any time anybody from Zurich, gee, if I
 19 go make an offer in excess of the Zurich limits, does
 20 that mean you're going to try to stick me with the
 21 defense? Did you ever ask anybody that?
 22 A Of course not.
 23 Q All right. Now, if you had wanted to make an offer,
 24 you could have acted on it and asked Ms. Fuell, you

1 National Union?
 2 THE WITNESS: My understanding, your Honor,
 3 is that National Union is an AIG company.
 4 THE COURT: So for all practical purposes,
 5 AIG, when you worked there, you deemed yourself the
 6 insurer?
 7 THE WITNESS: The insurer, yes, your Honor.
 8 THE COURT: So you were not a third-party
 9 administrator?
 10 THE WITNESS: No, your Honor.
 11 THE COURT: Now, when the meeting on March 5
 12 ended, was there any discussion as to what had been
 13 decided?
 14 THE WITNESS: It was -- yes. It was pretty
 15 clear to me that Mr. Conroy, as far as I was concerned,
 16 was now going forward. And Mr. Conroy, I believe, was
 17 going to continue to work with Mr. Deschenes, to accept
 18 the transfer of information from Mr. Deschenes, file
 19 materials, so on and so forth.
 20 THE COURT: So you're saying that all that
 21 had been decided at the end of the meeting was that
 22 Conroy would be serving as associate counsel?
 23 THE WITNESS: Well, essentially, yes. But, I
 24 mean, I believe it was a good meeting, because again it

1 gave us the opportunity for all of us to get together
2 and continue to talk and sort of put a face to the
3 voice on the telephone. It was clear that all those
4 parties, with the exception of me, were going to
5 continue to have a relationship in going forward.

6 THE COURT: Okay. At the time of that
7 meeting, did you know that you were headed for Iraq?

8 THE WITNESS: Yes.

9 THE COURT: So you knew that you were going
10 to be a short-timer there?

11 THE WITNESS: Yes, your Honor. And that was
12 one of the reasons, too, why I wanted to go in there
13 and certainly explain to them in person and to assure
14 them that there would be a transition.

15 THE COURT: Okay. What was decided, if
16 anything, with regard to what was to be told to Mr.
17 Pritzker with regard to his demand?

18 THE WITNESS: Again, that was still going to
19 be decided, because we wanted -- I wanted Mr. Conroy to
20 speak directly to Mr. Pritzker, but we were still
21 receiving pushback on that.

22 THE COURT: Was there any discussion as to
23 what anyone would say to Mr. Pritzker with regard to
24 his demand?

1 THE WITNESS: Yes.

2 THE COURT: What was agreed at the meeting
3 that would be said to Mr. Pritzker with regard to the
4 demand?

5 THE WITNESS: I think that what would have
6 been said to Mr. Conroy would have indicated that the
7 demand was high, but, yet, that the parties were
8 meaningfully willing to negotiate the case and to come
9 up with a good response to a demand, and hopefully that
10 demand package was going to be answered in the future.

11 THE COURT: And was there any discussion as
12 to mediation apart from the unwillingness to pay Mr.
13 Pritzker \$5 million to enter into mediation?

14 THE WITNESS: Yes. As far as I'm concerned,
15 mediation was always a good alternative, because it got
16 the parties together. Often, in the excess world you
17 will have a mediation and the case won't be resolved,
18 but you'll have a follow-up date which then would
19 result with the case being resolved. So to me,
20 mediation was always a win-win opportunity, because
21 again you have the opportunity to view the parties and
22 to seek their resolve in trying to work to get the case
23 settled.

24 THE COURT: All right. But at the end of the

1 meeting was it agreed that somebody should seek to
2 obtain mediation with Mr. Pritzker without having to
3 pay or offer any money?

4 THE WITNESS: Well, yes. That was my
5 suggestion. My suggestion was to have Mr. Conroy
6 directly contact Mr. Pritzker and indicate just that,
7 we want to go to mediation, let's get this thing going.

8 THE COURT: All right. So you were prepared
9 to go to mediation.

10 THE WITNESS: Well, no. I mean, we still
11 were developing information. It was working hand-in-
12 hand. We were not adverse to going to mediation with
13 Mr. Pritzker. It wasn't like, you know, okay, let's go
14 next week. We were working with information to develop
15 to go to mediation; i.e., the deposition; i.e., the IME
16 from the psychiatrist, that type of information. That's
17 what we were doing.

18 THE COURT: All right. Was there any
19 decision made at this meeting that you would not
20 proceed to mediation, or that you were going to proceed
21 to obtain the depo of Marcia Rhodes?

22 THE WITNESS: There was rancor at the
23 meeting, there was frustration at the meeting again
24 because of the different level of information and

1 opinion that was going on. That type of decision could
2 not have been reached at that time. We weren't going
3 to say we weren't going. We weren't going to say that
4 we were, because it was a productive meeting. It was a
5 first-start meeting, your Honor. We all expressed,
6 everyone expressed the need to resolve through
7 mediation to make some step here.

8 THE COURT: All right. We've been at this
9 for a while. At the end of the meeting did you
10 understand that Mrs. Rhodes was going to be deposed?

11 THE WITNESS: Yes.

12 THE COURT: And was that expressed at the
13 meeting?

14 THE WITNESS: It was expressed at the
15 meeting. My feeling was that she should be deposed.
16 Mr. Conroy had indicated that. It was indicated --
17 again, there were people there at the meeting that felt
18 nothing more needed to be done because time was of the
19 essence and we needed to go approach Mr. Pritzker. Our
20 side, myself and Mr. Conroy, with our experience, or
21 certainly Mr. Conroy's experience as an experienced
22 trial litigator, always realized the need to go further
23 with some investigation.

24 The Campbell firm is a trial firm. They're

1 not afraid to try difficult cases. But we certainly
 2 couldn't come in as gangbusters and say we're trying
 3 this case, because again that would have even further
 4 fractionalized the people that were there.
 5 But to answer your question specifically,
 6 yes, the desire to have Mrs. Rhodes deposed, yes.
 7 THE COURT: Yes, it was decided that you
 8 would depose Mrs. Rhodes? Or yes, you wanted to depose
 9 Mrs. Rhodes.
 10 THE WITNESS: The latter, your Honor, that we
 11 were more comfortable proceeding with her deposition.
 12 THE COURT: Was it your understanding that
 13 you were in charge of the defense?
 14 THE WITNESS: At that point, no, not in
 15 charge of the defense, no.
 16 THE COURT: Who had the ability to determine
 17 what the defense would do?
 18 THE WITNESS: No one really had the --
 19 THE COURT: Well, let me ask you. You or
 20 GAF?
 21 THE WITNESS: It would have been more -- GAF
 22 had any -- GAF, sir.
 23 THE COURT: Try my question. Who was in
 24 charge of the defense? Was it you or was it GAF or was

1 decision on any particular approach. It was just
 2 opinions discussed regarding what would possibly be our
 3 approaches in going forward.
 4 THE COURT: So at the end of the meeting, in
 5 terms of what was accomplished by way of decision,
 6 you're telling me essentially nothing was accomplished
 7 by way of decision.
 8 THE WITNESS: The best way to put it is that
 9 a lot of work needed to occur.
 10 THE COURT: Was there any decision as to what
 11 work needed to occur?
 12 THE WITNESS: Yes.
 13 THE COURT: And what decision was made as to
 14 what work needed to occur?
 15 THE WITNESS: Number one, that we needed to
 16 respond to Mr. Pritzker pretty quickly; and, number
 17 two, the IME. And Mr. Conroy clearly said I would like
 18 a psychiatrist IME. And also this issue of the
 19 deposition. And also I recall my conversation with Mr.
 20 Conroy regarding, again, the primary policies. That's
 21 what I expected him to do.
 22 THE COURT: Okay. So was the decision made
 23 at that meeting to proceed with an IME?
 24 THE WITNESS: It was not unanimous. I

1 it both you and GAF?
 2 THE WITNESS: No. I'm sorry, your Honor. I
 3 misunderstood you. GAF.
 4 THE COURT: Okay. So it was not your call.
 5 THE WITNESS: Correct, sir.
 6 THE COURT: And did GAF agree to proceed to
 7 depose Mrs. Rhodes?
 8 THE WITNESS: I don't recall specifically. I
 9 know it was discussed. Again, GAF wanted -- there was
 10 an urgency to approach Mr. Pritzker and respond to the
 11 settlement demand.
 12 THE COURT: By saying what?
 13 THE WITNESS: By saying let's go get a
 14 deposition, let's go to mediation, something like that.
 15 THE COURT: So you're saying at the end of
 16 the meeting there was direction given to GAF's counsel
 17 to go speak with Mr. Pritzker and say we will proceed
 18 to mediation as long as you don't insist upon any
 19 precondition?
 20 THE WITNESS: Not exactly, because Mr.
 21 Deschenes felt that we needed to, again, give Mr.
 22 Pritzker that money and pay that money. So there were
 23 different opinions on how best to proceed.
 24 The meeting did not result in one clear-cut

1 remember Anne Peri and Jane Gordon-- you know, the
 2 conversation would have been do we need this, and Bill
 3 would have said yes, I want this to go forward. And no
 4 one really responded. It was just a question of we
 5 were explaining that we felt now that we were fully
 6 involved and we had reached up to us that this is how
 7 we would like to proceed, with an IME.
 8 MR. ZELLE: Mr. Satriano, the Judge has heard
 9 all this before. If you can just confine your answers,
 10 whether decisions had been made or not. I think that's
 11 all he's driving at here. Were decisions made? If so,
 12 on what subjects? If they weren't, then tell him they
 13 weren't.
 14 THE WITNESS: They were not.
 15 THE COURT: Before you left for Iraq, did you
 16 sit down with Mr. Mastronardo?
 17 THE WITNESS: Yes.
 18 THE COURT: And did you discuss this case?
 19 THE WITNESS: Yes, Judge.
 20 THE COURT: And what did you tell him needed
 21 to be done with regard to this case?
 22 THE WITNESS: I told him specifically that we
 23 needed to take Marcia Rhodes' deposition; specifically
 24 that we needed to have the IME performed by the

1 physiatrist; specifically we needed to continue to look
2 into the issues of other available insurance. And I
3 also told him that there was a pretrial conference
4 pending, I believe that was in April. And I also
5 understood that there was a hearing regarding a third-
6 party defendant's motion, I believe, and that was going
7 to take place in March. Essentially, I gave him a
8 status update as to what was going on with the case.

9 THE COURT: All right. So was it your
10 understanding that by the time you had left for Iraq, a
11 decision was made to obtain an IME and to get the
12 Marcia Rhodes deposition?

13 THE WITNESS: No, your Honor. After I spoke
14 to Mr. Mastronardo and told him, I mean, I fell off.
15 That was it. --

16 THE COURT: So when you said we need to do
17 this --

18 THE WITNESS: What Rich would agree -- Rich
19 agreed that that would be the route that we would
20 proceed. He did not disagree, certainly, with my
21 suggestion that we have the IME and the deposition. He
22 said okay. It was just that work needed to be done.

23 THE COURT: And was it your understanding
24 that no offer could be provided until the IME and the

1 deposition had been done?

2 THE WITNESS: Yes. Again -- yes.

3 THE COURT: But it was also your
4 understanding that GAF was in charge of its own
5 defense.

6 THE WITNESS: Yes.

7 THE COURT: And did you have any
8 understanding as to what would happen if GAF said we
9 don't wish to proceed with an IME or a deposition?

10 THE WITNESS: Sure.

11 THE COURT: What would happen in that
12 instance, if GAF said that it does not wish to proceed
13 to have those done?

14 THE WITNESS: GAF could have done anything
15 they wanted to do, including give their \$2 million. I
16 mean, I had no power over that. We were hoping that it
17 would be more of a sort of bilateral decision on how to
18 proceed with the defense of the litigation. But GAF
19 was certainly free to do whatever they wanted to do. I
20 could not prevent them from doing anything, whether
21 it's an IME, give their money, or no deposition, for
22 that matter.

23 THE COURT: So are you saying that if GAF had
24 not agreed to proceed with the IME, with the Marcia

1 Rhodes deposition, you would have considered that to be
2 a breach of its duty of cooperation?

3 THE WITNESS: I felt very strongly that the
4 IME should take place and the deposition should take
5 place.

6 THE COURT: Why don't you try my question.
7 Did you understand that it would be a breach of the
8 duty of cooperation of an insured if it had failed to
9 follow your request to get an IME and the deposition of
10 Marcia Rhodes?

11 THE WITNESS: Yes, sir.

12 THE COURT: Was that communicated at the
13 meeting?

14 THE WITNESS: Not in the language that you've
15 selected, no. I mean, it was -- well, we wanted it,
16 yes.

17 THE COURT: Was it communicated in any other
18 way?

19 THE WITNESS: Yes, Judge.

20 THE COURT: How was it communicated to them
21 that you would -- strike that.

22 How was it communicated to them?

23 THE WITNESS: I suggested to them that this
24 would be a better approach to take. Again, there was a

1 motion out there. Trial was not imminent. We had a
2 pretrial conference coming up, so I would have said,
3 "Hey, we have plenty of time to do this, and I think we
4 should do this."

5 I would have cajoled them into certainly
6 saying this is a good idea for the purposes of the
7 defense, and certainly we owed a duty to the insured to
8 fully defend it. And that included IMEs and
9 depositions.

10 THE COURT: Okay. I've got no further
11 questions. Any questions of counsel within the scope
12 of my questions?

13 EXAMINATION BY MS. PINKHAM:

14 Q Mr. Satriano, when you responded to Mr. Bartell's
15 questions about AIG taking a stance as to coverage, did
16 you reference the assistance and cooperation clause?

17 A Yes.

18 Q Do you recognize this document?

19 A Yes.

20 Q What do you recognize the document that I just handed
21 you to be?

22 A That was my letter to Mr. Bartell.

23 MS. PINKHAM: Your Honor, I move to offer
24 this into evidence.

1 For the record, I'm referencing a February
2 13, 2004 letter bearing the Bates stamp ZA0525.
3 THE COURT: Any objection?
4 MR. ZELLE: I need to look at it.
5 MR. GOLDMAN: Let me see it for a second.
6 MR. ZELLE: I don't think so. That is an
7 exhibit already, your Honor. It's 215.
8 MS. PINKHAM: I'm sorry.
9 MR. ZELLE: It's in the 200 series, but our
10 tabs don't have "twos" on them yet.
11 THE COURT: Okay. It's 215?
12 MR. ZELLE: Right.
13 THE COURT: All right.
14 MS. PINKHAM: Thank you, Mr. Zelle.
15 THE COURT: Any further questions of counsel?
16 MS. PINKHAM: No.
17 THE COURT: Mr. Zelle, any further questions
18 that you may have?
19 MR. ZELLE: No, your Honor.
20 THE COURT: Mr. Goldman?
21 MR. GOLDMAN: No, your Honor.
22 THE COURT: All right. Thank you, you may
23 step down.
24 THE WITNESS: Thank you, your Honor.

1 A Just about a year.
2 Q Did you go to college?
3 A Yes.
4 Q Before college, where did you grow up?
5 A I'm from Indianapolis. I grew up in Indiana.
6 Q Where did you go to college?
7 A I went to Indiana University.
8 Q Did you graduate?
9 A Yes, I did.
10 Q In what year?
11 A Graduated from Indiana University in 1975.
12 Q With what degree?
13 A A bachelor's degree in economics.
14 Q Did you go on to any higher education?
15 A Yes, I did.
16 Q Where did you go?
17 A To the Harvard Business School
18 Q Did you graduate?
19 A Yes, I did.
20 Q With what degree?
21 A A master's in business administration, with a
22 concentration in finance and marketing.
23 Q Now, on January 9, 2002, what was your occupation?
24 A Acting vice president of marketing, but in a consulting

1 THE COURT: We'll take our morning break.
2 It's 11:35.
3 (A recess was taken at 11:35 a.m.)
4 THE COURT: All right. Let's call your next
5 witness. Mr. Pritzker, you're back to work?
6 MR. PRITZKER: I am, after a brief hiatus.
7 Harold Rhodes.
8 HAROLD RHODES, Sworn.
9 THE COURT: Good morning, Mr. Rhodes. It's
10 barely still morning, but still morning. If you would
11 please state your full name and spell your last name
12 for the court reporter.
13 THE WITNESS: My name is Harold Rhodes.
14 That's R-h-o-d-e-s.
15 THE COURT: Okay. Mr. Pritzker, please
16 proceed.
17 DIRECT EXAMINATION BY MR. PRITZKER:
18 Q Where do you live, Mr. Rhodes?
19 A My address is 11 Jannock Road in Milford,
20 Massachusetts.
21 Q What is your present occupation?
22 A I am the vice president of marketing for a company
23 called New River, Incorporated.
24 Q How long have you been with New River?

1 capacity, for a company called Visibility.
2 Q Where were they located?
3 A In Chicago, Illinois.
4 Q Did you commute prior to January 9, 2002?
5 A Yes.
6 Q On what kind of a basis?
7 A One or two or three days a week, depending on the --
8 you know, the needs, you know, that were going on at
9 the company.
10 Q And when you weren't at the company -- the company was
11 where?
12 A In Chicago.
13 Q When you weren't at the company, where did you work?
14 A I have a basement office.
15 Q At the house?
16 A At our house, yes, sir.
17 Q Now, you know, obviously, of Marcia's terrible accident
18 on January 9, '02, and I'm not going to go into any
19 detail about your reaction to that, but it is important
20 that you describe to the court generally how you felt
21 directly after the accident.
22 A Well, you know, certainly shock. I mean, that's the
23 first thing that happens, is, you know, it's just
24 unbelievable that such a thing should happen. You

1 know, there's a sadness that comes over that you're
 2 never going to be able to relieve Marcia's plate.
 3 There's, you know, frustration because there's so much
 4 to know, to learn, to deal with this. And, you know,
 5 just generally I was overwhelmed by everything.
 6 Q When was counsel retained?
 7 A In January 2002.
 8 Q Did you sign a fee agreement with counsel?
 9 A Yes, I did.
 10 Q Did you understand the costs would have to be paid?
 11 A Yes, I did.
 12 Q When was suit filed?
 13 A In July of 2002.
 14 Q When was Zalewski's criminal hearing, if you remember?
 15 A I believe it was in October or November of 2002.
 16 Q Were you generally kept apprised of the demands for
 17 settlement that occurred on behalf of the Rhodes
 18 family?
 19 A Yes.
 20 Q When was the first demand?
 21 A I believe it was July 2003.
 22 Q Was that verbal or written?
 23 A I think that that one was a verbal demand.
 24 Q And do you know when the first written demand occurred?

1 2003. This is, you know, nearly two years since
 2 Marcia's crash and we hadn't heard anything from any of
 3 the defendants. And I believe what we wanted to do is
 4 to get a wake-up call to say pay attention to us, talk
 5 to us. You know, this has gone on an awfully long time
 6 now.
 7 Q Well, was there ever a response to the nineteen and a
 8 half million dollar demand?
 9 A Not that I recall.
 10 Q At some time did you receive an indication that some
 11 money had been offered to the family?
 12 A Yes, I remember that.
 13 Q Do you remember when that was?
 14 A As I recall, that was in March of 2004.
 15 Q How much was it?
 16 A That was for \$2 million.
 17 Q Did the plaintiffs ever respond to that demand?
 18 A Yes. Yes, we did.
 19 Q In what way?
 20 A It was not accepted.
 21 Q Did the plaintiffs ever counteroffer?
 22 A No, we didn't.
 23 Q Why not?
 24 A Well, you know, it's now two years -- it's now 26

1 A In August of 2003.
 2 Q How much was the first written demand for?
 3 A As I recall, it was for sixteen and a half million
 4 dollars.
 5 Q Did you on behalf of the family authorize that demand
 6 to be made?
 7 A Yes.
 8 Q Was it ever responded to?
 9 A Not that I ever recall.
 10 Q Was there a second demand?
 11 A Yes.
 12 Q When was the second demand?
 13 A As I recall, this one was in December of 2003.
 14 Q How much was that demand for?
 15 A It was increased to nineteen and a half million
 16 dollars.
 17 Q Did you on behalf of the family authorize that?
 18 A Yes, I did.
 19 Q Why was the demand increased, from your vantage point,
 20 from sixteen and a half million to nineteen and a half
 21 million some four months later?
 22 MR. COHEN: Objection.
 23 THE COURT: Overruled. I'll allow it.
 24 A Well, it's now December of -- it's now December of

1 months past Marcia's injury or crash. I mean, it's
 2 been a long time now and we've been through an awful
 3 lot.
 4 Q My question to you, Mr. Rhodes, was why didn't you
 5 respond to this particular \$2 million demand?
 6 A I was insulted and I was very angry.
 7 Q Did you have any feelings about what the demand
 8 constituted?
 9 A I don't know, but I do know what a good-faith offer
 10 should have been.
 11 Q So you didn't believe this was a good-faith offer?
 12 A No, certainly.
 13 Q Did the defendants make any other offer?
 14 A I don't believe until the time of mediation.
 15 Q And that was when?
 16 A That was in August of 2004.
 17 Q Were you at the mediation?
 18 A Yes, I was.
 19 Q And what was the first offer that the defendants
 20 communicated to you at the mediation?
 21 A 2.7 or 2.75 million dollars.
 22 Q What was your reaction to that offer?
 23 A I was outraged. It just wasn't a good-faith -- it just
 24 wasn't a good-faith offer.

1 Q Why didn't you think it was a good-faith offer?

2 A Well, you know, it didn't cover -- it didn't even cover

3 Marcia's medicals or her related expenses, let alone

4 any monies for Marcia's incredibly long, you know, pain

5 and suffering and even, you know, a loss of consortium.

6 I mean, it was just ridiculous.

7 Q Do you remember what the defendants' final offer was on

8 the date of the mediation?

9 A As I recall, \$3.5 million.

10 Q What was the reaction to that?

11 A Equally outraged. I mean, it was good that they raised

12 it, but still, you know, this now barely covered

13 Marcia's economic and medicals, past and present. It,

14 you know, just gave a little bit of money for Marcia's

15 long-term pain and suffering. And by now I'm -- you

16 know, I'm realizing the concept of interest on this

17 amount of money, and knowing what a discounted amount

18 would have been back when the accident would have been,

19 so it's even lower.

20 Q You said 3.5. Did you understand approximately how

21 much interest had accrued from the date that suit was

22 brought?

23 MR. COHEN: Objection, your Honor.

24 THE COURT: Well, sustained. I mean, I think

1 know, weren't willing to do that.

2 MR. COHEN: Motion to strike. As to what the

3 defendants would have been willing to do. There's no

4 evidence that was ever communicated.

5 THE COURT: All right. Well, I will allow in

6 what he said he was willing to move, but beyond that,

7 it's stricken.

8 (By Mr. Pritzker)

9 Q Do you know whether or not the defendants were willing

10 to negotiate in that range?

11 MR. COHEN: Objection.

12 THE COURT: I'm sorry. Willing to negotiate

13 the net range?

14 (By Mr. Pritzker)

15 Q Do you know whether or not the defendants were willing

16 to negotiate in the range that you said you were

17 willing to negotiate; namely, 6 to \$10 million?

18 MR. COHEN: Objection. Lack of foundation as

19 to how he would know.

20 THE COURT: Yes. You'll have to tell me how

21 he would know that, so why don't you go straight to

22 that question.

23 (By Mr. Pritzker)

24 Q How do you know what the defendants' position was

1 we all know it's 12 percent common, so I don't need him

2 to tell me that.

3 (By Mr. Pritzker)

4 Q Do you remember what the plaintiffs' first offer was or

5 first demand was at the mediation?

6 A Ours? We said fifteen and a half million dollars,

7 including assurances for continued healthcare for

8 Marcia.

9 Q Including or in addition to?

10 A In addition to. I'm sorry. In addition to.

11 Q Why was healthcare a part of the demand package?

12 A Well, it began to occur to me that, you know, when and

13 if we got this settled and United Healthcare had

14 expended an enormous amount of money on our behalf, you

15 know, as a single policyholder, that they might drop

16 us. And that's really scary, you know. So I wanted to

17 be sure that we were -- that, you know, Marcia and I

18 we're taken care of.

19 Q What was the ending offer that was in the demand that

20 was made at that mediation?

21 A I think we came down to \$15 million.

22 Q Were you willing to move from there?

23 A Yes. We were willing to negotiate within a range of 6

24 to \$10 million, but apparently the defendants, you

1 concerning continued negotiations?

2 MR. COHEN: Objection. Mediation privilege.

3 MR. PRITZKER: I don't think it is.

4 MR. COHEN: If he's going to testify as to

5 something that the mediator told him.

6 MR. PRITZKER: I not asking him --

7 THE COURT: Why don't you lead him a little

8 bit so we know what the source of it is so I can

9 evaluate.

10 (By Mr. Pritzker)

11 Q Mr. Rhodes, do you understand that you are not to

12 testify as to anything that the mediator said to you or

13 -- that the mediator said to you?

14 A Yes, sir.

15 Q And, in fact, how do you know that the defendants were

16 not willing to negotiate in the range of 6 to \$10

17 million?

18 A They got up and left.

19 Q And what was the last offer that the defendants

20 communicated to you or to the plaintiffs, to you on

21 behalf of the plaintiffs, before leaving?

22 A Three and a half million dollars.

23 Q Before the mediation --

24 THE COURT: I'm sorry. How long after that

1 offer was communicated to you did they leave?
 2 THE WITNESS: I think somewhere between, you
 3 know, an hour, an hour and a half.
 4 Q Before the mediation started, had you and your wife
 5 authorized counsel to settle for any particular amount?
 6 A Yes, we did, sir.
 7 Q How much was that?
 8 A For \$8 million.
 9 Q Had you ever authorized any sum for settlement prior to
 10 mediation?
 11 A No, we hadn't.
 12 Q We know that you authorized the demands to be made.
 13 A Yes.
 14 Q And you understand the difference between a demand and
 15 an actual authorization for settlement.
 16 A Yes.
 17 Q During the mediation, did you ever vary the \$8
 18 authorization?
 19 A No. We stayed at \$8 million because there was never a
 20 good-faith offer in which to consider, you know, having
 21 a discussion that varied from \$8 million, so we stayed
 22 at \$8 million.
 23 MR. COHEN: Motion to strike.
 24 THE COURT: Overruled.

1 A I believe right at the beginning of the trial.
 2 Q And there was a jury verdict, right?
 3 A Yes, there was.
 4 Q How much was the jury verdict for?
 5 A Nearly 12 -- or \$9.4 million.
 6 Q Was interest tacked onto that verdict?
 7 A Yes, it was.
 8 Q And what was the total of the jury verdict, plus the
 9 prejudgment interest?
 10 A It was nearly 12 million, like \$11.9 million.
 11 Q Jumping back for a minute, at the very end of
 12 mediation, was there a settlement between the
 13 plaintiffs and Professional Tree?
 14 A Yes.
 15 Q For how much?
 16 A For \$550,000.
 17 Q Did the plaintiffs receive any of that money
 18 immediately when Professional Tree settled?
 19 A Well, Marcia and I didn't, no.
 20 Q Why not?
 21 A As I recall, there was a lien, there was a lien from
 22 United Healthcare on the verdict for all the medicals,
 23 which I think was like \$400,000. And before we could
 24 get any money, that lien had to be, as I remember, that

1 (By Mr. Pritzker)
 2 Q Did you have an understanding of how much a good-faith
 3 offer would be?
 4 A Yes.
 5 MR. COHEN: Overruled. I'll hear it.
 6 A Well, I knew -- well, let me say the opposite. I knew
 7 what a good-faith offer would not be, okay. Let me put
 8 it that way. I knew a good-faith offer would not be
 9 one that didn't cover Marcia's -- or didn't cover
 10 Marcia's medical and related expenditures, past and
 11 future. I knew if it didn't include something for
 12 Marcia's extensive pain and suffering, her life-long
 13 pain and suffering, and I knew if it didn't include
 14 something for, you know, the loss of consortium, it
 15 wouldn't be a good-faith offer.
 16 Q Were there any further offers between then and the time
 17 the trial started?
 18 A No.
 19 Q Was there an offer during the trial?
 20 A Yes, I believe so.
 21 Q What was the first offer during the trial?
 22 A As I recall, it was the same \$3.5 million made at the
 23 end of mediation.
 24 Q And that was made when?

1 lien had to be taken care of.
 2 Q When you say there was a lien on the verdict, did you
 3 mean the verdict or just the proceeds?
 4 A Proceeds, yeah. Proceeds.
 5 Q Did the plaintiffs ultimately settle with United
 6 Healthcare to release the lien?
 7 A Yes, we did.
 8 Q How much money?
 9 A As I recall, around \$165,000.
 10 Q Aside from the money that was received from
 11 Professional Tree, when was the next money received
 12 from the defendants?
 13 A It was a couple of months after trial. It was, yes, it
 14 was in December 2004.
 15 Q And for whom did that money come?
 16 A That money came from Zurich.
 17 Q How much was it?
 18 A Approximately \$2.3 million.
 19 Q Did AIG pay at the same time?
 20 A No. No, they didn't.
 21 Q Did you understand that they had taken any action?
 22 A They filed an appeal instead of paying money.
 23 Q Did AIG ever pay?
 24 A Yes, eventually.

1 Q When?

2 A They paid in three installments, as I recall, in 2005:

3 in July, August and September, or it could have been

4 August, September and October, in that time period.

5 Q And those three installments amounted to how much?

6 A Just under \$9 million.

7 Q So between the money that the plaintiffs received from

8 Professional Tree and the money from Zurich and the

9 money that was ultimately paid by AIG, how much totally

10 did the plaintiffs receive, approximately?

11 A About \$11.8 million.

12 Q And do you know what the total judgment was, plus the

13 interest on the unpaid balances?

14 A Yes, I do.

15 Q How much money?

16 A That was \$12.6 million.

17 Q In order to settle with AIG, the plaintiffs gave up

18 roughly \$700,000?

19 MR. COHEN: Objection.

20 THE COURT: Overruled.

21 A Yes. We had to give up 7 or \$800,000 to settle.

22 (By Mr. Pritzker)

23 Q Now, I think you mentioned earlier that the fee

24 agreement between the plaintiffs and Brown Rudnick

1 the time that the plaintiffs received the last of the

2 monies in September of 2005, how much in costs the

3 plaintiffs paid?

4 A We paid around \$140,000.

5 Q And how was that payment made?

6 A Brown Rudnick would deduct those costs from the

7 proceeds and send us the remaining amount.

8 Q Now, you've already told us a little bit about how you

9 felt right after Marcia's injuries. Have any of those

10 feelings gone away?

11 A You know, certainly I'm no longer overwhelmed and

12 certainly the shock has certainly dissipated to some

13 extent. The frustration and sadness, you know, remain.

14 They'll always be there.

15 Q At some time did you notice those feelings getting

16 less?

17 A Certainly. You know, Marcia, Rebecca and I have all

18 adjusted to our new life.

19 Q When would you say, if you could put a time frame on

20 it, when you started to feel less sorrowful about

21 Marcia's condition?

22 A Well, certainly after the renovation was completed and

23 Marcia no longer had to be in a living room out in the

24 middle of our house. Now that she had, you know, some

1 required costs to be paid; is that true?

2 A Yes, sir.

3 Q And can you tell me your understanding of the costs

4 that were to be paid and how they were to be paid?

5 A Well, when we signed the agreement, you know, you

6 explained or I understood the costs would cover direct

7 costs associated with the case, you know, I'll call

8 them indirect costs associated with the case. The

9 direct costs might be travel, the indirect costs might

10 be telephone or fax; and that the direct costs would be

11 charged at cost, whatever it was, and that the indirect

12 costs would be charged whatever the rate was for, you

13 know, Brown Rudnick, you know, for a large firm in the

14 Boston area.

15 Q And was the obligation to pay costs part of the

16 contingent fee agreement between the plaintiffs and

17 Brown Rudnick?

18 A Yes, it was.

19 Q In addition to that, was there a percentage that Brown

20 Rudnick was to receive from any recovery on the matter?

21 A Yes, there was.

22 Q Do you remember how much the percentage was?

23 A Thirty-three percent.

24 Q Could you tell me, between the time of the accident and

1 privacy, I felt a great deal better that, you know, she

2 could now get on and have a regular life without being

3 intruded upon. I think that that's probably when it

4 began. I could see that.

5 I would certainly go on to say the first time

6 Marcia took driving lessons and Mr. Whitehouse, the

7 driving instructor, told me, we discussed it

8 afterwards, and when I asked him does he think that

9 Marcia is going to be able to learn to drive, I

10 understood that she was going to be able to drive, and

11 that certainly made me feel much better.

12 Q Why?

13 A Well, between having, you know, new, larger space that

14 afforded her the opportunity to have friends over, that

15 we could have dinner at, that she could have her

16 privacy, and having the independence of being able to

17 drive for herself or with Rebecca, these are two good

18 steps in the course of a person's, you know,

19 occupational rehabilitation. And these were important,

20 big steps to making Marcia feel better and making me

21 feel better.

22 Q Prior to the renovations that you completed, where was

23 Marcia staying?

24 A Our house is a regular, you know, four-bedroom, two-

1 story Colonial house where there's four rooms, four or
 2 five rooms on the first floor and four bedrooms on the
 3 second floor. And so since Marcia couldn't up the
 4 stairs, we moved the piano out of the living room and
 5 we moved a medical bed into the living room, and that's
 6 where Marcia stayed. There were no doors or anything.
 7 But that's where Marcia stayed, slept, lived.
 8 Q Now, at some point, did the legal case begin to concern
 9 you?
 10 A Yes.
 11 Q Can you tell me when you started to feel some concern
 12 about the case?
 13 A Well, I remember I didn't think much about the legal
 14 case in the first half of 2002, because Marcia was in
 15 the hospitals and that was the major thing thinking
 16 about. But by July, you know, this is when I began to
 17 ask you how things were going, and, you know, knowing
 18 that really had proceeded and really having an
 19 expectation that things would proceed along, made me
 20 anxious. By November, October, when Mr. Zalewski was
 21 found guilty and expecting now that liability was
 22 perfectly clear, that nothing was happening, really,
 23 really made me anxious about what was going on with the
 24 case.

1 how would you describe what you were feeling as
 2 it related to the litigation process?
 3 A Oh, by the end of 2003 I was just -- I was
 4 angry. I was just completely, completely
 5 mortified. I mean, we were two years, we hadn't
 6 heard from anybody. We had used up a
 7 significant amount of monies to support this.
 8 You know, liability was clear, but yet nothing
 9 was happening.
 10 Q How did it make you feel?
 11 A I mean, I think Marcia said it best the other
 12 day. It was a no-brainer. And I was just angry
 13 that we just, you know, didn't just solve this
 14 think and, you know, just resolve it and let
 15 Marcia and me and Rebecca move on with our
 16 lives. Your Honor, I mean, it was just there.
 17 Q You'd mentioned the anger. Was there other
 18 feelings that you can describe as this process
 19 wore on during 2003?
 20 A Well, I mean, it was just a very, very difficult
 21 time. I mean, I'm sure towards the latter --
 22 I'm sure that by the latter part of 2003, you
 23 know, I was growing even more concerned about
 24 where we were with money and, you know, I'm sure

1 MR. COHEN: Your Honor, move to strike any
 2 conversations he had with his counsel.
 3 THE COURT: I will. I'm not sure that they
 4 form the substance of his answer, but I haven't focused
 5 on that. So go ahead.
 6 (By Mr. Pritzker)
 7 Q You understand, Mr. Rhodes, that you should not be
 8 disclosing conversations of you and I?
 9 A Yes, sir.
 10 Q Directing you attention to the date of the 2003;
 11 can you tell me whether or not the anxiety was
 12 increasing?
 13 A Well, now I was becoming increasingly concerned
 14 about money. Since the expenses, you know, were
 15 exceeding income we were beginning to suddenly
 16 use up our liquid assets, and this was really
 17 quite concerning because, you know, I'm a
 18 Harvard MBA and I can see the direction where we
 19 were going with, you know, our assets and, you
 20 know, this really began to concern me a great
 21 deal, especially having no -- now, no
 22 understanding of how long the whole trial, you
 23 know, this whole process was going to take.
 24 Q Directing your attention to the whole of 2003;

1 I was waking up at night worried about what we
 2 were going to do for money.
 3 Q Did that abate during the first half of 2004?
 4 A No, it just grew worse. You know, the anger
 5 just turned to outrage.
 6 Q If you tried to calculate or have you calculated
 7 how your net assets, the liquid assets, your
 8 assets were being reduced during the period from
 9 time of the accident until August of 2004?
 10 MR. VARGA: Objection. Your Honor, we
 11 have an objection certainly to testimony on this
 12 subject, predominantly because we still have not
 13 received a full disclosure of financial asset
 14 information. What we received are spreadsheets,
 15 which do not provide any source documentation
 16 for the defendants to examine it, to understand
 17 what was happening with the accounts at various
 18 times, what all the investments were, how they
 19 would be completed.
 20 As a result of that, all we have are
 21 summaries prepared by counsel which are not
 22 sufficient and able for meaningful cross-
 23 examination on this subject. This material was
 24 requested during discovery. All we received

1 were two pages of Quick and Reilly reports and
2 some other materials such as the tax returns and
3 something about a line of credit that was taken
4 out.

5 But in terms of the full disclosure of
6 that sort of information that hasn't been
7 complied with, it would be inappropriate for the
8 witness to now be able to explain the extent to
9 which he claims assets were being depleted
10 during this process and any effects that that
11 had, where there hasn't been a full and fair
12 opportunity on the part of the defense to
13 examine those records and to contest the
14 witness's credibility.

15 MR. PRITZKER: Your Honor, I would like
16 at least to, if the court wishes to hear
17 dialogue in this, to show the court what was
18 disclosed to counsel.

19 THE COURT: I think it makes more sense
20 to show me what you have disclosed as opposed to
21 describing it.

22 MR. PRITZKER: Let me make sure that
23 it's complete. And by the way, this was not
24 prepared by counsel. It was prepared by Mr.

1 Rhodes.

2 I'll hand it to the court.

3 And again, this was pursuant to the
4 court's order to disclose the financial
5 information, which made up the assets which were
6 being depleted.

7 MR. COHEN: Could we get a copy of
8 that? Is that what this is you provided us?

9 MR. PRITZKER: Yes.

10 MR. COHEN: Just for the record, I'd like
11 to join in the same objection..

12 MR. PRITZKER: If I may, your Honor, just to
13 clarify?

14 THE COURT: You may.

15 MR. PRITZKER: This was the dialogue, was all
16 about the disclosure, was as a result of the
17 plaintiffs' intent to seek lost wages as part of our
18 damages in this case. The defendants have been duly
19 notified that we are not seeking lost wages, that we
20 are only seeking damages for Mr. Rhodes' emotional
21 state because his assets were being depleted.

22 Mr. Rhodes can walk through these schedules
23 to show what the depletion of the liquid net worth was
24 and how they were arranged. The dollars aren't as

1 important as his perception and the emotional strain
2 that that caused him.

3 THE COURT: We can mark this for I.D., but I
4 will allow the questioning, limited to the issue of
5 emotional distress and not to the issue of lost income
6 or lost opportunity to earn.

7 MR. COHEN: Your Honor, can I add one thing
8 to Mr. Varga's objection, and that is in the trial of
9 the underlying case, there was also testimony about Mr.
10 Rhodes' concern about the depletion of his assets.
11 Our position is that that's something he's already been
12 compensated for by the other jury.

13 THE COURT: I don't know how he would be
14 compensated for that as part of a loss of consortium,
15 so I don't consider that to be duplicative.

16 MR. PRITZKER: I can leave that with the
17 court, your Honor.

18 THE COURT: Okay, it should be marked for
19 I.D.

21 (Exhibit G for I.D., marked; Harold Rhodes
22 Asset Spreadsheet.)

23 MR. VARGA: Your Honor, I just want to make

1 sure I understand the scope of the court's ruling on
2 it. It will allow testimony regarding the effect that
3 the alleged depletion of assets had on Mr. Rhodes. Is
4 that what your Honor said? I want to make sure --

5 THE COURT: He is able to testify to the
6 emotional distress suffered by the financial
7 circumstances which he contends were caused by the
8 failure to settle. So to the extent that that
9 emotional distress was, in part, derived from his
10 financial concerns, I'll allow him to testify as to
11 that.

12 MR. VARGA: Thank you.

13 (By Mr. Pritzker)

14 Q Mr. Rhodes, before we broke for that colloquy, I think
15 I had asked you whether you knew how your net liquid
16 assets were being depleted between January 2, '02 --
17 I'm sorry January 9, '02 and August of '04?
18 A I'm wondering if I could look at that schedule because
19 then I would give perfect answers, otherwise I'm just
20 going to try to remember as best I can.

21 MR. PRITZKER: May I hand this to the
22 witness, your Honor?

23 THE COURT: You may.

24 THE WITNESS: Thank you.

1 THE COURT: Since we always strive for
2 perfection.
3 A I keep very detailed reports of our financial situation
4 ever since we were married. So these come from, you
5 know, reports or files, computer files that I've kept
6 for a long time. On January 31st we had a liquid net
7 worth of about \$630,000. So liquid net worth would --
8 MR. VARGA: I'm sorry, I don't mean to
9 interrupt, the witness is reading from a document that
10 is not in evidence. It's marked as G for
11 identification so --
12 THE COURT: If anybody wishes to offer it,
13 they may, I mean, it's being --
14 MR. PRITZKER: I'll ask a simpler question,
15 Your Honor.
16 THE COURT: Okay. I mean, it's being used.
17 It's a document which he prepared, I gather, with the
18 numbers in front of him and is being used to refresh
19 their memory or as recorded recollection, but I don't
20 really see it to be a problem.
21 MR. VARGA: My only objection, your Honor, is
22 it's a summary prepared by the witness in anticipation
23 of this lawsuit and this trial, but we don't have the
24 backup for it. That's the basis for our objection.

1 MR. COHEN: I think objection. Your Honor
2 has already ruled that the retirement investment should
3 be included in the liquid assets, is my understanding.
4 THE COURT: Well, with regard to disclosure,
5 yes. But he can define it however he wishes to define
6 it. You can cross-examine him and speak to him as to
7 whether or not that may have played a role in his
8 experience with regard to his financial situation. So
9 you may proceed.
10 (By Mr. Pritzker)
11 Q By August of '04, Mr. Rhodes, without looking at that,
12 just listen to my question. By August of '04, do you
13 remember approximately how much remained in net liquid
14 assets?
15 A \$167,000.
16 Q And how did that make you feel?
17 A I was scared to death. I mean, at the present rate
18 that we were using up our liquid assets, soon I would
19 have to, you know, start using our retirement assets,
20 which would have been -- had a penalty on it, as well
21 as been taxed, so it's not exactly the amount shown.
22 You know, we may have to take out a mortgage on our
23 home, even though our mortgage was very low. And
24 although I didn't segregate money for Rebecca's college

1 THE COURT: All right.
2 MR. VARGA: To the extent he's going to read
3 it or it's otherwise going to be offered, we definitely
4 object to that.
5 THE COURT: Okay. I understand that and I've
6 overruled that to the extent that I will allow him to
7 be testifying generally about the change in his
8 financial circumstances. I don't need to hear about
9 each particular transaction, but I will allow him to
10 describe what the family's financial circumstances were
11 and how that changed prior to receiving the money from
12 settlement.
13 A Could you ask the question again, please?
14 (By Mr. Pritzker)
15 Q Yes. Generally, how much had your net liquid assets
16 depleted between January 9, '02 and August of '04?
17 A About \$470,000, our liquid assets.
18 Q And how do you define "liquid assets"?
19 A By convention, we include any cash on hand, any
20 brokerage monies, but not retirement, not the non-
21 tradable, not the home value, not personal property.
22 It's deducted then from any taxes that are payable, any
23 credit cards that are payable, the home renovation that
24 was due, but, you know, not the auto, not the mortgage.

1 fund, I really came to worry whether we would have
2 money for Rebecca's college fund. So, you know,
3 whether -- you know, I was scared to death.
4 THE COURT: I'm sorry. The money for her
5 college fund is not part of this.
6 THE WITNESS: No. No, that's included in our
7 assets. It's not separated, but I knew that as the
8 money went down, I wasn't going to have money for
9 Becca's college fund.
10 THE COURT: Okay. But did you have any money
11 for her put aside in a --
12 THE WITNESS: No.
13 THE COURT: -- separate account?
14 THE WITNESS: No, sir.
15 THE COURT: Okay.
16 (By Mr. Pritzker)
17 Q When again did the plaintiffs received the first demand
18 from the defendants?
19 A The plaintiffs' first demand, the --
20 Q The first offer from them.
21 A I'm sorry. Could you repeat the question, please?
22 Q When did the plaintiffs received -- you already
23 testified that there was a \$2 million demand in March?
24 A A \$2 million --

1 Q A \$2 million offer. Excuse me.
 2 A -- in March, yes.
 3 Q And then there was no offer between then and mediation?
 4 A That's correct.
 5 Q When you received -- strike that.
 6 When you went to mediation, do you remember
 7 the day?
 8 A I remember it was in August.
 9 Q Do you remember how you felt going into the mediation?
 10 A Oh, I was just as glad as glad can be that, you know,
 11 we were going to actually sit down and work this
 12 through and not have to go to trial. I mean, that was
 13 just great, that, you know, we had finally gotten to a
 14 point where we're going to have, you know, a discussion
 15 that we could, you know, finalize this whole thing on.
 16 Q Do you remember your first impression when you walked
 17 into the mediation room?
 18 A Oh, I was excited and as happy as I could possibly be.
 19 I mean, there were 20 or 30 people besides the --
 20 besides us, you know, from the defendants. And, you
 21 know, in my business world, if you had this large of a
 22 meeting, you'd call it the big-bang meeting. And
 23 that's where everybody got in a room and you made up
 24 your mind and, you know, you didn't leave until it was

1 -- the whole thing is just overwhelming, you know, as
 2 to what was going to happen now.
 3 Q Does anything stand out in your mind during trial that
 4 set you off on different emotions?
 5 A I sat there and I listened to the defendants' life-care
 6 planner, and I suppose I had never been more angry in
 7 my entire life. She said -- she said that it would be
 8 okay for Marcia to live -- she said that there wasn't
 9 any need for renovations and that Marcia could
 10 comfortably live in a living room on a hospital bed for
 11 the rest of her life, and I just was really angry. And
 12 then she said that Marcia only needed a certain amount
 13 of care, just in the mornings, because I would be there
 14 and Becca would be there to take care of her, to mean
 15 that we would be the personal care attendants for
 16 Marcia. And, you know, when I was listening to the
 17 life-care planner say these two things, I just realized
 18 that they just didn't want to -- they just didn't want
 19 to provide a fair amount of Marcia and me.
 20 Q Were there other times during the trial -- before
 21 I get there -- did you display any kind of --
 22 the feelings that you've just described did it
 23 come out in any physical manifestation at the
 24 trial?

1 done because that was the goal of everybody. So, you
 2 know, I looked at everybody and I said to myself, you
 3 know, they wouldn't send all these people unless they
 4 were absolutely committed to getting this thing done,
 5 so that was great.
 6 Q How did you feel when you heard the first offer of the
 7 2.75 million?
 8 A Hopeless, depressed. I knew right then that it just
 9 wasn't going to happen.
 10 Q Why? What made you feel that way?
 11 A I mean their opening offer wasn't even a good-faith
 12 offer. It didn't even cover -- it didn't even cover,
 13 you know, Marcia's past and future medical-related
 14 expenses. I mean, they knew at that point where we
 15 were. I mean, they knew everything. They had the
 16 medical, I mean they had the expense -- they had
 17 everything and they started off at \$2.75 million, and I
 18 am shocked, that -- this is not a good-faith effort on
 19 their part.
 20 Q Did your feelings change by the end of the day?
 21 A No.
 22 Q Did they change by the beginning of trial?
 23 A Yeah. I just -- you know, I just -- you know, I'm now
 24 really worried about trial and, you know, now it's just

1 A Yes, I'm sure it did.
 2 Q How?
 3 A I'm sure I cried. Especially, you know, there
 4 is that other point that they made my wife
 5 testify. For goodness sake, it wasn't her
 6 fault. That's what I kept thinking. She was
 7 rear-ended into and they are making her now go
 8 through trial. They knew everything. Why were
 9 they doing that?
 10 Then the worst came, the worst came
 11 when they made my daughter testify. I mean,
 12 here's this 16-year-old girl and I was causing
 13 her to go to this trial and it's something she
 14 was going to have to carry with her for the rest
 15 of her life and that's something I don't think
 16 any father would want to do to his daughter.
 17 Q How did you feel when the jury came back with
 18 the verdict?
 19 A Oh, God. Extremely relieved. Extremely.
 20 Q Happy?
 21 A Very happy. Very satisfied.
 22 Q Then what?
 23 A Well, I mean we thought it was over. I mean,
 24 the jury returned a verdict and a judgment and

1 they calculated what the interest on it was and,
2 you know, we thought it was over and we'd be
3 getting our money soon. But that didn't happen
4 and it just like -- this rollercoaster, we felt
5 really good and now it was like back to the
6 bottom again.

7 Q Do you remember what your thoughts were when you
8 first learned that AIG had filed a notice of
9 appeal?

10 A Well, there's two things. The first was, I
11 mean, I just couldn't believe it. I mean, what
12 in God's name are they doing? The jury said,
13 what the jury said, please pay us the money so
14 we can get on with our lives. But more than
15 that, more than that, this is when I realized
16 that if they can delay this for two more years,
17 we would be in dire financial straits. And I
18 was just absolutely afraid that we wouldn't be
19 able to withstand two more years and then we
20 would just have to take whatever they offered.

21 MR. PRITZKER: I have no further
22 questions, your Honor.

23 THE COURT: Okay. Any cross-
24 examination?

1 A That's what I said in my interrogatory. Later
2 on, a similar question was asked in the
3 deposition where I further clarified that.

4 Q Well, Mr. Rhodes, I don't care what you said in
5 your deposition. My question is, do you stand
6 by this answer or don't you?

7 A Well, I -- yes, I stand by that answer --

8 Q Okay. And you did not file any supplemental
9 answers to interrogatories to that question
10 giving any other answer, did you?

11 A No, I didn't.

12 Q Now, in fact at your deposition you testified,
13 did you not, that at the time of the mediation
14 you drew a line in the sand at \$8 million, and
15 you wouldn't accept at the mediation anything
16 less than that. Do you recall that testimony ?

17 A I said that in the deposition, but later on in
18 the deposition I clarified that statement. And
19 if you put the clarification into the context
20 what I said was, since no good-faith offer was
21 ever made that we could discuss, I never felt
22 the need to move from \$8 million. I mean, had
23 you made a good-faith offer and the lawyers and
24 the mediator and my brother Steve all said that

1 MR. COHEN: Yes, your Honor.

2 THE COURT: Okay, Mr. Cohen.

3 CROSS-EXAMINATION BY MR. COHEN:

4 Q Mr. Rhodes, I'd like to read you one of your
5 answers to an interrogatory that was propounded
6 by my claim, AIGDC, and it's your answer to
7 interrogatory number nine. The question was:
8 please state what offers of settlement
9 you would have accepted from January 2002 until
10 the resolution of the underlying matter. If the
11 amount you would have accepted changed at any
12 time, please indicate for what periods of time
13 each amount is applicable.

14 And your answer is:

15 I believe the family was willing to
16 accept \$8 million to resolve the underlying
17 matter up through the mediation. Stating what
18 the family would have agreed to between the time
19 of the mediation and the jury announcing its
20 verdict would be speculative. After the jury
21 verdict, I was willing to accept the full amount
22 of the jury verdict, plus all accrued interest,
23 to resolve the underlying matter.

24 Is that still your testimony, sir?

1 it was the right thing to do, you know, I don't
2 know what I would have done then.

3 MR. COHEN: Your Honor, I move to
4 strike everything after "I said that at the
5 deposition."

6 THE COURT: Overruled.

7 (BY MR. COHEN)

8 Q Specifically, Mr. Rhodes, at the deposition you
9 said:

10 question: So you are saying that if you
11 had an offer of \$8 million --

12 MS. PINKHAM: Can I have a page
13 reference, please?

14 MR. COHEN: I'm sorry, it's page 93,
15 line 5.

16 (BY MR. COHEN)

17 Q So you are saying that if you had an offer of \$8
18 million, you didn't care who it was from. You
19 would have settled the case on the day of the
20 mediation?

21 Your answer was: Yes.

22 Then my question was: Okay. Now is it
23 fair to say, though, 8 million was the line in
24 the sand that you were drawing in your mind as

1 to you wouldn't accept anything less than that?
 2 Answer: Yes.
 3 So if you were offered \$7 million at
 4 the mediation, you wouldn't have accepted that?
 5 Answer: That is correct.
 6 Certainly if you were offered \$6
 7 million at the mediation, you wouldn't have
 8 accepted that, you would have tried the case,
 9 right?
 10 Answer: That's correct.
 11 Do you stand by that testimony, sir?
 12 A I stand by that, in the context of the further
 13 testimony that was given just after that
 14 discussion.
 15 Q I guess your attorney will have a chance to get
 16 into that on redirect, Mr. Rhodes.
 17 MR. PRITZKER: We could have it read
 18 right now, your Honor, and save some time.
 19 MR. COHEN: I'd be happy to read
 20 anything that they want me to read.
 21 THE COURT: He's described it. Let Mr.
 22 Cohen do his questioning and then I'll hear from
 23 you again.
 24 (BY MR. COHEN)

1 at that time the accident case was going on,
 2 correct?
 3 A Yes, that's true.
 4 Q Now, when you talked about what you felt a good-
 5 faith or fair offer would or wouldn't have been
 6 in response to Mr. Pritzker's testimony, you
 7 were talking again about the package deal of all
 8 three plaintiffs combined, correct?
 9 A Yes, sir.
 10 Q And you never gave any thought to what a fair
 11 settlement offer would be to settle your loss of
 12 consortium case, correct?
 13 A That's correct, sir.
 14 Q And you never gave any thought to what would be
 15 a fair offer with respect to Rebecca's loss of
 16 parental-society case either, correct?
 17 A That's correct, sir.
 18 Q It's true, is it not, that prior to and during
 19 the trial of the accident case, you thought that
 20 there was a possibility that the jury would come
 21 back and award you less than \$6 million, right?
 22 A I had no idea, you know, what the jury would
 23 offer, but, you know, anything was possible.
 24 Q Well, let's turn to page 103 of your deposition,

1 Q Now, at all times during the time the accident
 2 was going on, I'm going to refer to the case
 3 that you tried in Norfolk Superior Court as the
 4 accident case on occasion throughout my
 5 questioning of you so you understand that's what
 6 that means?
 7 A Okay.
 8 Q At all times during that case, you were only
 9 willing to settle this case as a package deal.
 10 In other words, you had to settle, Mrs. Rhodes
 11 had to settle, Rebecca all had to settle, or
 12 there would be no settlement, right ?
 13 A That's true.
 14 Q And in fact, every settlement demand that was
 15 made in the accident case was made on behalf of
 16 the whole family and not on behalf of any of the
 17 three individual plaintiffs, correct?
 18 A That's true, sir.
 19 Q And in addition to that, Mrs. Rhodes wanted you
 20 to make all of the decisions as to settlement,
 21 correct? She wanted to be left out of that?
 22 A Yes, that's true, sir.
 23 Q And you were also making the decisions as to
 24 settlement on behalf of Rebecca, who was a minor

1 Mr. Rhodes. Actually, I guess we're going to
 2 start on page 102, line 12. Let me read you
 3 your testimony.
 4 Question: Prior to the trial, did you
 5 have any expectations as to what range of jury
 6 verdict might be returned?
 7 No.
 8 You had no guesses or estimates as to
 9 what the jury might do?
 10 Answer: No.
 11 Question: Did you think there was a
 12 possibility that they would award less than \$8
 13 million?
 14 Your answer was: Yes.
 15 Question: Did you think there was a
 16 possibility that they may award less than \$6
 17 million?
 18 Your answer was: Yes.
 19 Question: Did you think there was a
 20 possibility that they might award less than \$4
 21 million?
 22 Answer: I don't -- I don't believe
 23 that would have happened.
 24 Question: Did you think there was a

1 possibility that they would award less than \$5
 2 million?
 3 Answer: I don't know. I don't know.
 4 One more question: But you were
 5 concerned about what they would come back with,
 6 right?
 7 Answer: Yes.
 8 And that's still your testimony today,
 9 Mr. Rhodes?
 10 A Yes, sir.
 11 Q Okay. And you understood, did you not, that a
 12 large component of the damages that your counsel
 13 was asking the jury to award you consisted of
 14 pain and suffering and loss of consortium,
 15 right?
 16 A Yes, sir.
 17 Q And in fact, that was the major amount of the
 18 damages you were seeking, correct?
 19 A Yes, sir.
 20 Q Because the future medical costs were, by your
 21 own expert's testimony, was going to range from
 22 \$1.4 million to \$1.9 million, correct?
 23 A I believe that's true, sir.
 24 Q And you also were seeking some past costs,

1 Q I'll get to that in a second.
 2 Do you agree that pain and suffering
 3 and loss of consortium damages are difficult for
 4 anybody to quantify?
 5 A Yes.
 6 Q And that's because it's very difficult to put a
 7 number of somebody's pain and suffering and
 8 emotional distress because you can't see a
 9 medical bill or lost wage bill. It's not as
 10 easy to put a number on that as it is what your
 11 future lost wages are going to be or what your
 12 future medical bills are going to be, right?
 13 A That's correct, sir.
 14 Q Now, with respect to the independent medical
 15 examination, you viewed it as reasonable for the
 16 defense attorneys or the insurance companies to
 17 seek to perform an IME, correct?
 18 A Well, yes, but not in the way that -- not in the
 19 way the defendants went about it. So yes to the
 20 answer that it is reasonable.
 21 Q The IME itself, though, I understand you have
 22 issues with regard to the timing of the IME and
 23 there was a male doctor versus a female doctor,
 24 but the fact that they wanted to have your wife

1 including the past medicals and the cost of
 2 renovating your home and the cost of the van and
 3 the cost of the healthcare aid, and that all
 4 amounted to something in the range of \$900,000,
 5 right?
 6 A Yes, I believe so.
 7 Q So the vast majority of the demands that you
 8 made, whether it was the \$18.5 million demand,
 9 the \$19.5 million demand, the 15.5 plus the
 10 health insurance demand, that consisted of pain
 11 and suffering, right?
 12 A Pain and suffering and the loss of consortiums.
 13 Q And you understood, did you not, that pain and
 14 suffering is a very subjective thing for a jury
 15 to consider as to what it's worth and what it's
 16 not worth, right?
 17 A I guess.
 18 Q And would you agree that such damages, pain and
 19 suffering and loss of consortium, are difficult
 20 to quantify for a jury.
 21 A I guess.
 22 Q Well, you testified to that at your deposition;
 23 did you not?
 24 A I can't remember.

1 examined wasn't unreasonable in your view,
 2 correct?
 3 A No, it wasn't unreasonable.
 4 Q And that's because they wanted to determine what
 5 future level of rehabilitation your wife could
 6 accomplish in terms of being able to participate
 7 in the various activities of daily living that
 8 she wasn't able to participate in at the time,
 9 correct?
 10 A Yes.
 11 THE COURT: We're going to have to call
 12 it a day. It is 1 o'clock. We shall reconvene
 13 tomorrow at nine. It is the last day before our
 14 break. What shall I expect? Am I going to hear
 15 from Mr. Kiriakos tomorrow?
 16 Mr. Pritzker: Yes, your Honor.
 17 THE COURT: And before we leave, just
 18 so -- as the jury verdict, I don't know that I
 19 know what share of it was loss of consortium and
 20 what share was from Ms. Rhodes.
 21 MR. PRITZKER: It is, I believe, part
 22 of the docket, your Honor. It was \$500,000 for
 23 Rebecca; 1.5 million for Harold.
 24 THE COURT: And the rest was?

1 Mr. Pritzker: 7.412 was Marcia's.
 2 THE COURT: Okay. We shall reconvene
 3 tomorrow.
 4 (Hearing adjourned.)
 5 Q
 6 Q
 7
 8
 9
 10
 11
 12
 13
 14
 15
 16

CERTIFICATE

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

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

Paula Pietrella

Faye LeRoux

COMMONWEALTH OF MASSACHUSETTS

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

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 10

BEFORE: GANTS, J. BOSTON, MASSACHUSETTS FEBRUARY 16 2007

PAULA PIETRELLA FAYE LEROUX

APPEARANCES

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

FOR: The Plaintiffs Marcia Rhodes, et al.

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

FOR: The Defendant Zurich American Insurance Company

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

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

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

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

INDEX

Table with columns: WITNESS, DIRECT, CROSS, REDIRECT, RECROSS. Rows include Harold Rhodes (Resumed) and Arthur Kiriakos.

EXHIBITS

Table with columns: NO., DESCRIPTION, PAGE. Rows include Harold Rhodes Asset Spreadsheet, Deposition Designations of Warren Nitti, Video Diskette of Deposition of Warren Nitti, and Certified Financial Statements.

FOR I.D.

None

PROCEEDINGS

(In court at 9:05 a.m.)

THE COURT OFFICER: This Honorable Court is now open, you may be seated.

THE COURT: Good morning.

MR. PRITZKER: Good morning, your Honor.

MR. VARGA: Good morning.

THE COURT: We're the Tom Brady courthouse this morning.

All right. You plan to call your next witness, Mr. Pritzker?

MR. COHEN: I'm on my cross still, your Honor.

THE COURT: You're on cross, all right. So we still have, of course, Mr. Rhodes is still on the stand. All right. I'm just looking forward to Mr. Brady's testimony. I don't quite know what he knows about this case, but I'm sure you'll find a reason to call him.

THE WITNESS: Good morning, Judge.

THE COURT: Welcome back, Mr. Rhodes. You remain under oath and we will not again place you under oath.

THE WITNESS: Thank you.

THE COURT: And, Mr. Cohen, you may proceed.

MR. COHEN: Thank you, your Honor.

HAROLD RHODES, Resumed.

CROSS-EXAMINATION BY MR. COHEN, Continued:

Q Good morning again, Mr. Rhodes.

If you recall, the first question that I asked you yesterday had to do with an interrogatory answer that you gave in this case, the answer to Interrogatory 9 of AIGDC's interrogatories, and I read the question and the answer and I asked you some questions about it. Do you recall?

A Yes.

Q I asked you what you would take to settle the case at various points in time, correct?

A Yes.

Q My only question for you with regard to that is that you signed -- you got Rebecca's answers to interrogatories as well in this case, correct, because she was a minor?

A Yes.

Q And that exact same interrogatory answer was in Rebecca's answers to interrogatories, correct?

A Yes.

Q And you also worked on your wife Marcia's interrogatory

answers, correct?

A I helped, yes.

Q And that exact same interrogatory answer was in Mrs. Rhodes' interrogatory answers as well, correct?

A Yes.

Q Now, I think where we left off yesterday is we were talking about the independent medical examination, and you had indicated that you didn't have any objections to the performance of the examination itself, but you had some other objections to it. Do you recall that?

A Yes.

Q And one of the objections was you objected to the timing of the examination; you thought it should have been performed earlier, right?

A Yes.

Q And the one other objection that you had to it was that you would have preferred that a female doctor perform the examination rather than a male doctor, correct?

A Yes.

Q Now, isn't it true that you did not tell anyone that you would prefer a female doctor to perform the examination?

A I don't recall whether I discussed it with counsel or not; but outside of counsel, no.

Q Okay. As far as you know, a request to have the examination performed by a female doctor was not communicated to the defendants.

A Yes.

Q And you testified as such in your deposition as well, correct?

A Yes.

Q Now, Mrs. Rhodes has seen various male doctors over the years, correct?

A Yes.

Q And, in fact, the psychiatrist that treated her for 20 years or so, Ben Aspel, is a male, correct?

A Yes.

Q And the orthopedic surgeon that testified at the trial of the accident case was a man, correct?

A Yes.

Q And there were other male doctors that treated her at various times, especially after the accident, correct?

A Yes.

Q Now, the other objection that you had to the independent medical examination was the location. You would have liked to have the independent medical examination performed at your house rather than having to drive into Boston to have that done, correct?

1 A Yes.

2 Q But, again, that's not something that was ever
3 communicated to any of the defendants in the accident
4 case, correct?

5 A Yes.

6 Q Now, let me move on to the trial of the accident case.
7 You testified in response to the questions of Mr.
8 Pritzker that you underwent a great deal of stress and
9 anguish over events that happened during the trial,
10 correct?

11 A Yes.

12 Q You understand, do you not, that a trial is an
13 adversary process and each side is trying to present
14 the evidence in the manner that is in the best light to
15 that side, correct?

16 A Yes.

17 Q Okay. That's part of how trials work, right?

18 A Yes.

19 Q So it wouldn't be surprising to you to hear that the
20 defendants were trying to put the best light on the
21 evidence, just as your lawyers were doing at the trial,
22 correct?

23 A Yes.

24 Q Now, you testified for about five or six hours at the

1 Q And your counsel also put on the "Day in the Life"
2 video as part of the trial of the accident case,
3 correct?

4 A Yes.

5 Q That wasn't put on by the defendants, right?

6 A It was not put on by the defendants.

7 Q And you were asked during the time that the "Day in the
8 Life" video was played to narrate it, so to speak,
9 correct?

10 A Yes.

11 Q And you did that, correct?

12 A Yes.

13 Q Now, did your wife agree to the playing of the "Day in
14 the Life" video during the trial?

15 A Yes.

16 Q You had testified in response to Mr. Pritzker's
17 questions that quote/unquote they made my wife and
18 daughter testify. Do you recall that testimony?

19 A Yes.

20 Q And, again, the -- strike that --
21 Your daughter Rebecca was called to testify
22 by the plaintiffs, by your lawyers, right?

23 A Yes.

24 Q And the same for Marcia, right?

1 trial of accident case, didn't you?

2 A I don't recall exactly how long it was.

3 Q Okay. Well, do you recall in your deposition in this
4 case I asked you that question and --

5 Counsel, for your page reference, it is on
6 page 93 -- I'm sorry, page 101 -- and I asked you a
7 question and you testified. And we were talking about
8 the trial, line 8.

9 Answer: Yes.

10 Question: How long were you on the witness
11 stand?

12 Answer: I don't know specifically but
13 approximately five to six hours.

14 Does that refresh your recollection now?

15 A Yes.

16 Q And your counsel called you to testify, correct?

17 A Yes.

18 Q And, in fact, most of the questions that were asked of
19 you were asked your own counsel, correct?

20 A Yes.

21 Q And a lot or most of the personal questions that you
22 found embarrassing were questions that your counsel
23 asked you, correct?

24 A Most, yes.

1 A Yes.

2 Q And the vast majority of the questions that Rebecca was
3 asked were asked by your own counsel?

4 A Yes.

5 Q Including virtually all, if not all, the questions that
6 you found to be difficult and embarrassing and
7 stressful for her, correct?

8 A Yes.

9 Q You also testified that one thing that was giving you
10 the stress during the trial was the testimony of Jane
11 Mattson, who is the life-care expert for the
12 defendants, right?

13 A Yes.

14 Q And you said one of the things that you said about Ms.
15 Mattson was that she had testified that it would be
16 okay for Marcia to stay in the living room, and home
17 renovations were not necessary, right?

18 A Yes.

19 Q And you said that made you extremely angry, correct?

20 A Yes.

21 Q When were actually the home renovations, adding a
22 bedroom and a bathroom for your wife, performed?

23 A Well, right now I don't remember exactly, but I know it
24 was in my deposition. But if you'd just give me a

1 moment to think about it.
 2 Q Okay. Take your time.
 3 A I believe we broke ground in March of -- March of 2003
 4 we broke ground.
 5 Q And those renovations, the new bedroom and the new
 6 bathroom on the first floor for Mrs. Rhodes as well as
 7 the family room, were completed long before the trial
 8 of the accident case, which was in September 2004,
 9 correct?
 10 A They were completed about December 2003.
 11 Q Okay.
 12 A Or about then.
 13 Q So Mrs. Rhodes wasn't living in the living room at the
 14 time of the trial of the accident case, correct?
 15 A No.
 16 Q At the trial of the accident case, liability had been
 17 stipulated to by all of the defendants, correct?
 18 A Yes.
 19 Q Mr. Zalewski admitted that he was at fault for this
 20 accident, correct?
 21 A Yes.
 22 Q And with the exception of Penske, the other truck
 23 defendants, as they call them, the parties that had a
 24 connection with the ownership or operation of the

1 Q And you heard your wife testify during the trial of
 2 this case, correct? And she testified that she thought
 3 the accident case was a, quote, no-brainer, unquote,
 4 correct?
 5 A Yes.
 6 Q And you've also adopted that testimony in response to
 7 the questions of Mr. Pritzker. You also said that the
 8 accident case was a no-brainer, didn't you?
 9 A Yes.
 10 Q Okay. If the amount of damages awarded in the accident
 11 case was such a no-brainer, what were you worried about
 12 screwing up?
 13 A I'm sorry. Could you repeat the question, please?
 14 Q Sure. If it was such a no-brainer that the jury would
 15 award a large -- strike that.
 16 If it was a no-brainer that the amount of
 17 damages that you were entitled to was so clear, how
 18 could you have screwed up the testimony and that
 19 resulted in a lower verdict?
 20 A Well, I think there's two parts to your question. The
 21 liability associated with the crash, as well as all of
 22 the medical damages and things for Marcia, were a no-
 23 brainer. That part was a no-brainer. Whether a jury
 24 could see this and -- let me redo my first part.

1 truck, they had all stipulated to liability as well?
 2 A Yes.
 3 Q And nobody at the trial of the accident case was
 4 alleging that Mrs. Rhodes was at fault herself in any
 5 way, correct?
 6 A Yes.
 7 Q And the only issue that was before the court in the
 8 accident case was what would be the fair amount of
 9 damages that Mrs. Rhodes, you, and Rebecca were
 10 entitled to recover, right?
 11 A Yes.
 12 Q So you knew that regardless of how the trial went, you
 13 were going to receive an award that was whatever the
 14 jury thought was fair and reasonable, correct?
 15 A Yes.
 16 Q You testified previously, did you not, that you were
 17 concerned that you were going to quote/unquote screw
 18 up, unquote, your testimony in the accident case,
 19 right?
 20 A Yes.
 21 Q And you were worried that this would affect the amount
 22 of the verdict that you, your wife, and daughter might
 23 receive, correct?
 24 A Yes.

1 Was a no-brainer to me, to Marcia, to those
 2 who evaluated the case. Whether a jury could see it as
 3 a no-brainer, I couldn't say for sure because I don't
 4 know how the jury interprets things. So, therefore, if
 5 I had made an incorrect statement or not a full
 6 statement or not an accurate statement or whatever,
 7 that might have screwed up the case.
 8 Q And so the amount of damages that a jury might award
 9 wasn't a no-brainer, because juries can come to widely
 10 different opinions as to what certain types of damages
 11 are worth, correct?
 12 A Yes.
 13 Q Okay. If you tried this case a hundred times, you
 14 realize that you wouldn't probably get the exact same
 15 verdict twice, right?
 16 A Well, I can't say for sure, but I assume so.
 17 Q And do you agree that how the parties perform as
 18 witnesses on the witness stand is certainly an
 19 important factor in how a jury might view the case in
 20 terms of damages?
 21 A Yes.
 22 Q And so that was a reasonable factor for the insurance
 23 companies to want to take into account in performing an
 24 evaluation of what the damages were, correct?

1 A Well, I don't know what's reasonable for the insurance
 2 companies to include or not include. I'm not an
 3 insurance company.
 4 Q Now, during the trial there were offers that were made
 5 by the defendants, right?
 6 A Yes.
 7 Q Settlement offers. And prior to the end of the trial
 8 and before the closing argument, you know now that
 9 AIGDC made you an offer of \$6 million, which was in
 10 addition to the \$550,000 that the tree service had
 11 already agreed to pay, right?
 12 A I learned that after the trial.
 13 Q You weren't informed of that offer by Mr. Pritzker
 14 while the trial was going on, correct?
 15 A Marcia had developed a medical complication so we had
 16 to leave early on the last day of trial, and because of
 17 Marcia's medical complication, I gave total control
 18 over to Mr. Pritzker so I could go home and take care
 19 of Marcia.
 20 Q Okay. I'm not saying there's anything wrong with that.
 21 I'm just asking, you weren't aware that that offer had
 22 been made?
 23 A Yeah, I was not aware.
 24 Q I presume, though, that Mr. Pritzker and the rest of

1 And your answer was: I don't know.
 2 Correct?
 3 A That's what my testimony was.
 4 Q And is that still your belief?
 5 MR. PRITZKER: Your Honor, once again,
 6 there's just one more line in there, which I think is
 7 relevant, if counsel wants to continue reading.
 8 MR. COHEN: I'd be happy to read it, if he
 9 wants.
 10 THE COURT: Okay. I take that to be an
 11 oblique request on the rule of completeness, but if you
 12 wish to read it, then we can obviate the need for me to
 13 rule.
 14 MR. COHEN: I don't have any problem reading
 15 it.
 16 MR. COHEN: (Reading): But you know that you
 17 wouldn't have accepted 6 million or 7 million dollars.
 18 And answer: I'm pretty sure not, no. I
 19 mean, I don't know. I don't know.
 20 A That's correct.
 21 MR. COHEN: Well, I wasn't asking you a
 22 question. I was just complying with counsel's request
 23 to read it.
 24 (By Mr. Cohen)

1 your trial team had your cellphone number and they
 2 could have contacted you if they wanted to.
 3 A If they wanted to, yes.
 4 Q And if you had been aware of that \$6 million offer, you
 5 wouldn't have taken it, would you?
 6 A I would have gone on the advice of counsel.
 7 Q Well, let me read from your deposition, Mr. Rhodes.
 8 This is on page 105, starting with line 4.
 9 Question: Were you ever told that an offer
 10 of \$6 million was made during the trial?
 11 Answer: No.
 12 Question: Okay. Would you have accepted an
 13 offer of \$6 million if it was made during the trial?
 14 Answer: No.
 15 Is that still your testimony?
 16 A Yes.
 17 Q Okay. And the next question is:
 18 Would you have accepted an offer of \$7
 19 million if it was made during the trial?
 20 And your answer again was: No. Correct?
 21 A That's what my testimony was.
 22 Q And the following question was:
 23 Would you have accepted an offer of \$8
 24 million if it was made during the trial?

1 Q Now, you're aware, are you not, that there was no
 2 response made by your attorneys to the offer. In other
 3 words, they didn't come down to a number or make a
 4 counterproposal to the \$6 million, right? I mean, you
 5 know that now.
 6 A I know that now, yes.
 7 Q If you had been aware at the time of trial that \$6
 8 million had been offered, would you have wanted your
 9 attorneys to make some sort of counteroffer, whatever
 10 that was?
 11 A I would have sought the advice of counsel and followed
 12 their advice.
 13 Q Okay. And I presume, since they didn't make a
 14 counteroffer, their advice would have been no, right?
 15 You can assume that?
 16 A Yes.
 17 Q Now, you had your deposition taken in the accident case
 18 in October 2003, right?
 19 A The underlying case, yes.
 20 Q And until your deposition was taken, there was no way
 21 for the defendants and the insurers to place an
 22 accurate value on your loss of consortium case, right?
 23 A Yes.
 24 Q And the same goes for Rebecca. There was no way for

1 the defendants and the insurers to place an accurate
2 value on her loss of parental society case until her
3 deposition was taken, right?
4 A Well, to both those questions, now that I've had a
5 chance to think about it a little bit more, the
6 defendants had received an enormous amount of
7 documentation, and they, from those documentation,
8 could have understood that, you know, what Marcia's
9 medical condition was as a paraplegic. So now, as I
10 have a chance to think through what you're asking, I do
11 think that defendants could have formed a reasonable
12 estimate of the loss of consortium based upon the
13 medical records that were provided to the defendants.
14 Q The medical records that were provided to the
15 defendants have to do with Mrs. Rhodes' injuries and
16 not the injuries that were suffered by you as a result
17 of your accident or your daughter as a result of the
18 accident, correct?
19 A That's correct.
20 Q Now, you testified in detail in response to Mr.
21 Pritzker's questions about the stress and frustration
22 of litigation that you assert that you suffered as a
23 result of the case not settling earlier, right?
24 A Yes.

1 accident case in late October 2003?
2 A Well, I certainly was over the shock and I certainly
3 was no longer overwhelmed by all the activity. I'm
4 sure there was. I mean, there still is today sadness
5 about, you know, Marcia's condition and frustration
6 that, you know, it's difficult, it's impossible to have
7 her be, you know, walking again. You know, so.
8 Q Do you recall the deposition of your accident case, and
9 this is on page 33, starting on line 15.
10 You testified, quote, Life since the accident
11 has become just terrible. Marcia has very little
12 interest in, you know, seeing other people, although we
13 do on occasion. She is, you know, very depressed,
14 angry, and it makes it very difficult for her to
15 socialize.
16 Do you recall that testimony?
17 A Yes.
18 Q Was that a fair statement of the emotional state that
19 you were going through at that time?
20 MR. PRITZKER: Objection.
21 THE COURT: Overruled.
22 MR. PRITZKER: I think that paragraph, your
23 Honor, deals with Marcia, not with Harold.
24 THE COURT: Their lives were intertwined, so

1 Q You told us that it was very stressful, that you felt
2 angry, that essentially you felt very badly about the
3 whole litigation process, right?
4 A Yes.
5 Q Now, you're not contending, however, that you suffered
6 any physical manifestations of any emotional distress
7 that you believed were sustained as a result of the
8 frustration of litigation; isn't that right?
9 A Yes. I'm not contending physical.
10 Q And in addition to whatever stresses and frustrations
11 you felt over litigation, there were also quite a few
12 other stresses in your life that you were going through
13 during this period, correct?
14 A At what point in time, please?
15 Q During the time that the accident case was pending.
16 A Well, as I said yesterday in the beginning, you know,
17 there was a great deal of emotion associated with
18 Marcia's accident, but over time that abated as the
19 family adjusted. But the emotional stress of the
20 litigation, you know, grew and grew and grew over the
21 time until trial and then actually continued after
22 trial, too.
23 Q Had the emotional distress over Marcia's accident
24 abated at the time your deposition was taken in the

1 you may answer.
2 A Could you repeat the question, please.
3 (By Mr. Cohen)
4 Q Do you want me to repeat the testimony or just the
5 question?
6 A Just the question, please.
7 Q Is that a fair statement of your emotional state at the
8 time you gave the deposition, in other words, life is
9 just terrible.
10 A As it refers to the time up to the depositions, yes.
11 Q Now, there was some testimony yesterday that Mr.
12 Pritzker elicited about, I guess you could say the
13 chart or spreadsheet that you put together. Do you
14 have that in front of you? It was marked for
15 identification yesterday.
16 A Yes, sir.
17 Q And what number is it for identification?
18 THE COURT: It's G.
19 MR. COHEN: Thank you, your Honor.
20 (By Mr. Cohen)
21 Q That lists your various assets and your various
22 liabilities at three specific points in time, correct?
23 A Yes.
24 Q The first date is January 31, 2002, right?

1 A Yes.

2 Q Second date is March 31, 2003.

3 A Yes.

4 Q And the third date is August 31, 2004, right?

5 A Yes.

6 Q August 31, 2004, was eleven days -- strike that -- was just a few days before the trial of your accident case started, right?

7

8

9 A Yes.

10 Q And January 31, 2002, was just a few days, about three weeks after the accident that your wife suffered, right?

11

12

13 A Yes.

14 Q And do you see in the column "Asset" it lists cash on hand, brokerage, retirement investment, stocks, home value and personal property, right?

15

16

17 A Yes.

18 Q And you testified yesterday about what you believe your liquid assets were, correct?

19

20 A Yes.

21 Q And that was six hundred some thousand dollars, right?

22 A Yes.

23 Q But that didn't include the \$287,423.37 for your retirement investment, right?

24

1 for Mrs. Rhodes, right, or had already started doing maybe?

2

3 A Yes.

4 Q And that included building a ramp to your house, right?

5 A Yes.

6 Q And widening the doorways so she could move her wheelchair around from room to room, right?

7

8 A Yes.

9 Q Was there any other aspect of that first part of the home renovations?

10

11 A Yes.

12 Q What?

13 A This was a building of a handicap accessible bathroom for Marcia.

14

15 Q Okay. Now, I'm going to skip over March 31, 2003 and go on to August 31, 2004. Again, you list the same type of assets. You listed cash on hand at \$43,187.77, right.

16

17

18

19 A Yes.

20 Q And you listed the amount you had in your brokerage account as \$159,416.48, right?

21

22 A Yes.

23 Q And now you had over \$350,000 in your retirement savings account, right?

24

1 A Yes.

2 Q And it did not include the value of your home which you assessed at \$213,380, right?

3

4 A Yes.

5 Q And in fact, if you add up all of your assets that you had on January 31, 2002, that comes, by my calculation, to \$1,278,577. Does that sound about right?

6

7

8 A Yes.

9 Q I can give you a calculator to confirm that.

10

11 And then you have some liabilities, and the liabilities included \$25,000 in tax that you were going to have to pay; \$3,500 that you owed to American Express; \$38,000 for the home renovation costs; \$35,000 for auto; and \$67,340 for your mortgage, right?

12

13

14

15 A Yes.

16 Q And if you add those up, you come up \$168,840, if I'm doing my math right. Does that sound about right?

17

18 A Yes.

19 Q And if you subtract your total assets -- subtract your total liabilities by your total assets, what you get is \$1,118,731; is that right?

20

21

22 A Yes.

23 Q And home renovations, that referred to the so-called phase one home renovations that you were going to do

24

1 A Yes.

2 Q And you list stocks, parenthesis, non-tradable, as \$6,506 and some change, right?

3

4 A Yes.

5 Q Was that one of the companies that you had an equity interest in?

6

7 A Yes, it would have been restricted stock.

8 Q And was that You Promise?

9 A Yes, that would have been You Promise, yes.

10 Q And you listed your home value now as \$470,000, right?

11

12 A Yes.

13 Q And your personal property as being worth \$65,000, right?

14

15 A Yes.

16 Q And if you add up all those numbers, is it fair to say that your total amount of assets as of August 31, 2004, was \$1,094,842?

17

18 A I'll assume your calculations are correct, yes.

19 Q I guess if I added wrong, your lawyers will probably correct me.

20

21 A Okay.

22 Q Now, that was just about 180 or 90 thousand dollars less than your assets as of January 2002, right?

23

24 A Yes.

1 Q Now, you also listed your liabilities as of August 31,
2 2004, and those included taxes that you owed in the
3 amount of \$30,000, right/
4 A Yes.
5 Q And credit card payments of \$5,000, right?
6 A Yes.
7 Q And a mortgage of \$45,000, right?
8 A Yes.
9 Q And the Fleet equity line that you had taken out of
10 \$115,000, right?
11 A Yes.
12 Q Now, what the August 31, 2004 chart doesn't include was
13 the \$550,000 that you were going to receive from the
14 tree service, right?
15 A Well, no, but I wasn't going to receive \$550,000 from
16 the tree service.
17 A Okay. I understood you weren't going to get all the
18 money, but that was the amount of the settlement,
19 right?
20 A Yes.
21 Q And it doesn't include any of that money in that chart,
22 right?
23 A Yes.
24 Q And out of that settlement money from the tree service,

1 Q \$195,105 to be exact. And your total assets minus your
2 total liabilities as of August 31, 2004, not including
3 your share of the tree service, money was \$899,842.
4 Does that sound correct?
5 A Yes.
6 Q And that was just about 218 or 19 thousand dollars less
7 than your assets minus liabilities as of the time that
8 you included in the first spreadsheet January 2002,
9 right?
10 A Yes.
11 Q Now, the home equity, if you had wanted to, the
12 \$470,000, you could have tapped that for an equity
13 line, correct?
14 A Yes.
15 Q And in fact, what you chose to do when you first got
16 money out of the accident case, or your family did, was
17 to pay off the equity line because you don't like
18 having loans, right?
19 A That's correct.
20 Q And your retirement investments of more than \$350,000,
21 that also could have been tapped as well, if you had
22 wanted to, and understood that you may or may not have
23 paid some penalty.
24 A Not only would I have had to pay some penalty, but I

1 you paid the Fleet equity line of \$115,000, right?
2 A Yes.
3 Q And you also, I presume, paid your lawyers a third of
4 it?
5 A Yes.
6 Q You paid them at that time or did you pay them at some
7 later time?
8 A It was deducted from the fee, from the proceeds.
9 Q So a third of the \$550,000 was deducted and the lawyers
10 got that as their contingent fee, right?
11 A That's correct.
12 Q And were the costs that they had incurred or some of
13 the costs they had incurred up to that point also
14 deducted?
15 A I can't remember.
16 Q By the way, when costs were deducted from payments that
17 you were getting by Brown Rudnick, was that separated
18 into costs attributable to Harold, costs attributable
19 to Rebecca, and costs attributed to Marcia, or was it
20 all just deducted as a lump sum?
21 A It was a lump sum.
22 Q Now, if you add up the liabilities on August 31, 2004,
23 that comes to \$195,000, correct?
24 A Yes.

1 actually would have had to pay some tax on the
2 withdrawal as well.
3 Q Are you aware that the penalty for early withdrawal on
4 IRA is ten percent?
5 A Yes.
6 Q And are you aware that the tax code provides that if
7 your medical expenses are more than 7.5 percent I
8 believe of the amount you're withdrawing, that you get
9 a deduction for that?
10 A I became aware of that later, yes.
11 Q But in any event, back in August of 2004, you didn't
12 get an equity loan. In fact, you paid off the one you
13 had, right?
14 A Yes.
15 Q And you didn't attempt to tap your retirement
16 investment, correct?
17 A That's correct.
18 Q Now, you have a number of expenses that you actually
19 paid yourself on behalf of your family while the
20 accident case was going on, correct?
21 A I'm not quite sure what you mean by that.
22 Q Okay. Well, Marcia, obviously as a result of her
23 accident, was incurring a lot of expenses, right?
24 A Yes.

1 Q And those expenses included all sorts of medical bills?
 2 A Yes.
 3 Q But for the vast majority of the medical bills, those
 4 were being paid by your health insurer, which was
 5 United Healthcare, right?
 6 A A good portion was being paid, but there was also a
 7 good portion that we had to pay out of pocket because
 8 they were non-reimbursable expenses from United
 9 Healthcare.
 10 Q I'm going to get to that in a second, but before I
 11 forget, you talked yesterday about you paid a lien from
 12 United as part of the money that you received from the
 13 tree service, right?
 14 A Yes.
 15 Q And your lawyers were able to negotiate the amount of
 16 the lien down from the mid-400s to \$140,000 or so,
 17 correct?
 18 A I believe the number was \$165,000.
 19 Q That you paid on the lien?
 20 A That would be paid on the lien.
 21 Q In any event, whatever it was, did you know when that
 22 was paid to United?
 23 A No, I don't.
 24 Q Do you know if it was paid between the time that the

1 A Yes.
 2 Q And you also recall during the trial case, you
 3 testified that you paid \$4,366.04 for what you termed
 4 medical miscellaneous, right?
 5 A Yes.
 6 Q And that included the riding lessons that Marcia was
 7 beginning to take to operate a handicapped-equipped
 8 van, right?
 9 A That would have been one of the things.
 10 Q And there also was a medical alert device that you paid
 11 for?
 12 A Yes.
 13 Q And those things weren't covered by your health
 14 insurance, right?
 15 A That's correct.
 16 Q And that adds up to approximately 26 or \$27,000 of
 17 medical costs that you actually incurred yourself
 18 through the end of August 2004, right?
 19 A Those would have been the specific medical costs, yes.
 20 Q And in addition to that, you also had to pay out of
 21 your own pocket for the home health aides, right?
 22 A That's correct.
 23 Q And the home health aides charges up through the end of
 24 August 2004, as you testified at the trial of the

1 tree service paid you the \$550,000, or the insurers
 2 did, and the time that you received the Zurich payment
 3 of more than \$2.3 million?
 4 A Yes.
 5 Q It was paid during that time period?
 6 A Yes.
 7 Q And once you got additional money from Zurich and later
 8 from AIGDC, did you pay additional amounts to United as
 9 part of their lien?
 10 A No.
 11 Q So I think I was talking before about the expenses that
 12 you had before the accident and you said the health
 13 insurer didn't pay all the expenses because there were
 14 some medical expenses that you had to pay as well,
 15 right?
 16 A Yes.
 17 Q Do you recall that you testified at the trial of the
 18 accident case, that you paid a total through the end of
 19 August 2004, \$13,074 for medical equipment?
 20 A Yes.
 21 Q And do you recall that during the trial of the accident
 22 case, you also testified that through the end of August
 23 2004, you paid a total of \$9,722.17 for medical
 24 supplies?

1 accident case, were \$95,313.70; is that right?
 2 A That sounds correct, yes.
 3 Q In fact, you continued to pay some charges to home
 4 health aides after that and up to the present day,
 5 right?
 6 A That's correct.
 7 Q That was part of the life-care plan that was put
 8 together by both your expert who testified at trial and
 9 the defense expert, right?
 10 A Well, the two experts had differing opinions, but, yes.
 11 Q They had different opinions as to how much, how many
 12 hours of aide services Marcia needed or would be
 13 beneficial to her, right?
 14 A That's correct.
 15 Q In fact, there was testimony at the trial of the
 16 accident case from your own expert positions that it
 17 would be a good idea if Marcia got a little bit less
 18 home health time so that she could develop more
 19 independence, right?
 20 A I can't remember specifically.
 21 Q Do you recall that subject being brought up?
 22 A Vaguely.
 23 Q So other than two things, the home renovations and the
 24 wheelchair-accessible van, the only other costs that

1 you had incurred up through the end of August 2002 was
 2 a \$27,000 that we had talked about, right?
 3 I think I meant through the end of August
 4 2004, which was the date we were looking at on the
 5 spreadsheet, right?
 6 A Yes. I'm just -- I'm trying to remember if there was
 7 anything else. Just a moment.
 8 Q Okay. Take your time.
 9 A So there was what I call renovation A, the bathroom;
 10 renovation B, the addition. There was the home health
 11 aide, aides. There was the van and then there were
 12 medical reimbursements, medical supplies and medical
 13 other. As best I can remember, yes.
 14 Q So I've identified all of the expenses that you
 15 obviously had to pay yourself.
 16 A I think so.
 17 Q And the renovations to your home, other than the
 18 basement renovation, which was ongoing at the time of
 19 trial, had already been completed, right?
 20 A Yes.
 21 Q And you had paid for the basement renovation; that was
 22 included in the numbers you gave at trial, right?
 23 A I can't remember how that was presented.
 24 Q Okay. Well, in any event, do you recall testifying at

1 future to look forward to or to dread was the \$20,000
 2 for the kitchen or so?
 3 A I believe so, yes.
 4 Q In fact, at the time of your deposition at least, you
 5 still hadn't done the kitchen renovation, right?
 6 A Yes, that's correct.
 7 Q Have you done it since then?
 8 A No, we haven't.
 9 Q And the other cost that you had already incurred in the
 10 past was the cost of getting this wheelchair van,
 11 right?
 12 A I'm sorry, say it again, please?
 13 Q The cost of getting this van that could accommodate
 14 Marcia's -- Mrs. Rhodes's wheelchair.
 15 A That's true.
 16 Q And the van cost whatever it cost, right?
 17 A Yes.
 18 Q And so you had a van -- you were going to have a
 19 vehicle anyhow, right?
 20 A Yes.
 21 Q And the additional costs of the van were 14,000 plus
 22 dollars to modify it so it could fit a wheelchair,
 23 right?
 24 A Yes.

1 trial that the total cost of the basement renovation
 2 was going to be \$48,939?
 3 A That sounds correct, yes.
 4 Q And that was to finish off the new part of the basement
 5 underneath the bedroom, bathroom and family room, which
 6 you already built the previous year, right?
 7 A Yes, that's correct.
 8 Q And you did put an office for your wife in there?
 9 A Yes, we did.
 10 Q Now, in addition to that, the only renovation costs
 11 that you projected as having to incur at some point in
 12 the future was the cost of renovating your kitchen,
 13 right?
 14 A That's correct.
 15 Q And do you recall testifying at trial that you
 16 anticipated that that was going to cost you \$20,000?
 17 A I don't remember exactly, but if that's what I said,
 18 yes.
 19 Q And the purpose of that was so that Mrs. Rhodes could
 20 have a kitchen that had utensils and pots and pans and
 21 cooking devices accessible to her and her wheelchair
 22 so that could cook, right?
 23 A Yes.
 24 Q And so the only renovation costs that you had in the

1 Q But have you bought a new van since the time of the
 2 accident trial?
 3 A No, we have not.
 4 Q And do you expect to keep this van for a while longer?
 5 A No, we don't.
 6 Q When do you plan on trading it in and getting a new
 7 van?
 8 A Within the next 12 months.
 9 Q Okay. So at least as of August 2004, the only expenses
 10 that you anticipated that you would actually have to
 11 pay for yourself in the, say, next two or three years
 12 was the medical equipment, medical supplies, medical
 13 miscellaneous, and home health aide costs and possibly
 14 the kitchen renovation, which you didn't end up having
 15 done anyhow.
 16 A And the only other thing I'd add to it is any
 17 additional medical durable equipment, and there
 18 probably are other areas I just can't think of right
 19 now.
 20 Q Okay. So is it fair to say that your anticipated out-
 21 of-pocket expenses for, say, the next two and a half
 22 years, after August of 2004, would be comparable to the
 23 out-of-pocket expenses that you had incurred in the
 24 previous two and a half years are 126, \$127,000.

1 Q Well, you're talking about only those expenses related
2 to -- related to Marcia. There were certainly ongoing,
3 you know, living expenses that we had to pay, you know,
4 just to live. And then there was, you know, the
5 looming bill for Rebecca's, you know, college expenses.
6 So those were all looming directly ahead of me. So
7 there was medical and then there was all the family
8 things that I knew were coming that would be there too.
9 Q Okay. But those were coming anyhow, whether Mrs.
10 Rhodes had her accident or not. You were going to be
11 paying for Rebecca's college, right?
12 A Yes.
13 Q By the way, you were one of the founders of a company
14 called UPromise, right?
15 A Yes.
16 Q That's a company that has you set aside money for your
17 kid's college education, right?
18 A Yes.
19 Q And I take it you took advantage of that, right?
20 A I took advantage of the savings portion but not the 529
21 portion.
22 Q Now, in September 2004, you got a full-time job with a
23 company called XFormx, right?
24 A I started off with XFormx in September as a consultant

1 XFormx between September 2004 and March 2006.
2 A Okay, yes.
3 Q And so as of September of 2004 -- I assume you started
4 after the trial of the accident case.
5 A Yes.
6 Q You had a full-time job?
7 A Yes.
8 Q And the only reason you left that job was because the
9 company folded, right?
10 A That's correct.
11 Q And you immediately got another job with a company
12 called NewRiver. And you work for NewRiver up to the
13 present day, right?
14 A That's correct.
15 Q And you told me in the deposition I took that you were
16 happy with your job at XFormx, other than the fact that
17 the company went bust, right?
18 A Yes.
19 Q And you weren't looking for any new employment
20 positions during that period of time.
21 A That's correct.
22 Q And, in fact, you had worked part-time as a consultant
23 for XFormx before September 2004; isn't that right?
24 A Yes. I believe so, yes.

1 and then later converted to an employee, but
2 effectively an employee, a full-time employee
3 throughout the whole period.
4 Q In any event, you were working full time for XFormx
5 starting in September 2004 and going through March
6 2006, right?
7 A Well, I had no other -- I had no other assignment or
8 other work.
9 Q Well, do you recall in your -- do you recall signing an
10 errata sheet to your deposition transcript in this
11 case?
12 A Yes.
13 Q And do you recall that during your deposition in this
14 case I asked you some questions about where you had
15 worked before and after the accident and there was some
16 confusion as to exactly what dates that you had worked
17 for which companies when, right?
18 A Yes.
19 Q Because you had been a consultant for a number of
20 different companies during that period, right?
21 A Yes.
22 Q And so you were kind enough to provide us with an
23 errata sheet, and one of the things that you said in
24 the errata was that, quote, I was working full-time for

1 Q And you're happy with your job now at NewRiver, and you
2 have an equity stake in that company, right?
3 A Yes.
4 Q Now, the home health aides, you've testified that in
5 the second quarter of 2004, you decreased the amount of
6 time that you had the home health aides from 40 hours a
7 week to 32 hours a week. Do you recall that?
8 A Yes.
9 Q And so essentially you cut back eight hours a week,
10 right?
11 A Yes.
12 Q And is it your testimony that that was because you were
13 concerned about the cost?
14 A Yes. And the cost of the home healthcare aides at that
15 time was \$25 an hour, right?
16 A Yes.
17 Q And that equals \$200 a week, right?
18 A Yes.
19 Q Now, is it fair to say that you didn't choose not to
20 get employment that would have paid you a lot more than
21 \$200 a week because of the \$200 a week that you wanted
22 to add for home healthcare aides.
23 MR. PRITZKER: Objection.
24 THE COURT: Sustained as to the form of the

1 question. I'm not sure it was your best question.
 2 MR. COHEN: We all have had days, I guess.
 3 THE COURT: You questions have been very good
 4 otherwise. That just wasn't your best.
 5 MR. COHEN: Thank you, Judge. I wasn't
 6 fishing for a compliment.
 7 (By Mr. Cohen)
 8 Q Let me rephrase the question, if I can remember what it
 9 was now.
 10 At one point in this case, you took the
 11 position, did you not, that you didn't return to work
 12 -- or -- strike that -- that you couldn't afford a home
 13 health aide for more hours and that's why you didn't
 14 return to work, right?
 15 A I think so. I mean --
 16 Q Okay. But you would have earned far more at a job you
 17 believed you could have obtained than the cost of the
 18 home health aide, right?
 19 A Well, that's just it. You know, there would have been
 20 -- I would never have been able to return to the kind
 21 of work that I had been doing previous to Marcia's
 22 accident, either as an acting VP of marketing or as a
 23 consultant. In both those kinds of positions, I was
 24 obligated to be available, you know, 24 by 7. So the

1 accident case, right?
 2 A Yes.
 3 Q Now, let me turn to the mediation that you went to on
 4 August 11, 2004. You were present, right?
 5 A Yes, I was.
 6 Q And your wife wasn't present?
 7 A No, she was not.
 8 Q And your daughter wasn't present?
 9 A No, she was not.
 10 Q And your lawyers were present, right?
 11 A Yes, they were.
 12 Q And you're a very experienced businessman; are you not?
 13 A I'd like to think so, yes.
 14 Q And I presume that as part of your business experience,
 15 you've had the opportunity to negotiate various things,
 16 whether it's contracts or employment or whatever,
 17 right?
 18 A Yes.
 19 Q Would you deem yourself to be an experienced
 20 negotiator?
 21 A I'm not sure I would go so far as to say "experienced,"
 22 but one that has had opportunities for negotiation,
 23 yes.
 24 Q And you understand generally how the negotiation

1 opportunity to earn the kinds of money that I was
 2 earning previous to the accident, that would never
 3 happen ever again.
 4 To go on, the only kind of permanent
 5 employment that I could seek was, you know, very
 6 limited to those kinds of positions where I could be
 7 available to Marcia in case of, you know, any kind of
 8 issue arising. For example, if I took a position and
 9 the home health aide didn't show up, which happened,
 10 you know, on any number of occasions, I just couldn't
 11 take that chance. I mean, Marcia would just be lying
 12 in bed.
 13 And further, you know, there was only a
 14 limited set of kinds of opportunities that were
 15 available to me to go to. So the reason why I didn't
 16 return to work was that, you know, my primary concern
 17 was for Marcia and Marcia's well being and the
 18 opportunities.
 19 Now, would I have liked to have returned to
 20 work and everything? Certainly, but, you know, I had
 21 that difficult choice of, you know, choosing Marcia or
 22 choosing work.
 23 Q But that had to do with the injuries that Mrs. Rhodes
 24 sustained in the accident and not the settlement of the

1 process works, right?
 2 A Yes.
 3 Q One side asks for a lot more than they really want and
 4 then the other side proposes giving a lot less than
 5 they really expect to do or to pay, right?
 6 A Well, that's one kind of negotiation.
 7 Q Okay. But that's a very common kind of negotiation,
 8 right?
 9 A It's one kind of negotiation.
 10 Q Okay. And let's just skip to that kind of negotiation.
 11 In fact, at the mediation of the accident
 12 case and throughout the accident case, your lawyers on
 13 your behalf and your family's behalf made a number of
 14 settlement demands, right?
 15 A That's correct.
 16 Q And, of course, they demanded eighteen and a half
 17 million dollars?
 18 A Are you talking at mediation?
 19 Q No, no. Throughout the course.
 20 A Previous to mediation, they made that demand, yes.
 21 Q That was in the summer of 2003, right?
 22 A Yes.
 23 Q And then in August of 2003, the demand package was sent
 24 and that demanded \$16.5 million, right?

1 A Yes.

2 Q And then the demand, as you testified yesterday, was
3 raised to \$19.5 million.

4 A Yes.

5 Q And then at the mediation, there was a \$15.5 million
6 demand plus the assumption of your wife's health
7 insurance, right?

8 A Our family's health insurance, yes.

9 Q Okay. Actually, was there a first demand of \$16.5
10 million at the mediation? That was the case, wasn't
11 it?

12 A I don't recall that.

13 Q Now, you understand from your experience in
14 negotiations that the numbers, that the money that
15 you're talking about are designed to send a signal to
16 the other side about where you ultimately want to end
17 up.

18 A Well, again, I was -- you know, counsel was leading the
19 negotiation process so I was depending on them for
20 their expertise in terms of, you know, strategy. I
21 really didn't participate in the strategy portion of
22 it.

23 Q Okay. I understand that, but your experience as a
24 negotiator, setting aside whatever happened in this

1 A I'd agree with that.

2 Q By the way, during your time at Harvard Business
3 School, did you ever take a course in negotiation?

4 A No, not a course.

5 Q Did you ever take any courses otherwise in negotiation?

6 A I may have attended a seminar or two during my business
7 career, but I can't recall specifically.

8 Q Did you ever read any of those books, like how to reach
9 the best result? I forget what they're called.

10 A Yes, I'm sure I did.

11 Q So you understood, did you not in this case, that when
12 the offers were made to you by Zurich and then AIGDC,
13 that they were starting on the low side and they'd be
14 working their way up as you came down, right?

15 A I think that that was, you know, the general strategy,
16 yes.

17 Q And the strategy or hope of both sides was that you'd
18 be able to meet somewhere in the middle, or close to
19 the middle, at a happy medium that you both could live
20 with and both be happy with, right?

21 A Well, I don't know if the strategy -- again, I don't
22 know about the strategy to meet at a happy medium. As
23 I said, that was being directed by counsel. But in a
24 fuller sense, there definitely was the goal to come to

1 case, is that where you start off is designed to send a
2 signal as to where you want to go, right?

3 A Are you talking about this mediation or me --

4 Q I'm just talking about negotiations in general right
5 now.

6 A The first number is the first number. It's the place
7 to begin negotiating. I don't ascribe anything more to
8 it than that.

9 Q Okay. That's typically not where somebody wants to end
10 up. They don't make their best demand first, correct?

11 MR. PRITZKER: Objection.

12 THE COURT: Overruled. He can describe his
13 understanding.

14 A Well, in some negotiations, you know, one just presents
15 its best and final offer, and this is done often. I
16 think in this negotiation this was just a starting
17 point to begin discussions, yes.

18 Q In the accident case, none of the offers, none of the
19 demands were presented as this is the final demand,
20 correct?

21 A That's true.

22 Q And that was the same with the offers. None of the
23 offers were presented as this is the final offer,
24 correct?

1 an agreement that both sides would be satisfied with.

2 Q Well, bearing in mind your negotiations experience, do
3 you believe that making an offer of \$18.5 million and
4 then reducing it to 16.5 and the increasing it to 19.5
5 is something that was designed to send the signal, hey,
6 we're going to be really flexible here, or is it
7 designed to send the signal, hey, we're really serious
8 about what we're looking for?

9 MR. PRITZKER: Objection.

10 THE COURT: Sustained.

11 (By Mr. Cohen)

12 Q What signal do you believe was being sent by the
13 demands that were made on your behalf in the accident
14 case?

15 A Which demand are you referring to, please?

16 Q All the demands in general. If you have to break it
17 down, you can.

18 A Would you repeat the question please?

19 Q What signal do you believe that the various
20 demands that you made and we talked about in the
21 accident case was designed to send to the
22 defendants and their insurance companies?

23 A Wake up, pay attention, let's start talking, we
24 have a very seriously injured person who is

1 going to need enormous financial resources and
 2 we must get going on this.
 3 Q Do you think the demands that were made by and
 4 on your behalf in the accident case were
 5 designed to send a signal, we're willing to
 6 settle for \$8 million?
 7 MR. PRITZKER: Objection.
 8 THE COURT: Sustained.
 9 MR. COHEN: I'll move on.
 10 (By Mr. Cohen)
 11 Q The mediation lasted most of the day, correct?
 12 A I can't remember exactly when it ended.
 13 Q Okay. And the first offer that was made at the
 14 mediation was proceeded-- the first demand -- strike
 15 that.
 16 The first offer that was made at the
 17 mediation was followed shortly thereafter by another
 18 offer, right?
 19 A If you could refresh my memory of the sequence of
 20 demands, that would be helpful.
 21 Q Well, I think yesterday you testified that the first
 22 offer was 2.75 million, then there was the three and a
 23 half million dollar offer made?
 24 A Yes, that's correct.

1 THE WITNESS: Was included.
 2 THE COURT: So you thought that the offer at
 3 mediation of -- their final offer of --
 4 THE WITNESS: 3.5, sir.
 5 THE COURT: 3.5 million included the tree
 6 service?
 7 THE WITNESS: Not at the end. I realized
 8 that it was inclusive of the tree service.
 9 THE COURT: So by the time mediation was
 10 over, by the time that day was ended, you realized that
 11 was not including the tree service.
 12 THE WITNESS: Yes.
 13 THE COURT: Okay.
 14 THE WITNESS: Yes.
 15 (By Mr. Cohen)
 16 Q In any event, after the mediation ended you knew at
 17 that time that there was going to be a trial about
 18 three weeks later, right?
 19 A Yes.
 20 Q And in fact, you knew the trial date as of, or around
 21 April 2nd, which was when the trial date was set at the
 22 pre-trial conference, right?
 23 A Yes.
 24 Q And you knew that during the entire period of the case

1 Q And that was just on behalf of the truck defendants,
 2 right?
 3 A Yes.
 4 Q And simultaneously you were negotiating with the tree
 5 service, right?
 6 A That's correct.
 7 Q And ultimately at the every end of the mediation you
 8 settled with the tree service for the \$550,000 that
 9 we've talked about before?
 10 A Yes, that's correct.
 11 Q And the total amount of offers that were made to you at
 12 the mediation were \$4,055,000, right?
 13 MR. PRITZKER: Objection.
 14 THE COURT: Overruled. He's just adding up
 15 the tree service with the other offers, so he may
 16 answer.
 17 A Well, quite frankly, I didn't know whether the \$550,000
 18 was included in the 3.5 at the time, but you know, I
 19 think later on during the day I realized that it was
 20 included, yes.
 21 (By Mr. Cohen)
 22 Q Now, after the mediation --
 23 THE COURT: I'm sorry, was included or was
 24 not included?

1 you were going to get 12 percent per year interest on
 2 any judgment you obtained?
 3 A Yes.
 4 Q And at least by the time of trial you knew that you
 5 were going to get a judgment because liability had been
 6 stipulated to, right?
 7 A Yes.
 8 Q And after the trial you received more than \$2.3 million
 9 from Zurich, right?
 10 A Yes, after the trial.
 11 Q That was in December of 2004, right?
 12 A Correct.
 13 Q And by that time, you had collected almost \$3 million
 14 in settlement money between Zurich and the tree
 15 service, not including whatever you paid United and
 16 your lawyers and taxes, right?
 17 A That's correct.
 18 Q And whatever you netted from that settlement was many
 19 times more than what your anticipated medical equipment
 20 and supplies and medical miscellaneous and home health
 21 aide costs were being projected for the next several
 22 years, right?
 23 A Well, for the next couple of years, but over a longer
 24 period of time, probably not.

1 Q Wasn't it a fact that actually the amount that you
 2 netted from Zurich and the tree service was more than
 3 the entire cost of the life-care plan that was
 4 testified to by your expert at trial?
 5 A Yes. But again, I consider the, you know, not just the
 6 medical expenses but the living expenses and everything
 7 else that goes along with life. Okay?
 8 Q Okay. But the life-care plan we discussed before, you
 9 were looking for it, dreading it or whatever, having to
 10 pay somewhere out-of-pocket in the 125/150 range in the
 11 next two and a half years, and you received from the
 12 tree service and Zurich even after attorneys' fees and
 13 tax and United was deducted, somewhere out in the area
 14 of \$2 million, right?
 15 A Yes.
 16 Q And the total life-care plan reduced to present value,
 17 you testified to at trial by your experts, was
 18 somewhere between \$1.4 and \$1.9 million for the
 19 remainder of Marcia's life expectancy, right?
 20 A Yes.
 21 Q Now, you reached a settlement with AIG in early June of
 22 2005; is that right?
 23 A Yes.
 24 Q And one of the items of damages that you're claiming in

1 have settled the accident case either after mediation
 2 or at sometime before the end of the trial for at least
 3 \$8 million, right?
 4 A Well, I don't know I'd put the figure \$8 million on it,
 5 but I do know that I had hoped that everything would
 6 have been settled before trial.
 7 Q But you testified yesterday that you felt that --
 8 strike that -- that you would have taken \$8 million to
 9 settle the entire accident case, not just your claim
 10 but that of Marcia and Rebecca as well, right?
 11 A Well, I believe my testimony was at the time of
 12 mediation Marcia and I agreed to \$8 million. Before
 13 mediation we really never had thought about it or
 14 talked about it. But I suppose since, you know, we
 15 would have taken 8 million at mediation, I suppose we
 16 would have taken 8 million previous to mediation.
 17 Q Okay. But in any event, you claim that you've been
 18 damaged because instead of paying you \$8 million you
 19 had to go to trial, right?
 20 A Yes.
 21 Q And at trial you recovered almost \$12 million, right?
 22 A Yes.
 23 Q So your damage claim is that you had to go to trial,
 24 which you recovered \$4 million more than you would have

1 this case is that as part of the settlement, you
 2 forwent a small portion of the judgment, right? In
 3 other words, in order to settle the case, you gave up 6
 4 or \$700,000 that if the judgment had been paid in its
 5 entirety, including the post-judgment interest you
 6 would have received, right?
 7 A Yes.
 8 Q And you're saying that those are damages that you
 9 should be entitled to recover in this case, right?
 10 MR. PRITZKER: Objection.
 11 THE COURT: Basis?
 12 MR. PRITZKER: I'm not sure that Mr. Rhodes
 13 is saying that. That's our legal theory.
 14 THE COURT: Overruled. You may answer.
 15 A I mean, I know that that's part of the claim, yes.
 16 (By Mr. Cohen)
 17 Q And the gist of this current claim, you're aware of, is
 18 that you feel that AIGDC should have paid you \$8
 19 million or more to settle the case, right? Back in
 20 before the trial?
 21 A I'm sorry, Mr. Cohen, could you help me understand
 22 that?
 23 Q Okay. It's your allegation, is it not, that your
 24 attorneys have made on your behalf, that AIGDC should

1 taken, right?
 2 A Well, that's not correct. You know, the damage claim
 3 had to do with, you know, what Marcia, Rebecca, and I
 4 had to go through because AIG forced -- because the
 5 defendants forced us to go to trial.
 6 Q That's understood and I probably should have phrased
 7 the question better.
 8 You're claiming that any economic damages
 9 that you suffered, including that 650,000 or \$700,000
 10 that you didn't collect because you settled rather than
 11 recovered the judgment, was because AIG didn't pay you
 12 \$8 million at the time of trial, right?
 13 A I just want to be very clear that, yes, we did recover
 14 \$4 million more than the 8 million, but we didn't know
 15 that going into trial; it could have been a lot less,
 16 too.
 17 Q Okay. It could have been a lot less than \$8 million,
 18 right?
 19 A That's correct.
 20 Q Or even \$6 million?
 21 A Yes, that's correct.
 22 Q Or even \$5 million?
 23 A It could have been anything.
 24 Q Right. Now, let me just you one question. You were

1 when your brother, Steven, Judge Rhodes, testified?
 2 A Yes.
 3 Q And you recall that in your deposition in this case,
 4 you testified that your brother did not give you any
 5 advice about the accident case?
 6 A That's correct.
 7 Q And you also testified that you only spoke to your
 8 brother one time about the accident case and that
 9 related to the increase in the offer from \$16.5 million
 10 to \$19.5 million that was made in December, 2003. Do
 11 you remember that testimony?
 12 A At that time, that's what I remembered, yes.
 13 Q Okay. And in fact you said -- and this is on page 162
 14 of your deposition testimony, quote: That was the
 15 complete extent of my conversation with my brother and
 16 anyone else about the case, unquote. Correct?
 17 A Yes, that was my testimony.
 18 Q Now, we talked a little bit about the costs that you
 19 paid to Brown Rudnick, right?
 20 A Yes.
 21 Q And the total amount of the costs I think you said were
 22 something like \$140,000?
 23 A Yes.
 24 Q That extends back to January 2002, right?

1 A I remember discussing with Mr. Pritzker at the
 2 beginning, and he was careful to explain this to me --
 3 I guess I'm not supposed to say that -- Let me put it
 4 that way I understood that the costs were in two
 5 parts. There would be the direct out-of-pocket costs,
 6 which are travel or something like that, and that there
 7 would be indirect costs for their internal, and that
 8 would be charged at whatever the rate was for a large
 9 firm in the Boston area. And if that included
 10 overhead, I don't know. I mean, I assume so.
 11 Q Okay. So it wasn't your understanding that the
 12 overhead of the firm was included in the nearly \$4
 13 million contingent fee that you paid to the firm?
 14 MR. PRITZKER: Objection.
 15 THE COURT: Overruled, he may answer.
 16 A Well again, I don't know exactly what you mean by
 17 "overhead." If you could be more specific, I perhaps
 18 could answer.
 19 (By Mr. Cohen)
 20 Q Okay. Well, was it your anticipation when you signed a
 21 contingent fee agreement that you were going to pay for
 22 secretarial overtime charges?
 23 A As needed, certainly.
 24 Q Okay. And it was your understanding that you were

1 A That's correct.
 2 Q And you don't have in your head what costs you've
 3 incurred, say, from the beginning of -- during 2004,
 4 correct?
 5 A No.
 6 Q Do you understand that your attorneys aren't seeking
 7 any out-of-pocket costs after 2004?
 8 A I can't say for sure. I don't know.
 9 Q Okay. Now you signed a contingent fee agreement in
 10 this case on behalf of your whole family, right?
 11 A Yes. And you recall that the contingent fee agreement
 12 said that you would only have to pay reasonable costs?
 13 A That's correct.
 14 Q Did you make any effort to determine how much of those
 15 costs that you were being charged were reasonable or
 16 whether all of them were reasonable?
 17 A Periodically, Brown Rudnick would send me statements of
 18 costs as time went on, and I'm sure I looked at them
 19 and if I had had any questions, I'm sure I would have
 20 asked Mr. Pritzker. But that's what I did.
 21 Q Okay. You didn't expect as part of the costs, the
 22 reasonable costs that you would be paying Brown
 23 Rudnick, that you would be paying for the firm's
 24 overhead charges, right?

1 going to pay for local telephone calls?
 2 A Certainly.
 3 Q And for Mr. Pritzker's cell phone calls?
 4 A Certainly.
 5 Q And was it your understanding that you were going to
 6 pay 20 cents per page for photocopying?
 7 A Again, I don't think we ever talked about specific 20
 8 cents, but I knew that he would charge, you know, what
 9 would be consistent with large firms in the Boston
 10 area.
 11 Q Okay. Let me move on to the next subject. All of the
 12 settlement proposals that were made to you by AIGDC
 13 included a structured settlement component, right?
 14 A That's correct.
 15 Q And it's fair to say, is it not, that you did not do
 16 anything to investigate what a structured settlement
 17 was all about?
 18 A That's correct.
 19 Q And you didn't understand that a structured settlement
 20 meant that AIGDC would be purchasing an annuity for
 21 Mrs. Rhodes, correct?
 22 A I did not understand that that's how that would work.
 23 Q Okay. And you didn't understand that there was a
 24 portion of the annuity that would be guaranteed for

1 either the entire life or a period of years, whether it
 2 was 20 years or whatever?
 3 A That's correct.
 4 Q And you didn't understand that the periodic payments
 5 that you would be receiving from that settlement
 6 wouldn't be taxable, correct?
 7 A That's correct.
 8 Q It turned out when you did get the settlement, you
 9 ended up paying about \$1 million in taxes on it, right?
 10 A That's correct.
 11 Q And in fact, you didn't investigate whether the
 12 interest that would be paid on that annuity, you didn't
 13 investigate what interest rate would earn or be paid on
 14 that annuity, right?
 15 A No, I didn't.
 16 Q Okay. And it turned out that after you got the
 17 settlement monies from the insurers for the tree
 18 service, from Zurich and from AIGDC, you put all that
 19 money in low-risk mutual funds, right?
 20 A Low-risk bonds.
 21 Q Okay. And those had about a two percent rate of
 22 return, right?
 23 A And as it turned out, closer now to three and a half
 24 percent post-tax.

1 A Yes, he did.
 2 Q You came to the scene of the accident after it occurred
 3 and Marcia was still in the car?
 4 A Yes.
 5 Q And Mr. Zalewski was still there, right?
 6 A I believe so, yes.
 7 Q As was it your impression from your interaction with
 8 him that day that he felt very badly about what had
 9 happened?
 10 A At the day of the accident?
 11 Q Yes.
 12 A I had no interaction with him on the day of the
 13 accident.
 14 Q Okay. I can understand that.
 15 Now, let me turn to a few questions, and
 16 we're heading towards the end here, about Marcia's
 17 medical condition after the accident and particularly
 18 around the time of the mediation and the trial.
 19 Is it true that Mrs. Rhodes' physicians set a
 20 goal for her that she should be able to be able to
 21 transfer herself?
 22 A No, that's not true.
 23 Q Well, did Mr. Rhodes' caregiver tell you that it was
 24 important that Mr. Rhodes transfer?

1 Q Okay. Well, whatever that is, that was far less than
 2 the interest that you were receiving in the accident
 3 case of 12 percent a year, right?
 4 A That's true.
 5 Q Were you aware that the structured settlement proposals
 6 included both a large lump-sum payment and these
 7 periodic structured settlement proposals?
 8 A I believe that was explained, yes.
 9 Q Okay. And you were aware that the structured part of
 10 the settlement was designed to make sure that your wife
 11 had guaranteed health care consistent with her life-
 12 care plan for the rest of her life, right?
 13 A I believe that's what I was told, yes.
 14 Q By the way, I'll just ask you one question. You had
 15 occasion to meet Mr. Zalewski when he pled nolo
 16 contendere or whatever he did?
 17 A Briefly, yes.
 18 Q And is it fair to say that he apologized to you and
 19 your wife for causing this accident?
 20 Is it fair to say that Mr. Zalewski
 21 apologized to you and your wife when you did have
 22 occasion to meet him?
 23 A Yes, that's true.
 24 Q Did he appear remorseful?

1 A At one time or another one of the many caregivers may
 2 have indicated that Marcia should try to transfer.
 3 Q Let me just read you from your testimony at the trial
 4 of the accident case. And this is on page 109, and I'm
 5 starting with line 14. The question doesn't seem to be
 6 particularly relevant. There are several questions.
 7 You gave a fairly long answer. And as part of your
 8 answer --
 9 MR. PRITZKER: Objection, your Honor. We
 10 either have to have the question and the answer or I
 11 object to it.
 12 (By Mr. Cohen)
 13 Q All right. The question was: What does it entail to
 14 coordinate with them?
 15 And part of your answer was: There's
 16 obviously a lot of discussion about trying to get
 17 Marcia to be able to transfer, but with her broken legs
 18 and her cast and everything like that, you know, all
 19 coordinated to, let's say, put off all of that kind of
 20 activity.
 21 Do you recall that there was a lot of
 22 discussion now that an important goal for Marcia at
 23 some point in the future was that she hopefully would
 24 be able to transfer herself?

1 A Well, it's always a goal for any paraplegic to try to
 2 transfer, though as time came on and as Marcia had leg
 3 fractures and then was required to wear leg casts, you
 4 know, continually, Dr. Roaf indicated that a goal of
 5 trying to transfer or learning to do a self-transfer
 6 was no longer reasonable.

7 Q Okay. Well, isn't it a fact that around 2004, Marcia's
 8 physicians wanted her to try and lose weight?

9 A Yes.

10 Q And they wanted her to engage in aquatic therapy?

11 A Yes.

12 Q And the reason for that, for both of those, was that
 13 she hopefully would be able to gain more upper body
 14 strength if she did that?

15 A Yes.

16 Q And one of the reasons for that was, at least at that
 17 time, that there was hope that if she did that, she
 18 would be able to be able to transfer herself, right?

19 A I don't think so.

20 Q Just to be clear, transferring means being able to get
 21 from one's bed to the wheelchair, wheelchair to toilet,
 22 wheelchair to a chair or a couch or whatever. That's
 23 what we mean by transfer, right?

24 A Yes.

1 what the goal of the plan is --.

2 Question: Understood.

3 You continued: -- from the reality of what
 4 Marcia --

5 Question: We'll talk about reality in a
 6 moment, okay.

7 Question: That's the plan that's been
 8 recommended by expert Adele Pollard?

9 Answer: Yes, that's the plan, yes.

10 Question: The goal ahead, hard as it may be,
 11 is for independence, maximum, whatever you can achieve,
 12 correct?

13 And your answer was: To the maximum extent
 14 that Marcia can attain, yes, sir.

15 Do you recall that testimony?

16 A Yes.

17 Q Okay. In fact, at that time of the trial, Marcia
 18 hadn't been able to participate in aquatic therapy
 19 because of the casts that she had on, right?

20 A And numerous other secondary complications.

21 Q Has she been able to do aquatic therapy since that
 22 time?

23 A No. Dr. Roaf and Dr. Mastriani have told her not to do
 24 this.

1 Q And the reason for that was because the doctors wanted
 2 Marcia to be able to be more independent and less
 3 dependant on you, right?

4 A Well, as I said, it is a goal of all paraplegics to
 5 learn how to do a self-transfer, but after Marcia had
 6 had her fractures of her leg and the orthopedic surgeon
 7 required that Marcia wear her air casts fulltime, the
 8 goal for Marcia in particular of learning to do an
 9 unassisted transfer was no longer in place. She
 10 physically couldn't do that with her leg casts on.

11 Q Let me read you from your trial testimony. This is
 12 Volume Day 7, page 44. It starts line 11.

13 Question: Is it fair to say that to boil it
 14 all down, the plans are trying to get Marcia's weight
 15 down and her strength and endurance up; isn't that
 16 true?

17 Answer: That's the goal, the life-care plan,
 18 yes.

19 Question: And that would enable her
 20 optimally to transfer without any assistance, that she
 21 is strong enough to go from bed to wheelchair,
 22 wheelchair to commode, shower or whatever; isn't that
 23 true?

24 Your answer was: Well, you have to separate

1 Q Okay. And do you recall in the trial transcript, you
 2 testified that Dr. Roaf wanted Marcia to do aquatic
 3 therapy to build up her strength?

4 A Yes. At that point, that was the position. Later that
 5 perspective changed.

6 Q Okay. And Marcia had -- Mr. Rhodes, I'm sorry -- had a
 7 lot of set-backs after the accident, complications,
 8 right?

9 A That's true. And you can call her Marcia.

10 Q Okay. She had pressure sores that basically confined
 11 her to bed from December 2002 to August 2003?

12 A Yes.

13 Q And she had fallen on occasions and fractured her legs?

14 A Yes.

15 Q And she had the blood clots that caused her legs to
 16 swell up?

17 A That's correct.

18 Q And it's fair to say, is it not, that during 2003 and
 19 into 2004, she really hadn't had a chance to begin her
 20 rehabilitation process that you would have expected
 21 from an injury of the type she suffered because of
 22 those complications?

23 A That's true.

24 Q And another one of the things that had been recommended

1 by both your doctor and -- strike that -- your life
 2 care-planner and the defense life-care planner is that
 3 she attend a spinal education in-patient program for a
 4 week or so either at Boston University or out in
 5 Colorado, right?
 6 A That's correct.
 7 Q And that was designed so that she could again learn how
 8 do deal with her injuries and become more independent,
 9 right?
 10 A That's true.
 11 Q And at the time of trial she hadn't done that, or had
 12 not been able to do that?
 13 A That's true.
 14 Q And also right around the time of trial she was just
 15 starting to learn how to drive by herself, right?
 16 A I think that's the timing, yes.
 17 Q She had her learner's permit?
 18 A I believe so.
 19 Q And in fact, she got her license to drive a vehicle
 20 with wheelchair accessible controls afterwards, right?
 21 A Yes, she did.
 22 Q And she's driving now, right?
 23 A Yes, she is.
 24 MR. COHEN: That's all I have, thank you.

1 A No.
 2 Q Was Rebecca the beneficiary of any trusts?
 3 A No.
 4 Q What about Marcia?
 5 A No.
 6 Q You testified a little bit earlier today and I think
 7 yesterday also about some of the stress that you felt
 8 due to money concerns. Do you remember that?
 9 A Yes.
 10 Q And you were concerned that the lack of settlement
 11 offers prior to March of 2004 -- you were concerned
 12 with that, yes?
 13 A Yes.
 14 Q And I think earlier today you said what was concerning
 15 you was that Mrs. Rhodes had enormous financial -- she
 16 needed enormous financial resources to get the care
 17 that she needed for the future, yes?
 18 A Yes.
 19 Q So what was your greatest concern during this time
 20 period, 2002, 2003, 2004, was getting enough
 21 compensation for Marcia so that you could provide for
 22 her needs, medical and otherwise, in the future?
 23 A Well, not just the economic -- not just for the
 24 economic, you know, medical-related past and future,

1 THE COURT: Okay. Anybody from Zurich?
 2 MR. VARGA: Yes, your Honor. Thank you.
 3 CROSS-EXAMINATION BY MR. VARGA:
 4 Q Good morning, Mr. Rhodes.
 5 A Good morning, Mr. Varga.
 6 Q I want to go back to just before the mediation for a
 7 few moments in August of 2002.
 8 A Could you just speak up a little bit, please?
 9 Q Yes, I'm sorry. You testified in your deposition in
 10 this case that you knew going into the mediation, that
 11 in order to have an effected outcome in the mediation,
 12 you and Mrs. Rhodes needed to have an agreement with
 13 respect to how much money you'd be willing to accept at
 14 the mediation, yes?
 15 A Yes.
 16 Q Okay. And so what you did is you went and you spoke to
 17 Marcia about that subject, yes?
 18 A Yes.
 19 Q And when you got out of that conversation and you went
 20 to the mediation, you had Mrs. Rhodes' authority with
 21 respect to a particular range of settlement, correct?
 22 A Yes, I did.
 23 Q In 2002 or 2003 or 2004 until the time of the trial,
 24 were you the beneficiary of any trusts?

1 but also for what was going to be a lifetime of pain
 2 and suffering for that, as well as our consortium
 3 claims. So all those together was what we were aiming
 4 for.
 5 Q I understand that, but you weren't so concerned about
 6 you getting money for certain purposes. You wanted to
 7 get money to take care of your wife in the future, yes?
 8 A Well, I wanted to get money to take care -- money for
 9 Marcia, but I was also concerned about her pain and
 10 suffering.
 11 Q Of course --
 12 A You know, that she was going to go on for many years.
 13 Q Okay. And that's what was causing you stress when you
 14 weren't hearing from the defendants, correct?
 15 A That's correct.
 16 MR. VARGA: I have nothing further, your
 17 Honor.
 18 THE COURT: Any further questions?
 19 MR. PRITZKER: Your Honor, first I'd like to
 20 offer into evidence Exhibit G for identification. That
 21 is the spreadsheet that Mr. Cohen was cross-examining.
 22 MR. COHEN: We don't have any objection, your
 23 Honor.
 24 THE COURT: Okay, that which was G for I.D.

1 may come in as Exhibit 86.

2

3 (Exhibit No. 86, marked; Harold Rhodes Asset
4 spreadsheet (previously G for I.D.))

5

6 MR. PRITZKER: Do you have a copy of now
7 Exhibit 86 in front of you --

8 MR. VARGA: Your Honor, I'm sorry. Has there
9 been an offer into evidence of that document? I may
10 have missed that.

11 I just want to note our objection for the
12 record, based on the discussion we had yesterday. I
13 won't go through it again, but I just want to note
14 Zurich's objection.

15 THE COURT: Okay. It's so noted. Overruled.

16 REDIRECT EXAMINATION BY MR. PRITZKER:

17 Q Now, do you have a copy of Exhibit 86 in front of you?

18 A Yes, I do.

19 Q Can you tell me on Exhibit 86, let's just take the
20 section entitled "January 31, '02," which of the items
21 you included in liquid net worth and which ones you
22 didn't.

23 A In liquid net worth, would have been an addition of
24 cash on hand, brokerage, you know, brokerage account,

1 A I'm sorry?

2 Q You had borrowed against the home value?

3 A I took out a Fleet equity line for \$115,000 to be able
4 to build the house, yes.

5 Q And the equity loan was -- was it a secured or an
6 unsecured equity loan?

7 A It was a secured.

8 Q Okay, secured by what?

9 A The house.

10 Q Mr. Rhodes, I'm going to give you a certified copy of
11 your deposition transcript. That's the deposition that
12 was taken on August 22, 2006. And I would like to
13 direct your attention to page 94 -- I'm sorry, to the
14 bottom of page 93.

15 Do you have it?

16 A Yes, I do.

17 Q I'm going to read certain questions and answers from
18 that portion, and I want you to read along with me, if
19 you would.

20 MR. VARGA: Your Honor, objection.

21 MR. COHEN: Objection.

22 THE COURT: Okay. What are you doing?

23 MR. PRITZKER: I am completing the answer to
24 Mr. Rhodes' question on cross-examination of Mr. Cohen,

1 not the retirement, not the non-restricted assets, not
2 the home value, not the personal property. And
3 deducted from that would have been any taxes payable,
4 credit card payable, but it wouldn't have included --
5 well, it would have included the home renovation but
6 not the auto or the mortgage.

7 Q All right. Now as you go across in time from January
8 31, '02, to August 31, '04; did any of those liquid
9 assets increase?

10 A No, they didn't.

11 Q Did any of the non-liquid assets increase?

12 A Yes, they did.

13 Q Which ones increased?

14 A The retirement accounts increased --

15 Q By how much approximately?

16 A About \$65,000.

17 Q And what else?

18 A The home value increased by about \$250,000.

19 Q And that's it?

20 A I'm sorry. And personal property went up by about
21 \$20,000.

22 Q So it's the home value that went up the most?

23 A Yes.

24 Q And as to that, you had borrowed against it?

1 which was incomplete. Mr. Cohen had asked --

2 THE COURT: As to what?

3 MR. PRITZKER: As to whether or not \$8
4 million was never varied from the beginning of the
5 case, that he would never have taken less than \$8
6 million.

7 THE COURT: I will let you read no more than
8 one page.

9 MR. PRITZKER: Okay.

10 (By Mr. Pritzker)

11 Q Mr. Rhodes, if you would go instead to page 112.

12 A Yes.

13 Q Do you see the question: Would you have accepted \$6
14 million at any time?

15 A Yes.

16 Q And the answer is: I don't know. You know, again,
17 there was never an offer made of \$6 million, so we
18 never considered it. You know, it's like you don't
19 think about these things. I've got day-to-day stuff
20 that's going on in my life and you don't speculate on
21 stuff that's not happening, so I don't know. I mean,
22 if you had put an offer on the table, I don't know, but
23 you didn't do that.

24 Did I read that accurately?

1 A Yes.

2 MR. COHEN: Your Honor, I would ask Mr.

3 Pritzker to read the next two questions for the sake of

4 completeness.

5 THE COURT: All right, he may do so.

6 (By Mr. Pritzker)

7 Q Next question: Okay. But at the time of the

8 mediation, at least, you already told us you wouldn't

9 have taken \$6 million to settle the case, that's

10 correct.

11 MR. PRITZKER: Next one?

12 MR. COHEN: Yes.

13 (By Mr. Pritzker)

14 Q (Reading): And the same for the time of the trial,

15 right?

16 Answer: That's correct.

17 Did I read that right?

18 A Yes.

19 Q Mr. Rhodes, at some time were you concerned about the

20 continuation of your healthcare coverage?

21 A Yes.

22 Q And was that part of the concern with the ongoing costs

23 that you might incur as time went on?

24 A Very much.

1 the proceeds?

2 A No, there wasn't.

3 Q Directing Marcia's ability to transfer, was that always

4 a goal?

5 A Well, by the healthcare providers at the beginning of

6 any case I came to understand that learning to

7 transfer, or learning to do an unassisted transfer is a

8 goal, and that's how you start off. At some point in

9 the future, though, after Dr. Mastriani indicated that

10 due to her fractures and her increasing osteoporosis,

11 that she had to wear her leg casts now full time, that

12 goal was no longer in effect for Marcia. She never did

13 an unassisted transfer.

14 Q Can she do an unassisted transfer to this day?

15 A No, certainly not.

16 Q Mr. Rhodes, why did you and the family decide to become

17 a plaintiff again in this case?

18 MR. VARGA: Objection.

19 MR. COHEN: Objection. I don't think that's

20 in the scope, your Honor.

21 THE COURT: Sustained. I think that it's --

22 MR. PRITZKER: I have no other questions.

23 THE COURT: All right. Any further

24 questions?

1 Q Concerning the basement renovations, was Marcia ever

2 able since the date of the accident to access the

3 second floor of your home?

4 A No, she has not.

5 Q Why not?

6 A It's a stairway to upstairs and of course she can't

7 travel upstairs, up the stairs.

8 Q What about elevators?

9 A In our kind of home, we couldn't put in an elevator.

10 Q Was there an opportunity to put an elevator down to the

11 basement?

12 A We have a stair lift -- I mean, a wheelchair lift to

13 get into the basement.

14 Q And there was enough room with the renovation to

15 accomplish that?

16 A Yes, that was part of the design.

17 Q And that's why the basement renovation was done?

18 A Yes.

19 Q You mentioned that on the proceeds of the settlement in

20 the underlying case you paid \$1 million worth of taxes?

21 What was that tax on?

22 A The interest portion of this judgment or the proceeds,

23 whatever the correct word is..

24 Q Was there any tax paid on the non-interest portion of

1 MR. COHEN: I just have one question.

2 RE-CROSS-EXAMINATION BY MR. COHEN:

3 Q Do you still have your health insurance with United

4 today?

5 A Yes, but it's gone up dramatically.

6 Q How much has it gone up?

7 A About \$800.

8 Q Per year?

9 A Yes.

10 MR. COHEN: Thank you.

11 MR. VARGA: I have no questions.

12 THE WITNESS: Oh, I'm sorry. Per month.

13 Eight hundred dollar per month. I should have listened

14 more carefully.

15 THE COURT: Any further questions?

16 MR. PRITZKER: No questions, your Honor.

17 THE COURT: All right. We'll take our

18 morning break a little bit early. So the next witness

19 will be whom?

20 MR. PRITZKER: The next witness is here,

21 Arthur Kiriakos.

22 THE COURT: All right.

23 MR. PRITZKER: I just have a couple of things

24 to deal with before I put Mr. Kiriakos on, just offers

1 of documents.

2 THE COURT: Why don't we do that so we can
3 get them marked during the break.

4 MR. PRITZKER: Your Honor, we have to find a
5 them in a box.

6 THE COURT: Then we'll do our break.

7 MR. PRITZKER: But for the court's
8 information, I'm going to be intending to offer the
9 financial statements certified from both AIG and
10 National Union Fire Insurance Company as they're filed
11 in their home states.

12 MR. VARGA: Objection, your Honor.

13 MR. COHEN: Object. Not relevant to
14 anything.

15 THE COURT: For what reason?

16 MR. PRITZKER: It is a relevant piece of
17 evidence, your Honor, in punitive damage cases as to
18 the financial status of each defendant.

19 MR. COHEN: Not in this jurisdiction it
20 isn't, your Honor.

21 MR. PRITZKER: I will cite the appropriate
22 cases.

23 THE COURT: I'm aware that in non-93A cases,
24 where the issue is double or treble, that. for

1 THE COURT: All right. Well, I'll hear from
2 counsel, but frankly it's much ado about very little in
3 view of the outcome of this case.

4 MR. PRITZKER: Secondly, your Honor, is the
5 video transcript and written transcript of Mr. Nitti.

6 THE COURT: Of Mr. Nitti?

7 MR. PRITZKER: Mr. Nitti was the only
8 adjustor that plaintiffs' counsel ever dealt with, and
9 he succeeded Mr. Satriano as AIG's adjustor. The
10 defendants have decided not to bring him, and we have
11 his video deposition which we wish to offer.

12 THE COURT: Okay. You also have the
13 transcript?

14 MR. PRITZKER: We do, your Honor, but I do
15 believe, as I've said previously, that while we've been
16 somewhat selective, Mr. Nitti's demeanor is somewhat at
17 issue.

18 THE COURT: Well, that may be, but I will
19 read the deposition and determine whether or not there
20 are any portions of his transcript that I wish to see.
21 It's a three-hour video, I gather?

22 MR. PRITZKER: Yes, somewhat less.

23 THE COURT: All right. But you're not
24 planning on that being done now. You're planning on

1 instance, discrimination cases it may come in, but I
2 don't think it bears in 93A cases. Frankly, it also
3 doesn't matter. I have no doubt that there are the
4 financial means, so --

5 MR. PRITZKER: But it does make somewhat of a
6 difference, your Honor, as indicated in both *State Farm*
7 *v. Campbell* and the *BMW* case in the U.S. Supreme Court,
8 one of the indicia of the reasonableness of the
9 punitive damages is the net worth of the defendant.

10 THE COURT: If there are punitive damages,
11 then this case is going to focus on the conduct of the
12 defendants, not really on their ability to pay, because
13 I have no serious doubt that they do have the ability
14 to pay.

15 Frankly, it doesn't really matter to me, as I
16 say, because I don't think there's any serious -- I
17 don't think there's any significant possibility that it
18 will have any bearing on the issue of whether or not
19 there are punitive damages, given my understanding of
20 the size of these insurance companies.

21 MR. PRITZKER: Well, notwithstanding that,
22 your Honor, and with all due respect, I do have to
23 create a record because I think that the record may
24 become an issue at some time.

1 calling --

2 MR. PRITZKER: Definitely not. And the only
3 reason I bring it up now is because of the break that's
4 happening today, we thought that it was an opportune
5 time for the court to have it.

6 MR. COHEN: Just so I could briefly respond
7 to the Nitti video, there will be testimony later in
8 the case that Mr. Nitti has a tic. It's a physical
9 problem. That's the way he acts everyday, whether he's
10 being deposed or not. Apparently, the plaintiffs deem
11 that as some significance, but there will be testimony
12 about that later, your Honor.

13 THE COURT: All right. And his deposition
14 describes that tic? If I read it, will I learn of this
15 tic?

16 MR. COHEN: I don't you're going to be able
17 to miss it during the deposition.

18 THE COURT: No. If I read it, will I learn
19 of it? Is there any testimony ----

20 MR. COHEN: No. There will be testimony from
21 our other witnesses about his mannerisms.

22 MR. PRITZKER: Your Honor, the tic was not
23 the demeanor that I was talking about.

24 THE COURT: All right. Well, what I will do

1 is, I will first read it. If there's any portions of
2 it -- I don't think I need to see three hours of his
3 demeanor. After I read it, I'll determine whether or
4 not I wish to see any portion of it in order to
5 evaluate his demeanor. I expect I can substantially
6 shorten the time period, but I doubt I need three hours
7 of demeanor. So work that through and we'll reconvene.

8 (A recess was taken.)

9 THE COURT: All right.

10 MR. PRITZKER: Your Honor, the Nitti
11 transcript and video diskette.

12 THE COURT: Okay. Marked as Exhibit 87?

13 MR. PRITZKER: Exhibit 87 for the transcript
14 and 87A for the video.

15 THE COURT: Okay.

16 MR. PRITZKER: The video disks I believe
17 include, if the court needs it, an instruction as to
18 how to open the disk.

19 THE COURT: It's a CD?

20 MR. BROWN: We also have a courtesy copy for
21 your Honor as well.

22 THE COURT: Okay. Mr. Nitti's first name is?

23 MR. PRITZKER: Warren.

24 THE COURT: Okay.

1 (Exhibit No. 87, marked; Deposition
2 Designations of Warren Nitti.)

3 (Exhibit Number 87A, marked; Video Diskette
4 of Deposition of Warren Nitti.)

5 MR. PRITZKER: And I would like to go back
6 again, your Honor, to the financials, and I would like
7 first to offer the certified financial statements of
8 Zurich Insurance Company, certified by the State of New
9 York Insurance Department.

10 THE COURT: For what year?

11 MR. PRITZKER: I'm sorry?

12 THE COURT: For what year?

13 MR. PRITZKER: Well, it's for 2005, but it
14 includes, for comparison, 2004. So it's a two-year
15 financial statement.

16 MR. VARGA: Your Honor, we renew our
17 objection. I'd like to be heard on that for a moment,
18 if I may?

19 THE COURT: Go ahead.

20 MR. VARGA: First of all, I don't even know
21 what company Mr. Pritzker is offering these for, what

1 underwriting company or what, because we haven't seen
2 them. But putting that aside for the moment, the court
3 hit the nail on the head earlier. This does not go to
4 the question of conduct. It goes to the question of
5 assets. And that's not something that has any tendency
6 to prove or disprove a fact that is material to the
7 court's decision in this case with respect to Zurich.

8 The question that is before the court on
9 these damages is whether there was, first of all, any
10 violation and if then the violation was knowing or
11 willful. And these financial statements have
12 absolutely no bearing on that whatsoever. That's the
13 primary basis for the objection.

14 And as I mentioned, we don't even know what
15 the company is that they're being offered for. They
16 haven't been produced to us previously, so.

17 MR. COHEN: Ditto for us, your Honor. Again,
18 I don't know what the companies are. I think he
19 mentioned AIG, which is a parent company of the two
20 defendants.

21 MR. PRITZKER: That's not so, no. As to
22 Zurich, it's Zurich American Insurance Company, the
23 defendant in this case. And as to AIG, it is National
24 Union Fire Insurance Company of Pittsburgh,

1 Pennsylvania, and those are certified by the Illinois -
2 -- I'm sorry, the Pennsylvania Insurance Department,
3 where National Union is authorized to do business in,
4 where they must file.

5 THE COURT: All right.

6 MR. PRITZKER: I do have summaries, your
7 Honor, which are actually less than ten lines each, if
8 that makes it easier, because these are rather bulky
9 financial statements.

10 THE COURT: The issue is not their bulkiness.
11 The issue is their relevance. I, frankly, have not
12 studied -- I know that in other 93A cases, where there
13 are punitive damages and those relatively few cases in
14 which there are punitive damages in Massachusetts, the
15 financial strength of the defendant is something that
16 may be considered by a jury in determining punitive
17 damages, or a fact finder. I, frankly, do not know
18 whether it's something that may be considered under
19 93A.

20 In any event, I've already said that it's not
21 something that I intend to give any significant weight
22 to, if any weight. So I will admit it. I'm going to
23 admit it de bene. There should be some case on 93A
24 punitives which address it. We'll give you the time to

1 consider it.

2 MR. PRITZKER: I can represent to the court

3 that we have not found any, but the United States

4 Supreme Court has dealt with the issue as it relates to

5 punitive damages and that this would be relevant, at

6 the very least, as to whether the court accept double

7 or triple damages under the 93A statute. I can quote

8 from *State Farm v. Campbell* the particular section, if

9 the court wishes.

10 THE COURT: *State Farm v. Campbell* is not a

11 93A case.

12 I do understand that, in general, with regard

13 to punitive damages, that is a factor that may be

14 considered.

15 MR. PRITZKER: And it is not a substitute, as

16 the court goes on to say, for other factors.

17 THE COURT: I'm aware of that as well.

18 I will admit it, as I say. I mean, I'm well

19 aware that Zurich and National Union are substantial

20 insurance companies, and this is really not the kind of

21 case in which I think it will have any bearing, but I

22 will admit them unless there is an affirmative case

23 that says that this is not a factor that may be

24 considered in a 93A punitive damage determination.

1 then I will exclude it. I'm not going to read it

2 until, review it until the end of the case so nothing

3 will be lost, but it's safer to err on the side of

4 admission than on the side of exclusion because of its

5 general admissibility with regard to matters of

6 punitive damages.

7 Okay, anything else?

8 MR. PRITZKER: No. But just so the record is

9 clear, your Honor, I will offer as Exhibit 88 the

10 National Union Fire Insurance Company of Pittsburgh

11 certified financial statement.

12 THE COURT: Eighty-eight is National Union.

13 Eighty-nine is Zurich?

14 MR. PRITZKER: And 89 will be Zurich. The

15 certification is from the State of New York.

16 MR. COHEN: May I just ask for copies?

17 MR. PRITZKER: Copies are right here.

18 THE COURT: And I assume these are publicly

19 available.

20 MR. PRITZKER: I'm sorry. Publicly

21 available.

22 THE COURT: Okay.

23 MR. PRITZKER: Which is how we got them.

24

1 MR. COHEN: Your Honor, I think the point --

2 THE COURT: It's much ado about almost

3 nothing.

4 MR. COHEN: I think that the point with

5 respect to 93A is statute bases the punitive damage

6 determination on whether the conduct is willful or

7 knowing and then that's the only factor.

8 THE COURT: Right. I think that's plainly

9 the case. There can be no punitive damages unless

10 there is willful and knowing conduct. At the same

11 time, if I do find willful or knowing conduct, I do

12 have the discretion to go double or treble; and to that

13 extent, that is a more traditional punitive damage

14 determination and I may be able to use this in

15 considering whether or not double or treble are

16 appropriate.

17 But, again, I've not looked at it. And as I

18 say, I don't expect to find anything that I didn't

19 expect. I sort of assumed each of you are substantial

20 insurance companies, solvent, and I expect profitable,

21 so I think it's not worth a great deal of time.

22 So it will come in as 88 and 89. They'll

23 come in de bene. Show me any case which will speak to

24 it that will indicate that it should not be considered,

1 (Exhibit No. 88, marked; Certified Financial

2 Statement of National Union Fire Insurance Company of

3 Pittsburgh, Pennsylvania.)

4

5 (Exhibit No. 89, marked; Certified Financial

6 Statement of Zurich American Insurance Company.)

7

8 MR. PRITZKER: The plaintiffs would like to

9 call Arthur Kiriakos, your Honor.

10 THE COURT: Okay.

11

12 ARTHUR KIRIAKOS, Sworn.

13

14 THE COURT: Good morning, sir. If you'd

15 please state your full name and spell your last name

16 for the court reporter?

17 THE WITNESS: Certainly. Arthur A. Kiriakos,

18 K-i-r-i-a-k-o-s.

19 THE COURT: Okay. You may proceed.

20 DIRECT EXAMINATION BY MR. PRITZKER

21 Q Where do you live, Mr. Kiriakos?

22 A 3 Ethel Street, Blackstone, Massachusetts.

23 Q What is your present occupation?

24 A Worker's compensation claims consultant for Broadspire

1 Company.
 2 Q Is Broadspire Company somehow connected with Crawford &
 3 Company?
 4 A The two companies merged several months ago.
 5 Q And when did you start working for them?
 6 A November 29, 2006, as an employee.
 7 Q All of the opinions that you're about to testify to,
 8 when were they generated?
 9 A Months before that. May, June of '06.
 10 Q Let's back up a little bit. Where do you live?
 11 A 3 Ethel Street, Blackstone, Mass.
 12 Q Did you go to college?
 13 A Yes, I did.
 14 Q Where did you go to college?
 15 A My undergraduate degree was from Boston State College
 16 in 1980, in business administration.
 17 Q After college, where did you go?
 18 A Kemper Insurance, in 1980, four days after graduation,
 19 as a claims adjuster.
 20 Q How long did you work at Kemper?
 21 A Approximately three and a half years. I was there from
 22 June of 1980 until January of 1984.
 23 Q And what kind of adjusting -- what kind of cases did
 24 you adjust while you were at Kemper?

1 Q And what period of time were you at Hanover?
 2 A From January of '84 until approximately June of '86.
 3 Q When you left Hanover, where did you go?
 4 A Commercial Union Insurance Company, here at One Beacon
 5 Street in Boston.
 6 Q What was your position with Commercial Union?
 7 A I was a home office claims consultant in the general
 8 liability department.
 9 Q What were your responsibilities?
 10 A I supervised commercial general liability claims at a
 11 national level, which meant that the exposure had to
 12 exceed either a \$500,000 value or it was a catastrophic
 13 injury, or both. I supervised 13 offices in 22
 14 jurisdictions, as well as supervising and directing two
 15 programs. One was the BIKEe corporation, which was the
 16 Colgate-Palmolive Football Helmet Division, and the
 17 other was British Tire & Rubber.
 18 Q Now, directing your attention just for a moment to the
 19 Colgate-Palmolive division. You said it was the BIKE
 20 part of that company?
 21 A Yes, I did, sir.
 22 Q And what did BIKE manufacture?
 23 A Football helmets.
 24 Q In your capacity in that role, did you become familiar,

1 A I adjusted personal and commercial auto liability,
 2 general liability, and workers compensation claims.
 3 Q And when you left Kemper, where did you go?
 4 A Hanover Insurance Company, at the time Boston, Mass.,
 5 then Waltham, Mass.
 6 Q And what did you do for Hanover?
 7 A I was a casualty claims supervisor.
 8 Q And as a casualty claims supervisor, did you work with
 9 adjusting claims?
 10 A I supervised six adjusters.
 11 THE COURT: I'm sorry, that was with who?
 12 THE WITNESS: Hanover Insurance Company, your
 13 Honor.
 14 (By Mr. Pritzker)
 15 Q You supervised six adjusters adjusting what kind of
 16 claims?
 17 A Personal injury, predominantly personal lines auto,
 18 Massachusetts automobile, workers compensation, and
 19 some commercial line claims, commercial auto claims.
 20 Q Approximately how many auto claims were you responsible
 21 for as supervisor during that period?
 22 A On average, 1,200.
 23 Q Twelve hundred a year?
 24 A Twelve hundred in total.

1 more familiar, with the catastrophic injuries?
 2 A Yes, I did.
 3 Q Including spinal injuries?
 4 A Predominantly spinal injuries.
 5 Q Back to Commercial Union, can you tell me the kinds of
 6 claims that you generally supervised at National.
 7 A If there were any catastrophic claim involving a
 8 general liability policy. An example would be a
 9 products claim involving Poulan. They used to
 10 manufacture chainsaws and we had a Tulsa, Oklahoma
 11 office. If the case was catastrophic and it was
 12 improper use of a chainsaw, I supervised the claim from
 13 day one because the injury was catastrophic. There
 14 were other types. As I said, the BIKE Division of
 15 Colgate-Palmolive was a separate project that I was in
 16 charge of.
 17 Q Okay. How long were you at Commercial Union?
 18 A Approximately four -- just under four years. April of
 19 1990.
 20 Q From June of '86?
 21 A Yes.
 22 Q When you left Commercial Union, where did you go?
 23 A At the time it was called American International
 24 Adjustment Company, which was a division of AIG. I was

1 a litigations claims manager.
 2 Q How long were you at AIG?
 3 A Fourteen months, fifteen months.
 4 Q During that period of time, what did you do for them?
 5 A I managed their litigation claims department here in
 6 Boston. They had split off the litigated claims into
 7 another group, and I was hired to supervise, direct and
 8 control, as well as manage that group of files and
 9 staff.
 10 Q What kind of cases did that include?
 11 A Anything that was a commercial auto: self-insureds,
 12 commercial, general liability products claims,
 13 construction liability. I'm trying to think if there
 14 was anything else. There was no medical malpractice.
 15 There was some professional liability.
 16 Q When you left AIG, what did you do?
 17 A I had the entrepreneurial spirit. I started -- I met a
 18 young man and we began a business plan to open up an
 19 ADR firm, an alternative dispute resolution firm known
 20 as Equimar, Incorporated. And I was around during the
 21 foundation or the founding stage of it and writing and
 22 formulating the plan, and then at the inception, the
 23 first listed employee on the corporate charter.
 24 Q How long did that last?

1 consultant. For workers compensation, it was exposure
 2 of a half a million dollars, a reserve exposure, half a
 3 million dollars or more. But I was also the only
 4 designated person to handle employer liability claims
 5 under the workers comp policy in those jurisdictions
 6 that allow it.
 7 Q And what was your reserve, how much in reserves -- how
 8 many claims in reserves did you supervise,
 9 approximately?
 10 A It's a two-part question. And if you don't mind, I'll
 11 answer it accordingly.
 12 Q Please.
 13 A There was 120 claims on average that I actually
 14 supervised and handled, and the total reserves were, on
 15 average, \$50 million.
 16 Q When you left Hartford Insurance, what did you do?
 17 A I went back as an equity partner to the company I had
 18 founded, Equimar. It had been purchased and resold a
 19 couple of times, now known as ADR-Equimar, at 50
 20 Congress Street in Boston, where I was in charge from a
 21 directorship standpoint of the day-to-day operation, as
 22 well as the marketing.
 23 Q And how long did that last?
 24 A I left in May of this year, so 13 months. I got there

1 A Our relationship split approximately one year later,
 2 and I went out and ventured into another business on my
 3 own.
 4 Q What was that other business?
 5 A It was an independent claims adjusting company known as
 6 Adjusters Out-Standing. I formed that officially on
 7 the corporate charter October 1, 1992, and I continued
 8 until December of 2003.
 9 Q Was that basically a third-party administration
 10 company?
 11 A An independent adjusting company. We did third-party
 12 administration function for two mutual companies here
 13 in the Commonwealth where we were under agreement to
 14 investigate, evaluate, and with their authority
 15 negotiate settlement on automobile and commercial
 16 liability claims.
 17 Q What were the two companies that you were acting in
 18 that capacity for?
 19 A Fitchburg Mutual and at the time, Quincy Mutual.
 20 Q When you left Adjusters Out-Standing, Inc., where did
 21 you go?
 22 A To Hartford Insurance in Syracuse, New York.
 23 Q In what capacity?
 24 A I was a high-exposure, workers compensations clams

1 in April the preceding year.
 2 Q And then where did you go?
 3 A I was an independent claims consultant through two
 4 different firms. The first was the Hiller Group, out
 5 of Woodstock, Vermont. I was a workers compensation
 6 and liability claims consultant, an independent
 7 consultant assigned to Hartford Insurance in Hartford,
 8 Connecticut, where I was brought on board just to
 9 handle claims on an independent basis, and that
 10 includes investigating, evaluating and negotiating
 11 claims to conclusion.
 12 Q Okay. And what was the other group?
 13 A The other group was Insurance Overload Staffing, here
 14 in Boston. As with most independents, they're
 15 projects. When the project ended at Hartford, it was
 16 the middle of September. They offered me a claims
 17 manager's job in Syracuse, New York, and I didn't wish
 18 to relocate. I came on board with these people and
 19 went to work at Crawford & Company at the time, as a
 20 workers compensation claims handler as an independent
 21 consultant.
 22 Q Now, during your career, have you testified as an
 23 expert in any cases?
 24 A Yes, I have.

1 Q And have those been in Massachusetts?
 2 A Yes, they have.
 3 Q In the Superior Court?
 4 A Yes, they have.
 5 Q Approximately how many?
 6 A Prior to today, there were eight.
 7 Q And were those representing the plaintiff, representing
 8 the defendant, or mixed?
 9 A Mixed.
 10 Q Are you also a lecturer?
 11 A I've lectured, yes, I have.
 12 Q In what areas?
 13 A In claims handling, as it would pertain to 93A, Chapter
 14 176D.
 15 Q And approximately how many times have you lectured?
 16 A At the Massachusetts Continuing Legal Education through
 17 the Mass. Bar, three times.
 18 Q On what subjects?
 19 A Claims handling. The seminar's caption or its title
 20 was "How to Try A Chapter 93A Case."
 21 Q Have you also published?
 22 A Yes, I have.
 23 Q How many times?
 24 A Three times.

1 A Yes, I did.
 2 Q Did you review a copy of the Zurich claims documents as
 3 produced to plaintiffs' counsel?
 4 A Yes, I did.
 5 Q Did you review a copy of AIGDC as an agent of National
 6 Union Fire Insurance Company's claims documents?
 7 A Yes, I did.
 8 Q Okay. What about the plaintiff's medical
 9 documentation?
 10 A I was given it. I reviewed the demand letter. I
 11 reviewed the discharge summary. And I want to say I
 12 recall reviewing the life-care plan, but I reviewed
 13 them almost a year ago.
 14 Q What about the plaintiffs' original demand letter?
 15 A I reviewed that.
 16 Q With the exhibits?
 17 A The exhibits that were submitted, yes, I did.
 18 Q Did you look at the summons and complaint in the
 19 underlying litigation?
 20 A Yes, I did.
 21 Q Did you look at discovery documents from the underlying
 22 obligation?
 23 A Yes, I did, sir.
 24 Q Did you look at the claim file notes and correspondence

1 Q On what subjects?
 2 A Claims handling and claims handling procedures.
 3 Q Given all of your experience, have you developed an
 4 understanding or an expertise of claims handling
 5 practices for primary insurers?
 6 A Yes, I have.
 7 Q Have you developed an expertise and understanding of
 8 the claims handling practices of excess insurers?
 9 A Yes, I have.
 10 Q And have you developed an expertise in the claims
 11 handling of third-party administrators?
 12 A Yes, I have.
 13 Q You've become familiar with the Rhodes claim?
 14 A Yes, I have.
 15 Q What did you do in order to become familiar with that
 16 claim?
 17 A I reviewed a numerous list of documents, which I cannot
 18 recall off the top of my head -- they were listed on my
 19 affidavit -- as well as had more than one conversation
 20 with counsel. And also put together -- at my request,
 21 counsel put together a chronology of events.
 22 Q Did you review as part of the process of developing
 23 opinions in this case the Crawford & Company claims
 24 file as produced to plaintiffs' counsel?

1 before the verdict as produced to plaintiffs' counsel?
 2 A Yes, I did.
 3 Q Did you look at the correspondence between plaintiffs'
 4 attorney and Crawford & Company as agent for Zurich?
 5 A Yes, I did.
 6 MR. GOLDMAN: Objection.
 7 THE COURT: Overruled.
 8 Q Did you review the underlying verdict?
 9 A Yes, I did.
 10 Q Did you review the 93A demand letters to both Zurich
 11 and AIG?
 12 A I recall reviewing both of those documents, yes, I do.
 13 Q And did you look at the responses from Zurich, AIG, and
 14 National Union Fire Insurance Company of Pittsburgh,
 15 Pennsylvania?
 16 A Yes, I did.
 17 Q Did you look at the various transcripts and exhibits
 18 from depositions in this action?
 19 A Yes, I did.
 20 Q And did you look at -- I think you've already testified
 21 you looked at a chronology that was prepared by
 22 plaintiffs' counsel.
 23 A Yes, I did, sir.
 24 MR. GOLDMAN: Your Honor, I'd request a copy

1 of that chronology that's been supplied to counsel.
 2 THE COURT: Mr. Pritzker?
 3 MR. PRITZKER: It was actually a verbatim
 4 reproduction of what was responded to in the answers to
 5 interrogatories for Mr. Kiriakos's testimony here
 6 today. So it's part of the expert answers, your Honor.
 7 It was accompanied verbatim.
 8 MR. COHEN: I'd still like to see it.
 9 THE COURT: I think they're entitled to it.
 10 MR. PRITZKER: I'm not sure that it's in
 11 separate form, but I'd be happy to try and locate it
 12 and to present it. I assume we'll have two weeks to do
 13 that.
 14 THE COURT: Yes, let's proceed, as long as
 15 they have it before their cross.
 16 MR. COHEN: Does he have it in front of him
 17 now?
 18 THE WITNESS: I have nothing.
 19 MR. PRITZKER: Your Honor, Mr. Brown, whom I
 20 cannot work without, tells me it's actually in the
 21 courtroom.
 22 THE COURT: Mr. Brown's salary demand has
 23 just increased.
 24 All right, let's proceed.

1 administrator's perspective, as what they do, what
 2 their role is. As a third-party administrator, their
 3 role is advisory in that they are given the charge and
 4 retained by an insurer; in this case, Zurich. Their
 5 charge is to investigate and evaluate the claim, but at
 6 no time do they control the financial or the fiduciary
 7 responsibility in the claim, unless expressly
 8 authorized by the carrier. And at no time do they
 9 complete a coverage opinion, unless expressly
 10 authorized by the carrier. And furthermore, the
 11 disposition plan, although recommended, is not
 12 finalized unless by the carrier. If I may continue?
 13 Q Yes, please.
 14 A Having said that, looking at this case from the outset,
 15 we have a claim, an automobile accident, a very sad
 16 automobile accident, as well all know and we've heard.
 17 They received the claim and immediately they begin an
 18 investigation of same. And as early on as a couple of
 19 weeks into the claim, January 23 or thereabouts, they
 20 note the fact in their claim file notes that there is a
 21 relationship between their insured, or the person
 22 they're investigating on behalf of, which is GAF.
 23 As an administrator, you're in the role of
 24 investigating on behalf of someone, as instructed by a

1 (By Mr. Pritzker)
 2 Q What else did you do in order to familiarize yourself
 3 with this claim?
 4 A After reading all the documents, I sat down and looked
 5 at this from a claims handling perspective, and only as
 6 a claims handling perspective, because that's what I
 7 am, is a claims professional.
 8 Q And did you speak with counsel?
 9 A Oh, on numerous -- I said that earlier, Mr. Pritzker.
 10 Q Okay. And as a result of all of your work, have you
 11 developed any opinions as it relates to the claims
 12 handling practices of the defendants in this case?
 13 A Yes, I have.
 14 Q Do you have an opinion regarding the work that Crawford
 15 & Company did regarding this claim?
 16 A Yes, I do.
 17 Q What is that opinion?
 18 A My opinion is that Crawford acted reasonably in its
 19 investigation and evaluation of the claim, in its
 20 recommendations regarding the disposition of the claim,
 21 as well as properly and timely reporting to insurers.
 22 Q Okay. How did you reach that opinion?
 23 A Well, I reached it based upon my experience as a claims
 24 handler, in looking at this case from a third-party

1 carrier. That GAF has a relationship with DLS, and DLS
 2 has an operator, who is Mr. Zalewski, and there is also
 3 another entity known as Penske. They identify that
 4 early on.
 5 Within a couple of days thereafter,
 6 continuing their investigation, which included visiting
 7 the field, interviewing witnesses, et cetera, procuring
 8 many, many documents, they note the fact that liability
 9 is unfavorable. I think the wording he used, and no
 10 matter where it flows from, but it's unfavorable. I'm
 11 paraphrasing. And within 21 days, they note the fact
 12 that this is a catastrophic claim. They write what I
 13 call a full, formal report. It's multi-captioned, it
 14 identifies all the parties, it identifies the
 15 relationship as they note to date, 21 days out, but
 16 also identifies the potential exposure in this case,
 17 that the claim is catastrophic. It may be premature to
 18 put a perfect figure on it, and they note that too, but
 19 he notes the fact that it is a catastrophic claim.
 20 And he further notes that it's reportable --
 21 that's a key word here -- reportable to the carrier
 22 from the first day. The first day is whatever the
 23 agreement with the carrier dictates. He sends a copy
 24 of this report to the carrier, meaning Zurich.

1 Q Okay.

2 A And it doesn't end there. In continuing forward, we

3 see that through communications, Willis, the broker if

4 you will in this case, writes to the excess carrier,

5 because the handling adjustor notes that we've got to

6 find out who the excess is. They didn't know it,

7 obviously. At that given point in time, 21 days after

8 the accident, Willis, the broker, writes to the excess,

9 placing them on notice of maybe this is one you should,

10 you know, run quarterback over. And within 30 days

11 thereafter, AIG, slash, National Union, okay,

12 acknowledges receipt of this claim and opens up a claim

13 file, okay? So they're aware there's an exposure into

14 their layer.

15 Within 30 days thereafter, Crawford, doing

16 its due diligence as an adjustor, okay, notes that this

17 is a policy limits exposure to the primary carrier. So

18 within 90 days from the beginning of receipt of this

19 claim until the date they've received it, they're

20 acknowledging this exposure, and they continue to

21 report same, all the way throughout. And that

22 continues, as I recall, it continues throughout the

23 theme of the file, so far so that by September the

24 adjustor is talking about a full value exposure in this

1 Q Why don't you need them?

2 A Because I can evaluate them in the abstract. I can

3 evaluate exposure from the day I knew it was a

4 paraplegic. I don't need any document to evaluate the

5 exposure as a claims professional.

6 Q Well --

7 A Go ahead.

8 Q You couldn't determine, at that point, could you, the

9 settlement value of the case.

10 A Settlement value?

11 Q Yes.

12 A No, but I can determine exposure value.

13 Q And could you, if you were the third-party

14 administrator, have determined that the exposure value

15 was over \$2 million?

16 A Absolutely.

17 Q How?

18 A From the --

19 MR. GOLDMAN: Your Honor, I'm going to

20 object. There's no foundation for this witness as an

21 expert to testify to this line. If I might voir dire

22 him for a minute, I don't believe the Lanigan

23 requirements have been satisfied.

24 THE COURT: I'll give you a very brief voir

1 case, which is far more than the underlying limit.

2 Q Okay. Let's back up for a minute.

3 A Certainly.

4 Q First of all, did you know what the primary policy's

5 limits were?

6 A Yes, I do.

7 Q How much were they?

8 A \$2 million.

9 Q And did you find out what the excess policy limits

10 were?

11 A Yes, I did.

12 Q What were they?

13 A \$50 million.

14 Q Did Crawford need to get underlying medical expense

15 documents before putting the recommendation into its

16 reports, as it did, that the reserves should be

17 increased to \$2 million?

18 A Absolutely not.

19 Q Why not?

20 A Given the parameters of this case, given this case,

21 we're talking about a paraplegic, a middle-aged woman

22 who is a paraplegic. Those documents you just

23 described this early on, to look at full value, are

24 nothing but a red herring. I don't need them.

1 dire.

2 VOIR DIRE EXAMINATION

3 (By Mr. Goldman)

4 Q When you formulated your opinions in this case, did you

5 consult with any treatises on claims handling?

6 A Treatises, no, I did not.

7 Q Any standards put out by the legislature or any

8 regulatory authorities?

9 A No, I did not.

10 Q Were there any books or articles that you consulted?

11 A To review of this case?

12 Q Yes.

13 A No, I did not.

14 Q Are your opinions -- if were to try to determine, for

15 example, whether your opinions are accurate or not,

16 what would we look to, to try to determine that?

17 A Claims handling -- the number of claims I've handled,

18 the number of spinal cord cases I've handled over the

19 last 27 years.

20 Q Just your experience?

21 A Just my experience.

22 MR. GOLDMAN: Your Honor, note my objection.

23 THE COURT: Noted.

24 MR. COHEN: I object also.

1 THE COURT: Frankly, it's not timely. If
2 there were to be a Daubert-Lanigan objection based on
3 the plaintiffs' expert, I should have heard about it
4 earlier. In any event, I believe the objection goes to
5 we weight and not to admissibility and it is denied.
6 So you may proceed.

7 (By Mr. Pritzker)

8 Q How would you, if you were handling this third party
9 administration, have determined that a \$2 million
10 exposure, which was the limit of the primary policy,
11 was exposed?

12 A Based upon my knowledge. First of all, let's back up
13 and just look at the facts of the case. Liability is
14 adverse to GAF. No matter where it's coming from, you
15 know you have a lion's share of culpability. There is
16 a relationship of these four entities which requires
17 some investigation, but you know you are on the hook.

18 I use this phraseology, but I'm a claims
19 person, I'm not a lawyer. Having said that, I've also
20 handled and supervised, at minimum, 60 spinal cord
21 injury cases, whether they be quadriplegic or
22 paraplegics, having handled them as football helmet
23 cases, automobile cases and a variety of other
24 premises, fall-downs, so I know how to evaluate the

1 potential exposure from a full-value perspective of a
2 spinal cord injury of paralysis, if you will.

3 Q And once again, what would the purpose be of getting
4 documentation from a primary policyholder, from a
5 primary insurer's point of view? What would the
6 purpose be of getting documentation to value either
7 settlement or full liability value?

8 A Early on, the amount of documentation is going to be
9 limited. First of all, you're not going to be able to
10 get my hands on any medical. I may get a discharge
11 summary. But as I said a few minutes ago, they truly
12 are a red herring. I don't need them to evaluate this
13 claim, this claims in particular. Especially the \$2
14 million level, sir.

15 Q And that's what we were dealing with?

16 A Correct.

17 Q Do you know that Zurich raised certain coverage issues?

18 A Yes, I do.

19 Q Did you develop an opinion concerning Zurich's work in
20 resolving those coverage issues?

21 A Yes, I did.

22 Q What is that opinion?

23 A Zurich should have upon receipt of the notice of this
24 claim, within the first 30 days, they were aware of the

1 fact that the four parties I noted before, GAF, DLS,
2 Mr. Zalewski and Penske, were somehow contractually
3 related. They should have then gone and got a copy of
4 that contract, requested it through the TPA, the third-
5 party administrator, and then pursued to get a copy of
6 the policy. In order to do that --

7 Q Would they need to get a copy of the policy? It was
8 their policy?

9 A Sir, they may not have it in their claim file. So they
10 would then go to one of several vehicles to procure a
11 copy of it. They would go to either the policyholder,
12 GAF, which isn't standard practice. You want to
13 certify, you want to get a full and complete copy. You
14 go to the broker, but more importantly you go to your
15 own underwriter, your own database, to secure a copy.

16 In order to address those coverage issues
17 they should have been raised within 30 days. And they
18 received notice, or were getting notice, from as early
19 as January 30, '02.

20 Q Did you have an opportunity to look at the policy?

21 A Yes, I did, some time ago, sir.

22 Q Are you familiar with reading policies?

23 A Yes, I am.

24 Q Did you come to any conclusion as to whether or not the

1 policy was clear on who was covered?

2 A It was clear as to who was covered, the additional
3 endorsement being Penske. The issue of contract might
4 have required a further review, but it wasn't
5 complicated. It wasn't this complex issue.

6 Q Can you remember whether or not the driver of the
7 vehicle, with permission, was a covered person?

8 A With permission --

9 MR. GOLDMAN: Objection, your Honor. There's
10 no foundation for this witness to be giving opinions
11 regarding coverage, that he has a coverage background
12 or expertise. He started out by saying that he was
13 testifying about claim handling.

14 THE COURT: How is he an expert as to the
15 plainness of an insurance policy?

16 MR. PRITZKER: I will go into that if the
17 court wishes.

18 THE COURT: All right. I will sustain the
19 objection as of now.

20 (By Mr. Pritzker)

21 Q Mr. Kiriakos, as part of your 27 years experience, have
22 you ever as part of your job responsibilities had the
23 responsibility of determining coverage issues?

24 A Yes, I have.

1 Q How many times?
 2 A Sir, I can't give you an accurate number. It's
 3 hundreds, if not thousands.
 4 Q In which jobs?
 5 A Every single one of them at every single level.
 6 Q And why would that kind of issue be a part of an
 7 adjustor or claims administration job description?
 8 A It wouldn't be part of the TPA. That role is the
 9 carry. As I said a few minutes ago, a third-party
 10 administrator doesn't analyze coverage unless expressly
 11 authorized.
 12 The primary role of any claims person under
 13 the claims process, if you will, the tripartite process
 14 of investigative, evaluative, and disposition is
 15 coverage. If I don't have coverage, I don't have an
 16 exposure.
 17 Q So at each of the insurance companies that you worked
 18 for, you evaluated coverage issues?
 19 A Absolutely.
 20 Q Were there times when you had to engage counsel to help
 21 in that process?
 22 A Absolutely.
 23 Q Were there other times when you didn't have to engage
 24 counsel to perform that process?

1 A Yes, I do.
 2 Q Do you have an opinion as to whether or not that was
 3 handled in a proper manner?
 4 A No, it was not.
 5 Q Why?
 6 A First of all, we're dealing in a timeframe here. We've
 7 already had an eight-month delay before it gets to
 8 coverage counsel. Once it gets to coverage counsel
 9 it's on someone's diary. It now becomes a hot item.
 10 Coverage is number one. To wait another five months,
 11 Mr. Pritzker, and just stand in the wings, if you will,
 12 waiting for this opinion is not good claims handling.
 13 It's your job to direct and secure. It's not the
 14 attorney's job to sit there and come back to you.
 15 You've got to go get it sometimes.
 16 Q Did you see any indication that Zurich had been
 17 proactive in trying to get coverage counsel to respond?
 18 A No, I did not.
 19 Q Do you know when the coverage counsel did respond?
 20 A Yes, I do.
 21 Q When was that?
 22 A March of '03, approximately five months after he
 23 received the request to complete it.
 24 Q In your opinion, is that a reasonable time for the

1 A Yes, there was.
 2 Q And in looking at the Zurich policy with GAF, were you
 3 able to determine whether or not the driver was a
 4 coverage person under that policy?
 5 A As long as he had permission, he was covered.
 6 Q Permission for what?
 7 A Permission to operate the motor vehicle.
 8 Q So getting back again, what in your opinion should
 9 Zurich have done in order to resolve coverage issues as
 10 to the driver or DLS, the employer of the driver?
 11 A The primary duty would have been to secure a copy of
 12 the policy, the claims handling function, get a copy of
 13 the contract, read the investigative report with regard
 14 to the relationship that existed, and then make a
 15 determination from there. Bear in mind, this
 16 determination is not going to be made by one person.
 17 There are layers of people assisting in the review and
 18 analysis of the policy.
 19 Q Within the company?
 20 A With in the company.
 21 Q You mentioned that there are times when coverage
 22 counsel is necessary and engaged?
 23 A Absolutely.
 24 Q And do you know that that happened in this case?

1 kinds of coverage issues that were presented by Zurich
 2 to have been resolved?
 3 A The 13 months or the five months?
 4 Q Well, let's take it both ways. First of all, was the
 5 13 months an appropriate amount of time?
 6 A It was unreasonable. It was not appropriate.
 7 Q How about the five months?
 8 A No, it was not reasonable.
 9 Q Do you have an opinion concerning what, if any, impact
 10 the existence of other primary policies of the
 11 defendants would have had on Zurich's duties in the
 12 Rhodes claim?
 13 A Yes, I do.
 14 Q What is that opinion?
 15 A My opinion is other primary policies does not remove
 16 Zurich's duty to investigate, evaluate and negotiate a
 17 claim; it just lessens the potential financial exposure
 18 to GAF.
 19 Q Okay. And what is that opinion based on?
 20 A First, it's based upon the information I read in the
 21 file; and secondly, based upon a compendium of
 22 knowledge I bring to the table as a claims person. As
 23 a claims person the first duty is to my policyholder.
 24 And my function is to investigate, evaluate and dispose

1 of a case when liability and damages are reasonable
 2 clear. If there is going to be other tortfeasors that
 3 will lessen that exposure, that's fantastic, it does
 4 help, but in this case I was aware that I, being
 5 Zurich, aware that I had a lion's share of the
 6 culpability.

7 Q You were talking about tortfeasors. I thought we were
 8 talking, or I was talking, and I want to direct your
 9 attention back to other primary policies for the
 10 defendants who were covered under the Zurich policy.

11 A That would still lessen the exposure, but it doesn't
 12 remove Zurich's duty. It lessens the exposure to GAF
 13 ultimately, but still the value of this case was far in
 14 excess of that. You still have a duty to complete your
 15 investigation and continue the evaluation and dispose
 16 of the case.

17 Q In your opinion, what would that have required Zurich
 18 to do? You know that they tendered, for instance.
 19 When?

20 A March of '04, the formal tender, the end of March.

21 Q What, in your opinion, should they have done?

22 A The tender should have occurred once they have
 23 knowledge, if you will, that the damages exceed their
 24 primary policy limit. And in this case they're on

1 primary policies of the four by this time named
 2 defendants, should that have delayed the process?

3 A No, it should not.

4 Q How should that have been handled?

5 A They should have instructed their adjustor, okay. In
 6 this case the TPA is standing in the adjustor's shoes,
 7 okay, to secure the information. But still they have a
 8 duty to continue the investigation and the evaluation,
 9 so they should have been gathering other pieces of
 10 information; i.e. what are the damages? what's the
 11 exposure? what's the full value exposure? Because, in
 12 essence, if there's other policies, I don't know what
 13 the offset may be. But ultimately my two million may
 14 be exposed; I have a duty to note that and be prepared
 15 to tender.

16 Q Do you have an opinion, given all of these factors,
 17 when the primary carrier should have formally tendered
 18 its policy limits to the excess carrier?

19 A My opinion is as early on as April of '02, but no later
 20 than September of '02, when the handling adjustor --
 21 you know, I look at this case, if he was sitting within
 22 Zurich would be no different -- notes the case value of
 23 \$5 million to \$10 million. This, at that point in
 24 time, would have been a trigger point to tender the

1 notice from less than 30 days in the potential exposure
 2 is catastrophic. Moreover, from as early as April of
 3 '02, they are well aware that their exposure is far in
 4 excess of that.

5 But continuing forward, if we acknowledge the
 6 fact, Mr. Pritzker, if you can indulge me for a moment,
 7 that it took them 13 months to make a coverage opinion,
 8 which in my mind is unreasonable. One delay.

9 They then, in May of '03, same year, same
 10 time, they turn around and ask for -- they document the
 11 fact that there is going to be -- the TPA is
 12 recommending a policy limit or the policy posting.
 13 It's been recommended all along. That's never changed.
 14 Or the value has been noted all along.

15 In June of '03 they note that fact they're
 16 looking for -- they need more information.

17 Finally, in September of '03, they note that
 18 the case has got that value. They are going tender the
 19 policy. But this doesn't occur for another six and a
 20 half, almost seven months.

21 Q So once again, what should they have done?

22 A Tendered when it was clear that the exposure to their
 23 insured, GAF, was in excess of their policy limit.

24 Q Once again, as it related to searching for additional

1 policy.

2 Q If you were acting as the third-party administrator,
 3 would you have said "I can't put a value on this until
 4 I depose the plaintiffs"?

5 MR. GOLDMAN: Objection, your Honor.

6 THE COURT: Sustained as to the form. It's
 7 not what he would do. It's what a reasonable person in
 8 that position would have done.

9 (By Mr. Pritzker)

10 Q Was it unreasonable for Crawford & Company to put a
 11 value on the case before it had all of the underlying
 12 medical documentation?

13 A No, it is not unreasonable.

14 Q Would it have been unreasonable for Zurich to have
 15 adopted the recommendations of Crawford & Company --

16 MR. GOLDMAN: Objection, your Honor.

17 THE COURT: Let him finish the question.

18 (By Mr. Pritzker)

19 Q Would it have been unreasonable for Zurich to have
 20 adopted the recommendations of Crawford & Company
 21 without requiring review of the underlying medical
 22 information of Mrs. Rhodes.

23 MR. GOLDMAN: Objection, your Honor.

24 THE COURT: I am going to sustain it, unless

1 you make clear what the recommendations are that you're
 2 referring to.
 3 (By Mr. Pritzker)
 4 Q Do you know when Crawford & Company recommended first
 5 reserving the case at the policy limits of \$2 million?
 6 A April of '02, if I recall correctly.
 7 Q Do you know when Zurich actually reserved the case at
 8 the policy limits of \$2 million?
 9 A It's memory; December of '03.
 10 Q Did Zurich need to wait until December of '03 to
 11 reserve the case at the policy limits of \$2 million?
 12 MR. GOLDMAN: Objection, your Honor.
 13 THE COURT: Sustained as to the form.
 14 (By Mr. Pritzker)
 15 Q Do you have an opinion as to whether or not the timing
 16 of Zurich's reserving at \$2 million was reasonable?
 17 A Yes, I do.
 18 Q What is that opinion?
 19 A It was not unreasonable -- excuse me, it was
 20 unreasonable. Pardon me.
 21 Q Why?
 22 A Because you reserve, you post a reserve when it is
 23 clear that there is an exposure on a file. In this
 24 case, the policy limit exposure was clear early on, as

1 Q I understand that. Is that a reasonable industry
 2 standard?
 3 A Yes, it is.
 4 Q In your opinion, did Zurich follow it in this case?
 5 A No, they did not.
 6 Q Why not?
 7 MR. GOLDMAN: Your Honor, I'm going to
 8 object. There is nothing in Mr. Kiriakos' report that
 9 deals with this subject.
 10 THE COURT: The subject being what, Mr.
 11 Goldman?
 12 MR. GOLDMAN: Zurich's policy, internal
 13 policies or reserve setting, for that matter, also.
 14 MR. PRITZKER: I'll find it, if you give me a
 15 moment, your Honor.
 16 THE COURT: All right. Are the best
 17 practices in evidence?
 18 MR. PRITZKER: Yes.
 19 THE COURT: I'm not quite clear why I need
 20 him to paraphrase what the best practices are, so why
 21 don't we move on.
 22 MR. PRITZKER: Okay.
 23 (By Mr. Pritzker)
 24 Q I believe you just testified that the best practices,

1 early as April.
 2 Q How could it be clear if you don't have the medical
 3 information about Mrs. Rhodes' accident and injuries?
 4 A As I said earlier, I have enough information to make
 5 that determination just by what my adjuster is telling
 6 me because of the limitations of my policy and the size
 7 of the case.
 8 Q Were you familiar with best practices documents of both
 9 Zurich and Crawford?
 10 A Yes, I was.
 11 Q Do you know what the best practices of Zurich required
 12 as far as the timing of making reserve, of reserving a
 13 case?
 14 MR. GOLDMAN: Objection, your Honor.
 15 THE COURT: Overruled.
 16 A Yes, I do.
 17 (By Mr. Pritzker)
 18 Q What were they?
 19 A Posting a reserve to ultimate value when it is noted,
 20 you know, known to the file, that there's an exposure
 21 to that, but basically you're posting a reserve that is
 22 reflective of the exposure at the time you're aware of
 23 it. I'm paraphrasing, Mr. Pritzker. I'm putting in my
 24 own words.

1 whatever they say, are reasonable within industry
 2 standards?
 3 A Yes, they are.
 4 Q As you understand those industry standards?
 5 A Yes, they are.
 6 Q Do you know whether or not Zurich followed, adhered to
 7 their own standards?
 8 MR. GOLDMAN: Objection, your Honor. That's
 9 not part of the opinion.
 10 MR. PRITZKER: I think it is.
 11 THE COURT: Well, I will allow it. You may
 12 answer.
 13 A Mr. Pritzker, could you repeat the question?
 14 (By Mr. Pritzker)
 15 Q Do you know, in your opinion, did Zurich follow its own
 16 standards, you've indicated are the same as industry
 17 standards, in reserving the \$2 million on the Rhodes
 18 case?
 19 A No, they did not.
 20 Q Why not?
 21 A They did not post the reserve in a timely fashion based
 22 upon the exposure in the case.
 23 Q Do you know that a dispute arose between Zurich and AIG
 24 as to who was to pay defense costs?

1 A Yes, I do.
 2 Q Do you know when that dispute first arose?
 3 A When the formal tender was forwarded and received, and
 4 that would have been in March of '03 -- excuse me --
 5 '04.
 6 Q Do you know whether or not the dialogue actually
 7 occurred earlier than that?
 8 A As far as I've been informed, yes, it did.
 9 Q Okay. You were informed that it occurred when?
 10 A As early -- there was discussion about a tender in
 11 November of '03.
 12 Q Do you know whether or not that started the dialogue
 13 about who was going to pay the defense costs?
 14 MR. GOLDMAN: Objection. Leading.
 15 THE COURT: Sustained. Why don't you use a
 16 hypothetical. I've heard the evidence, so it's not
 17 helpful for me to have him attempt to recollect it,
 18 perhaps imperfectly. So if you want to use a
 19 hypothetical, use a hypothetical, and then if that
 20 mirrors the evidence, then I'll accept the opinion or
 21 at least consider it.
 22 (By Mr. Pritzker)
 23 Q If you take as a given, Mr. Kiriakos, the fact that
 24 when Zurich first attempted to tender, a dialogue

1 Q Have you run into situations in your practice where
 2 issues of who's going to pay defense costs have arisen?
 3 A Absolutely.
 4 Q When that happens, what is your opinion of how it
 5 should be resolved?
 6 A The insurer still has an obligation to investigate,
 7 evaluate and negotiate. At the same time they can
 8 bicker between themselves of who is going to pay
 9 defense costs. It doesn't change the tender timing, it
 10 should not have changed, and it shouldn't have changed
 11 the acceptance of the tender. That's a separate issue.
 12 Q And how should the two insurers have resolved that?
 13 A They could have litigated it.
 14 Q Or?
 15 A Or arbitrated it.
 16 Q Or?
 17 A Or come to some sort of arm's length agreement. I
 18 mean, just agree to, you know, disagree for now.
 19 Q What was the effect -- strike that.
 20 What would be the effect of a -- strike that.
 21 What would be the effect of a dispute between
 22 a primary and a excess carrier if in fact -- let me try
 23 it again.
 24 Do you have an opinion as to what the effect

1 occurred between Zurich and AIG about who was going to
 2 pay the defense costs, would that be an appropriate
 3 reason to delay acceptance of the tender?
 4 A No, it is not.
 5 MR. GOLDMAN: Objection, your Honor.
 6 THE COURT: Is an objection?
 7 MR. GOLDMAN: Objection. I believe it
 8 mischaracterized -- it wasn't a pure hypothetical. It
 9 was a hypothetical trying to reference things, evidence
 10 in this case improperly or to summarize evidence.
 11 THE COURT: What do you contend to be
 12 inaccurate?
 13 MR. GOLDMAN: That Zurich was attempting to
 14 tender.
 15 THE COURT: They weren't?
 16 MR. GOLDMAN: They did.
 17 THE COURT: Well, AIG has a different view of
 18 it. But in any event, I think we all know what
 19 happened, so the characterization is of no particular
 20 consequence to me. You may proceed.
 21 (By Mr. Pritzker)
 22 Q What is the basis of your opinion?
 23 A Based upon my knowledge between the primary and the
 24 excess of what should have actually occurred.

1 might be if an excess and primary carrier do not
 2 reserve the dispute for a later time but rather try to
 3 resolve that dispute before a tender is accepted?
 4 MR. COHEN: Objection, your Honor. Calls for
 5 a legal conclusion.
 6 MR. GOLDMAN: Objection.
 7 THE COURT: Sustained.
 8 (By Mr. Pritzker)
 9 Q Do you know that in fact there was a dispute between
 10 AIG and Zurich from the documents that you reviewed --
 11 A Yes, I do.
 12 Q -- over defense costs?
 13 A Yes, I do.
 14 Q And do you know what the effect of that dispute was?
 15 MR. GOLDMAN: Objection, your Honor. That's
 16 asking the plaintiffs to --
 17 THE COURT: I'm not sure that's his
 18 expertise. I've heard the evidence. You may move on.
 19 (By Mr. Pritzker)
 20 Q In your experience in the insurance field, should a
 21 dispute between an excess and primary carrier over
 22 defense costs delay the resolution of a tender?
 23 MR. GOLDMAN: Objection.
 24 THE COURT: I think what he said to me is --

1 my understanding of what he said to me is that once
2 Zurich tendered its limits, AIG should have immediately
3 accepted the tender and resolved separately the dispute
4 with regard to defense costs.

5 THE WITNESS: Correct, your Honor.

6 THE COURT: I think I get that. In terms of
7 what consequence it had pragmatically on this case, I
8 think that's beyond his expertise. So you may proceed.

9 MR. PRITZKER: I agree.

10 (By Mr. Pritzker)

11 Q Did you become aware of the timing of settlement
12 discussions?

13 A Yes, I did.

14 Q Were you aware of when the first offer from the
15 defendants occurred?

16 A Yes, I am.

17 Q When was that?

18 A August of '04.

19 Q Were you aware that there was an offer of Zurich's
20 policy limits prior to August --

21 MR. COHEN: Objection. Leading.

22 MR. GOLDMAN: Objection.

23 (By Mr. Pritzker)

24 Q Were you aware of any other offer?

1 THE COURT: Okay. Go ahead.

2 A Prior to August of '04, was I aware of another offer?

3 Q Yes.

4 A No, I was not.

5 Q Okay. What offer were you aware of in August of '04?

6 A That AIG had extended an offer of 2.75 million.

7 Q Do you have an opinion, given what you know of the
8 Rhodes claim file, of both Zurich and AIG at that time,
9 whether or not that was an appropriate offer?

10 A Yes, I do.

11 Q What is that opinion?

12 A The offer was outrageously low.

13 Q Why do you say that?

14 A Negotiation takes on a dynamic in every case, Mr.

15 Pritzker. In this case, if that offer had been made
16 sometime before -- we go back. There's been an awful

17 long delay in this case, and over a year from the time
18 that demand was received and much further than that,
19 when you consider everyone's valuation of the case.

20 Having said that, and approximately a month before

21 trial -- and now, again, my exact dates, I'm not sure -

22 - it becomes adversarial when it's that low, given that

23 the case value, as outlined by the claims handler, if

24 you will, at the time, in a conference call with GAP,

1 was almost three times that.

2 MR. COHEN: I'm not sure that his answer is
3 continuing to be responsive to the question, your
4 Honor.

5 THE COURT: Overruled.

6 A Should I continue?

7 (By Mr. Pritzker)

8 Q Yes, please.

9 A Okay. If you consider for a moment that negotiation,
10 as I said, takes on that dynamic, you're now creating,
11 instead of being favorable -- I'm not saying offer your
12 target range, Mr. Pritzker. I don't mean that at all,
13 okay? You always start lower than that, but the timing
14 is everything in any negotiation.

15 This late in the game, if you will, too low
16 is adversarial, okay? Just the same way, you've got to
17 give yourself room to resolve. So if you have the case
18 evaluated in the mid-6 million dollar range, you
19 wouldn't start one third that, not a month before
20 trial.

21 Q Let's back up for a minute.

22 A Sure.

23 Q What is the requirement for AIG as to when they start
24 working on this claim file in relation to when the

1 tender occurred?

2 A They are separate.

3 MR. COHEN: Your Honor, I'd like to object on
4 the grounds that we've heard nothing that he has any
5 experience working for an excess insurer. I don't
6 believe he's qualified to testify as to the claim
7 practices of an excess insurer, and I'd like the
8 opportunity to voir dire him as to that.

9 THE COURT: I will allow it. I thought he
10 had said he had done some excess work, but I will --

11 MR. PRITZKER: He did, your Honor.

12 THE COURT: I'll allow you to do a brief voir
13 dire as to that issue.

14 VOIR DIRE EXAMINATION

15 (By Mr. Cohen)

16 Q Thank you, Mr. Kiriakos. During the several jobs that
17 you've held in insurance, have you ever worked for an
18 excess claims department?

19 A An excess claims department? No, I have not.

20 Q And so therefore you've never had the opportunity to
21 handle any claims arising under an excess policy,
22 correct?

23 A That's not correct at all, sir.

24 Q Well, if you never worked for an excess claims

1 department, how did it come about that you were
 2 handling excess claims?
 3 A Obviously, you've never worked within an insurance
 4 company, because 20 years ago, they didn't have it
 5 broken out like that. So when I was at Commercial
 6 Union at a corporate level, I had primary and excess
 7 cases. I said that earlier.
 8 Q When you worked for Commercial Union from 1986 to 1990
 9 -- so that's ended 17 years ago -- you worked on some
 10 cases that involved excess insurance policies.
 11 A Absolutely.
 12 Q And how many cases were there?
 13 A You're asking for a number I can't come up with. I
 14 couldn't -- every one of the paraplegic and
 15 quadriplegic cases. There was a primary SIR, there was
 16 a primary policy, and there was an excess policy.
 17 There were aggregates, and I was in charge of them
 18 nationally and for British Tire & Rubber, globally.
 19 Q I'm not asking you whether the cases you worked in
 20 involved primary policies and excess policies. What I'm
 21 asking you is whether your employer issued any excess
 22 paper on any of the cases that you actually worked on.
 23 A The employer itself? I can't recall.
 24 MR. COHEN: Your Honor, note my objection.

1 A Yes.
 2 Q And what is that opinion?
 3 A They become involved as soon, as early on as when
 4 there's a potential exposure into that layer.
 5 Q Now, are they obligated to become involved?
 6 A Only once they receive notice, Mr. Pritzker.
 7 Q Okay. Notice being different from tender?
 8 A Yes, it is, sir.
 9 Q Are they obligated to do anything prior to actual
 10 tender?
 11 A It's no different than any other claim. A claim is a
 12 claim. Their obligation is to investigate, evaluate,
 13 and work toward the disposition and resolution on
 14 behalf of their policyholder.
 15 MR. COHEN: Your Honor, objection and motion
 16 to strike. I think that calls for a legal conclusion.
 17 THE COURT: Overruled.
 18 (By Mr. Pritzker)
 19 Q On what do you base that opinion?
 20 A Based upon my own claims experience, once you forward
 21 notice, okay, to any insurer, okay, there's a duty to
 22 protect the interests of your policyholder.
 23 Now, in this case there's layers, and layers
 24 of insurance to the policyholder when they purchased it

1 MR. GOLDMAN: My objection.
 2 THE COURT: Okay. The objection on Daubert-
 3 Lanigan is overruled. Again, it goes to weight, not to
 4 admissibility. I'm satisfied that he's handled enough
 5 excess claims, albeit not in a separate excess claims
 6 department, for him to offer an opinion. I will
 7 consider your arguments with respect to the weight with
 8 which I give it.
 9 With that, you may proceed.
 10 (By Mr. Pritzker)
 11 Q Mr. Kiriakos, in your work for primary insurers --
 12 THE COURT: Keep your voice up, Mr. Pritzker.
 13 MR. PRITZKER: I'm sorry.
 14 (By Mr. Pritzker)
 15 Q In your work for primary insurers, did you also have
 16 occasion to interface with excess carriers?
 17 A Absolutely.
 18 Q And has that continued from the time that you left
 19 Commercial Union to the present time?
 20 A Absolutely.
 21 Q Okay. And as a result of that, have you become
 22 familiar generally with the industry practices as it
 23 relates to when an excess insurer becomes involved in a
 24 claim where their excess layer appears to be exposed?

1 should be seamless, if you will. There shouldn't be
 2 any bump in the road. When there's an exposure from
 3 one layer to the next, it should be two carriers
 4 working together.
 5 In this case -- I'm going to focus on the
 6 Rhodes case -- we have a value of a case in excess of
 7 the primary layer. They receive notice. The open up a
 8 file. They can conduct the same investigation and ride
 9 shotgun, if you will, over the primary carrier's
 10 shoulders, receiving copies of everything. That's part
 11 of their investigation; to include coverage analysis,
 12 to include liability reporting, to include damages.
 13 They don't have to wait for a formal tender. And then
 14 at that point, they're postured and ready for the
 15 tender because they have a complete file.
 16 Q Can they actually start conducting settlement
 17 negotiations prior to the tender?
 18 A They have to work with the primary on that, ask the
 19 primary for its money, or agree that they're going to
 20 step into their shoes and take over the case.
 21 Q And if that doesn't happen?
 22 A Then, contractually, they're going to need it in
 23 writing.
 24 Q Does that in your opinion affect their ability to be

1 ready for a tender when it occurs?
 2 A No, it does not.
 3 Q Did you ever -- first of all, are you familiar with the
 4 bidding that occurred when it occurred in this case?
 5 A The bidding?
 6 Q The negotiation for settlement.
 7 A As I said, the initial offer. I'm going to assume
 8 that's when it started. If you're going to use the
 9 demand as the starting point, that was sometime before.
 10 Q Okay. Let's start with the offer that you remember in
 11 August of '04.
 12 A Correct, sir.
 13 Q Do you remember any other offers that the defendants
 14 made between August of '04 and the end of '05?
 15 A There were several.
 16 Q What was the next one you remember?
 17 A The next one I recall is a \$3.5 million offer. I think
 18 we heard someone testify that Mr. Rhodes testified to
 19 that earlier.
 20 Q Do you have an opinion whether or not a \$3.5 million
 21 offer was a good-faith -- strike that -- was a
 22 reasonable offer in August of '04?
 23 A No, it was not.
 24 Q Why not?

1 you recall, we had a motion to strike an affidavit that
 2 Mr. Kiriakos filed. The expert interrogatory answers
 3 were never actually supplemented. I'd like to read to
 4 you what he actually said in his -- what actually the
 5 Rhodesees said in their expert interrogatory answers,
 6 if I may.
 7 MR. PRITZKER: Why isn't this cross-
 8 examination?
 9 THE COURT: First of all, I think I've read
 10 them as part of the motion to strike summary judgment.
 11 In any event, I'm aware of the issue, and you can
 12 address it on cross-examination.
 13 MR. COHEN: Thank you, your Honor.
 14 A I'm sorry, Mr. Pritzker, I forgot the question.
 15 (By Mr. Pritzker)
 16 Q So did I. Your settlement value range was what?
 17 A Six to \$8 million.
 18 Q Was that a settlement value that you put on as of the
 19 time of trial?
 20 A No.
 21 Q When was the settlement value targeted towards?
 22 A Early on in the file I saw the exposure to that level.
 23 Because of all the experience I have in these type of
 24 cases, I could evaluate it at that level. The

1 A Once again, sir, we're on the eve of trial and now
 2 other factors come into the case that impact the case,
 3 and they're both subjective and objective. The subject
 4 of one, they're as simple as the sympathy of the
 5 plaintiff and the plaintiff's family; to my opponent --
 6 you, Mr. Pritzker; to the objective factors, which are
 7 going to be the gearing up for trial, which is
 8 expensive; the interest that's accrued to date and it
 9 continues to run. So if I evaluated the case sometime
 10 ago at X, now I'm at X plus Y, so my evaluation is
 11 going up, yet the offers that are that low, the
 12 disparity keeps widening, so that's what makes the
 13 offer outrageously low.
 14 Q Did you personally ever attempt to put a settlement
 15 value on the Rhodes case?
 16 A Yes, I did.
 17 Q What was that value?
 18 A Six to \$8 million.
 19 Q And was that a value that you put on as of the time of
 20 trial?
 21 A No.
 22 Q What was it?
 23 MR. COHEN: Your Honor, this testimony is
 24 conflicting with his expert interrogatory answers. If

1 valuation from a negotiating standpoint would have come
 2 sometime around the summer of '03, that value. It is
 3 not the trial value in the potential verdict value.
 4 Q Would the trial or potential verdict value be more or
 5 less?
 6 A More.
 7 Q Why?
 8 A Well, first of all, we're not even arguing liability.
 9 As I recall, liability was stipulated. And secondly,
 10 there are those factors I've added in earlier that I
 11 have to factor in. The big one is interest, given that
 12 over two years worth of time has gone on. If you
 13 factor in interest, my settlement range moves from
 14 7.885 million -- I'm doing it off the top of my head,
 15 okay -- to 10.8, 10.9 million, because it's a real
 16 issue now with trial here. There's interest facing the
 17 value of the case.
 18 Q If you take into account, Mr. Kiriakos, the entire
 19 timeline of this case as you know it, from the date of
 20 the accident to the final payment from AIG, how would
 21 you describe the manner the Rhodes claim was handled by
 22 Zurich and AIG?
 23 MR. GOLDMAN: Objection, your Honor.
 24 THE COURT: Overruled. I'll allow it.

1 A Unreasonable, unnecessary in the length of delays, and,
2 quite frankly, especially at the end when everyone
3 could have done the right thing, the offers were
4 outrageous, so I put all three together.

5 (By Mr. Pritzker)

6 Q Are you familiar with the verdict that was rendered by
7 the jury in this case?

8 A Yes, I am.

9 Q And are you familiar with the offers that were made by
10 AIG to settle the case after verdict?

11 A Yes, I am.

12 Q Do you have an opinion as to whether or not those were
13 reasonable offers?

14 A Yes, I do.

15 Q What is that opinion?

16 A The opinion is they were unreasonably and outrageously
17 low.

18 Q Why?

19 A You have a verdict now of \$12 million. I'm rounding
20 off, sir. It's easier for me to do the math. The
21 offer, I recall reading, was 7 million, which is
22 roughly 55 percent. As a former home office person, I
23 also know the potential success of an appeal, okay? I
24 know that it's very limited, and I know my chances of

1 Q And how did that impact on your opinion?

2 A That just isn't proper claims handling. You don't do
3 that. You don't coerce someone to release another case
4 because of your underlying case you want to settle.

5 Q Now, you made reference several times to the
6 adversarial posture of at least some of the offers that
7 the defendant insurers had made. Is that an improper
8 way to proceed?

9 A After you lose, yes, okay, with regard to the verdict.
10 Before that, everything's a timeline, Mr. Pritzker. I
11 have no problem starting out and holding a tough line
12 if I'm a year before trial. Eve of trial, I don't have
13 as much leverage, so I'm going to have to concede a
14 little bit more. So to just take an adversarial
15 position isn't good old-fashioned claims handling. No,
16 it's not.

17 Q Are you familiar with the standards that require an
18 insurer to effectuate a reasonable settlement, fair and
19 reasonable settlement, once liability is clear?

20 A Yes, I am.

21 Q In your did either Zurich or AIG meet that standard?

22 MR. COHEN: Objection. I think that's the
23 ultimate issue that he shouldn't be able to testify to
24 and he's also not qualified.

1 success are very limited. Having said that, I factor
2 that in. So if I have a 90 percent chance of loss, my
3 total settlement value is 90 percent of the total value
4 of the case.

5 That said, I can use as leverage --
6 negotiation is concession and leverage -- leverage that
7 my defense counsel is telling me I've got better than a
8 10 percent chance. I've got a good shot of appeal. So
9 I may offer 80 or 85 percent to negotiate it. But
10 ultimately 55 percent is unreasonably low. It comes to
11 this whole case of adversarial posturing between the
12 insurers and the plaintiff.

13 MR. COHEN: Your Honor, motion to strike on
14 the grounds that he has no expertise to evaluate the
15 merits or lack thereof of the appeal.

16 THE COURT: I'm going to overrule it, but I
17 do recognize there are certain assumptions implicit in
18 his opinion, which I will take into account. So you
19 may proceed.

20 (By Mr. Pritzker)

21 Q Did you take into account, Mr. Kiriakos, that the \$7
22 million offer also included a release of this case, of
23 the 93A claim?

24 A Yes, I did.

1 MR. GOLDMAN: I join in that.

2 THE COURT: The ultimate issue is of no
3 consequence because we allow the ultimate issue to be
4 testified to in a civil case.

5 I will allow him to testify as to whether
6 liability was reasonably clear in this case. That has
7 to be implicit in his decision anyway, in his opinions.
8 So I will him to be explicit with regard to it. You
9 may proceed.

10 (By Mr. Pritzker)

11 Q Did you understand that liability was reasonably clear?

12 A Yes.

13 Q From what time forward?

14 A Liability as it pertains to the claims interpretation
15 or the statutory interpretation?

16 Q Let's talk only about the claims interpretation.

17 A Claims interpretation. Liability was reasonably clear
18 that GAF was responsible. And their entities that they
19 contractually held within the first thirty days, we can
20 extend it out even nine months, to September of '02.
21 But after that, from that point on, liability was
22 reasonably clear.

23 Q And in your opinion did either Zurich or AIG try to
24 effectuate a reasonable settlement once liability was

1 clear?

2 A No, they did not.

3 MR. PRITZKER: I have no other questions.

4 THE COURT: Okay. You may proceed with

5 cross.

6 CROSS-EXAMINATION BY MR. COHEN:

7 Q Let's start by talking about your background a little

8 bit, Mr. Kiriakos. You're not a lawyer.

9 A No, I'm not.

10 Q You've never tried a case.

11 A No, I have not.

12 Q You never litigated a case.

13 A No, I have not.

14 Q And your experience has been in various insurance

15 related jobs since you graduated from college back in

16 1980, correct?

17 A That's partially correct. I've also founded two

18 businesses.

19 Q You're being paid for your testimony here today.

20 A Yes, I am.

21 Q And you have given a number of seminars in which you

22 describe what proper claims handling, what improper

23 claims handling practices is.

24 A Yes, I have.

1 handling expert or an expert in anything else for that

2 matter?

3 A Other than Superior Court, is that what you're asking?

4 Q That's what I'm asking.

5 A I just want to be clear, sir. Yes, I have testified in

6 a district court case.

7 Q In the United State District Court or in the State

8 District Court?

9 A State District Court. Salem District Court, to be

10 exact.

11 Q What was the State District Court case?

12 A It was against Commerce Insurance. I do not recall the

13 name of the plaintiff. It had to do with a motor

14 vehicle and a garaging issue and a contractual issue.

15 It was a 93A claim.

16 Q And you testified on behalf of the plaintiff in that

17 case?

18 A Yes, I did.

19 Q Now, looking at the list of your expert testimony in

20 Superior Court of the nine cases that you've testified

21 in Superior Court before today, including today, on

22 seven occasions you testified for the plaintiff and two

23 for the defense, right?

24 A Yes, sir.

1 Q And you've told us that you've published some materials

2 in connection with those seminars, right?

3 A Yes, I have.

4 Q In addition to that, you said that you published three

5 other publications and you didn't explain what they

6 were. What were they?

7 A No, I was referring to the same thing, sir. It was

8 through the Mass. Continuing Legal Education Program,

9 Mass. Bar.

10 Q You gave the same seminar three times and you produced

11 some more materials each of those three times.

12 A Similar but not the same.

13 Q And the last one you added on some details, right?

14 A No.

15 Q No?

16 A I have reported three different types of cases and the

17 handling of three different types of cases, and I gave

18 an example in my publication of the tripartite or

19 claims process and the case itself. All the parties,

20 of course, whited out.

21 Q And you said you testified in each cases in Superior

22 Court before today as a claims handling expert, right?

23 A Correct.

24 Q Have you ever testified in any other court as a claims

1 Q And the first case that you have listed is a case

2 called *Courtchesne v. Holyoke Mutual*?

3 A Yes, sir.

4 Q And you testified for the defendant in that case?

5 A Yes, I did.

6 Q And that was one of the mutual companies that you work

7 with at Adjusters Outside or Outside Adjusters?

8 A Adjusters Out-Standing. I'm trying remember if that

9 was Holyoke Mutual. Yes, it was.

10 Q So you testified for one of your clients then?

11 A They weren't a client. There was no retention. There

12 was none of that relationship.

13 Q But at some point they were a client of yours.

14 A After that case, yes.

15 Q What was the subject matter of that case?

16 A You're asking me to remember twelve years ago.

17 MR. PRITZKER: Objection, your Honor.

18 THE COURT: Overruled.

19 A It was, as I recall, it was a bad-faith case in a 93,

20 173D violation. And it was a UM case, a Mass. auto

21 case.

22 Q So that wasn't a liability insurance case at all,

23 right?

24 A Excuse me?

1 Q That wasn't a liability insurance case. It was a
 2 first-party case, right?
 3 A It was a first-party case against Holyoke, yes.
 4 Q And the case that you did in district court for the
 5 plaintiff, what kind of 93A case was that?
 6 A That was a garaging issue and the young man had been
 7 accused of misrepresentation and fraud.
 8 Q Again, a first-party case, not a third-party liability
 9 case?
 10 A Correct.
 11 Q And in *Inineri v. Commerce Insurance Company* you
 12 testified for a plaintiff?
 13 A Hm-hmm.
 14 Q And what type of 93A violation was alleged in that
 15 case?
 16 A It was an inadequate offer on a bodily injury or third-
 17 party case.
 18 Q Do you recall what the nature of the injury was?
 19 A It was over ten years ago; no, I do not.
 20 Q The next case is *Litchfield v. Arbella*. You testified
 21 for the plaintiff. Do you recall what that was all
 22 about?
 23 A That was again an underinsured motorist claim, a first-
 24 party case. They had already settled the tort case and

1 Q And you testified for the plaintiff in that case and
 2 there was a defense verdict, correct?
 3 A Correct.
 4 Q And then there was the *Resendez v. Liberty Mutual* case.
 5 What was that case about?
 6 A That was a construction site loss. It was personal
 7 injury, third-party, and it was a multi-million dollar
 8 underlying verdict.
 9 Q And the issue in that case was whether the appeal was
 10 brought in good faith. Do you recall that?
 11 A Yes, you're absolutely correct, sir.
 12 Q And you testified for the plaintiff and there was a
 13 defense verdict on the 93A case on that case as well,
 14 right?
 15 A Correct.
 16 Q And the *Tallent* case, that was another case that
 17 involved the propriety of an appeal and you testified
 18 for the plaintiff in that case as well.
 19 A Yes, I did, sir.
 20 Q And the last case on your list is *Bobick v. CNA*. And
 21 you testified for the defense in that case, right?
 22 A Correct.
 23 Q And I take it that also involved whether an offer was
 24 reasonable, right?

1 it was a soft-tissue injury.
 2 Q And the defense, the other side, the defense prevailed
 3 in that case, right?
 4 A Yes.
 5 Q And then you testified in a case called *McNeil v.*
 6 *Quincy Mutual Insurance Company*. What was that case
 7 about?
 8 A That was a personal injury case. It was a
 9 construction, general liability. It was a fall through
 10 a roof. It was a valuation; it was a third-party case.
 11 Q Was it for failure to settle in time?
 12 A Yes.
 13 Q Did it involve paralysis or anything such as that?
 14 A I cannot recall. I do not believe so, sir.
 15 Q And you testified for the plaintiff and there was a
 16 defense verdict in that case.
 17 A Correct.
 18 Q Next case you say you testified in was *Broadbus v.*
 19 *Berkshire Mutual*.
 20 A Hm-hmm.
 21 Q What was that case about?
 22 A That was again a first-party at -- the primary level of
 23 insurance had been 200,000 -- excuse me -- 20,000. The
 24 UM was 500. It was a valuation, inadequate offer.

1 A Correct.
 2 Q And there was a reported decision under 93A in that
 3 case. Are you aware of that?
 4 A Correct.
 5 Q Now, currently you are a workers comp. adjustor for a
 6 company called Broadspire which is part of Crawford,
 7 right?
 8 A Yes, they are.
 9 Q And in that case, you're not doing liability cases at
 10 all, right?
 11 A I have taken on two liability cases in the last two
 12 weeks, construction losses.
 13 Q So most of your work for Broadspire, I take it, is
 14 workers comp?
 15 A Yes. And just three national accounts is all I'm
 16 handling.
 17 Q And before that you were a temp, right?
 18 A Yes, to use the phrase of the day, correct.
 19 Q And you've had a couple of different assignments; they
 20 were short-term assignments, right?
 21 A Yes, sir.
 22 Q And that was just a six-month job you were temping for,
 23 right?
 24 A Yes, sir.

1 Q And then prior to that, you worked for about a year
 2 with this mediation company, Equimar which you had
 3 helped found originally.
 4 A Correct.
 5 Q And you were an administrator in that job, right?
 6 A No, I was a director and equity partner.
 7 Q Were you mediating any cases in that job?
 8 A No, I did not.
 9 Q So you didn't involved in the mediation and you weren't
 10 handling claims in that job, either, right?
 11 A Correct.
 12 Q And prior to that, you were in a workers comp office
 13 for Hartford, right?
 14 A Yes.
 15 Q That was from December '03 to April 2005. That job
 16 lasted I guess about eighteen months, right?
 17 A Correct.
 18 Q And you told us that in that job you worked for a few
 19 cases involving what's called Part B of the workers
 20 compensation policy, the employer's liability part?
 21 A I never said a few. You've got it backwards. A
 22 hundred and seven out of out a hundred and twenty were
 23 employer liability. I was the only person in the
 24 country.

1 claims handling would have been task assignment.
 2 Q What do you mean by "task assignment"?
 3 A What you have just described, sir. Go out and take a
 4 statement, interview witnesses versus a full handling
 5 of a claim.
 6 Q So the minority of your work for Adjusters Out-Standing
 7 involved a full handling of the claim and evaluating
 8 the claim and putting a number on it and trying to
 9 settle the claim, right?
 10 A I guess I'd have to look for the word "minority" and
 11 what you exactly mean because --
 12 Q I mean less than fifty percent.
 13 A Yes, less than, because we handled over a hundred
 14 thousand cases in eleven years.
 15 Q Wow. So you handled personally over a hundred thousand
 16 cases?
 17 A No. I said "we" handled over a hundred thousand cases
 18 in eleven years.
 19 Q How many cases, by the way, have you personally handled
 20 yourself in your career as an insurance adjustor?
 21 A If I had to put a number, a conservative number, 20
 22 cases per day. And I have to remove out of twenty-six
 23 and a half, almost 27 years, two years where I was with
 24 an ADR firm; for 25 years at 20 a day at 250 work days

1 Q Well, we can go back and look at what you actually
 2 testified to. In any event, for eleven years before
 3 that you were working for Adjusters Out-Standing,
 4 right?
 5 A Correct.
 6 Q And that was a company that you founded?
 7 A Yes.
 8 Q And the business o Adjusters Out-Standing was
 9 essentially outside adjustment, right?
 10 A Independent claims adjusting, yes, sir.
 11 Q And basically what you would do, or your company did,
 12 in that job is, if there was an accident, you got the
 13 client, and they would ask to go out and take a look at
 14 the accident scene, take photographs, interview
 15 witnesses, take a reported statement maybe from
 16 somebody. That was basically the nature of your
 17 business; was it not?
 18 A That was only a piece of the business. Task assignment
 19 was one end; full assignment was the other. And I said
 20 that under direct.
 21 Q Well, do you recall testifying any differently at any
 22 testimony that you've given under oath?
 23 A Before today, I can't recall saying anything
 24 specifically different, no. And a lion's share of our

1 a year, approximately 125, 130,000 direct handling.
 2 Then there's supervision on top of that, and
 3 management.
 4 Q So you directly handled in 25 years 125,000 different
 5 claims. Is that your testimony?
 6 A Yes, it is.
 7 Q If we can assume an average workday of seven hours a
 8 day, that's pretty fair, right?
 9 A I haven't worked seven hours a day, sir, since I was 21
 10 years old.
 11 Q How many hours a day have you typically worked for
 12 these insurance companies that you've worked for,
 13 setting aside your own businesses?
 14 A Presently, I'm --
 15 Q I'm not asking presently. Just on average for the
 16 insurance --
 17 A Before that? Hartford, 55 to 60 hours on a regular
 18 basis. AIG was no different. Commercial Union was no
 19 different, because it included 36 weeks of travel a
 20 year.
 21 As a road adjustor at Kemper Insurance,
 22 anything less than 50 hours was frowned, and it was
 23 pretty clear that that's the way it was from the day I
 24 came out of college.

1 Q Well, let's say you worked 50 hours a week Does that
2 sound fair --
3 A Okay, that's reasonable.
4 Q -- as a claims adjustor?
5 A Sure.
6 Q And you told us you work on 20 cases a day --
7 A Sure.
8 Q -- five days a week, so it would be a hundred cases a
9 week and 50 hours. So that comes out to an average
10 that you spent on these claims of 30 minutes, right?
11 A An average? Sure. If that's the breakdown you wish to
12 use, sure.
13 Q Do you think that a claims adjustor can do a very good
14 job of being on a claim for an average of 30 minutes?
15 A Just touching a file, just taking a phone call was
16 working on a claim. You may only work on two for eight
17 hours, but you're going to make a decision on 20 more.
18 You're making 20 decisions a day, minimally. Not all
19 decisions are financial either.
20 Q Now, you testified that you worked as a claims manager
21 for AIAC, right?
22 A Yes.
23 Q And that is a subsidiary of the American International
24 Group or AIG, right?

1 A As a third-party administrator, yes, sir.
2 Q All the jobs that you had after that have been in ADR
3 or as an outside adjustor in workers compensation
4 claims, right?
5 A Yes, it is, except for Hartford Insurance, like I said.
6 Q Okay. But Hartford, you told us you were in the
7 workers compensation group there, right?
8 A And I said the type of claims I was handling were
9 employer liability, predominantly handling claims.
10 Q Now, I'd like to turn to your testimony in response to
11 questions from Mr. Pritzker, and he asked you something
12 about what are an excess insurer's obligations with
13 regard to the investigation of a claim, or something to
14 that extent. Do you recall that?
15 A I recall it.
16 Q And in order to determine what the obligations of any
17 insurer are, it's important and crucial to look at the
18 insurance policy, right?
19 A Yes, sir.
20 Q And it's the insurance policy that sets forth what the
21 obligations are of the insurer with regard to defense
22 and investigation, right?
23 A Absolutely.
24 Q Now, did you review the National Union insurance policy

1 A Correct.
2 Q And in that job you worked as a third-party
3 administrator?
4 A Yes.
5 Q And, in fact, that was the entire business of AIAC at
6 the time was as a TPA for other either insurers or
7 self-insurers, I guess.
8 A They were a captive. We only did AIG work or work for
9 the AIG Group.
10 Q Okay. But what were they a third-party administrator
11 for?
12 A Insurers as part of the AIG -- they were part of the
13 AIG Group.
14 Q And what was your authority level at that job?
15 A As I recall, at one point it was policy limits; another
16 time it was 250. It went up and down more than once.
17 Q Do you recall it being a 150,000?
18 A Sir, it could have been. It's 17 years ago.
19 Q That was a long time ago, right? In fact, that as
20 actually your last job working directly for a liability
21 carrier, correct?
22 A They weren't a carrier.
23 Q They were handling claims for liability carriers,
24 right?

1 that's at issue in this case?
2 A I did some time ago; yes, I did, sir.
3 Q Okay. Do you recall what it said about National
4 Union's obligations to defend and indemnify claims?
5 A Specifically, no, I do not.
6 Q Do you recall generally what it was?
7 A Generally, no, I do not.
8 Q Wouldn't that be important to know before you answered
9 a question in court under oath as to what National
10 Union and AIGDC's obligations were with regard to the
11 investigation of claims?
12 A I answered the question. As I recall, it was
13 hypothetical with regard to an excess carrier's role.
14 Q So you don't know what National Union's obligations, if
15 any, were with regard to defense and investigation,
16 right?
17 A I read the document that you're holding some time ago.
18 I didn't read them last night.
19 Q Well, okay. Let me read it to you again and see if
20 that refreshes your recollection of what you read.
21 It's Exhibit 69 and it's the second page and third page
22 of the exhibit, Bates stamped numbers 001972 and
23 001973. And this is under Roman numeral "Defense."
24 MS. PINKHAM: If you'd like to look at it,

1 Mr. Kiriakos, it's in Plaintiffs' Volume No. 2.
 2 Q Take your time to get it out.
 3 A What page again, sir? I'm sorry.
 4 Q 001972 and 001973 and it's under the heading "Insuring
 5 Agreements" and Roman numeral II, which is entitled
 6 "Defense."
 7 (By Mr. Pritzker)
 8 Q And it says, does it not: We shall have the right and
 9 duty to defend any claim or suit seeking damages
 10 covered by the terms and conditions of this policy when
 11 -- and then it gives two headings. One is the
 12 applicable limits of insurance in the underlying
 13 policies listed in the schedule of underlying
 14 insurance, and the limits of insurance of any other
 15 underlying insurance providing coverage to the insured
 16 have been exhausted by payment of claims to which this
 17 policy applies; or, two, damages are sought for bodily
 18 injury, property damage, personal injury or advertising
 19 injury covered by this policy but not covered by any
 20 underlying insurance listed in the schedule of
 21 underlying insurance or any other underlying insurance
 22 providing coverage to the insured.
 23 Did I read that correctly?
 24 A Yes, you did, sir.

1 any claim made, suit brought or proceeding instituted
 2 against the insurer. We will, however, have the right
 3 and shall be given the opportunity to participate in
 4 the defense and trial of any claims, suits or
 5 proceedings relative to any occurrence which, in our
 6 opinion, may create liability on our part under the
 7 terms of this policy. If we exercise such a right, we
 8 will do so at our own expense.
 9 Did I read that correctly?
 10 A Yes, you did.
 11 Q And essentially what this policy is saying, is it not,
 12 is that in the instances and the circumstances
 13 presented by the Rhodes case, AIG had no obligation to
 14 investigate, correct?
 15 A According to this policy language.
 16 MR. PRITZKER: Objection, your Honor. The
 17 document speaks for itself.
 18 THE COURT: I'm sorry. Where do you see
 19 "duty to investigate"?
 20 THE WITNESS: It's in C: It says: We shall
 21 not be obligated to assume charge of the investigation.
 22 THE COURT: Okay. It's different from duty
 23 to investigate. But okay. I read it. So your
 24 question?

1 Q And, in fact, in the Rhodes case, the underlying
 2 insurance had not been exhausted by payment of claims
 3 at the time of the trial of the Rhodes accident case,
 4 right?
 5 A Correct.
 6 Q And at the time -- and the Rhodes case wasn't a claim
 7 for bodily injury that was covered by the National
 8 Union policy and was not covered by any underlying
 9 insurance, right?
 10 A Correct.
 11 Q And that's because the Rhodes claim was covered by the
 12 underlying Zurich policy, right?
 13 A Correct.
 14 Q So this Rhodes case at the time of the trial didn't
 15 involve either one of the situations in which National
 16 Union assumed any duty to defend, right?
 17 A At the time of what, the underlying trial?
 18 Q At the time of the trial of the accident case in 2004,
 19 right?
 20 A Based on these two conditions, no, it did not.
 21 Q And then if you look at the next page, under subheading
 22 C, it says: In all instances, except A above -- and I
 23 just read A above -- we will not be obligated to assume
 24 charge of the investigation, settlement, or defense of

1 (By Mr. Cohen)
 2 Q So you agree that per the terms of the policy in this
 3 case, AIG, before the trial of the accident case, did
 4 not have any duty to perform any investigation, right?
 5 MR. PRITZKER: Objection.
 6 THE COURT: I'll allow it.
 7 A I don't agree with you.
 8 (By Mr. Cohen)
 9 Q Okay. And before, you told us that the obligations of
 10 an insurer governed by the policy -- we read you the
 11 policy, and policy says no duty to assume charge of the
 12 investigation, but nonetheless you disagree, right?
 13 A But the word "duty," with regard to investigate this
 14 case, okay, knowing full well the exposure that existed
 15 into this layer, okay?. Investigation takes on many
 16 forms, sir. It may not be this comprehensive analysis.
 17 MR. PRITZKER: Your Honor, I move to strike
 18 as being not responsive to anything I asked.
 19 THE COURT: You asked the question. You
 20 asked for his interpretation of the language.
 21 MR. PRITZKER: Okay. Go ahead. Sorry. You
 22 can continue.
 23 A As I said, duty is different in the interpretation --
 24 I'm not saying the language of this policy isn't what

1 you just read, sir. But then duty and obligation to my
 2 policyholder, given the exposure that existed in this
 3 case, is to make sure they're covered, to make sure
 4 everything that's going on is supposed to go on. I'm
 5 going to ride shotgun. I didn't say I was going to
 6 bully them. I didn't say I wasn't going to do
 7 anything. I realize what the policy says. I didn't
 8 make a leap of faith with regard to coverage
 9 interpretation. I talked about from a handling
 10 practical sense in the second I gave that opinion
 11 earlier.

12 Q So your opinion is based on practicality, right?

13 A Practical knowledge, working knowledge within an
 14 industry.

15 Q And that's the industry that you hadn't worked on any
 16 liability claims since 1990, right?

17 A I don't agree with you. You're saying I haven't worked
 18 on a liability claim? That's absurd.

19 Q No, I didn't say you hadn't worked on --

20 A You did say that, sir. If you want to ask another
 21 question, please ask it.

22 Q You hadn't worked as a liability claims handler for any
 23 insurer since 1990, right?

24 A Obviously you didn't listen, because employer liability

1 A No, I don't. I have nothing in front of me.

2 Q I can get you a copy of that.

3 These are the second supplemental answers of
 4 the plaintiffs to expert interrogatories, correct?

5 A Yes, they are, sir.

6 Q And that's the opinion that you wrote?

7 A Yes, it is.

8 Q And I'd like for you to turn to page 9 of the answers
 9 to that document.

10 A Bear with me, sir, if you could. Yes, sir, I'm at page
 11 9.

12 Q Okay. Under Roman numeral VII, do you see that? It's
 13 about two-thirds of the way down the page.

14 A Yes, sir.

15 Q And I'm going to read it to you. It says: AIGTS, as
 16 an agent for National Union Fire Insurance Company,
 17 never extended a reasonable offer before or during
 18 trial. Based on the facts presented, AIG's conduct for
 19 case disposition was not only outside of acceptable
 20 industry practice, it was outrageous.

21 Based on all the materials reviewed, there is
 22 no question that a settlement value of this case was
 23 somewhere between 6 million and 8 million.

24 Did I read that correctly?

1 is part B of the policy. In monopolistic states, it's
 2 like handling a general liability loss. I said that
 3 that was a lion's share of my pending in a workers
 4 compensation department.

5 Q Okay. And that lengthy tenure that you had was from
 6 December of 2003 to April 2005, right?

7 A With that carrier, you're correct.

8 Q Now, let me turn to another issue, because I think we
 9 only have a few more minutes and we'll continue
 10 chatting I guess on March 7. But what I'd like to turn
 11 to is the expert opinion that you gave in this case as
 12 indicated in the plaintiffs' answers to expert
 13 interrogatories.

14 A Okay.

15 Q I assume that you've read over that document at some
 16 point, right?

17 A I wrote it and I read it, yes.

18 Q Okay. You wrote the answers to expert interrogatories?

19 A Absolutely.

20 Q So it's your report, right?

21 A Absolutely.

22 Q Your words?

23 A Yes, they are.

24 Q Do you have that in front of you?

1 A Yes, you did.

2 Q Is there anything in that interrogatory answer that
 3 says that it's your opinion that the settlement value
 4 of this case was only 6 to 8 million dollars in early
 5 2002?

6 A No, there is not.

7 Q In fact, the sentence immediately preceding the
 8 sentence that talks about the settlement value being
 9 between \$6 million and \$8 million, talks about what a
 10 reasonable offer would have been before and during
 11 trial, correct?

12 MR. PRITZKER: Objection, your Honor.

13 MR. COHEN: It's two sentences --

14 MR. PRITZKER: It's not the sentence. It's a
 15 different paragraph, your Honor.

16 THE WITNESS: I'm confused, sir. I'm sorry.
 17 I've lost your place, and I apologize.

18 (By Mr. Cohen)

19 Q Okay. Go back two sentences before the sentence that
 20 says, "Based on all the materials reviewed."

21 A Okay. The --

22 Q That's the sentence starting with "AIGTS" --

23 A Or its adjustors?

24 Q Right.

1 A Okay.

2 Q And the next paragraph, which is starting with "Based
3 on all the materials reviewed," is meant to be a
4 further explication, is it not, of the point that you
5 made under Roman numeral number VII.

6 A We're under Roman numeral -- so you mean the next
7 paragraph down.

8 Q The paragraph where the 6 to 8 million dollar figure
9 appears --

10 A Yes.

11 Q -- that's a further explanation of what you have under
12 Roman numeral number VII, starting with "AIGTS" and
13 ending with "outrageous," right?

14 A Based upon the -- yes.

15 Q Okay. And in the first sentence of that paragraph,
16 you're talking about what a reasonable offer would have
17 been before or during trial, right? And not early
18 2002?

19 A I said settlement value of this case. I didn't say
20 before, during -- you're following a timeline, I take
21 it, from this response; am I correct?

22 Q I'm just asking you the question, Mr. Kiriakos.

23 A The settlement value in this case could have been
24 established long before the trial.

1 at that time. I expect we should be able to conclude
2 the case within a week, I would hope. We've already
3 gone two weeks so --

4 MR. COHEN: I think we were estimating
5 possibly six days, your Honor.

6 THE COURT: I'm sorry?

7 MR. COHEN: I think Mr. Zelle and I were
8 estimating possibly six trial days.

9 THE COURT: All right. Does that include
10 closing or is that without closing?

11 MR. ZELLE: Without. That's just witnesses.

12 THE COURT: Then you're talking seven.

13 All right, we'll see you then.

14 MR. VARGA: Your Honor, I'm sorry. We have a
15 scheduling problem with the 7th and I hate to bring it
16 up at this time because we had discussed it before, but
17 we have a case that's going to command our attention
18 down in Houston, Texas on that same day. We can do the
19 8th, we can begin on the 8th. I apologize for the
20 confusion that we created earlier by saying the 7th.

21 THE COURT: You say "command your attention."
22 What does that mean?

23 MR. VARGA: We have other matters with
24 finishing up discovery and so forth down in Houston

1 Q Okay. Well, whether it could have or couldn't have,
2 you didn't say that in your expert interrogatory
3 answers, did you?

4 A I said a fair -- I said a settlement value of this case
5 was somewhere between 6 to \$8 million.

6 Q But you didn't say that was the case in early 2002?

7 A No, I did not.

8 Q Okay. And you didn't submit any supplemental expert
9 interrogatory answers?

10 A Not that I'm aware of.

11 Q But you did submit an affidavit with the summary
12 judgment motion, right?

13 A The second affidavit I completed?

14 Q I don't know the first affidavit you completed.

15 A No. I'm talking about -- you're using legal terms,
16 sir. I've said from the outset -- you've qualified
17 that I'm not a lawyer, so if I submitted the second
18 document, you're talking about value, yes, I did submit
19 that.

20 Q You don't understand what the term "affidavit" mean?

21 A I understand the term. I understand what it means.
22 You're playing on words, sir. You know that.

23 THE COURT: Okay. We will take a brief
24 recess until March 7, and we shall continue this case

1 that has to get done before that trial starts, and
2 unfortunately the schedule is so tight that it's very
3 difficult to break free.

4 THE COURT: Do you have depositions scheduled?
5 What do you have?

6 MR. VARGA: There's depositions down there
7 and meetings that are scheduled. We're doing the best
8 we can to juggle all the time, your Honor.

9 Unfortunately, it's very difficult. I apologize.

10 MR. PRITZKER: Your Honor, the reason that we
11 put off from the 6th to the 7th was for Ms. Sackett's
12 availability.

13 THE COURT: I understand that.

14 MR. GOLDMAN: Part of the problem, your
15 Honor, is we were anticipating that one of two of us
16 could be here, and just where we are with the case, it
17 appears that when we resume, both of us are going to
18 need at least be there that day.

19 MR. PRITZKER: I certainly don't mind, your
20 Honor, in order to move things along, deferring Mr.
21 Kiriakos for a day.

22 THE COURT: If I move it to the 8th, do you
23 commit to getting the case to me, concluded by the
24 16th?

1 MR. VARGA: We certainly can commit to that.
 2 MR. ZELLE: The 8th is Thursday. Yes, with
 3 closings.
 4 THE COURT: With closings?
 5 MR. ZELLE: Sure.
 6 THE COURT: As long as the case is to me by
 7 the close of business on the 16th, but I'm not assuring
 8 you you're going to have any time beyond the 16th.
 9 MR. ZELLE: Plaintiffs close last, right?
 10 THE COURT: Well, that's --
 11 MR. ZELLE: Mental levity, your Honor, I
 12 understand.
 13 MR. COHEN: Your Honor, could I ask one more
 14 scheduling question. You said that the file briefs or
 15 requests for findings were supposed to be filed a week
 16 from this Monday and I assumed that schedule has been
 17 pushed off?
 18 THE COURT: Obviously I will consider myself
 19 free to start writing on the 16th. You can submit your
 20 briefs any time after that, but you have this
 21 additional time to work on the legal matters. You can
 22 work on the various legal issues that are out there.
 23 I've left lobby time to the end of the 26th, is
 24 probably when I would start maybe to write this case.

1
 2
 3
 4

1 but I probably have about 14 motions for summary
 2 judgment to decide between that and then as well.
 3 Certainly you should plan to get it in no
 4 later than the 23rd.
 5 MR. PRITZKER: Your Honor, I think you know,
 6 but Mr. Kiriakos is our last witness other than our
 7 bookkeeper whom we expect to be no more than 20
 8 minutes.
 9 THE COURT: Okay. So it's on the defense.
 10 I'm giving an extra day by postponing the case until
 11 the 8th and I expect it to be completed by the 16th,
 12 which is seven days after you had told me it would be,
 13 seven trial days.
 14 All right. We'll see you back on the 8th.
 15
 16 (Hearing adjourned at 1:05 p.m.)
 17
 18
 19
 20
 21
 22
 23
 24

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

 Paula Pietrella

 Faye LeRoux