

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Netscape Communications
Corporation, a Delaware
corporation; and
America Online, Inc.,
a Delaware corporation,

Plaintiffs,

vs.

No. C-06-00198 JW (PVT)

Federal Insurance Company,
an Indiana corporation;
St. Paul Mercury Insurance
Company, a Minnesota
corporation; Executive Risk
Specialty Insurance Company,
a Connecticut corporation;
and DOES 1 through 50,

Defendants.

CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER

* * *

VIDEO DEPOSITION OF
DALE EVENSEN

* * *

(VOLUME I)

Taken before LISA M. PETERSON, on the 4th day of
October 2006 in St. Paul, Minnesota, commencing
at approximately 9:21 a.m.

1 APPEARANCES

2
3 MS. LESLIE A. PEREIRA, Attorney at Law,
4 Abelson & Herron, LLP, Suite 650, 333 South Grand
5 Avenue, Los Angeles, California, 90071, appeared
6 on behalf of named Plaintiffs.

7
8 MS. SARA M. THORPE, Attorney at Law,
9 Gordon & Rees, LLP, Suite 2000, 275 Battery
10 Street, San Francisco, California, 94111,
11 appeared on behalf of named Defendant St. Paul
12 Mercury Insurance Company.

13
14 ALSO PRESENT: Mr. Joe Mildenberger, Videographer.

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I N D E X
EXAMINATION

Page

By Ms. Pereira 5

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INSTRUCTIONS NOT TO ANSWER

Page

(No instructions were given)

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REQUEST FOR PRODUCTION OF DOCUMENTS

Page

(No requests were made)

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REFERENCE INDEX

(Attached to back of transcript)

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I N D E X

DEPOSITION EXHIBITS

4	Exhibit	Page
5	No. 122	20
6	No. 123	52
7	No. 124	56
8	No. 125	73
9	No. 126	81
10	No. 127	89
11	No. 128	90
12	No. 129	98
13	No. 130	113
14	No. 131	116
15	No. 132	200
16	No. 133	203

17

18 NOTE: Deposition Exhibit Nos. 122 through 133
 19 were retained by Attorney Leslie A. Pereira and
 20 are not appended to the transcript.

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1 P R O C E E D I N G S

2

3 DALE EVENSEN

4

5 A witness in the above-entitled action, after
6 having been first duly sworn, testifies and
7 says as follows:

8

9 EXAMINATION

10

11 BY MS. PEREIRA:

12 Q Good morning, Mr. Evensen.

13 A Good morning.

14 Q As you know, the court reporter just swore you
15 in and so you are testifying here under oath as
16 if we were in a court of law even though we are
17 sitting here in a conference room.

18 Do you understand that?

19 A I do, yes.

20 Q Have you been deposed before?

21 A Yes, I have.

22 Q How many times?

23 A Three other times.

24 Q Now, I have seen your testimony in one of those
25 which was the AOL 5.0 litigation, is that

1 St. Paul?

2 A I was a lawyer at a law firm here in
3 Minneapolis.

4 Q Am I correct that you had been doing insurance
5 coverage litigation at that firm?

6 A That's not correct, no.

7 Q Can you tell me what you did then?

8 A I was general litigation lawyer in an insurance
9 defense typical law firm.

10 Q Had you been representing -- Had your firm been
11 representing St. Paul?

12 A I don't believe so, no.

13 Q What position did you take with St. Paul in
14 March 2000?

15 A A technology claim attorney.

16 Q What were the responsibilities of a technology
17 claim attorney at the time you were hired in
18 March 2000?

19 A They were to handle and supervise technology and
20 intellectual property claims.

21 Q Can you tell me what you mean when you say
22 technology and IP claims?

23 A Sure. The technology claim would be generally
24 an errors and omissions claim against a
25 technology insured. An intellectual property

1 exclusion is no longer on the policy but is
2 replaced with this wording."

3 Do you see that?

4 A Yes.

5 Q Do you recall having any conversation with
6 Michele about what any prior exclusions
7 pertaining to AI/PI coverage looked like?

8 A I don't, no.

9 MS. PEREIRA: I'm going to mark as
10 Exhibit 132 a letter dated December 13, 2000 to
11 Charles Curran from Dale Evensen.

12 MS. THORPE: It's Exhibit 131.

13

14 (Exhibit 131 was marked for identification.)

15

16 BY MS. PEREIRA:

17 Q If you can take a moment and look through that
18 document.

19 A Okay.

20 Q This document has been Bates labeled SPM 0077 to
21 0082.

22 Do you see that?

23 A Yes.

24 Q The last page of your letter, page 6 of your
25 letter SPM 0082?

1 A Yes.

2 Q Is that your signature on the page?

3 A It is.

4 Q Is this a letter -- Is this a copy of a letter
5 you sent to Charles Curran at AOL on or December
6 13, 2000?

7 A Yes.

8 Q This letter pertained to the SmartDownload
9 claim, is that right?

10 A That's correct.

11 Q Was this the first letter that you had written
12 to AOL on this claim?

13 A I don't recall.

14 Q Is this what you would consider your coverage
15 position letter?

16 A Yes.

17 Q The claim was first tendered in looking back at
18 Exhibit 129, it was received by you apparently
19 on September 5, 2000. Do you know why it took
20 over three months to prepare this coverage
21 position letter?

22 A No, I don't recall.

23 Q Was that what was sort of the standard timing,
24 if you had one, for sort of getting out a
25 coverage position letter on a claim?

1 A It does not, correct.

2 Q Do you know was this intended to cover all four
3 of those lawsuits?

4 A I don't know. I don't know why I didn't refer
5 to the other two lawsuits.

6 Q Can you tell me what you -- This letter is it
7 fair to characterize as a letter that denies
8 coverage for the SmartDownload claim?

9 A Yes.

10 Q And can you tell me what you did prior to
11 issuing this letter?

12 MS. THORPE: Objection. Vague.
13 Ambiguous.

14 A I received and reviewed the complaints, looked
15 at the coverage.

16 BY MS. PEREIRA:

17 Q When you say looked at the coverage, what do you
18 mean by that?

19 A The coverages under the policy, under the
20 TE09000917 policy. I may have had conversations
21 with Marsh. I may have had conversations with
22 the underwriters, with Michele. I may have had
23 communications with somebody at AOL but I don't
24 recall.

25 Q Anything else you specifically recall doing?

1 A No.

2 Q When you say you looked at the coverages under
3 the policy, what do you mean by that? Did you
4 get a copy of the actual policy issued to AOL?

5 A No.

6 Q So what did you actually do?

7 A I would have looked at the -- to the best of my
8 recollection I would have pulled up the form
9 list on the policy that would have identified
10 all of the insuring agreements and forms that
11 were in the policy.

12 Q Would you have looked or did you look at all of
13 the coverages to determine whether these
14 lawsuits were covered under any of the coverages
15 in the policy?

16 A I don't think I looked at anything but liability
17 coverages because it was a liability claim.

18 Q Meaning bodily injuries, property damage,
19 personal injury and advertising injury?

20 A Liability meaning a liability policy as opposed
21 to a first party property or first party
22 policy.

23 Q Were there any coverages other than the four I
24 mentioned that you would have looked at?

25 A No, I don't believe they had anything other than

1 a general liability. I know they didn't have
2 E&O coverage.

3 Q When you say you maybe had conversations with
4 Marsh but you don't recall, do you recall if you
5 had had any conversations with Marsh, what
6 specifically would they have been about?

7 A I just remember having conversations with Dennis
8 Love sometime over that summer, fall of 2000
9 about the number of claims that I was handling
10 for America Online. I don't have any specific
11 recollection of any conversation with him, but I
12 know I did talk to Dennis and maybe one or two
13 other people about AOL claims. Whether it was
14 this one I'm not sure either.

15 Q You don't recall specifically talking to them
16 about SmartDownload, what are the facts, what is
17 happening with that, that kind of
18 conversation?

19 A I do not, correct.

20 Q If you had had a conversation with Marsh about
21 SmartDownload, would you have had notes on the
22 conversation?

23 A Possibly, yes.

24 Q Was it your practice to keep notes when you had
25 sort of substantive discussion on a claim with

1 somebody at Marsh?

2 A Ideally, yes. I don't know if that was my
3 practice or not.

4 Q If you had had a conversation typically with
5 someone at Marsh about a claim, would you have
6 put electronic file notes into the Claim Works
7 system?

8 A That ideally was what I liked to do is to
9 document it somehow whether in a written form
10 only or written and electronic or electronic
11 only.

12 Q Is the same true with whether or not you had any
13 conversations with underwriters about this claim
14 specifically, would you have documented any
15 conversations with notes?

16 A I think it's fair to say my practice would
17 probably be about the same.

18 Q So meaning if there are none, there may or may
19 not have been a conversation, we just can't
20 conclude one way or another?

21 A Yes, you can't conclude one way or another,
22 correct.

23 Q The same with respect to whether or not you had
24 any conversations with AOL?

25 A If they are written notes or electronic notes, I

1 did have the conversation. If there are no
2 notes, we can't conclude that I didn't.

3 Q That's what I understood you to be saying.
4 Thank you.

5 Do you recall whether you did any legal
6 research prior to issuing this denial letter?

7 A I do not recall.

8 Q If you had done legal research, would the legal
9 research be contained in the claim file?

10 A Possibly.

11 Q Again is it just the case of whether you kept it
12 or not and it maybe was your practice to keep it
13 but maybe it wasn't or you tried to keep
14 stuff?

15 A Boy, six years ago. I don't remember what my
16 practice was, quite frankly, six years ago.

17 Q So the point being if there's no legal research
18 in the file, can we conclude you didn't do
19 any?

20 A No.

21 Q Did you do any research into the operation of
22 SmartDownload?

23 A Did I do any research in the operation of
24 SmartDownload? I don't recall speaking to
25 America Online and Netscape about how it

1 functioned.

2 Q Did you go onto Netscape's website to look at
3 anything about SmartDownload?

4 A I don't recall.

5 Q Have you ever used SmartDownload?

6 A No.

7 Q In the first paragraph you say here, "We must
8 respectfully deny your request on behalf of
9 America Online for defense and indemnity."

10 Do you see that?

11 A Yes.

12 Q Can you tell me what legal standard you did
13 apply in making your coverage determination?

14 A What legal standard did I apply? Whether or not
15 any of the insuring agreements were triggered by
16 the facts and allegations and whether we had a
17 duty to defend.

18 Q So does that mean you look at the complaint or
19 in this case the four complaints and ask
20 yourself whether there is a potential for
21 coverage? Is that the standard you would use?

22 A Review the complaints, review the coverages,
23 determine whether the facts and allegations of
24 the complaints and whether the plaintiffs are
25 seeking potentially covered damages and, if so,

1 they were alleged to have collected information
2 that was gathered by the SmartDownload program
3 when a user used that program to download large
4 files, yes.

5 Q In terms of a person collecting information that
6 it did not previously know about, is that not
7 making the information known to themselves?

8 MS. THORPE: Objection.

9 Argumentative. Mischaracterizes the allegations
10 in the complaint.

11 A I wouldn't characterize it as making it known to
12 themselves, no.

13 BY MS. PEREIRA:

14 Q What do you understand the term making known to
15 any person or organization to mean?

16 A Disclosing, releasing, publicizing, providing,
17 giving, sending to a person or organization.

18 Q Do you have any understanding in terms of how
19 many people you need to give something to for it
20 to be making known to any person or
21 organization?

22 A Maybe you can ask me a more detailed
23 hypothetical question.

24 Q If I tell one other person something, have I
25 made that information known to any person or

1 A Possibly.

2 Q Who was the third party? Whose content then are
3 we talking about?

4 MS. THORPE: Objection.

5 Argumentative.

6 A Again it wasn't something I focused on or spent
7 any time on considering it, but I think to the
8 extent that the facts as alleged implicated this
9 particular prong or definition of online
10 activities it might apply.

11 BY MS. PEREIRA:

12 Q But you believe your primary reason for invoking
13 this exclusion was the language which says
14 providing internet access to third parties?

15 A Yes.

16 Q Can you tell me how that applied to the
17 SmartDownload claim?

18 A The claims as alleged arose out of the use of
19 the program which was obtained on or over the
20 internet, and it arose out of the internet
21 access that was provided by AOL and Netscape.

22 Q Do you know whether in 2000 Netscape provided
23 internet access?

24 A As a browser, I believe.

25 Q It had a browser?

1 A Yes.

2 Q In your view is a browser providing internet
3 access?

4 A Yes.

5 Q How does that work exactly?

6 A It allows you to search the internet and access
7 various websites.

8 Q So then when you look at the terminology here
9 which is providing internet access, you
10 interpret that to mean not only getting on the
11 internet but also finding your way around the
12 internet?

13 A Yes.

14 Q What do you base that interpretation on?

15 A Just common experience.

16 Q Did you talk to anyone about this language,
17 providing internet access to third parties?

18 A I don't recall if I did or not.

19 Q Do you recall asking Michele Midwinter or anyone
20 in underwriting what the meaning of this
21 language was intended to be?

22 A I don't recall doing that, no.

23 Q Do you know whether the phraseology providing
24 internet access to third parties is a term of
25 art for internet service providers?

1 A I don't know what you mean by term of art. I
2 don't know whether it is or isn't.

3 Q You don't know whether it has any special
4 meaning among people who provide internet
5 services?

6 A No, I don't.

7 Q So you didn't ask anyone whether that was
8 intended to mean simply getting access to the
9 internet versus finding your way around the
10 internet?

11 A I don't recall talking to anyone about that
12 particular -- those words. It was pretty clear
13 to me what it meant, but it meant more than just
14 providing access to the internet to somebody.

15

16 (A break was had from 3:19 to 3:30.)

17

18 BY MS. PEREIRA:

19 Q Mr. Evensen, now, do you know whether Netscape
20 at the time the SmartDownload claims came in, do
21 you know whether they were an internet service
22 provider?

23 A I don't believe they were.

24 Q Do you know whether they had the ability to
25 provide internet access to people who were not

1 Q Do you know whether the claimants in the
2 SmartDownload lawsuits, do you know who their
3 internet service providers were?

4 A AOL.

5 Q Why do you say that?

6 A That's what they allege.

7 Q They allege AOL was their internet service
8 provider?

9 A That was my understanding, yeah.

10 Q If any of the claimants had been provided their
11 internet access by some other company, would
12 that have changed your analysis of the
13 application of the online activities
14 exclusion?

15 A It could.

16 Q How would that have changed your analysis?

17 A If AOL had nothing to do with this, it could
18 change my analysis. If there were no
19 allegations against AOL or Netscape?

20 Q No, I'm not asking that. I'm just asking if
21 their access to the internet, if the company who
22 hooked them up to the internet and gave them
23 their access was a company other than AOL, would
24 that have changed your analysis about
25 application of the online activities

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CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER

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VIDEO DEPOSITION OF
DALE EVENSEN

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(VOLUME II)

Taken before LISA M. PETERSON on the 7th day of
November 2006 in St. Paul, Minnesota, commencing at
approximately 3:31 p.m.

1 APPEARANCES

2
3 MS. LESLIE A. PEREIRA, Attorney at Law,
4 Abelson & Herron, LLP, Suite 650, 333 South Grand
5 Avenue, Los Angeles, California, 90071, appeared on
6 behalf of named Plaintiffs.

7
8 MS. SARA M. THORPE, Attorney at Law,
9 Gordon & Rees, LLP, Suite 2000, 275 Battery Street,
10 San Francisco, California, 94111, appeared on behalf
11 of named Defendant St. Paul Mercury Insurance
12 Company.

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14 ALSO PRESENT: Mr. John Mulcahy, Videographer.
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I N D E X
EXAMINATION

	Page
By Ms. Pereira	219

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I N S T R U C T I O N S N O T T O A N S W E R

(No instructions were given)

Page

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R E Q U E S T F O R P R O D U C T I O N O F D O C U M E N T S

(No requests were made)

Page

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R E F E R E N C E I N D E X

(Attached to back of transcript)

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I N D E X

DEPOSITION EXHIBITS

Exhibit	Page
No. 208-214	234
No. 215	255

NOTE: Deposition Exhibit Nos. 208 through 215 were retained by Attorney Leslie A. Pereira and are not appended to the transcript.

1 PROCEEDINGS

2

3 DALE EVENSEN

4

5 A witness in the above-entitled action, after
6 having been first duly sworn, testifies and
7 says as follows:

8

9 EXAMINATION

10

11 BY MS. PEREIRA:

12 Q Good afternoon, Mr. Evensen.

13 A Hello.

14 Q Let me start by asking you if you did anything
15 to prepare for your deposition today?

16 A I did, yes.

17 Q What is it that you did?

18 A I met with Counsel yesterday afternoon.

19 Q Approximately how long?

20 A 45 minutes or so.

21 Q Did you review any documents with your
22 counsel?

23 A Yes.

24 Q What documents did you review?

25 A I reviewed three claim files in preparation for

1 max on this guy's time, and you are wasting
2 your time.

3 MS. PEREIRA: I understand, and I
4 have every intention of trying to be done
5 within an hour of Mr. Evensen.

6 BY MS. PEREIRA:

7 Q I don't know if you answered my question. Is
8 it your understanding that or is it your belief
9 the making known provision is only satisfied if
10 the insured discloses something to a third
11 party?

12 A I think that's fair to say, yeah.

13 Q Is it your belief that personal injury offense
14 is only satisfied if the insured is someone who
15 is -- Is it your understanding that that
16 personal injury offense applies only if the
17 third party is someone who is outside of the
18 insured's organization?

19 A I think that's basically what I meant in
20 answering your first question to a third party,
21 yes.

22 Q Then is it your view that personal injury
23 offense is only triggered if the third party --
24 Let me rephrase that.

25 Is it your view that personal injury

1 offense -- that to trigger the personal injury
2 offense the third party that something is made
3 known to cannot be another insured under the
4 same policy?

5 MS. THORPE: Asked and answered.

6 A I believe so, yes.

7 BY MS. PEREIRA:

8 Q Finally in connection with that personal injury
9 offense, is it your view that the third party
10 that something is being made known to must be
11 someone or a corporation that is not related to
12 the insured?

13 MS. THORPE: Objection. Assumes
14 facts not in evidence. Irrelevant.

15 A I don't know what you mean by not related to.
16 I can't answer that question the way it's
17 phrased.

18 BY MS. PEREIRA:

19 Q Then is it your view if the third party is a
20 corporation that is related to the insured
21 corporation, related meaning there's a parent
22 and subsidiary corporation, that that personal
23 injury offense would not be triggered?

24 MS. THORPE: Objection. Incomplete
25 hypothetical. Assumes facts. Calls for

1 speculation.

2 A I believe so, yes.

3

4 (A recess was had from 3:51 to 3:56)

5 (Exhibits 208-214 marked for identification)

6

7 BY MS. PEREIRA:

8 Q Mr. Evensen, we marked as Exhibit 208 a letter
9 dated April 25, 2000 from Pam Matsufuji at
10 St. Paul to Laura Gehl at America Online. Have
11 you seen that letter?

12 A I do see it, yes.

13 Q Have you had an opportunity to review that
14 letter?

15 A Yes.

16 Q Is that a letter by which St. Paul denies
17 coverage for a claim called Rosenthal?

18 A Yes.

19 Q That claim was denied by Pam Matsufuji, is that
20 right?

21 A Yes.

22 Q Did you at any time supervise Ms. Matsufuji?

23 A At anytime what do you mean?

24 Q Have you ever at any time supervised

25 Ms. Matsufuji?