

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

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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.

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CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER

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VIDEO DEPOSITION OF  
DAN WEISS

\* \* \*

(VOLUME I)

Taken before LISA M. PETERSON, on the 5th day of  
October 2006 in St. Paul, Minnesota, commencing  
at approximately 9:00 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

\* \* \*

INSTRUCTIONS NOT TO ANSWER

Page

By Ms. Thorpe ..... 36, 104

\* \* \*

REQUEST FOR PRODUCTION OF DOCUMENTS

Page

(No requests were made)

\* \* \*

REFERENCE INDEX

(Attached to back of transcript)

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I N D E X

DEPOSITION EXHIBITS

4	Exhibit	Page
5	No. 134 .....	142
6	No. 135 .....	145
7	No. 136 .....	149

8

9 NOTE: Deposition Exhibit Nos. 134 through 136  
10 were retained by Attorney Leslie A. Pereira and  
11 are not appended to the transcript.

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

2  
3 DAN WEISS

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. Weiss. How are you?

13 A Good morning. Fine. Thanks.

14 Q As I'm sure you appreciate you are under oath  
15 here today even though we are sitting in a  
16 conference room rather than a court of law. Do  
17 you understand that?

18 A Yes.

19 Q Have you been deposed before?

20 A Yes.

21 Q When have you been deposed?

22 A I was deposed in connection with the coverage  
23 litigation between St. Paul and America Online  
24 involving the version 5.0 and 6.0 matters and  
25 then I was also deposed in a personal matter.

1 Q Have you had an opportunity to review your  
2 deposition transcript from the 5.0 litigation?

3 A I've had the opportunity to, yes.

4 Q Did you review that transcript?

5 A No.

6 Q Do you know whether there was any testimony in  
7 there that you believe to be inaccurate?

8 A I don't believe there was any testimony in there  
9 that was inaccurate.

10 Q Do you understand that you are here today in not  
11 only your personal capacity but also as a  
12 corporate designee on behalf of St. Paul?

13 A Yes.

14 Q Let me show you what we have previously marked  
15 as Exhibit 115. Have you seen that document  
16 before?

17 A I don't believe I have seen the entire  
18 document.

19 Q If I could just direct your attention to topics  
20 for examination No. 6 through 8.

21 A Okay.

22 Q Is it your understanding that you are here today  
23 in part to testify as a corporate designee for  
24 St. Paul on topics No. 6 through 8?

25 A As indicated here specifically in connection to

1 the application of the policy provisions of the  
2 claims at issue, I'm here as a corporate  
3 designee for that purpose.

4 Q And could you please look at topics 14 through  
5 17.

6 A Okay.

7 Q And is it your understanding that you are here  
8 today in part to testify as a corporate designee  
9 on behalf of St. Paul as to topics 14 through  
10 17?

11 A Yes.

12 Q What did you do to prepare for your deposition  
13 today?

14 A I had a meeting with my counsel.

15 Q Who is that?

16 A Sara Thorpe.

17 Q When did you meet with Sara Thorpe?

18 A Tuesday morning. Two days ago.

19 Q How long did that meeting take place?

20 A About two and a half hours.

21 Q Did you review any documents during that  
22 meeting?

23 A Yes.

24 Q What documents did you review?

25 A I reviewed the file correspondence and some file

1 until you became senior counsel in the legal  
2 services department?

3 A Yes.

4 Q That I believe was August?

5 A 2002.

6 Q When you became a technology claim attorney in  
7 April of '01, was that your first job with  
8 St. Paul?

9 A Yes.

10 Q What were your responsibilities as technology  
11 claim attorney?

12 A To administer claims, to analyze coverage and  
13 administer claims involving technology accounts  
14 and in general intellectual property and  
15 personal injury and advertising injury claims.

16 Q Can you give me just a general sense of -- and  
17 if it helps just assume a new claim came in --  
18 how you handled that claim if a new claim was  
19 tendered and it was assigned to you? What were  
20 your responsibilities with respect to handling  
21 that claim?

22 A My responsibilities were generally to review the  
23 materials submitted by the policyholder in  
24 support of its claim for coverage, review the  
25 policy, review any other materials as necessary



1 to make my coverage determination, then  
2 depending on the determination of coverage  
3 either issue a reservation of rights letter and  
4 agree to defend or deny coverage, correspond  
5 with the policyholder explaining our position  
6 and if it involves a provision of a defense, set  
7 up that defense, monitor the defense and  
8 hopefully get the claim resolved.

9 BY MS. PEREIRA:

10 Q When you started as a technology claim attorney  
11 in April 2001, were you handed a set of claims  
12 when you walked in the door?

13 A Yes.

14 Q Can you tell me were many of those claims  
15 ongoing claims?

16 A Several of them were ongoing claims, yes. I  
17 don't know what you mean by many. The group I  
18 was handed included ongoing claims.

19 Q Were you given any claims that were being  
20 brought by AOL at that time?

21 A Yes.

22 Q What AOL claims were you given at that time?

23 A I don't remember specifically. There were many  
24 of them that had already been submitted to us  
25 that Dale Evensen was handling, and he

1 essentially turned over all those claims  
2 involving AOL to me.

3 Q Was one of those claims the SmartDownload  
4 claim?

5 A Yes.

6 Q Why did you receive Dale Evensen's claims?

7 A Dale Evensen's AOL claims?

8 Q Yes. Are those the only claims you received  
9 from Dale Evensen?

10 A I don't remember. There may have been others.  
11 It was just an opportunity for me to get started  
12 on some claims. It was help relieving some of  
13 his workload and giving me something to start  
14 on.

15 Q So the SmartDownload claim was one that you  
16 received from Mr. Evensen?

17 A Yes.

18 Q Did you meet with Mr. Evensen at the time that  
19 you assumed the AOL claims from him?

20 A I'm sure I did.

21 Q Do you have any recollection of that meeting?

22 A No.

23 Q Do you recall how many roughly AOL claims there  
24 were that you received from Mr. Evensen?

25 A A dozen more or less.

1 Q So then if I understand you correctly, what you  
2 are saying is the tort of intrusion upon  
3 seclusion might be covered under this personal  
4 injury offense if it is coupled with the act of  
5 making it known to a third party?

6 A If there is a making known of information  
7 written or spoken material that violates a  
8 person's right of privacy, that's going to  
9 satisfy this offense. How that information is  
10 obtained is irrelevant to this offense. If  
11 there's a making known, it would satisfy this  
12 offense.

13 Q So your understanding is that eavesdropping is  
14 one example of intrusion upon seclusion, is that  
15 right?

16 A Right.

17 Q If a person eavesdrops on someone and shares the  
18 information that they heard with one other  
19 person, would that satisfy this personal injury  
20 offense?

21 MS. THORPE: Objection. Incomplete  
22 hypothetical.

23 A What type of material are we talking about?

24 BY MS. PEREIRA:

25 Q We can assume it's spoken material.

1 A Right. The offense applies to making known to  
2 any person or organization. So if that  
3 information which is written or spoken material  
4 and it violates a person's right of privacy is  
5 made known to one other person, that would  
6 constitute making known to a third party.

7 Let's be clear about that. Not any person.  
8 Sharing within a group of people who are within  
9 the same company, we consider the insureds to be  
10 the entity. So again we are talking about third  
11 parties. I want to be clear about that. But if  
12 the information is made known to a third party  
13 whether it's one person or group of people, that  
14 would satisfy this offense.

15 Q What are you basing your sort of third-party  
16 requirement on in this personal injury  
17 offense?

18 MS. THORPE: Objection.  
19 Argumentative.

20 A Because as I mentioned before, I think to  
21 interpret this as making known -- to interpret  
22 making known to mean making known to the person  
23 who's obtained the information is a tortured  
24 reading of the policy word. Making known  
25 requires an affirmative disclosure of that

1 don't know whether or not you can do that. The  
2 browser seems to be a separate function from the  
3 download function within the browsers that I  
4 use.

5 Q Do you know whether SmartDownload had any  
6 function that allowed you to browse to other  
7 sites on the internet?

8 A I do not know.

9 Q If the only functionality of SmartDownload was  
10 to allow you to download a large file, would you  
11 consider that to be providing internet access to  
12 third parties?

13 A Yes.

14 Q How so?

15 MS. THORPE: Objection. Asked and  
16 answered.

17 A SmartDownload allows the user to go out into the  
18 internet and access large files, download them  
19 to their own computers.

20 BY MS. PEREIRA:

21 Q Is it SmartDownload that allows the user to go  
22 out into the internet or is it the browser that  
23 allows the person to go out into the internet?

24 A The browser allows you to locate the files but  
25 you can't actually pull those files --

1 SmartDownload my understanding is allows the  
2 user to actually download those files from  
3 another website through the user's computer. So  
4 the browser gets you there, but if the browser  
5 doesn't have the download tool, you can't  
6 actually get the files and bring it back to your  
7 own computer.

8 Q Isn't it the browser then that is actually  
9 giving you the internet access to the other  
10 location?

11 A I don't read providing internet access as  
12 narrowly as you do. I think if you interpret  
13 internet access to mean just a browser, then  
14 that's not a reasonable reading of this  
15 exclusion when you consider what Netscape does,  
16 what it allegedly did. There are other parts of  
17 Netscape besides its browser that allow people  
18 to access the internet, one of which is  
19 SmartDownload.

20 Q Do you know whether this exclusion was drafted  
21 with Netscape's activities in mind?

22 A As opposed to AOL's activities?

23 Q Yes.

24 A I don't know. I wasn't privy to the drafting of  
25 this exclusion.

1 complaints plural, I guess -- alleged an injury  
2 from supplying third-party content?

3 A No.

4 Q So it was only the last prong which is providing  
5 internet access to third parties that you  
6 believe was triggered by the SmartDownload  
7 complaints?

8 A That's right.

9 Q Can you tell me how you felt that last prong  
10 applied to the SmartDownload claims?

11 A Taking the allegations as a whole in the  
12 underlying complaints it was clear to me that  
13 the only way this information could be -- the  
14 allegedly private information could be obtained  
15 was through internet access to third parties,  
16 and that's exactly what was being alleged here  
17 is that through access to the internet that  
18 SmartDownload was capturing private information  
19 and transmitting it back to Netscape and AOL.

20 Q So do you believe the SmartDownload complaints  
21 alleged that information was intercepted and  
22 transmitted back to AOL and Netscape?

23 A Information, yes.

24 Q Are you familiar with the SmartDownload  
25 product?

1 computer, you could use SmartDownload.

2 Q If you look at the language of the exclusion, it  
3 says providing internet access. So then do you  
4 view SmartDownload as a product which provides  
5 internet access?

6 A Yes.

7 Q Then you interpret access to mean the ability to  
8 find -- is it the ability to find files on the  
9 internet?

10 A Find and use and download files. That's what a  
11 hugh part of internet access is all about. This  
12 product my understanding was distributed in  
13 connection with the web browser Communicator,  
14 It's a component of the browser that allows --  
15 the portal that allows someone to access the  
16 internet and then to further access it through  
17 SmartDownload.

18 Q How did you come to understand what the  
19 providing internet access to third parties  
20 means?

21 A Besides the plain meaning of the words?

22 Q Yes.

23 A In the course of handling AOL claims I had an  
24 opportunity to discuss the underwriting of those  
25 claims with our underwriting personnel.



1 quotes from the policy and he quotes the duty to  
2 defend provision in the policy.

3 Do you see that?

4 A Yes.

5 Q Are you familiar with that provision?

6 A Yes.

7 Q Can you tell me under what circumstances a  
8 defense is provided by St. Paul under this type  
9 of a policy?

10 A Under what circumstances, well --

11 Q I guess I would say more generally what I'm  
12 getting at is what type of a standard do you  
13 apply when you are looking at a file?

14 A Each state has its own law regarding the scope  
15 of a duty to defend and what this language  
16 means, but generally speaking if the underlying  
17 complaint is potentially covered by the policy,  
18 then it would trigger our right and duty to  
19 defend.

20 Q Is that the standard you applied in evaluating  
21 coverage for the SmartDownload claim?

22 A Again it's a general standard, and any general  
23 standard would have to be modified in light of  
24 any existing case law, but when I would approach  
25 claims generally speaking I would look to see

1 whether or not the claim was potentially  
2 covered, assuming all the allegations were true,  
3 would it potentially trigger coverage.

4 Q Is that the standard you applied when you were  
5 evaluating the SmartDownload claim?

6 A I don't recall specifically analyzing it  
7 according to a certain standard. That was  
8 generally my standard I used when I analyzed all  
9 claims.

10 Q Did you prior to analyzing a particular claim,  
11 was it your practice to do any sort of a choice  
12 of law analysis?

13 A Sometimes I would do choice of law analysis.

14 Q Under what circumstances?

15 A When it was possible or likely that whether --  
16 some states law -- different states law -- Let  
17 me start again.

18 If the law of a particular jurisdiction  
19 meant that the outcome would be different, we  
20 would have to consider choice of law.

21 Q In connection with the SmartDownload claim did  
22 you do any choice of law analysis?

23 A I don't believe so.

24 Q Do you recall why that was?

25 A I was confident that regardless of what law

UNITED STATES DISTRICT COURT  
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Netscape Communications  
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and DOES 1 through 50,

Defendants.

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CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER

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VIDEO DEPOSITION OF  
DANIEL WEISS

\* \* \*

(VOLUME II)

Taken before LISA M. PETERSON on the 7th day of  
November 2006 in St. Paul, Minnesota, commencing at  
approximately 9:08 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 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.

13  
14 ALSO PRESENT: Mr. John Mulcahy, Videographer.  
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I N D E X  
EXAMINATION

Page

By Ms. Pereira ..... 171

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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)

1  
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I N D E X

DEPOSITION EXHIBITS

Exhibit	Page
No. 189-193 .....	196
No. 194 .....	218
No. 195-199 .....	230
No. 200 .....	253
No. 201-203 .....	263

NOTE: Deposition Exhibit Nos. 189 through 203  
 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 DANIEL WEISS

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. Weiss.

13 A Good morning.

14 Q I want to first talk to you about an exclusion  
15 in the St. Paul policy which is called  
16 deliberately breaking the law. In doing that  
17 I'm going to direct your attention back to what  
18 was previously marked as Exhibit 1, and I have  
19 for your convenience flagged with blue the  
20 specific exclusion in the policy, if you could  
21 take a look at that.

22 A Okay.

23 Q Are you familiar with that exclusion?

24 A Yes.

25 Q Can you tell me how that exclusion operates?

1 right?

2 A That's right.

3 Q And in connection with the Specht lawsuit was  
4 the plaintiff in that case seeking any sort of  
5 criminal sanctions against AOL or Netscape?

6 A No.

7 Q Is it true there is a civil component to the  
8 ECPA and the CFAA?

9 A It is true.

10 Q Is it your understanding those were the  
11 provisions that the plaintiff in Specht was  
12 trying to enforce?

13 A Yes.

14 Q Can you point me to the allegations that you  
15 believe support your view that Specht alleges  
16 that AOL and Netscape knowingly broke a  
17 criminal law?

18 A Well, as I mentioned before, there's a series  
19 of factual allegations that are designed to  
20 show that the provisions of both of those acts  
21 were, in fact, violated. So I'm not going to  
22 read all those paragraphs to you, but the  
23 factual allegations are contained in -- the  
24 substantive allegations are contained in  
25 paragraphs 19 through 40, and those are being



1 used to establish that the two acts were, in  
2 fact, violated.

3 There's no allegation in here that conduct  
4 was in any way negligent. In fact, the  
5 defendants' actions are alleged to have been  
6 conscious, intentional, wanton and malicious.  
7 Those are allegations in paragraphs 63 and 53.  
8 The complaint is filled with allegations of  
9 spying and intentional conduct.

10 In fact, paragraph 14 in the class action  
11 allegations section says that, "Plaintiffs'  
12 claims are typical of the claims of the other  
13 members of the class as Plaintiffs, and all  
14 other members of the class were injured in  
15 exactly the same way by the intentional theft  
16 of their private information in violation of  
17 federal laws as complained of herein."

18 So I think it's very possible that the  
19 deliberately breaking the law exclusion would  
20 apply to this lawsuit.

21 Q Directing your attention to paragraph 14 it  
22 says -- the one that you just referred me to it  
23 says, "All plaintiffs and all other members of  
24 the class were injured in exactly the same way  
25 by the intentional theft of their private

1 information in violation of federal law."

2 Do you read that to say that AOL and  
3 Netscape intended to take their private  
4 information or that they intended to violate  
5 federal law?

6 A I read that the word intentional to refer to  
7 the theft of the information, not the violation  
8 of federal law.

9 Q So you read that to mean they intended to take  
10 the information?

11 A That's the way I read it, yes.

12 Q How does that then support your view they  
13 knowingly broke a criminal law?

14 A I mentioned that in the context of an entire  
15 complaint, and when I read the fact there's no  
16 allegation here this conduct -- that the theft  
17 which is again the allegedly -- the conduct  
18 that allegedly breaks these two acts, that when  
19 I read that allegation in the context of all  
20 the other allegations there's no indication  
21 here that this was done negligently or  
22 unintentionally.

23 Q So then is it the case that if you don't see an  
24 allegation that conduct was done negligently or  
25 unintentionally, you conclude that it was done

1 crime?

2 A I believe that's generally accurate.

3 Q And a general intent crime is one where you can  
4 sort of commit a crime without intending to do  
5 so?

6 A You are taking me back to my criminal law days  
7 of law school 15 years ago. I don't know that  
8 I would agree with that statement, but I think  
9 I generally understand the difference between  
10 general intent and specific intent crimes.

11 Q I guess getting back to the exclusion in the  
12 policy, is it the case that you have to intend  
13 -- the insure has to intend to take the acts or  
14 to do the acts which constitute the crime or is  
15 it the case that the exclusion requires that  
16 the insured intend to commit the crime?

17 A The exclusion requires the person knowingly  
18 break the criminal law.

19 Q In your mind does that mean they have to be  
20 aware of the criminal law?

21 A That's what it means.

22 Q And then take action that they know is intended  
23 to break it?

24 A Yes.

25 Q Is it your view that's what is being alleged

1 here in the Smart Download in the Specht  
2 complaint?

3 A I think that's potentially what is being  
4 alleged here. I think as I mentioned to you  
5 before, I think there's a potential that  
6 exclusion would apply.

7 Q Is that the standard you use in applying an  
8 exclusion in the policy, whether there's a  
9 potential that it might apply?

10 A If you are going to write a reservation of  
11 writes letter or a denial letter and you want  
12 to be sure to assert an exclusion that  
13 applies -- I'm sorry. I lost focus in your  
14 question. Ask your question again and I will  
15 try to answer it.

16 Q My question is is that the standard that you  
17 apply or is that the standard you use when you  
18 are applying a policy exclusion, whether there  
19 is a potential that it applies?

20 A No. If that's what I said, I believe I  
21 misspoke. Reading this complaint I think it's  
22 entirely reasonable to determine that exclusion  
23 applies based on the allegations in this  
24 complaint.

25 Q Now, you have pointed me to several allegations

1 here, and I have looked at the ones you have  
2 pointed me to, and I do agree they say that AOL  
3 and Netscape intentionally took certain  
4 actions, but do you see any specific  
5 allegations in the complaint that says either  
6 AOL or Netscape intended to break a law, a  
7 criminal law?

8 MS. THORPE: Objection. Asked and  
9 answered.

10 A There are no magic words in here to say that  
11 AOL and Netscape knew about the law and  
12 intentionally broke it. Reading the complaint  
13 as a whole I think it's very easy to get to  
14 that conclusion, and the fact that there are no  
15 magic words about knowingly breaking the law to  
16 me doesn't determine whether or not the  
17 exclusion applies.

18 BY MS. PEREIRA:

19 Q Are there different states -- Are you aware  
20 whether there are different states that  
21 interpret this deliberately breaking the law  
22 exclusion differently?

23 A No.

24 Q You are not aware of that?

25 A I'm not.

1 last time, but go ahead.

2 BY MS. PEREIRA:

3 Q Like I said, I have five questions. Is it your  
4 belief then that personal injury offense is  
5 only satisfied if the insured discloses  
6 something to a third party?

7 A That offense requires that the information, the  
8 information that violates someone's right of  
9 privacy be disclosed to a third party.

10 Q And is it your view that that offense requires  
11 that the third party be somebody outside of the  
12 insured's organization?

13 A Yes. A third party does not include the  
14 insured.

15 Q Is it your view that that offense requires that  
16 the third party not be another insured under  
17 the same policy?

18 MS. THORPE: Objection. Asked and  
19 answered.

20 A Yes.

21 BY MS. PEREIRA:

22 Q Then finally, is it also your view that that  
23 offense requires that the third party not be  
24 another corporation that is related to the  
25 insured?

1 MS. THORPE: Objection. Incomplete  
2 hypothetical.

3 A I don't know that I would interpret that  
4 provision if this was some disclosure to a  
5 third party, someone other than the insured, if  
6 that third party was somehow related or  
7 affiliated to the insured, I don't know that I  
8 would -- I think coverage would exist under the  
9 bullet in that case.

10 BY MS. PEREIRA:

11 Q The reason I'm asking this is we have had some  
12 testimony in this case that that personal  
13 injury offense would not be triggered if the  
14 third party that the information was shared to  
15 was, for example, a subsidiary corporation of  
16 the insured.

17 A That is not also an insured?

18 Q Yes.

19 A A subsidiary noninsured?

20 Q Yes.

21 MS. THORPE: Objection. Irrelevant.  
22 Incomplete hypothetical.

23 A I have never had occasion to analyze a claim or  
24 make a coverage determination in that scenario.  
25 So I haven't contemplated whether or not our