

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
ERIC SOLBERG

* * *

(VOLUME I)

Taken before LISA M. PETERSON, on the 29th day of
September 2006 in St. Paul, Minnesota, commencing
at approximately 9:21 a.m.

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APPEARANCES

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

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

ALSO PRESENT: Mr. Joe Mildenberger, Videographer.

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I N D E X

EXAMINATION

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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

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NOTE: Deposition Exhibit Nos. 115 through 121 were retained by Attorney Leslie A. Pereira and are not appended to the transcript.

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

2

3 ERIC SOLBERG

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. Solberg.

13 A Good morning.

14 Q As I just mentioned, my name is Leslie Pereira.
15 I'm an attorney with the law firm of Abelson Herron
16 in Los Angeles and I am representing Netscape
17 Communications Corporation and America Online in a
18 coverage action they have going in San Jose,
19 California against St. Paul Insurance Company.

20 Have you had your deposition taken before?

21 A Yes.

22 Q Let me go through a few different ground rules just
23 so we have them in mind. I don't know how recently
24 your deposition experience was.

25 Even though we are sitting in this somewhat

1 in June 2005 pertained to either the personal
2 injury provisions of a CGL policy or the
3 advertising injuries of a CGL policy?

4 A I do not recall.

5 MS. PEREIRA: I want to mark as an
6 exhibit, we are going to start with Exhibit 115
7 since we have previously used 1 through 114, and
8 that is going to be Defendant St. Paul Mercury
9 Insurance Company's Response to Plaintiff America
10 Online Inc.'s Notice of Deposition.

11

12 (Exhibit 115 was marked for identification.)

13

14 BY MS. PEREIRA:

15 Q I'm going to direct your attention to page 3, and
16 if you could look at topic No. 4 which states, "All
17 changes to the language of the personal injury
18 liability coverage in St. Paul's technology
19 commercial general liability policy since 1985."

20 I know there have been some modifications to
21 that request pursuant to St. Paul's objections but
22 do you understand that you are here today to
23 testify as a person most knowledgeable about that
24 topic?

25 MS. THORPE: Let me just clarify the

1 scope that we will allow. We will allow you to ask
2 him questions about changes to the personal injury
3 liability coverage since 1985.

4 MS. PEREIRA: So we are going to go back
5 to '85?

6 MS. THORPE: Changes since 1985.

7 MS. PEREIRA: So not including the change
8 from '85 to '91?

9 MS. THORPE: No. That will include what
10 happened in '91 but not the development of the
11 policy in '85.

12 BY MS. PEREIRA:

13 Q Okay. I understand. Mr. Solberg, do you
14 understand what you have been designated as the
15 person most knowledgeable to testify on with
16 respect to topic No. 4?

17 A Yes.

18 Q Can you tell me what did you do to prepare yourself
19 to be the person most knowledgeable for St. Paul on
20 topic No. 4?

21 A Is your question referring to discussions that I
22 may have had with my attorney that's representing
23 me today or in general?

24 Q In general. When was it you learned that you were
25 going to be put forth by St. Paul as their person

1 A A St. Paul Travelers attorney that works in our
2 claims division also attended.

3 Q What was that person's name?

4 MS. THORPE: Judi Lambie, L-a-m-b-l-e.

5 BY MS. PEREIRA:

6 Q During the course of yesterday's meeting was
7 anybody else at St. Paul called on the phone or
8 patched into the meeting by phone or e-mail or
9 anything like that?

10 A No.

11 Q Other than the meeting yesterday with Ms. Thorpe
12 and Ms. Lambie, did you meet with anyone else to
13 discuss your deposition today?

14 A No.

15 Q Did you look at anything else other than the
16 side-by-side documents that you looked at with
17 Ms. Thorpe yesterday?

18 A No.

19 Q Is there anything else you can recall doing to
20 prepare yourself for today's deposition?

21 A Nope.

22 Q If you can look at topic No. 7 on Exhibit 115 --

23 MS. THORPE: Before you go to 7 so we are
24 clear, he is also going to talk on topic No. 5 on
25 the personal injury liability coverage in the CGL

1 form since 1985 as well to the extent you have any
2 questions.

3 BY MS. PEREIRA:

4 Q As to topic No. 5 -- Topic No. 4 pertains to
5 changes to the personal injury liability coverage
6 in the technology CGL. Topic No. 5 pertains to
7 changes to the personal injury liability coverage
8 in the CGL policy. So did you do anything to
9 prepare for topic No. 5 that we haven't talked
10 about yet?

11 A No.

12 Q And you do understand that you have been designated
13 by St. Paul as the person most knowledgeable on
14 topic No. 5 also?

15 A Yes.

16 Q And topic No. 7 is the meaning of the following
17 personal injury offense in the St. Paul policy,
18 making known to any person or organization written
19 or spoken material that violates a person's right
20 of privacy.

21 Do you understand that St. Paul has designated
22 you as a person most knowledgeable to testify on
23 that topic?

24 A Yes.

25 MS. THORPE: Let me interject an

1 objection first that we objected to the term
2 meaning. We are producing Mr. Solberg to talk to
3 you about the intent of the provision. This may be
4 just a semantics issue but to the extent there's
5 any different meaning given to those words, he is
6 here to talk to you about the intent of the
7 provisions.

8 MS. PEREIRA: I thought you guys had
9 clarified by saying intent and history, is that
10 correct?

11 MS. THORPE: True.

12 BY MS. PEREIRA:

13 Q So do you understand that you are here today
14 designated by St. Paul to talk about the intent and
15 history of that personal injury offense?

16 A Yes.

17 Q And is there anything other than meeting yesterday
18 with Ms. Thorpe and Ms. Lamble, is there anything
19 you did to prepare yourself to give testimony on
20 that topic?

21 A No.

22 Q Then topic No. 8 is the meaning of St. Paul
23 policy's deliberately breaking the law exclusion.
24 I understand Ms. Thorpe has clarified that you are
25 designated by St. Paul to talk about the intent and

1 history of that exclusion, is that right?

2 A Yes.

3 Q That's your understanding?

4 A Yes.

5 Q Is there anything that you did to prepare yourself
6 other than meeting with Ms. Thorpe and Ms. Lamble
7 yesterday to testify on topic No. 8?

8 A No.

9 Q Can you tell me -- just go through your history at
10 St. Paul? Have you been with St. Paul for 28
11 years, did you say?

12 A Yes.

13 MS. THORPE: To aid in that we brought
14 you a CV we can mark and use as an exhibit if you
15 want or not.

16 MS. PEREIRA: Let's mark this as Exhibit
17 116.

18
19 (Exhibit 116 was marked for identification.)

20
21 BY MS. PEREIRA:

22 Q Mr. Solberg, I understand that Exhibit 116 is a
23 copy of your resume or your curriculum vitae, is
24 that right?

25 A Yes.

1 Netscape, is that right?

2 A I would say that's not made public.

3 Q Just to work with your hypothetical, what if a
4 Netscape employee takes this bad credit information
5 and posts it not only in the Netscape employee
6 locker room but also in the America Online employee
7 locker room, has Netscape now made the information
8 public?

9 MS. THORPE: Objection. Incomplete
10 hypothetical. Calls for a legal conclusion. And
11 to be fair to this witness, I think you need to
12 explain the relationship of AOL and Netscape.

13 BY MS. PEREIRA:

14 Q Do you know the relationship of AOL and Netscape?

15 A No.

16 Q Netscape is a subsidiary corporation of America
17 Online. America Online is the parent corporation.

18 Do you recall what my question was?

19 A So Netscape is the subsidiary. That's still the
20 same organization.

21 Q So you would say subsidiary then is the same
22 organization?

23 A Yes, it's the same organization. It's no different
24 than St. Paul Mercury insurance versus St. Paul
25 Fire & Marine Insurance to me. Just because you

1 are a subsidiary, that's still the same
2 organization.

3 Q So again that is within the intent of this
4 provision that we are talking about?

5 A I'm saying that's not public.

6 Q It's not public because it's shared within --

7 A The organization.

8 Q The organization meaning a parent corporation and
9 all subsidiaries?

10 A Yes.

11 Q Can you tell me -- So I understand what you are
12 saying is that the intent of this provision then is
13 that made public only refers to information that is
14 released outside an organization, is that right?

15 A Made public does not include information released
16 internally. It would have to be a third party
17 outside of the organization to be made public.

18 Q What can you point to that supports that
19 position?

20 MS. THORPE: Objection. Argumentative.
21 We are talking about the intent of words in the
22 policy, and he has been testifying about it for the
23 last hour. I don't understand a question about
24 what can you point to.

25 BY MS. PEREIRA:

1 A No.

2 Q Do you know what department does that?

3 MS. THORPE: I have to object. We are
4 way farfield of the PMK notice. I will let you
5 finish this question but we need to get back to the
6 reason this witness is here.

7 A There's an education department that creates
8 material.

9 BY MS. PEREIRA:

10 Q So training materials would be produced or created
11 by the education department?

12 A Yes.

13 Q I am done with this exhibit. I'm going to ask you
14 now to look back at Exhibit 1 which is the policy
15 at issue in this lawsuit. If you could look at
16 Exhibit 1 on the page which is Bates labeled --
17 There are Bates labels in the bottom you can see
18 here and they are in numeric order. That one
19 starts at SPM 0108. If you could turn to SPM 0141,
20 please. If I could just direct your attention to
21 the personal injury offense language and
22 specifically to the seventh bullet point, the one
23 that reads, "Making known to any person or
24 organization written or spoken material that
25 violates a person's right of privacy."

1 Do you see that language?

2 A Yes.

3 Q Now, the first portion of that language it says
4 making known to any person or organization. Can
5 you tell me what the intent of that language is?

6 A To me the intent is making public.

7 Q Making public in the sense -- or are you saying
8 it's the same as the policy that we previously
9 looked at which said made public?

10 A I think that the intent is that it's making public
11 meaning a third party. It's not an internal you
12 tell -- one employee tells another employee
13 something. It's making known it is to the
14 public.

15 Q So you read that as meaning making known to any
16 person or organization outside of your
17 organization?

18 A Yes.

19 Q Can you tell me whether there is any sort of a
20 numeric -- there is intended to be any sort of a
21 numeric limitation on that in terms of the number
22 of people?

23 A It says any person or organization.

24 Q So you would read that as because those words are
25 in singular form?

1 A Uh-huh.

2 Q So that making known to a single person is enough
3 to satisfy that requirement?

4 A Yes, as long as it meets all the other conditions
5 of the policy, and we are talking about that it's
6 not making known to you as the insured which would
7 contemplate everybody else that fits under the
8 definition of you but basically to the public.
9 Could be to any person or organization.

10 Q Why do you say that is not intended to also
11 encompass making known to you the insured?

12 A It says making known to any person or organization.
13 It doesn't say making known to you. It's talking
14 about any person or organization.

15 Q It also doesn't say making known to any third
16 person or third-party organization?

17 MS. THORPE: Objection.

18 BY MS. PEREIRA:

19 Q Do you understand what I'm saying? You are saying
20 that -- If you saying it doesn't include making
21 known to you the insured, it seems to me you are
22 reading that to say making known to any third
23 person?

24 A It's still a legal liability contract, and so there
25 has to be -- This is not a first party contract by

1 intent you specified?

2 A I don't recall if we considered other language or
3 if I considered other language. I can tell you as
4 I sit here today that this language is very clear.
5 I understand the intent. I don't recall there is
6 any further discussion because I didn't feel there
7 was any need for further discussion and no one else
8 did. We felt the language was very clear as far as
9 what our intent is. I don't remember any other
10 conversations about other options for expressing
11 this.

12 Q Was there any documentation that was kept, did you
13 keep any documentation about other proposals for
14 this language that you might have had at the
15 time?

16 MS. THORPE: Objection. Assumes facts.

17 A I don't remember any other words that we used or
18 wanted to use other than what we have here. So I'm
19 not aware of any other documentation or any other
20 material that would have offered alternatives or a
21 reason. Words that we had were carefully thought
22 through. We believe that they are very clear and
23 they express our intent.

24 MS. PEREIRA: Let me mark another
25 exhibit. I'm going to mark the side-by-side

1 comparison which is comparing the 1985 CGL form to
2 the 1991 CGL form, and the Bates Nos. are SPM 2791
3 through SPM 2852.

4
5 (Exhibit 118 was marked for identification.)
6

7 BY MS. PEREIRA:

8 Q Are you familiar with this document, Exhibit 118?

9 A Yes.

10 Q Can you tell me what this document is?

11 A This is a side-by-side comparison of two different
12 forms, an April '91 form and a July '85 form.

13 Q And you testified a bit this morning about the
14 purpose of this document?

15 A Yes.

16 Q And is it fair to say what you testified this
17 morning was that the purpose of this document is to
18 inform insurance departments about changes between
19 policy forms?

20 MS. THORPE: Objection.

21 Mischaracterizes. Incomplete as to his
22 testimony.

23 A I believe my testimony was that we provide this
24 information to some insurance departments. We also
25 provide it internally as information for employees.

1 this document at the time it was prepared?

2 A I can't say for certain. I can only tell you
3 questions would go to him, but the fact of the
4 matter is typically he did a lot of this kind of
5 work.

6 Q I want to direct your attention to the page that's
7 -- it's probably easiest to follow the Bates Nos.
8 which is SPM 2801. This change or this page
9 appears to show the change between the 1985 version
10 of the personal injury offense which we looked at
11 earlier compared to the 1996 revision, is that
12 correct?

13 A Yes.

14 Q Under the Comment section the last comment it
15 states, "Replaced made public with making known to
16 any person or organization. This change clarifies
17 coverage." Do you see that?

18 A Yes.

19 Q Can you tell me what that means, this change
20 clarifies coverage?

21 A It means it's just an editorial change. It doesn't
22 change the intent.

23 Q So in effect that says there really was no
24 substantive difference between the language made
25 public and the replacement language making known to

1 any person or organization, is that correct?

2 A The intent is that it's trying to use more modern
3 language, if I can put it that way.

4 Q What do you mean by that? What is more modern
5 about the replacement language?

6 A It's just a different way of expressing our intent,
7 but the intent of made public with making known to
8 any person or organization is I think consistent.

9 Q Between the two forms?

10 A Uh-huh.

11 Q Now, you can see two comments above from that it
12 talks about a different change and it says, "This
13 is an editorial change." So in your view is there
14 any difference between something which is an
15 editorial change and something which is a change
16 that clarifies coverage?

17 MS. THORPE: Asked and answered.

18 A Editorial change and clarifies coverage. Clarifies
19 and editorial, we use those words
20 interchangeably.

21 BY MS. PEREIRA:

22 Q Because to me clarify means something was
23 previously unclear. Is the word clarifies coverage
24 not being used in that sense here?

25 A No. It means it's an editorial change. Clarifies

1 can be that we used words we thought were better
2 words. The English language evolves over time. So
3 we use different words, but the intent and what the
4 meaning is here is equivalent.

5 Q Do you know what the impetus was for the change
6 between the made public language to the making
7 known to any person or organization language?

8 A I do not recall.

9 Q Would there or should there have been sort of a
10 file collected or case made internally we need to
11 change this and here is why? Is that typically
12 done in connection with these types of changes?

13 MS. THORPE: Objection. Compound.

14 A In the normal revision process will be as I stated
15 before, we will be looking at what industry forms
16 are used, what information we have, collection of
17 news articles to industry publications. So why we
18 used these specific words, it may have been because
19 the industry was using these words, but we felt it
20 didn't have any difference in intent from the words
21 that were used previously.

22 But is there a file somewhere that explains
23 the nuances of why we use these words or some other
24 words? No. Basically it's what you see is what
25 you get in the sense that it's just different

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Netscape Communications
Corporation, a Delaware
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No. C-06-00198 JW (PVT)

Federal Insurance Company,
an Indiana corporation;
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and DOES 1 through 50,

Defendants.

CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER

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VIDEO DEPOSITION OF
ERIC SOLBERG

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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 1:37 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

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By Ms. Pereira 183

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INSTRUCTIONS NOT TO ANSWER

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(No instructions were given)

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REQUEST FOR PRODUCTION OF DOCUMENTS

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(No requests were made)

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I N D E X

DEPOSITION EXHIBITS

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NOTE: Deposition Exhibit Nos. 204 through 207 were retained by Attorney Leslie A. Pereira and are not appended to the transcript.

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

2
3 ERIC SOLBERG

4
5 A witness in the above-entitled action, after
6 having been first duly sworn, testifies and
7 says as follows:

8
9 (Exhibits 204-207 marked for identification)

10
11 EXAMINATION

12
13 BY MS. PEREIRA:

14 Q Good afternoon, Mr. Solberg.

15 A Good afternoon.

16 Q I wanted to follow up. I know we were here
17 several weeks ago for your deposition and we
18 just left a few areas that we didn't have time
19 to get into. So hopefully we will be very
20 brief today.

21 MS. THORPE: Let me for the record,
22 in our first -- when we were first together we
23 had objected to Eric Solberg talking about the
24 1985 changes or the 2001 changes to the general
25 liability forms but we had allowed him to

1 Q Did you do anything to prepare yourself for
2 your deposition on that point?

3 A No.

4 Q Let me get Exhibit 1, what we previously
5 marked. The policy is Exhibit 1, if you can
6 look at Exhibit 1. I may even have tabbed that
7 exclusion. If you can read over that
8 exclusion, please.

9 A Okay.

10 Q In looking at that exclusion can you tell me
11 generally what the intent of that exclusion
12 is?

13 A Excludes deliberately breaking the law.

14 Q Meaning it's intended to exclude coverage for
15 claims where the insured has deliberately
16 broken the law?

17 A Yes.

18 Q Is it intended to exclude coverage when an
19 insured has unintentionally or negligently
20 broken a law?

21 A It specifically states that knowingly breaking
22 the law. So if it's unintentional, then to me
23 that doesn't qualify as deliberately. It needs
24 to be intentionally breaking the law.

25 Q What does that mean exactly? Does that mean

1 the insured has to understand that an act is
2 illegal and then undertake that act anyways?

3 A It says knowingly breaking the law. So if an
4 individual knows they are breaking the law,
5 then that's deliberate, that's intentional.
6 It's knowledge.

7 Q So the knowingly means the individual has to
8 understand that their conduct is illegal?

9 A Yes.

10 Q And not just intend to take an act and take
11 that act but intend to take an act they think
12 is illegal?

13 A I think if you break a law intentionally,
14 deliberately, that's what this exclusion is
15 for. There seems to be two parts to this
16 particular exclusion; needs to be deliberate,
17 conscious, knowing, and you need to break a
18 law.

19 Q Let me give you an example of this, if I can.
20 What if I am driving my car and I'm driving 65
21 miles per hour and I intend to drive 65 miles
22 per hour and I don't know that the speed limit
23 is 55 miles per hour but I get pulled over,
24 et cetera, et cetera, is the intent of that to
25 exclude something like that? Would you say

1 Q So is St. Paul's intent by this that to exclude
2 coverage where the insured is convicted of a
3 crime?

4 MS. THORPE: Objection. Misleading.
5 Mischaracterizes the document.

6 A The exclusion I think is self-explanatory that
7 it's not our intent to cover losses when
8 someone breaks the law and they know it.

9 BY MS. PEREIRA:

10 Q I guess the situation I'm getting at, what
11 about a situation where an insured is alleged
12 to have broken a law but they are cleared of
13 that, they are found to be not liable for
14 breaking the law, is the intent of this
15 exclusion to preclude coverage for something
16 like that, for example, defense costs?

17 MS. THORPE: Objection. Incomplete
18 hypothetical.

19 A I would have to ask the question did they break
20 the law?

21 BY MS. PEREIRA:

22 Q No, they didn't break the law but they were
23 alleged to have broken the law.

24 A This says breaking the law. So if no law was
25 broken, then I don't see this exclusion

1 applying.

2 Q If an insured was cleared -- was alleged to
3 have broken a law but was ultimately cleared,
4 your view is this exclusion would not preclude
5 coverage?

6 MS. THORPE: Objection. Incomplete
7 hypothetical. Assumes facts not in evidence
8 and is misleading because you are being
9 incomplete in your question. Are you again
10 asking if it's an allegation in the complaint
11 -- Are you asking at the time of the
12 allegation of the complaint or are you asking
13 to look at coverage after the complaint is
14 concluded and the person is found not to have
15 been guilty?

16 MS. PEREIRA: If you can read back my
17 question. I thought I asked a complete
18 hypothetical. If the witness needs any
19 clarification, he can ask me.

20 MS. THORPE: Are you asking him a
21 duty to defend question or are you asking him a
22 duty to indemnify question?

23 MS. PEREIRA: I asked him a question.
24 If he doesn't understand the question, he can
25 ask me that.

1 what the intent of this is. Is the intent to
2 preclude -- It sounds like what you are saying
3 is the intent -- if an insured is alleged to
4 have deliberately broken a law and is, in fact,
5 found guilty of deliberately breaking a law, it
6 sounds like you would say this exclusion bars
7 coverage?

8 A For defense and indemnity.

9 Q So we are clear on that, that is what you are
10 saying?

11 A Yes.

12 Q Then my only other question is if an insured is
13 accused of knowingly breaking a criminal law
14 but is then found not guilty of doing that,
15 does this exclusion bar coverage for the
16 insured's defense costs?

17 MS. THORPE: Objection. Assumes
18 facts. Incomplete hypothetical. Calls for
19 speculation.

20 A If the loss wasn't due to breaking a law or
21 wasn't deliberate, then the policy does provide
22 coverage.

23 BY MS. PEREIRA:

24 Q So then does that mean if it's adjudicated that
25 an insured either didn't intend to break a law

1 or didn't, in fact, break a law, that they
2 would be entitled to their defense costs?

3 MS. THORPE: Objection. Misleading.
4 Incomplete hypothetical. Assumes facts.
5 Speculation.

6 A The exclusion would not be applied.

7 BY MS. PEREIRA:

8 Q Can you tell me who Barry Butenhoff is?

9 A Barry Butenhoff I believe used to work at the
10 company. I don't believe he works there
11 anymore. I think he is retired. He used to
12 work in the technology department. He was part
13 of the underwriting staff.

14 Q Do you know generally what time frame
15 Mr. Butenhoff worked for St. Paul in the
16 technology department?

17 A No, I don't.

18 Q Do you know who John Zacharski is?

19 A No.

20 Q Have you ever read a deposition transcript that
21 was given by Mr. Zacharski in a lawsuit
22 involving Melrose Hotel?

23 A No.

24 Q Did you know that Mr. Zacharski was designated
25 to testify for St. Paul as a person most