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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

JOHN A. HUBBARD,

Plaintiff,

-v-

THE HOME INSURANCE COMPANY, RISK ENTERPRISE MANAGEMENT LTD.
ANN GALASSO, and DOES A-Z,

Defendants.

CAUSE NO. CV-01-71-GE

DEPOSITION OF ANN GALASSO

Great Falls, Montana
Tuesday, June 18th, 2002
10:00 - 12:15; 1:39 - 5:00 P.M.

APPEARANCES:

DAVID B. GALLIK
Attorney at Law
120 East Lyndale Avenue
Helena, Montana 59601
Attorney for the Plaintiff.

SMITH, WALSH, CLARKE & GREGOIRE
Attorneys at Law
121 Fourth Street North, Suite 2A
Great Falls, Montana 59401
By: DENNIS P. CLARKE
Attorneys for the Defendants.

1 BE IT REMEMBERED that on Tuesday, June 18th,
2 2002 at the hour of 10:00 A.M. of said day, at the offices
3 of Smith, Walsh, Clarke & Gregoire, 121 Fourth Street
4 North, Suite 2A, Great Falls, Montana, and before Joan P.
5 Agamenoni, a Notary Public for the State of Montana,
6 pursuant to Notice, the deposition of ANN GALASSO was
7 taken on oral interrogatories.

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9 Thereupon,
10 ANN GALASSO,
11 having been first duly sworn to tell the truth, the whole
12 truth and nothing but the truth, testified upon her oath
13 as follows:

14
15 EXAMINATION BY MR. GALLIK:
16 Q Ms. Galasso, my name is Dave Gallik. I'm one of
17 the attorneys representing John Hubbard in this cause of
18 action that we're here for a deposition today. Have you
19 ever had a deposition taken?
20 A Yes.
21 Q How many times have you been deposed?
22 A Three or four times. I can't exactly remember.
23 It's three or four.
24 Q Do you recall what types of cases you gave a
25 deposition in?

I N D E X

| WITNESS | PAGE |
|--|------|
| ANN GALASSO | |
| EXAMINATION BY MR. GALLIK | 3 |
| EXHIBITS | PAGE |
| Deposition Exhibit A (retracted) | 120 |
| CERTIFICATE OF WITNESS | 177 |
| CERTIFICATE OF REPORTER | 178 |

1 A Primarily construction defect litigation when we
2 were seeking recovery of money back, and the other time
3 was we had interpleaded the remaining funds on a policy,
4 and the various defendants took my deposition to ensure
5 that all of the money had been interpleaded or spent.
6 Q When were these depositions taken, approximately
7 a year?
8 A 1998 and '99, I think.
9 Q So having had your deposition taken three or
10 four times in the past, you understand that our court
11 reporter is going to be taking down all of our words
12 verbatim; and, therefore, you need to wait until I'm done
13 with my question before you answer, and I'll wait until
14 you're done with your answer before I ask the next
15 question, all right?
16 A Correct.
17 Q The next thing that is very important is you
18 need to make sure you understand the question before you
19 answer it. If it's unintelligible or you don't understand
20 or would like me to rephrase, just please say so. And if
21 you don't ask, I'll assume that you understand the
22 question, fair enough?
23 A Yes.
24 Q For purposes of getting started here, what I
25 would like you to do is to just kind of take me through

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1 your educational background first, and then I would like
 2 you to take me through your professional history, as far
 3 as your work history?
 4 A How far back?
 5 Q Let's start with education.
 6 A How far back?
 7 Q Start with your high school.
 8 A Graduated high school 1969, Mission San Gabriel
 9 High School in San Gabriel, California. Went to St.
 10 Vincent's College of Nursing, got an RN diploma in 1972.
 11 St. Vincent's was in Los Angeles, California. Attended
 12 California State University at Los Angeles with my
 13 bachelor's degree in political science. That was March of
 14 1979. Went to the University of La Verne College of Law
 15 in La Verne, California, graduated with my JD in 1982.
 16 Q Did you take the bar exam?
 17 A Yes, I did.
 18 Q Which state?
 19 A I took both California and Georgia's. I'm a
 20 member of the Georgia bar.
 21 Q Never did become a member of the California bar?
 22 A No.
 23 Q As far as your employment history, could you
 24 give me the same type of a background?
 25 A I started, I was a nurse from 1972 to

6

1 approximately late 1983, when I injured my back. Had to
 2 have back surgery, and I was not allowed to go back to
 3 nursing. And went to work for an independent, handling
 4 primarily professional liability claims. It was Fisher &
 5 Associates in Torrance, California. And I was there to
 6 about -- I started there in March of '85, and I was there
 7 to about 1988. And then in 1988 I went to work for CIGNA
 8 in their professional liability claims department. And I
 9 was there to approximately 1990. In 1990 I went to
 10 Industrial Indemnity in Los Angeles as a claims supervisor
 11 and was there for, through '91. From there I went to
 12 Argonaut Insurance Company and was there from about April
 13 of '91 to actually it was December 31st, 1993. I worked
 14 New Year's Eve. And that was my last day there. And then
 15 I went to work for Home Insurance Company January 10th,
 16 1994. And when Home ceased doing business in '95, I
 17 worked for REM, I was employed by REM. And I've been
 18 there ever since.
 19 Q Tell me about REM. What is REM?
 20 A Risk Enterprise Management is a third-party
 21 claims management company, and we contract with various
 22 insurers or self-insureds and handle claims for them.
 23 Q Now, you indicated that you went to REM in 1995
 24 when Home ceased doing business. What do you mean by Home
 25 ceased doing business?

7

1 A Home ceased its operations. They no longer had
 2 a claim department, and they became an inactive insurance
 3 company. They ceased writing any policies.
 4 Q What was your job for Home before they ceased
 5 doing business?
 6 A I was a claims supervisor.
 7 Q All lines?
 8 A Just general liability, you know, which would
 9 encompass auto and GL.
 10 Q And your current position at REM is --
 11 A Claims supervisor.
 12 Q What type of training, other than the formal
 13 education you've indicated thus far, have you had in the
 14 insurance claims arena?
 15 A It's pretty much on-the-job training. I have
 16 attended seminars that various law firms have put on over
 17 time, and mostly it's been on-the-job training.
 18 Q When you were with Home Insurance Company, did
 19 they have a claims handling practice manual?
 20 A If they did, I never saw it.
 21 Q Of any of the insurers that you have worked for
 22 from Fisher & Associates to CIGNA to Industrial Indemnity
 23 to Argonaut to Home and then to REM, did any of them have
 24 a claims handling manual?
 25 A I don't recall with any degree of specificity

8

1 that the companies did. I know that Fisher & Associates
 2 didn't. They were simply too small, but I don't recall
 3 the other companies having one or anything that I was told
 4 was one. REM does have a claims manual that's directed
 5 towards our client handling expectation.
 6 Q How about Home Insurance, did they have a claims
 7 handling manual?
 8 A I never saw one.
 9 Q That's right. I asked that question. How many
 10 individuals do you supervise as the claims supervisor at
 11 REM?
 12 A Currently four plus a clerical assistant, four
 13 technical staff and a clerical assistant.
 14 Q How about at Home?
 15 A That would, that ranged in terms of how many
 16 supervisors we had. And it would have been, I think the
 17 maximum I had was six. It would have been between four
 18 and six at various times.
 19 Q When you worked for Argonaut Insurance in 1991
 20 and 1993, were you also in the claims department?
 21 A Yes.
 22 Q And was your title supervisor, claims
 23 supervisor?
 24 A No, it was not. I was a principal account
 25 specialist.

9

1 Q Were you the claims supervisor at Industrial
2 Indemnity when you were with them between '90 and '91?
3 A Yes, I was.
4 Q While working at REM, are there any lawyers,
5 besides yourself, on staff in the claims department?
6 A I'm not a lawyer at REM.
7 Q Oh, okay.
8 A I'm not employed as a lawyer at REM.
9 Q You're a claims manager.
10 A I'm a claims supervisor.
11 Q Does REM have any individuals on staff in your
12 office that are employed as lawyers?
13 A Not to my knowledge.
14 Q Have you ever done any courtroom testimony?
15 A Once for a client TIG.
16 Q When was that?
17 A That, I think, was 1999.
18 Q What type of a case was that?
19 A It was a recovery case brought by another
20 insurance carrier against TIG seeking equitable
21 subrogation.
22 Q REM, as you've indicated, is a third-party
23 claims management firm. How many insurers do you manage
24 claims for at REM?
25 A Well, I can only speak for my office.

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1 Q Sure.
2 A I don't know what all the other offices have for
3 clients. And I can only speak for the general liability,
4 I can't speak for workers' comp department, because I
5 don't know who all workers' comp has as clients.
6 Q Okay.
7 A But currently our department has four insurers
8 and two or three self-insureds.
9 Q How many offices does REM have besides yours?
10 A Huh, I think there's eight or nine, but I'm not
11 exactly sure. Could be ten.
12 Q Who is currently your supervisor? Who is next
13 in the chain of command at REM above where you're at?
14 A The claim manager, Larry Beemer, B-E-E-M-E-R.
15 Q How many claims supervisors do you have in your
16 office at REM?
17 A Just me.
18 Q Is Larry Beemer the individual in charge of your
19 REM office?
20 A No, he is not.
21 Q Who is?
22 A Dave Dilly is the vice-president, D-I-L-L-Y.
23 Q And he's in your office?
24 A Yes, he is.
25 Q Is there anybody between Mr. Beemer and

11

1 Mr. Dilly as far as supervisory control in your office?
2 A No.
3 Q So if I'm understanding it right, your claims
4 people report to you as the supervisor, you report to
5 Mr. Beemer as the REM claims manager, and Mr. Beemer
6 reports to Mr. Dilly as the REM vice president?
7 A Correct.
8 Q Who is the REM president and where at?
9 A Peter Johnson in Cranberry, New Jersey, is the
10 CEO.
11 Q Now, in 1995 Home ceased writing policies;
12 correct?
13 A Correct.
14 Q How does your relationship, your meaning REM's
15 relationship, work with the Home, given the fact that they
16 no longer do business and given the fact that there's a
17 supervisory ordered by the insurance commissioner in New
18 Hampshire? Tell me about that.
19 A When Home Insurance is sued, or currently that's
20 the only way we get anything in is by lawsuits, if they
21 know where to send it, and generally most of the people
22 know where to send the claims directly to us in Brea, or
23 they send them to New York, Home in New York, and it gets
24 forwarded to the correct office and a file is opened and
25 the claim is handled.

12

1 Q So the only time you're involved with Home work
2 is when Home themselves are sued as opposed to one of
3 their insured?
4 A No, when the insured is sued.
5 Q How large of a case load do you have right now,
6 open files, for Home?
7 A Me personally or --
8 Q Your office.
9 A Or the office? I think we have approximately
10 500 open Home claim files.
11 Q And how does that relate in number to the amount
12 of open Home claim files that you had when you worked for
13 the Home between 1994 and '95?
14 A I don't recall exact numbers, but there were
15 probably close to 1500 open files at that point in time.
16 That would have been both auto and GL. I need to make a
17 correction. I don't think it's 500 Home claim files. It
18 might be 300. I'm thinking of all the open claim files in
19 the office, but Home might be 300.
20 Q Was it in conjunction with Home's filing for
21 bankruptcy protection or the order of supervision that was
22 a cause of your moving from Home to REM?
23 A I don't understand. I don't understand your
24 question.
25 Q Well, you went to work from, in 1994, '95, you

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1 worked for Home, and then you went to work for REM. It
 2 was around that point in time that there was the order of
 3 supervision and the bankruptcy protection, if my
 4 understanding is correct, with Home?
 5 A I don't know exactly when all that happened,
 6 because I'm not involved in any of that.
 7 Q Well, my question is did that have anything to
 8 do with your moving your employment from the Home to REM?
 9 A Well, REM was comprised primarily of all former
 10 Home employees. We were all offered jobs with REM. REM
 11 was the carrier or the TPA that took over the handling of
 12 all of the Home claim files. Home ceased having a claims
 13 department.
 14 Q So REM was doing claims work for Home prior to
 15 their supervisory control order and bankruptcy protection
 16 filing; correct?
 17 A It began in June of 1995.
 18 Q That's when REM started doing --
 19 A Handling the claims for Home.
 20 Q So did REM handle any claims for Home before
 21 1995?
 22 A No.
 23 Q Was REM in existence before 1995?
 24 A If it was, I don't know about it. I don't know
 25 when it became a company and when it incorporated or did

1 our claims are there, and we review that on an annual
 2 basis.
 3 Q How many claims have you handled for REM that
 4 start in Montana, if you recall?
 5 A It's hard to remember when it was Home versus
 6 when it was REM. And the claim may have started when it
 7 was Home and then continued, we handled it as REM. It
 8 gets a little blurry, to be perfectly honest with you.
 9 But I've had I think two claims, two other claims in
 10 Montana.
 11 Q When were those claims, as best you can recall?
 12 A Might have been '96, '97.
 13 Q And do you recall what they were about?
 14 A One was a wrongful death. It was not a wrongful
 15 death. It was a quadriplegic claim.
 16 Q Auto?
 17 A Yes. And the other was a little later than '96
 18 or '97. It would have been, it would have been 2000. I
 19 take it back. The other was a claim that Weissman & Son's
 20 sent in erroneously that we had to investigate, because it
 21 was outside of our time of our policy period.
 22 Q What was that claim for by Weissman's?
 23 A I don't really recall. I just note that it was
 24 an accident, but the accident occurred after the
 25 expiration of the Home's policy. I think the accident was

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1 any of that stuff.
 2 Q Does REM have a written agreement for claims
 3 handling with the Home?
 4 A If it does, I've never seen it.
 5 Q Have you had any training through REM since your
 6 employment there with regard to your position as claims
 7 supervisor?
 8 A I guess I don't understand your question. Do
 9 you mean how to be a claims supervisor? I don't
 10 understand.
 11 Q Well, just, Ms. Galasso, what I'm interested in
 12 is what, if anything, have you been provided by way of
 13 training as far as how to handle a claim and what is
 14 necessary. Did they give you any training at all, whether
 15 it be formalized classrooms, whether it be how to books,
 16 manuals, those types of things?
 17 A No, because, we're all, we've all been in the
 18 business long enough that they presume we know how to
 19 handle a claim.
 20 Q Did they give you, they meaning REM, when you
 21 went to work for REM, did they provide you with any
 22 standards as to how to handle a claim, you know?
 23 A The only thing we were given and we do on an
 24 annual basis is review the California Claims Practices
 25 Act, since we're primarily based in California, most of

1 in '94.
 2 Q Do you recall if you dealt with an attorney on
 3 behalf of Weissman for that 2000 claim that was outside
 4 the policy period?
 5 A Yes.
 6 Q Who was that lawyer?
 7 A Bob Pfennigs.
 8 Q Have you ever met Bob Pfennigs?
 9 A No.
 10 Q Spoken with him on the phone a couple of times?
 11 A Yes.
 12 Q Now I want to focus on the particular facts of
 13 the case that is before us today, and I've got several
 14 documents that we've all seen here, because they come
 15 basically from your redacted claims file. And you have
 16 had an opportunity to go through your redacted claims
 17 file; correct?
 18 A Yes.
 19 Q Were you involved with the redaction of
 20 documents from the claims file?
 21 A No.
 22 Q Who redacted those, as best you know?
 23 A I don't know for sure.
 24 Q Did you have any discussions with anybody with
 25 regard to the redaction of documents from the claims file?

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1 A Not that I recall.
 2 Q Are you or is your office of REM where the
 3 original claims file is housed?
 4 A No.
 5 Q Where is the original claims file housed?
 6 A With Home's general counsel.
 7 Q And who is Home's general counsel?
 8 A Joe Ross.
 9 Q How long have you known Mr. Ross?
 10 A Probably since 1995.
 11 Q And how long has he been the general counsel?
 12 Since then?
 13 A Oh, probably before then, but I couldn't tell
 14 you when.
 15 Q Tell me, as best you can recall, without
 16 reference to the documents, and we'll get to those in a
 17 minute, how you became aware of this claim that has been
 18 made by Carl Weissman & Sons in the first instance?
 19 A When Bob Pfennigs and I were talking about the
 20 other claim files that had come in, which was the accident
 21 that happened after the policy, the Home policies expired,
 22 Bob mentioned that there was another claim that he was
 23 going to send to me. And I asked him a little bit about
 24 it, and he said that it had been dormant for a long time.
 25 And I said, well, send me the claim number, and I'll see,

18

1 send me the claim and the claim number, and I'll see what
 2 I can do about opening the file. And I asked him if he
 3 had the claim number at that time, and he said, no, he did
 4 not. So I just waited for him to send me whatever it was
 5 he was going to send me.
 6 Q When was this?
 7 A It was in about February of 2000.
 8 Q Did the other claim have anything to do with the
 9 crane at Carl Weissman?
 10 A I honestly do not remember.
 11 Q How long after this initial conversation with
 12 Mr. Pfennigs was it that this particular claim of Carl
 13 Weissman & Sons and now Hubbard was again brought to your
 14 attention?
 15 A Two months later.
 16 Q And how was it brought to your attention?
 17 A When he sent in the second amended complaint.
 18 Q And that would have been then about April?
 19 A Yes.
 20 Q And that came with a cover letter; correct?
 21 A As I recall, it did, yes.
 22 Q When you received this second amended complaint
 23 and cover letter in April of 2000 from Mr. Pfennigs
 24 regarding this claim, what did you first do, once you got
 25 it in the mail, I take it; is that correct?

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1 A Yes, I don't remember if it was also faxed. But
 2 I know when I got it, I called Bob Pfennigs.
 3 Q And what was the reason for your call?
 4 A To let him know that I had received it and I
 5 wanted to get some background as to what had gone on in
 6 the case, since it was a second amended complaint. I
 7 didn't have the claim file. I didn't have any
 8 information, other than the second amended complaint. He
 9 didn't provide me any additional information, and I wanted
 10 to know what had gone on.
 11 Q Did you consider the correspondence and second
 12 amended complaint that you received from Mr. Pfennigs in
 13 February, or excuse me, in April of 2000, to be a tender
 14 of the defense of that second amended complaint to the
 15 Home and, therefore, REM as their third-party claims
 16 manager?
 17 A Yes.
 18 Q What is your typical way of handling a claim
 19 once the defense is tendered by an insured? What do you
 20 normally do? Not necessarily with this case, but what is
 21 the normal process that you go through?
 22 A Well, if the insured is still in business, we
 23 normally call the insured to try to get information about
 24 what it was that they did. Primarily most of our things
 25 are construction defect claims. That's currently the only

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1 statute that is open that applies in most -- most of the
 2 insureds that we're dealing with are contractors,
 3 developers or subcontractors. So we call them, if they're
 4 around, to get information, to obtain copies of their job
 5 file, the subcontract, and basically get some basic
 6 information as to when they began on the job, when they
 7 completed their job, what they did on the job, their scope
 8 of work. If there is anybody still around that might be
 9 employed, so we can start identifying people early on. We
 10 may want them to walk the project site with us; take a
 11 look to see, during destructive testing, if there were any
 12 changes that were made to their work, anything along that
 13 line.
 14 If they're not in business anymore, which seems
 15 to be more typical than not, we usually end up calling the
 16 developer to find out if they have a document depository
 17 or if they happen to have the contract, along with notices
 18 of completion dates, so we can figure out if the policies
 19 is going to be triggered or not. We also try and find out
 20 from the developer if they know of any other carriers that
 21 might be involved with the insured or, if the insured is
 22 around, the identity of all of their other carriers, and
 23 then just go from there. Pull the policies to see what
 24 the coverage time frames are, take a look at where they
 25 are in terms of aggregate and depletion, and if there are

21

1 any open claims and we're defending them, who is doing the
 2 defending of them, so if there is a duty to defend, we're
 3 not reinventing the wheel. We can send it out to the
 4 appropriate defense counsel.
 5 Q Do you make the determination as to whether or
 6 not there is a duty to defend normally?
 7 A Yes. Not only me, but all of the claims people
 8 do.
 9 Q Sure. So if a claim comes in -- again,
 10 generically, I don't want to talk about this one quite
 11 yet. If a claim comes in to you, at some point in time,
 12 it's your responsibility to make the determination as to
 13 whether or not the insurer has a duty to defend?
 14 A Correct.
 15 Q Do you do that by yourself, or do you have a
 16 committee that makes that decision, or how does that work?
 17 A Well, once we get the information, we'll take a
 18 look at the information and analyze it with the coverage.
 19 Sometimes if it's, were not -- construction defect is so
 20 different from everything else. If it's something we're
 21 not clear on, we'll sit around and talk about it. If it's
 22 something that's, you know, we're not sure about, we'll
 23 write it up and send it on to New York and get an advisory
 24 opinion from New York to the Home office analyst there.
 25 If it's something that is very clear-cut, for instance,

22

1 the contract was signed two years after the expiration of
 2 the policy, it's a no-brainer, because there's no
 3 potential for property damage or bodily injury during the
 4 policy, if no work was done during the policy.
 5 Q Are there any standards or guidelines at REM
 6 that tell you when it's a no-brainer versus when you need
 7 to get assistance with other professionals within your
 8 organization?
 9 A No, that's just going to be on an individual
 10 case-by-case basis and what the person's technical
 11 background is.
 12 Q Sure. Now, I take it during your history in the
 13 claims field, insurance claims field, you have had
 14 occasion to have -- well, let me ask it this way: Have
 15 you had occasion to have the defense tendered more than
 16 one time based upon there being amended complaints?
 17 A Yes.
 18 Q And do you consider each amended complaint that
 19 is provided to you a separate tender?
 20 A No.
 21 Q What makes a distinction between whether it's a
 22 separate tender or a continuing?
 23 A There really, there's no set -- I guess I don't
 24 understand what you mean by continuing tender.
 25 Q Well, it was a bad question. Let me try again.

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1 And let's just talk about this case, because I think it's
 2 probably easier to focus in on the facts of this case. We
 3 know -- I'll assume you know, you tell me if my assumption
 4 is wrong -- that this case, this claim had been tendered
 5 in the early '90s initially?
 6 A Yes. That, well, I didn't know all of the
 7 facts, to be perfectly honest with you. I knew there was
 8 an open claim file. I knew nothing about the tender. I
 9 knew nothing about what had gone on in the '90s. I did
 10 not know whether there had been a suit. I presumed, when
 11 I'm getting a second amended complaint, that there was at
 12 least an original complaint and possibly a first amended
 13 complaint. But I never knew anything about it, because I
 14 didn't have the file. And Mr. Pfennigs did not in any way
 15 tell me that the claim had originally been disclaimed in
 16 1991.
 17 Q Did you ask?
 18 A I asked him about the claim, and all he told me
 19 was it had been dormant for quite some period of time.
 20 Q Okay.
 21 A And that was all he said.
 22 Q Now, you understand that in Montana there's a
 23 requirement for, statutory requirements for claims
 24 handling; correct?
 25 A Uh-huh, yes.

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1 Q All right. And you understand, do you not, that
 2 there are certain things for claims handling that are
 3 required to be done in Montana once the claim is filed,
 4 and that's an investigation, a prompt and reasonable
 5 determination; correct?
 6 A Yes.
 7 Q Did you understand it? Let me ask it this way
 8 then: What is your understanding of what is necessary to
 9 do pursuant to the Montana Unfair Claims Practices Act
 10 that must be done in order to stay within compliance once
 11 you get a claim?
 12 MR. CLARKE: So that we're clear on this
 13 question, you're only asking for her understanding, not
 14 for a legal conclusion?
 15 MR. GALLIK: Oh, absolutely.
 16 MR. CLARKE: Okay.
 17 A My understanding is that, specifically for this
 18 claim, would be to get the information that I could to
 19 determine whether or not, A, if there's going to be
 20 coverage; and, B, if there is coverage, then do I defend.
 21 Q (BY MR. GALLIK) So if we're talking about just,
 22 and let's again, generically based upon your claims
 23 background as opposed to specific case, if you get the
 24 tender of an amended complaint subsequent to original
 25 complaint, do you go through what is required pursuant to

25

1 the Unfair Claims Practices Act when tendered that second
 2 or amended complaint?
 3 A That's all going to depend. Is the second
 4 amended complaint our first notice of the claim? We never
 5 had an original complaint. We never had a first amended
 6 complaint. The second amended complaint is the first
 7 notice to whoever the insurer is, then you've got to go
 8 through and get all of the information to determine
 9 whether or not the policy is going to apply. If there has
 10 been a prior complaint and there has been a coverage
 11 determination that has been made, you're going to take a
 12 look at that second amended complaint in light of the
 13 investigation and stuff that was done with the first
 14 amended or the original complaint, is there anything new
 15 or different that is going to change the coverage opinion
 16 or coverage analysis that was done at the beginning the
 17 first time out.
 18 Q And for the Hubbard/Weissman claim, of those two
 19 categories, was this the first notification that you
 20 received and did you treat it that way?
 21 A No, it was not the first notification, because I
 22 was told that there was a prior claim number.
 23 Q And who had handled the prior claim?
 24 A Bob Andrea in our Denver office, our former
 25 Denver office.

26

1 Q And that was a Home Insurance Company claim?
 2 A Yes.
 3 Q Did you know Mr. Andrea?
 4 A Yes, I did.
 5 Q When did Mr. Andrea pass away?
 6 A I was thinking about that yesterday. I think it
 7 was in 1996 or '97. I can't remember. But I know it was
 8 after we had become REM, because he worked for REM.
 9 Q He worked for REM also?
 10 A (Witness nods head.) I believe it might have
 11 been '97.
 12 Q Let's go back then to your receipt of this
 13 second amended complaint and correspondence from
 14 Mr. Pfennigs tendering the defense of this matter in April
 15 of 2000. When you contacted Mr. Pfennigs after receipt of
 16 this stuff, what was discussed? What information did you
 17 elicit?
 18 A Well, I wanted to know what had gone on, you
 19 know, because obviously this loss was a loss in the late
 20 1980s, and here we are in the year 2000, what had gone on
 21 between times, what had happened, what was the status of
 22 the litigation, what had happened originally with this.
 23 Q What did you learn?
 24 A Not much. All he told me is that it had been
 25 dormant for a long period of time and he wanted the Home

27

1 to defend, but he didn't tell me anything about what had
 2 happened beforehand.
 3 Q Did you probe any further as to where, what he
 4 had been doing in the past six, seven years, with regard
 5 to this particular claim?
 6 A I asked but he said he didn't have the file in
 7 front of him, and he couldn't really remember since it had
 8 been dormant for so long essentially is what he told me.
 9 Q So during that telephone conversation,
 10 subsequent to the receipt of the second amended complaint
 11 and correspondence in April of 2000, you didn't learn
 12 anything substantive, other than the fact that the claim
 13 had been laying dormant?
 14 A That is all that he told me.
 15 Q After you talked to Mr. Pfennigs, how did you
 16 leave that telephone conversation with him? Were you
 17 going to get back to him? Was he going to supply you with
 18 something new? What was going to happen?
 19 A No. We had talked about it. I told him I would
 20 have to pull the file from storage. But, in the meantime,
 21 since he wanted us to defend and I had no information
 22 regarding that, and I knew that the later policies of
 23 Weissman's, because I had looked at the last couple of
 24 policies since we had them in our files when that
 25 erroneous claim had been tendered that had happened after

28

1 our policies, I knew that those later policies had stopgap
 2 coverage. And I mentioned this to him, and I said, I
 3 don't know if your 1987 policy has it or not, but on the
 4 assumption that it does, I will go ahead and assign
 5 defense counsel, but I said this will be under a
 6 reservation. And he said, "Is this going to be without
 7 reservation?" And I said, no, it will be under a
 8 reservation of rights, because if you do not have stopgap,
 9 the employee exclusion is going to apply to this, and we
 10 won't be defending you. In addition to the fact that all
 11 this is seeking punitive and exemplary damages for
 12 intentional acts that aren't going to be covered under a
 13 CGL policy. So I sent him out a very, very, quick, basic,
 14 very general reservation of rights that same day and faxed
 15 it to him, because I hadn't had the file yet.
 16 Q The same day that you got --
 17 A The same day that I got the tender and the same
 18 day that I had the conversation with him.
 19 MR. GALLIK: I'm going to ask to take five
 20 minutes, is that okay?
 21 MR. CLARKE: Sure.
 22 (Whereupon, a brief recess was taken at 10:50 to
 23 10:53 A.M.)
 24 Q (BY MR. GALLIK) Was the initial letter that you
 25 had sent, that you just talked about to Mr. Pfennigs dated

1 April 17, 2000?
 2 A As I recall, that is the date.
 3 Q I'm going to show you Bates stamp document
 4 000248 and ask that you review that and tell me if that is
 5 the initial?
 6 A Yes, this is the initial reservation of rights
 7 that I sent out.
 8 Q And for the purposes of the record, we're going
 9 to refer to all of those documents that have been
 10 exchanged between counsel by the Bates stamp number that
 11 we have provided on the bottom of those. We both used
 12 numerics. So I will refer to those that come from the
 13 Home's redacted claims file as Home Bates stamp number,
 14 and those that come from Mr. Hubbard as the Hubbard Bates
 15 stamp number. This particular document is Home Bates
 16 stamp Number 000248.
 17 Did you inform Mr. Pfennigs in the telephone
 18 call that you had with him just prior to sending 248 to
 19 him, did you inform him basically what this letter was
 20 going to say?
 21 A Yes.
 22 Q When you asked Mr. Pfennigs telephonically to
 23 forward copies of all pleadings as well as copies of any
 24 of the insured's file documents, medical reports,
 25 investigative reports, demands, correspondence, et cetera,

1 Home closed a file if it was still open or was -- you
 2 know, I just didn't know what had gone on and why the file
 3 was closed, because there was no way for me to know,
 4 absent pulling the file and reviewing the actual file.
 5 Q Do you recall any correspondence, whether verbal
 6 or in writing, with Mr. Pfennigs after you sent the April
 7 17th, 2000 letter to him and before you pulled the file
 8 from storage?
 9 A No. That would have been --
 10 Q How long did it take you to get the file from
 11 storage?
 12 A I had it within a couple of days, two, three
 13 days.
 14 Q Where was it located?
 15 A In the Iron Mountain storage facility that Home
 16 contracts with.
 17 Q And in a couple of days, subsequent to April
 18 17th, 2000, you did receive this file?
 19 A Yes.
 20 Q In terms of how much paper there was, boxes,
 21 files, how much was it? We're sitting here looking at the
 22 claims file or the underwriting file that you have here.
 23 Was it a banker's box? Was it two banker's boxes? What
 24 did you get?
 25 A I got one little file that was maybe that thick

1 to Mr. Zadick, how did Mr. Pfennigs respond?
 2 A I don't recall that he responded one way or the
 3 other.
 4 Q Do you know whether or not that ever occurred,
 5 that Mr. Pfennigs sent those documents pursuant to your
 6 request to Mr. Zadick?
 7 A I do not know.
 8 Q Had you ever had a working relationship on other
 9 claims matters with Mr. Zadick?
 10 A Yes.
 11 Q In this letter of April 17th, 2000 to
 12 Mr. Pfennigs from yourself, you indicate in the third full
 13 paragraph on the first page of this two page letter that
 14 Home is reserving its rights to withdraw from the defense
 15 if our continuing investigation reveals there is no duty
 16 on the part of Home Insurance Company to defend or
 17 indemnify the insured in this matter. We will review the
 18 coverage issues and file documents immediately upon
 19 receipt and advise you of any coverage issues. Tell me
 20 what it was that you intended to do with regard to this,
 21 quote, "continuing coverage investigation" that you
 22 indicated that you would be doing?
 23 A Well, I was going to get the file, pull the file
 24 from storage to see what had gone on at the time that the
 25 file was opened and the claim was sent in, and see why had

1 (indicating).
 2 Q Do you recall what was in that one little file?
 3 A Some documentation notes, a copy of the policy,
 4 a copy of the workers' comp policy I believe was in there.
 5 The original complaint filed by Mr. Hubbard was in there.
 6 I think that there was a letter acknowledging the receipt
 7 from Bob Andrea. There was a claims committee document
 8 discussing the coverage and the lack thereof, and then a
 9 disclaimer letter sent by Bob Andrea.
 10 Q Subsequent to reading this small -- and you
 11 indicated it was like a quarter inch, half inch?
 12 A Small, it was a small file.
 13 Q Subsequent to reading that, what did you do?
 14 A I called Mr. Pfennigs.
 15 Q And the purpose for your call was?
 16 A To find out where he thought that there might be
 17 coverage based on this original disclaimer. In my review
 18 of the second amended complaint, that didn't add anything
 19 or change any of the coverage analysis that was originally
 20 done. And I wanted to know if he had some additional
 21 information to see why he believed that there was coverage
 22 under the Home policy.
 23 Q So it was clear to you that there was no
 24 coverage right out of the chutes?
 25 A Right.

33

1 Q What did Mr. Pfennigs tell you why he felt there
 2 was coverage?
 3 A He didn't. I think I ended up leaving him a
 4 voice mail message, and I told him I would be getting a
 5 letter out to him consistent with that, and I would be
 6 withdrawing from the defense giving him the 30-days
 7 notice. And that is what I did, and I think I faxed that
 8 letter to him that day.
 9 Q So you don't think you talked to him?
 10 A I don't believe I talked to him. I don't recall
 11 that. But I think I left it all in a voice mail message
 12 to him.
 13 Q Subsequent to retrieval of the small claims file
 14 back in April of 2000, did you have a discussion with
 15 anyone else either from the Home or from REM with regard
 16 to the tender of the second amended complaint?
 17 A Not that I recall, because I wouldn't, I
 18 wouldn't have known anything.
 19 Q So you didn't get this file and say, boy, this
 20 seems strange, didn't talk to anybody about it?
 21 A No.
 22 Q After you left the voice mail for Mr. Pfennigs,
 23 did you have any discussions with -- well, when did you
 24 first actually communicate with him interactively where he
 25 spoke with you?

34

1 A Prior to --
 2 Q No, no, after you left this voice message.
 3 You've now got the second amended complaint. You've
 4 retrieved the small file from storage. You've looked at
 5 it. You've made the determination that it was disclaimed
 6 initially, it appears that it should still be disclaimed.
 7 You make a phone call to Pfennigs and you say, look, we're
 8 withdrawing because there is no coverage.
 9 A I don't think I ever talked to him again.
 10 Q So the only time you have actually interactively
 11 spoken, as opposed to leaving messages or sending e-mails
 12 or written correspondence, was that one time when you
 13 were, when he talked with you about this claim when you
 14 were dealing with the other claim; is that right?
 15 A The two times. The first time was in February
 16 2000 when he told me that he had another claim going --
 17 Q Right.
 18 A -- that he was going to send something else out.
 19 Q Right.
 20 A And he did call me one more time to tell me that
 21 they did, on that prior claim, who the current carrier or
 22 who the carrier for that time frame was, and that they had
 23 sent it on and they had received acknowledgment, and so I
 24 could go ahead and close my file.
 25 Q That was on the other claim?

35

1 A That was on the other claim. And we never
 2 discussed anything else. And the April 17th conversation
 3 that I had when I received the second amended complaint,
 4 and I called him to get more additional information.
 5 Q And he just said it's been dormant?
 6 A That is correct.
 7 Q So other than those two conversations, those are
 8 the only two interactive conversations that you had with
 9 Mr. Pfennigs?
 10 A That's all I recall.
 11 Q So then I take it on April 20th you put into
 12 writing that which you left for Mr. Pfennigs in a voice
 13 message telling him that you were withdrawing the defense?
 14 A Yes, it would have been that very day.
 15 Q I'm going to hand you that document. Make sure
 16 I've got it. And it is Bates stamped as Home Bates stamp
 17 Number 242. And I'm just going to give you this and put
 18 it right in front of you, because it's got all of them in
 19 there. Is that the document that we're talking about?
 20 That's the April 20th, 2000 letter from yourself to
 21 Mr. Pfennigs?
 22 A Yes.
 23 Q Prior to writing this letter, had you discussed
 24 this tender of the second amended complaint with anyone at
 25 Home?

36

1 A I discussed it with Larry Beemer. I brought in
 2 the second amended complaint and the file when it came in.
 3 And said I'm not seeing anything different here, and I
 4 don't see -- you know, there's no stopgap. I don't see
 5 where coverage is going to apply. Do you have any problem
 6 if we send out a disclaimer and withdraw from the defense?
 7 And he took a look at it and said, no, I think you're
 8 right.
 9 Q And was that prior to or subsequent to exhibit
 10 000242 Home Bates stamp?
 11 A Probably the same day.
 12 Q Did Mr. Beemer review this letter of April 20th
 13 prior to it being sent to Mr. Pfennigs?
 14 A I don't believe so, no.
 15 MR. CLARKE: Just so the record is clear here,
 16 Dave, I don't know that you're aware of this, but there is
 17 a fax cover sheet that went with that letter that is
 18 000241. Just for completeness, let's make sure that we
 19 have that.
 20 MR. GALLIK: Yes. Thank you very much.
 21 MR. CLARKE: Yeah.
 22 Q (BY MR. GALLIK) Your counsel has just pointed
 23 out that there was a fax cover page to that April 20, 2000
 24 letter from yourself to Mr. Pfennigs. And on the front
 25 page of that fax cover sheet, which is Home Bates stamp

37

1 000241, you indicate. "Everything else is being sent under
2 separate cover." What do you mean by that? Here, let me
3 pull it out.

4 A Oh, the, I sent a copy of the policy. Yeah, I
5 attached a copy of the workers' comp dec page to this
6 letter. Everything else is being sent under separate
7 cover, because I think on this I said here's a copy. I
8 think I enclosed a copy of the policy as well as a copy of
9 the Workers' Comp policy, and I sent him everything that I
10 had regarding the policies and the coverage. But it would
11 have been too voluminous to fax.

12 Q So when you say everything, you're talking about
13 the --

14 A The GL policy and the workers' comp policy.

15 Q The actual policies themselves?

16 A Yes.

17 Q Anything else?

18 A No.

19 Q So when you say everything else is being sent
20 under separate cover, you're talking about the GL policy
21 and the workers' comp policy?

22 A And the original of the letter would have been
23 sent with those, with those being attached.

24 Q Now, in your letter of April 20th, prior to
25 sending this out, other than pulling the file, speaking

39

1 you know where he is at today?

2 A I don't have a clue where he is today. I know
3 he went to Reliance. I don't have a clue where he is
4 right now.

5 Q Did you ever try to find him?

6 A No.

7 Q And in that committee report -- and I guess it
8 would be appropriate to just look at it now. I don't know
9 that I've got one copied. Let me look here real quick.

10 MR. CLARKE: I think it's 25, but I'm not sure.

11 THE WITNESS: No, that would not be it.

12 MR. CLARKE: That's not it.

13 THE WITNESS: That's just the doc note.

14 MR. CLARKE: That's right, it is. I think it's
15 Number 265. At the top it says action initiator.

16 MR. GALLIK: Right. Thank you very much,
17 Counsel.

18 Q (BY MR. GALLIK) Referring you to Home Bates
19 stamp document Number 000265, at the top it indicates
20 action initiator with Mr. Bob Ellis in handwriting right
21 underneath action initiator, and then the name Sedgwick
22 James right next to that. Was this document in the file
23 that you retrieved from storage?

24 A Yes, as I recall, it was.

25 Q Was it your understanding that Bob Ellis was

38

1 with Mr. Beemer, was there anything else that was done
2 with regard to investigating this claim?

3 A There wasn't anything else that really needed to
4 be done, because the first thing you have to determine is
5 is coverage going to apply to this claim. Coverage has
6 got to be the first thing that is determined. If there is
7 no coverage, then really everything else really has almost
8 no meaning regardless of severity of injury or severity of
9 degree of damage.

10 Q In the little file that you requested from
11 storage and were given prior to writing the April 20, 2000
12 letter, you indicated that there was a committee review
13 report?

14 A Yes.

15 Q Do you recall who the individuals on that
16 committee, besides Mr. Andrea, were?

17 A Not offhand, no, I do not.

18 Q Did you make any attempt to try to contact any
19 of those committee members to determine what there
20 committee did?

21 A No, because I didn't know where they were.

22 Q Did you know Mr. Ellis, Bob Ellis?

23 A I've never met him, no. I know of him. I know
24 who he is, but I've never met him.

25 Q Does he work for -- who does he work for? Do

40

1 Mr. Andrea's supervisor?

2 A I believe he was.

3 Q Do you know what position he had at that point
4 in time with the Home?

5 A I don't remember whether he was the claim
6 manager or he was the local VP for the office. I don't
7 recall exactly.

8 Q Did you talk with anybody about this particular
9 document after you had the file retrieved from storage in
10 April of 2000?

11 A No, I didn't talk with anyone about it.

12 Q Did you show it to anybody at your office?

13 A Well, Larry Beemer would have seen it when he
14 took a look at the file.

15 Q Besides Mr. Beemer?

16 A No.

17 Q Do you know whose writing this is on this action
18 initiator?

19 A I don't know. I think it's Bob Andrea's, but I
20 couldn't tell you for sure.

21 Q Is there any indication on that particular
22 document as to who the third member of this review
23 committee is?

24 A No, I don't have a clue.

25 Q Have you ever inquired as to who that third

| | | | |
|----|---|----|---|
| 41 | <p>1 member was?</p> <p>2 A There is nobody for me to inquire.</p> <p>3 Q There would be no other documentation besides</p> <p>4 this one?</p> <p>5 A None. And the office was long since closed.</p> <p>6 Q When you received that file from storage in</p> <p>7 April of 2000, did it contain a letter from Sedgwick James</p> <p>8 or Fred S. James in Spokane to the Home Insurance Company,</p> <p>9 if you recall?</p> <p>10 A Well, from what I've seen, it had these two</p> <p>11 documents.</p> <p>12 Q And you're referring to -- just give me the</p> <p>13 Bates stamp?</p> <p>14 A Bates stamp 266 and 267.</p> <p>15 Q And how about Bates, Hubbard Bates stamp Number</p> <p>16 00002? And I'm going to put that in front of you. I have</p> <p>17 that one copied. That's a letter dated January 29th,</p> <p>18 1991, and it's in front of you now. And that is a letter</p> <p>19 that is sent to Home Insurance from Janet Davey claim</p> <p>20 department of Sedgwick James?</p> <p>21 A Yes, it's Home stamp 274.</p> <p>22 Q 274, Home, okay. Was that document in the small</p> <p>23 file that you retrieved in April of 2000?</p> <p>24 A Yes.</p> <p>25 Q Was there anything in that letter that caused</p> | 43 | <p>1 April 20th, that we have discussed here today -- and that</p> <p>2 is Bates stamp numbers Home 242, 245, it will be Number 8</p> <p>3 in your stack.</p> <p>4 A Uh-huh.</p> <p>5 Q Excuse me, I'm going to refer to the letter of</p> <p>6 April 17th instead of the one of April 20th, and that one</p> <p>7 again is the very first letter you sent. Therein you</p> <p>8 indicate that there was some concern that you had with</p> <p>9 regard to stopgap coverage.</p> <p>10 A Yes.</p> <p>11 Q Tell me what stopgap coverage is.</p> <p>12 A <u>Stopgap coverage</u> is intended to take, not take</p> <p>13 the place of, but to be placed in general liability</p> <p>14 coverage what is normally found under Part 2 employer's</p> <p>15 liability coverage in a workers' comp policy.</p> <p>16 Q And what is Part 2 coverage in an employer's</p> <p>17 workers' comp?</p> <p>18 A Part 2 coverage in workers' comp is employer's</p> <p>19 liability. And in the event that a lawsuit is brought in</p> <p>20 a civil action by an employee against the employer, that</p> <p>21 the Part 2 coverage would provide a defense to the</p> <p>22 employer.</p> <p>23 Q Coverage also, indemnity?</p> <p>24 A Not necessarily, no.</p> <p>25 Q And at the point in time of the loss, 1987, do</p> |
| 42 | <p>1 you concern with regard to the original disclaimer of this</p> <p>2 claim?</p> <p>3 A No.</p> <p>4 Q In the third full paragraph, last two sentences,</p> <p>5 Ms. Davey indicates, quote, "Per the attached complaint,</p> <p>6 the claimant is alleging gross negligence. Therefore, we</p> <p>7 request that you set up a claim under the general</p> <p>8 liability coverage," unquote. Did that not cause you</p> <p>9 concern?</p> <p>10 A No.</p> <p>11 Q Why not?</p> <p>12 A They did set up a claim under the general</p> <p>13 liability coverage.</p> <p>14 Q In the forth full paragraph it says, "Please,</p> <p>15 refer this matter to an attorney to appear on behalf of</p> <p>16 the insured and keep us advised regarding the status."</p> <p>17 Did the claim file that you retrieved in April of 2000</p> <p>18 indicate there was any referral of this claim to an</p> <p>19 attorney to appear on behalf of the insured?</p> <p>20 A No.</p> <p>21 Q Did that cause you any concern?</p> <p>22 A No.</p> <p>23 Q Why not?</p> <p>24 A There was no coverage for the claim.</p> <p>25 Q Now, you mentioned in the letter of the 20th,</p> | 44 | <p>1 you have any knowledge of whether Home Insurance Company</p> <p>2 offered stopgap coverage?</p> <p>3 A I knew that it had offered stopgap coverage,</p> <p>4 <u>because I had seen it in other policies in other</u></p> <p>5 <u>jurisdictions.</u></p> <p>6 Q And at some point in time were you made aware of</p> <p>7 the fact that there was an issue with regard to whether</p> <p>8 Home was to provide stopgap coverage?</p> <p>9 A I know that Mr. Pfennigs sent a letter, after I</p> <p>10 had disclaimed coverage, contending that there was an</p> <p>11 underwriting issue.</p> <p>12 Q And what was your understanding of Mr. Pfennigs'</p> <p>13 issue with regard to underwriting?</p> <p>14 A Well, I sure as heck wondered why they didn't</p> <p>15 bring this up as an issue in 1991 when the original</p> <p>16 disclaimer was sent, not only to the insurer and</p> <p>17 Mr. Pfennigs' office, but also to Sedgwick James.</p> <p>18 Q Besides wonder, did you do anything?</p> <p>19 A There's nothing for me to do. Home didn't have</p> <p>20 an underwriting department anymore, because Home didn't</p> <p>21 exist as an active insurance company.</p> <p>22 Q And at some point in time, though, you, you</p> <p>23 meaning REM, your third-party administration firm, became</p> <p>24 aware of a former Home employee by the name of Dave Wood</p> <p>25 that was involved in this issue; correct?</p> |

45

1 A That's what Mr. Pfennigs had told me, said in
2 his letter.
3 Q Okay.
4 A That was the only information that I had.
5 Q And you searched for him; right?
6 A I tried to locate him.
7 Q And you found him?
8 A I found an address for him.
9 Q Did you ever get ahold of him?
10 A I did not, because at that time Home retained
11 coverage counsel, and I provided it to the coverage
12 counsel to the Home.
13 Q At what point in time did Home retain coverage
14 counsel?
15 A After I had obtained all of the policies. When
16 they challenged the disclaimer, I think it was the end of
17 May, beginning of June, I don't recall right now, I sent a
18 letter back saying I don't understand why you're
19 challenging this nine years later, what has changed
20 between 1991 and 2000, and I asked for information. And I
21 said what I would do is try and locate all of the policies
22 to see if stopgap coverage had been issued at any time
23 prior to this loss or shortly thereafter and try to
24 determine if there was any potential. The purpose in that
25 was that I was trying to find coverage for the insured.

46

1 If every policy before this 1987 policy, '86/87 policy had
2 stopgap, and every policy after had stopgap, but this one
3 didn't, then I would have written to New York and said
4 this is what we have, this is what I've discovered in
5 terms of the coverage investigation, maybe a mistake was
6 made, I think that I would recommend continuing to defend
7 the insured under these circumstances. But I didn't find
8 that.
9 Q What did you find?
10 A I found that no policy prior to 1989 had any
11 stop, had ever had stopgap coverage. There was no
12 application prior to 1989 that ever requested it.
13 Q Have you ever spoken with Mr. Wood?
14 A No.
15 Q Are you aware of anybody at either Home or REM
16 having spoken with Mr. Wood recently about this?
17 A I don't know of anybody that has spoken with
18 him.
19 Q What was your understanding of the issue that
20 Mr. Pfennigs brought forth with regard to Mr. Wood and
21 stopgap coverage at this point in time in 2000?
22 A Quite frankly, I thought it was a CYA. I don't
23 think that it was ever, I don't think that it was ever,
24 ever discussed. I don't think that Sedgwick James or Fred
25 S. James, whoever the broker was at the time, ever sought

47

1 it, because it is the broker who advises their client as
2 to which coverages are going to be obtained. It isn't the
3 underwriter. The underwriter is there to sell the
4 policies and sell the coverages and to sell as much as
5 they can.
6 Q Was there any investigation done with regard to
7 Mr. Pfennigs' allegations about stopgap and Mr. Wood?
8 A The only thing I did is I went and pulled, tried
9 to find anything that I could find in the files, in the
10 underwriting files. And I went all the way back to the
11 beginning in the underwriting files to see if there was
12 anything that could have been missed, and I could not find
13 anything.
14 Q And you did look for Mr. Wood?
15 A Well, I mean, just to, you know, his current
16 address, whereabouts.
17 Q Why?
18 A In case coverage counsel for the Home wanted to
19 talk to him.
20 Q Do you know if they ever did?
21 A I don't know. I never asked.
22 Q You had indicated in your testimony a little
23 while ago that, if there had been stopgap coverage before
24 and after, but not this particular year, you would have
25 requested that they provide a defense; correct? Is that

48

1 your testimony?
2 A Yes, I would have made that recommendation, and
3 they would have taken it up to the regulators.
4 Q If Mr. Wood had told you that, yeah, I told them
5 they didn't need stopgap insurance, would you have
6 recommended that Home continue the defense?
7 A No.
8 Q How come?
9 A Because it still doesn't affect the coverage, if
10 the broker chose to not get it. And they have an
11 independent obligation to their client to assess this. If
12 that's what they chose to do, then that's a broker
13 problem.
14 Q Let me ask you this: Your understanding of the
15 agent who sells the insurance for Home or any of your
16 other clients, insurance company clients, is it your
17 understanding that those agents or brokers that sell the
18 insurance are agents of the insured, the insurer or both?
19 A They're not our agents. This is somewhat of a
20 technical issue. There are some like Allstate and Farmers
21 who have registered agents that are literally employees of
22 Allstate and Farmers that are out in the community, and
23 they are agents of that attempting to sell coverage. Fred
24 S. James does not qualify for that. They are a broker.
25 They represent their clients, and they go out and contact

49

1 different insurance companies and underwriting departments
2 for insurance companies to place coverage for their
3 clients. And they, on an annual basis, may try and get
4 four or five different quotes from different insurance
5 companies to find out what's the most amount of coverage
6 or the best coverage that they can get for the buck.
7 That's their job. And then they make the recommendations
8 to their clients as to what the coverages are going to be.
9 So they are not agents of an insurer. They are the agents
10 for the insured.

11 Q Do you know whether or not in 1991 if Fred S.
12 James or then Sedgwick James was a duly appointed agent of
13 the Home in Montana?

14 A To my knowledge, I couldn't tell you. I don't
15 know.

16 Q Have you looked?

17 A I don't know.

18 Q Have you looked?

19 A I don't know. And I don't know where I would
20 look.

21 Q Are you familiar with the fact that in Montana
22 all producers or agents must be registered with the
23 insurance commissioner's office?

24 A I presume so. That's the way it is in most
25 states.

51

1 the claims file here to assist with your recollection,

2 when did you first request a coverage opinion?

3 A After I received and had all of the policies in
4 hand. Well, I had requested authority before that, but I
5 didn't send it out until I had all of the policies so I
6 could send out a complete underwriting file and policy
7 file to coverage counsel.

8 Q Can you, by looking at the redacted claims file,
9 would that assist you in determining when that coverage
10 opinion was initially requested?

11 A Well, it probably would have been in October,
12 because I was on vacation until the end of September.

13 Q Well, how long were you on vacation?

14 A About two-and-a-half weeks.

15 Q So that would have been late September?

16 A Yeah, I think we left, I was trying to think, I
17 think I left somewhere right around the 10th of September
18 or something, and I didn't get back to work until like the
19 22nd or 23rd of September, somewhere in there. It might
20 have been a little bit earlier, but I know it was like the
21 last week of the September I came back to work.

22 Q Had you looked at all of the policies prior to
23 sending them out for a coverage opinion?

24 A I looked at all of the policies to see if there
25 was any stopgap coverage and took a quick look at the

50

1 Q And are you familiar with the fact that, in
2 order to sell insurance from a particular insurer, that
3 agent must have an appointment by that insurer?

4 A I couldn't tell you. I do not know.

5 Q And so you don't know what relationship there is
6 for that appointment and what the obligations are for that
7 appointment?

8 A I have no clue.

9 Q Why was, why would it be that, if Carl
10 Weissman & Sons had stopgap for every year before and
11 every year after, except this year, you would have
12 recommended the defense to continue?

13 A I would have just presumed it was an oversight
14 in putting, in writing down the endorsement number on the
15 policy.

16 Q Do you know, in your experience, whether
17 underwriters, such as Mr. Wood, are agents of the Home?

18 A They're employees.

19 Q Employees, agents under the principal agency?

20 A As far as, I don't know how you would -- they
21 were employees, that all I would know, of the underwriting
22 department.

23 Q Of Home?

24 A (Witness nods head.)

25 Q Okay. When, if you can, and, you know, I've got

52

1 application to see if there was anything mentioned in them
2 before I sent them out.

3 Q And at that point in time, you were aware that
4 there was no stopgap, right, once you collected out all of
5 the policies and sent them out for a coverage opinion in
6 October of 2000?

7 A Yes.

8 Q But you were convinced, were you not, if there
9 was no stopgap coverage as of April 20th, 2000, that the
10 initial disclaimer in 1991 would stand?

11 A Yes.

12 Q And then you obtained all of the policies, did
13 not find stopgap coverage; correct?

14 A That is correct.

15 Q Why then send it out to coverage counsel? If
16 you were convinced that there wasn't stopgap coverage, why
17 send it out to coverage counsel?

18 A Because Mr. Pfennigs was making allegations
19 regarding an underwriting department, and that was beyond
20 my, anything to do with the claims department. And that
21 was a potential issue for Home Insurance Company. And to
22 protect Home Insurance Company, it was sent out to
23 coverage counsel to review.

24 Q So it was because of the allegations with regard
25 to the stopgap and Mr. Wood that you sent it out to

53

1 coverage counsel?
 2 A Correct.
 3 Q Did you request a coverage opinion on
 4 specifically that, that being the allegations with regard
 5 to stopgap and Mr. Wood?
 6 A I don't recall that, no.
 7 Q When you send out a file for a coverage opinion,
 8 tell me what you do?
 9 A I send out a complete copy of the file. I send
 10 out the underwriting file and all of the policy forms to
 11 coverage counsel.
 12 Q Is there anything that you don't send to them
 13 that you have?
 14 A No, they get everything.
 15 Q Underwriting files, claims files, policies?
 16 A They get everything.
 17 Q And was there a cover letter with the request
 18 for coverage opinion that you sent in October?
 19 A There probably was. It's not in the file
 20 though.
 21 Q Do you know if it's in the nonredacted claims
 22 file?
 23 A In the non?
 24 Q My claims file that you've provided me has
 25 several documents redacted. All of the documents that are

54

1 redacted for the most part have to do with coverage and
 2 coverage counsel.
 3 A Then I think it's probably, it's been redacted
 4 out.
 5 Q But you do have recollection of there being a
 6 cover letter?
 7 A Generally, yeah, because they would get
 8 everything.
 9 Q Do you use the same coverage counsel in Montana
 10 for all of your coverage opinions?
 11 A I didn't know who to use in Montana, and I
 12 called our litigation department to get some names of some
 13 coverage counsel.
 14 Q Okay.
 15 A Because I've never had to deal with a coverage
 16 issue in Montana.
 17 Q Did you talk with anybody in your litigation
 18 office about the issues with respect to that which you
 19 were --
 20 A No, I just would have asked them to give me the
 21 names of somebody that does coverage in Montana.
 22 Q Was this the same person you asked about who you
 23 should assign as defense counsel?
 24 A I didn't ask anyone who to assign as defense
 25 counsel.

55

1 Q You just knew?
 2 A Gary Zadick did the defense for Home in Montana.
 3 Q Did you contact Mr. Zadick asking him who you
 4 thought might be a good one for coverage counsel?
 5 A Absolutely not, absolutely not.
 6 Q Did you ever engage in conversations with
 7 Mr. Zadick with regard to the issue of an obligation to
 8 defend or indemnify this claim?
 9 A No. He knew that we were defending it under a
 10 reservation of rights.
 11 Q Let's talk about the reservation of rights. In
 12 the initial disclaimer in 1991 by Mr. Bob Andrea, it was
 13 not done under reservation of rights; correct?
 14 A That was just a flat out disclaimer of coverage.
 15 Q And the only reason you reserved rights in your
 16 disclaimer letter of April 20th, 2000, was what? Why did
 17 you reserve rights then when they didn't back in 1991?
 18 A Because I was assigning attorney to defend them,
 19 because I presumed there would be stopgap coverage. And I
 20 didn't have a clue what had gone on in '91. Mr. Pfennigs
 21 certainly didn't tell me that coverage had originally been
 22 disclaimed on this file. They were insistent that a
 23 defense be done, be given, and I was trying to do the
 24 right thing for the insured, but at the same time I have
 25 an obligation to protect the Home. If I had done this

56

1 without a reservation of rights, that would have
 2 jeopardized Home's coverage position. Until I knew what
 3 the full coverages were, I was trying to do the right
 4 thing with the insured, but still protect Home's coverage
 5 position in the event coverage became an issue.
 6 Q And the only way coverage would become an issue
 7 is if there was stopgap, in your opinion?
 8 A Elements would still be an issue, such as the
 9 intentional acts. But there would have been a defense, if
 10 stopgap were in place, but stopgap is not in place.
 11 Without stopgap being in place, there is not coverage for
 12 employee injuries under a CGL policy.
 13 Q And after you became aware of the fact that
 14 there was no coverage, no stopgap -- strike that. Let me
 15 ask it this way: So the coverage issue that you're
 16 talking about has specifically to do with whether or not
 17 there should have been stopgap coverage?
 18 A No.
 19 Q What was the coverage issue then?
 20 A The coverage issue was whether stopgap had been
 21 put into the policy.
 22 Q But you knew that it hadn't?
 23 A I didn't know that it hadn't on April 17th.
 24 Q No, but when you assigned coverage counsel
 25 subsequent to obtaining --

57

1 A I didn't.
 2 Q You've got to wait until I finish. My
 3 recollection of your testimony was that you assigned
 4 coverage counsel after obtaining all of the policies and
 5 in those policies you did not find stopgap.
 6 A Incorrect.
 7 Q Tell me what your testimony is.
 8 A I assigned Gary Zadick on April 17th, the day I
 9 received the second amended complaint.
 10 Q As coverage counsel?
 11 A As defense counsel.
 12 Q I'm talking about coverage counsel.
 13 A Coverage counsel was done afterwards.
 14 Q After you had obtained all of the policies?
 15 A Yes.
 16 Q And so the only issue with regard to coverage
 17 that you had for coverage counsel was whether or not there
 18 should have been stopgap coverage?
 19 A Well, I wanted, I didn't leave that as the sole
 20 issue. I left him to review the entire file as a whole.
 21 Q How long did it take to obtain -- you say you
 22 collected all of the policies before you sent them to
 23 coverage counsel. We're talking about the workers' comp
 24 policy. We're talking about the CGL along with some
 25 endorsements. What other policies were out there?

58

1 A All of the policies going back to the date of
 2 the first policy that was ever issued.
 3 Q And that's what you sent to coverage counsel?
 4 A Yes.
 5 Q Where were these documents located? How did you
 6 go about collecting them up to send them?
 7 A We have to request them from New Hampshire, and
 8 then they locate them. And sometimes they're on
 9 microfiche. Sometimes they're in storage. I don't know
 10 how it is, but they have to locate them. And they send
 11 them to us, and that can be time consuming.
 12 Q So who in New Hampshire did you make the request
 13 for all of the policies?
 14 A I don't know the person. My CA did it. I just
 15 wrote out a list of the policies.
 16 Q Is it a Home Insurance Company office that you
 17 request?
 18 A It's a New Hampshire office, that's all I know.
 19 Q Of Home Insurance?
 20 A It used to be Home Insurance Company. I think
 21 REM took over the rent.
 22 Q So you requested the documents, the documents
 23 being all of the policies from REM?
 24 A Well, from the New Hampshire office.
 25 Q Of REM?

59

1 A I guess that's what it is. I don't know. I
 2 asked my clerical assistant to do it. All I did was give
 3 her a list of policies, and she's the one that makes the
 4 contact with that.
 5 Q And when did you ask your clerical assistant to
 6 do that?
 7 A I don't recall exactly when. It would have
 8 been, I guess, sometime after, it would have been sometime
 9 after receiving Mr. Pfennigs' May letter challenging the
 10 disclaimer. And I see that there was a letter that I sent
 11 out in June, Home's Bates stamp Number 229. So it would
 12 have been sometime around that date, June 6th.
 13 Q Well, let's talk about that. Home Bates stamp
 14 Number 229 and 230. And you should have a copy of that in
 15 front of you also. And it would be the ninth document
 16 down, and they're separated by blue sheets in front of
 17 you, unless you have your own there.
 18 With regard to Home Bates stamp 229 and 230,
 19 this letter was sent to Mr. Pfennigs as a result of his
 20 letter to you that was dated May 26th; correct?
 21 A Yes.
 22 Q And in that May 26th letter from Pfennigs to
 23 yourself, Mr. Pfennigs had taken exception to the
 24 disclaimer; correct?
 25 A Yes.

60

1 Q And the purpose of the June 6th, 2000 letter,
 2 Bates stamp 229 Home, that you sent to Mr. Pfennigs was to
 3 inquire further as to his objection to your disclaimer?
 4 A Yes, he set no basis for why he believed the
 5 disclaimer was erroneous. He just objected to it, but
 6 provided nothing as to why the disclaimer was incorrect.
 7 Q How come, in your letter of June 6th, Bates
 8 stamp 229, 230, second full paragraph, you ask, "Please
 9 identify the agent at Marsh Advantage America who
 10 purportedly, quote, '...made repeated inquire with Home
 11 Insurance Company underwriter Dave Wood concerning the
 12 purchase of employer's liability coverage.'" That was in
 13 Mr. Pfennigs' May 26th letter; correct?
 14 A Well, his letter says, "With the above in mind,
 15 it has come to our very recent attention that the
 16 insurance agent for Carl Weissman & Son's, Inc., Marsh
 17 Advantage America made repeated inquiry. He doesn't
 18 identify anybody. It's just simply a contention.
 19 Q He doesn't identify Mr. Wood?
 20 A No, he doesn't identify who at Marsh Advantage
 21 America allegedly made these statements.
 22 Q So where did you come up with Mr. Woods's name
 23 to put into the June 6th, 2000 letter?
 24 A He identifies Dave Wood as the Home underwriter.
 25 I asked who at Marsh Advantage America said this.

61

63

1 Q Why did you want to know who that person was at
 2 Marsh Advantage America?
 3 A So I could pass that information on.
 4 Q To whom?
 5 A To coverage counsel. That's why I also asked
 6 for any letters or anything confirming that Marsh
 7 Advantage America had allegedly relied on purported
 8 statements made, any confirming letters to these purported
 9 statements. Otherwise, I have no basis for belief that
 10 they did, that they would send anything.
 11 Q But you made no attempt to confirm whether it
 12 was true or not with Mr. Wood, who was a Home employee at
 13 the time?
 14 A It was unlikely he would have known anything
 15 beyond what was in the underwriting file.
 16 Q But you made that assumption; correct?
 17 A Correct. But I figured I'm going to let
 18 coverage counsel do that. That's not a claims issue.
 19 Q At the time you wrote the letter June 6th, 2000,
 20 to Mr. Pfennigs, Bates stamp 229, 230, did you have all of
 21 the documentary, all of the documents, including the
 22 insurance policies; that were going to be sent to Home --
 23 A No.
 24 Q -- for coverage?
 25 A No, I only had the file, the claim file.

1 underwriting perspective to see if there was any coverage
 2 and that stopgap had been an oversight on the '86/87
 3 policy.
 4 Q Do you recall how much in fees you had paid to
 5 Mr. Zadick for his representation of Carl Weissman & Sons
 6 during that time frame that you had assigned him as
 7 defense counsel on this claim?
 8 A It wouldn't have been very much. I don't
 9 recall. But I'm sure it was under \$1,000. I could, I
 10 think that maybe the doc notes might have something,
 11 but -- there was a \$522.16 check sent on September 13th,
 12 2000. So I presume that's the only thing that would have
 13 been paid to Mr. Zadick.
 14 Q In your June 6th, 2000 letter to Mr. Pfennigs,
 15 you indicate or you ask the question, "Please identify the
 16 agent at Marsh Advantage America who purportedly made
 17 repeated inquiry to Home Insurance Company underwriter
 18 Dave Wood concerning the purchase of employer's liability
 19 coverage." How come you didn't use the word stopgap?
 20 Isn't it my understanding that there's two types of
 21 employer's liability coverage?
 22 A I quoted from his letter. I was simply quoting
 23 from his letter.
 24 Q Based upon your coverage investigation, at the
 25 point in time of this incident, this loss, did the Home

62

64

1 Q On June 6th?
 2 A On June 6th.
 3 Q Is there anything in your file that would
 4 refresh your recollection as to when you received the
 5 policies and documents that you sent to coverage counsel?
 6 A No. They wouldn't have all come in at once. In
 7 all likelihood, they would have just sent them off as they
 8 were able to locate them and retrieve them and copy them.
 9 So they would have come out, they would have come out over
 10 a period of time.
 11 Q Did you inform Mr. Pfennigs on or before June
 12 6th of 2000 that you were going to request a coverage
 13 opinion from coverage counsel?
 14 A There would have been no need for me to do so,
 15 so, no, I did not.
 16 Q When you referred to conducting a coverage
 17 investigation with respect to this matter, on the second
 18 page of your June 6th, 2000 letter, what does that mean?
 19 A That I was going to find out if there was, like
 20 I said, I was looking for coverage. And I was going to
 21 pull all of the files, all of the policies and
 22 underwriting files to see if stopgap had been requested at
 23 any time prior to the '86/87 policy, and if it had been
 24 issued anytime prior to that, immediately prior or
 25 immediately subsequent, or what had gone on from an

1 have the entire insurance portfolio for Carl Weissman &
 2 Sons?
 3 A At the time in 1987, I couldn't tell you. They
 4 didn't have workers' comp in Montana.
 5 Q Was there anything else that we haven't talked
 6 about as far as the coverage investigation that you
 7 indicated was going to occur when you wrote the letter of
 8 June 6th, 2000, to Mr. Pfennigs?
 9 A I don't understand your question.
 10 Q Well, we've talked about what you were going to
 11 do with regard to this coverage investigation?
 12 A Right.
 13 Q You say in the letter, the second page, Bates
 14 stamp 230, that at this time Home will review the policies
 15 issued to Carl Weissman, as well as the underwriting
 16 files. Home continues to reserve its right to conduct a
 17 coverage investigation with respect to this matter. By
 18 undertaking such coverage investigation, Home is not
 19 waiving any of its rights under the policy. So other than
 20 what we've talked about, you collecting up all of the
 21 files, policies, underlying files and sending them to
 22 coverage counsel, what more was done with regard to the
 23 investigation for purposes of making a determination on
 24 coverage?
 25 A Nothing else. It was just trying to locate all

65

1 of the policies and review to see if there was stopgap
 2 coverage purchased at any time.
 3 Q And you left that up to coverage counsel?
 4 A The ultimate decision was going to come from
 5 coverage counsel.
 6 Q You didn't make that decision?
 7 A I didn't make the ultimate decision.
 8 Q I'm going to refer you to Home Bates stamp
 9 Number 219, and I apologize, it's not in that packet. So
 10 I would ask counsel to put it in front of you, or I can
 11 turn it around. When did you first see that document?
 12 A It was faxed to me on June 7th from Gary
 13 Zadick's office.
 14 Q Did you provide -- well, let me ask you this:
 15 How did Gary Zadick know that you were interested in
 16 trying to track down this issue with regards to stopgap
 17 and Marsh Advantage America involved therewith?
 18 A I haven't got a clue, because I sure as heck
 19 didn't tell him. So unless Bob Pfennigs instructed them
 20 to send this to Gary, I haven't got a clue why they did
 21 what they did.
 22 Q Did you instruct Bob Pfennigs to send everything
 23 to defense counsel?
 24 A I didn't instruct -- other than the defense
 25 file, that was all I asked him to do, and the pleadings

66

1 and everything else. I didn't ask him for anything else.
 2 Gary's job is to defend the insured. He is not coverage
 3 counsel. And I have no clue what Mr. Pfennigs did.
 4 Q And so you have no idea why Mr. Bulger at Marsh
 5 Advantage America wrote a letter to Gary Zadick on May
 6 15th of 2000?
 7 A I have no idea why.
 8 Q When you received this letter, what did you do
 9 with it, this letter meaning Home 219?
 10 A It went into the claim file and was sent to
 11 coverage counsel along with everything else.
 12 Q Prior to receipt of this letter, Home Bates
 13 stamp 219, had you ever heard of Dave Wood?
 14 A No.
 15 Q And it's true that Mr. Pfennigs brought up
 16 Mr. Wood after May 15th, 2000. That would have been May
 17 26th of 2000; correct?
 18 A Yes.
 19 Q So you don't have any knowledge of why
 20 Mr. Zadick would have been tracking down this issue and
 21 Dave Wood?
 22 A I don't know that he was tracking it down. I
 23 think it was sent to him, and he sent it on to me.
 24 Q And you don't have any idea as to who first
 25 contacted Mr. Bulger with regard to this issue?

67

1 A I have no idea.
 2 Q Have you ever spoke with any of your colleagues
 3 at work with either the Home or with REM about this letter
 4 and why Bulger would have sent it to Zadick?
 5 A No.
 6 Q Have you ever asked Zadick?
 7 A No. But the letter is dated June. Mr. Zadick
 8 was no longer defense counsel or, if he was, it was solely
 9 at Weissman's expense, but we were not paying him. So he
 10 just passed it on. His retention ceased as of May 22nd by
 11 the Home.
 12 Q But this letter was within that time frame?
 13 A No, it's sent in June; isn't it?
 14 Q The letter itself.
 15 A Oh, it's May 16th.
 16 Q May 15th?
 17 A So he just forwarded it on. But why it was sent
 18 to him, I couldn't tell you. It wasn't anything that I
 19 requested him to do.
 20 Q Did anybody inform Mr. Zadick that there was
 21 going to be a coverage issue?
 22 A Yes, I did.
 23 Q What did you tell him?
 24 A He just received a copy of the letter that I
 25 sent out in June, I mean in April.

68

1 Q You didn't talk to him on the phone?
 2 A No.
 3 Q How many times did you talk on the telephone
 4 with Mr. Zadick in 2000 with regard to this particular
 5 file, if you recall?
 6 A As far as I know, I called him the one time to
 7 let him know that the file was coming and that we were
 8 defending under the reservation of rights, and then he got
 9 the letter afterwards. I don't recall talking to him.
 10 Q Do you recall if any of your colleagues that are
 11 employed by either the Home or by REM had any discussions
 12 with Mr. Zadick?
 13 A To my knowledge, no.
 14 Q And you've had no discussions with any of your
 15 coemployees?
 16 A Well, no one else was handling the file. So I
 17 don't know why they would have.
 18 Q I guess what I'm getting at, Ms. Galasso, is I
 19 don't understand why Mr. Bulger would have, out of the
 20 blue, sent a letter like this regarding Dave Wood to
 21 Mr. Zadick?
 22 A I don't know either.
 23 Q That's fair. I'm just trying to figure it out.
 24 A I haven't spoke with Mr. Bulger. I haven't got
 25 a clue why he did what he did.

69

1 Q After reading this letter, did you feel it
 2 appropriate to talk with Mr. Wood regarding the
 3 allegations made by Mr. Bulger in that letter?
 4 A No.
 5 Q Why not?
 6 A Again, I think it was a case of probably CYA.
 7 They had the original disclaimer in 1991, and nothing was
 8 done. If this was truly an issue and this was truly
 9 something that was an issue for the insured and their
 10 agent, why are they waiting until 2000 to say that this is
 11 what they relied on, when they had the original disclaimer
 12 back in 1991, and nothing was ever done at that point in
 13 time. They never questioned the disclaimer. They did
 14 nothing.
 15 Q So you just made the assumption that it was a
 16 CYA?
 17 A Yeah, it was simply my opinion. It's not
 18 reasonable. If you get a letter disclaiming coverage to
 19 one of your clients and you truly believe that coverage is
 20 appropriate, then generally most agents immediately follow
 21 up, say, hey, I don't understand this. We purchased this
 22 and I'll send you the stuff. So maybe your policy isn't
 23 correct. You need to be doing something more. None of
 24 this was ever done.
 25 Q But you could put closure on it, right, by

70

1 contacting Mr. Wood and saying is what Mr. Bulger says
 2 true?
 3 A It's not a claim issue. That's an underwriting
 4 issue, and that's not my department. My department is
 5 claims and interpreting the policies and applying them to
 6 the law. It could be a potential issue for the Home, but
 7 it is not a claims issue.
 8 Q But if the underwriting department would have
 9 made a mistake and simply forgotten to put the endorsement
 10 on, that's not a claims issue either, but you would have
 11 made a recommendation to provide coverage?
 12 A Because at that point in time it does affect
 13 coverage, when every other policy ever issued to this
 14 insured has a stopgap endorsement, and this one policy
 15 doesn't, then that is a concern to me from a claims
 16 handling standpoint.
 17 MR. GALLIK: Sure. It's now 12:15. Should we
 18 break for lunch, because I'm going to go a while?
 19 MR. CLARKE: Sure.
 20 (Whereupon, a lunch recess was taken at 12:15 to
 21 1:39 P.M.)
 22 Q (BY MR. GALLIK) We are back on the record,
 23 Ms. Galasso's deposition, after the lunch break.
 24 Ms. Galasso, I would like to talk with you a little bit
 25 about the letter that was sent by Mr. Andrea to Carl

71

1 Weissman & Sons on February 4th, 1991. And that is the
 2 second document in there after the blue page, identified
 3 as Home Bates stamp Number 257, 0000257. This was one of
 4 the documents that was in the file that you retrieved;
 5 correct?
 6 A Yes.
 7 Q In that document at second page, the last, well,
 8 the middle three paragraphs starting with we have also
 9 reviewed your workers' compensation employer's liability
 10 policy, do you see where I'm talking about?
 11 A Uh-huh, yes, I do.
 12 Q Did you understand, when you read this, that
 13 Mr. Andrea had already looked at all policies with regard
 14 to determination if there was any coverage for the claim
 15 made by Mr. Hubbard?
 16 A Yes.
 17 Q And you understood that to mean that there was
 18 no coverage under either workers' comp or the employer's
 19 liability policy; correct?
 20 A Well, there was no employer's liability policy,
 21 except under workers' comp, which would have been Part 2
 22 employer's liability. The GL policy didn't have any
 23 employer's liability or stopgap.
 24 Q But my question simply is that he had reviewed
 25 the workers' compensation coverages and the general

72

1 liability coverages for Weissman related to the time of
 2 Mr. Hubbard's loss.
 3 A Yes.
 4 Q And after review of all of those policies, was
 5 it your understanding from reading 000257 and 0000258,
 6 that Mr. Andrea had come to the conclusion that there was
 7 no coverage either under general liability or workers'
 8 compensation?
 9 A Yes.
 10 Q Is there something that Mr. Andrea didn't look
 11 at, as far as you know, from reading his letter of
 12 February 4, '91?
 13 A No.
 14 Q If not then, why did you want to go back and
 15 retrieve all of these policies to determine if there was
 16 stopgap coverage?
 17 A Because we had received a challenge by
 18 Mr. Pfennigs of our coverage determination.
 19 Q Now, at some point in time, and let's refer to
 20 Document 0000236, which is the April 20 letter from
 21 Mr. Pfennigs to Mr. Zadick, do you recall seeing that one?
 22 And it is in that bunch of documents in front of you.
 23 It's 236, Home 236, and that would be -- it's not in that.
 24 I'm sorry. I'm going to have to turn it around for you,
 25 236. You've got it there?

73

1 MR. CLARKE: Uh-huh.
 2 Q (BY MR. GALLIK) Okay. Did you see a copy of
 3 this letter?
 4 A I'm not a carbon copy holder, so I couldn't tell
 5 you. I don't recall independently at this point. But if
 6 it was in our file, then obviously it's made its way into
 7 the file, but I don't have any independent recollection of
 8 it.
 9 Q In the second paragraph of 236, Home 236, it
 10 indicates that we learned how the Supreme Court was going
 11 to rule on the intentional harm exception. What did you
 12 understand that to mean?
 13 A Do you mean now or then, because I don't recall
 14 having any independent thought at all?
 15 Q Well, let me ask it this way then: When did you
 16 first become aware that there was an issue with regard to
 17 the intentional harm exception?
 18 A Well, reading, just reading the case, I knew
 19 that that's, you know, the complaint, I knew that that's
 20 what Mr. Hubbard was alleging.
 21 Q And at some point in time you became aware of
 22 the fact that the Montana Supreme Court was going to rule
 23 on that case or had ruled on that case in a case known as
 24 Sherner versus Conoco?
 25 A I think Mr. Pfennigs may have mentioned that, or

74

1 it might have been in his letter. I don't recall.
 2 Q Do you recall when you first obtained a copy of
 3 the Sherner decision and in what context? And I'm
 4 referring you to Home 220, which is the Sherner decision,
 5 and it comes after 219, which was that May 15, 2000 letter
 6 from Bulger at Marsh Advantage to Zadick.
 7 A Yeah, on the fax copy, June 7th, 10:49, from
 8 Marra, Wenz & Johnson, they were counsel, workers' comp
 9 counsel in Montana that had been on Home's panel, and I
 10 contacted them and asked them for a copy of it.
 11 Q Who at Marra, Wenz & Johnson did you contact?
 12 A I don't recall. I think I spoke to the
 13 receptionist and told her who I was and just asked to
 14 speak to somebody, but I don't recall who it was. They
 15 just sent me a copy of the, you know, of the case.
 16 Q How did you first learn of the case in order to
 17 contact Marra, Wenz & Johnson?
 18 A I think Mr. Pfennigs had mentioned it.
 19 Q All right. And then on -- who is Teresa
 20 Brereton?
 21 A She was the adjustor that, if there had been
 22 coverage, she would have probably just continued handling
 23 the file. But she resigned right around that time, so I
 24 just kept the file.
 25 Q What involvement, if any, did Ms. Brereton have?

75

1 A She had none.
 2 Q Had you discussed this claim with her?
 3 A I didn't get, no, I didn't get the chance,
 4 because I just kept the file on my desk until I had
 5 received the claim file. And then I would have done
 6 appropriate supervisor notes to her, had there been
 7 coverage, and instructed her on what to do.
 8 Q Tell me about the notes that you take. I note
 9 in the redacted claims file, that there are some notes.
 10 Tell me what the general process is at REM with regard to
 11 retaining notes and documenting files?
 12 A You know, when you get some information on a
 13 file, you put some doc notes in there. If the system was
 14 up, we tried to put them in the system. But the system
 15 wasn't always up. So sometimes we would do handwritten
 16 documents. Sometimes, like in our file, I think you may
 17 have seen, I might have put some notes directly onto a
 18 letter. If I had received a letter and I called counsel
 19 or something that day, I would put my notes there, because
 20 I might have been on the system for something else or done
 21 something, just as a reminder that I had a conversation
 22 with someone.
 23 Q What guidelines or standards, if any, were in
 24 place with regard to REM regarding documentation of notes
 25 for the claims file?

76

1 A There's no standard that I'm aware of. It's --
 2 Q How about guidelines?
 3 A There's no guidelines. It's just, you know,
 4 best, you know, whatever you think needs to be put in
 5 there so the file is documented. So if someone picks up
 6 the file, in the event that you're absent, that they can
 7 follow through or answer a question or do what is
 8 necessary, so that the file gets handled in the event
 9 you're absent or that you leave the employ, and there
 10 could be some follow through.
 11 Q On April 20th of 2000 you wrote a letter, you'll
 12 recall, we discussed to Mr. Pfennigs. It's 242. It's
 13 Number 8, the eighth document. You've got it?
 14 A Uh-huh.
 15 Q Okay. I'm sorry. On that date on the fourth
 16 page, fourth full paragraph, it indicates, "We also note
 17 that workers' comp coverage appears to have been obtained
 18 under Home policy, a copy of which is enclosed. However,
 19 the policy appears to apply to California and Idaho." You
 20 go on to indicate that as such, it does not appear that
 21 workers' comp policy would apply to this lawsuit either.
 22 However I forwarded a copy of the file and policy to
 23 Maggie Sikes --
 24 A Sikes, S-I-K-E-S.
 25 Q -- in the workers' comp department for review

1 and analysis by workers comp. Did you have a discussion
 2 with Maggi Sikes?
 3 A. I did. I brought the file over to her. She
 4 told me she wasn't the person that handled it. It was
 5 going to be a gentleman by the name of Enrico Montoya,
 6 M-O-N-T-O-Y-A. And I brought the file over to Mr. Montoya
 7 and said, I'm going to leave the workers' comp analysis up
 8 to you, if you could contact -- and I had given him a copy
 9 of the file and the policy. And said, you know, I'm going
 10 to leave that analysis up to you. I don't think there's
 11 any coverage, as you can see in my letter, but I will
 12 leave that final determination up to you, since you're
 13 workers comp and I'm not.
 14 Q And did Mr. Montoya provide you with a written
 15 determination given the fact that you had left that
 16 determination up to him?
 17 A I never received one, no.
 18 Q Have you ever seen one?
 19 A No.
 20 Q Did you ever follow up, if you recall, to
 21 Mr. Pfennigs, after your April 20, 2000 letter to him with
 22 regard to the workers' comp policy analysis you indicated
 23 was going to be done?
 24 A No. And he never asked me about it.
 25 Q So as far as you know, this was the last word on

1 observation. I didn't see where there was coverage, but,
 2 you know.
 3 Q But you didn't know, because you weren't in that
 4 area?
 5 A No, I didn't think that there was, but there
 6 could be some vagaries workers' comp law that I don't know
 7 anything about.
 8 Q Well, at some point in time you got into the
 9 question of whether or not the Sherner decision would be
 10 applied retroactively; correct?
 11 A That was just my own personal observation,
 12 because I think that the laws had changed between the
 13 time, the workers' comp laws or whatever had changed in
 14 Montana between the time of this accident and the time of
 15 the Sherner accident, and that's why I didn't think that
 16 it would be applicable. But that was simply an
 17 observation that I made myself. I wasn't, it wasn't
 18 anything else.
 19 Q Whose call was it to make on behalf of REM or
 20 Home whether or not Sherner and the decision set forth
 21 therein was applicable to the Hubbard claim?
 22 A It had nothing to do with it. It was just
 23 simply an observation. It had nothing to do with the
 24 coverage.
 25 Q Well, was it your understanding, from talking to

1 whether or not there was any workers' comp investigation
 2 as far as coverage goes?
 3 A You know, I don't know. I don't know what
 4 workers' comp did. They never ever contacted me again.
 5 Q Are there any guidelines or standards that you
 6 follow or are required to follow with regard to an
 7 analysis for workers' comp?
 8 A Not that I'm aware of.
 9 Q When you wrote this sentence, as such, it does
 10 not appear that the workers' comp policy would apply to
 11 this loss either. However, I have forwarded a copy of the
 12 file and the policy to Maggie Sikes in the workers' comp
 13 for review and analysis by workers' comp. Was that just
 14 informational or did you intend that he would be provided
 15 with that review and analysis once accomplished, he being
 16 Mr. Pfennigs?
 17 A Well, I presumed that's what Mr. Montoya would
 18 do, if he felt that was appropriate. But I'm not a
 19 workers' comp adjuster, and I don't work in the workers'
 20 comp milieu. So that's why I left it up to them.
 21 Q Did you ask Mr. Montoya to respond to the
 22 insured with regard to the analysis for workers' comp?
 23 A I just brought it over to him and told him
 24 there's a workers' comp policy, but I would like him to
 25 take a look at it and make his own independent

1 Mr. Pfennigs, that because of the Supreme Court's holding
 2 in Sherner and the progeny of cases coming before it, that
 3 there could potentially be liability here and for this
 4 particular accident?
 5 A Liability is one issue. There is still no
 6 coverage.
 7 Q Okay.
 8 A Intentional acts aren't covered by a CGL policy.
 9 Q And so it was your determination that, because
 10 of the fact that there was alleged intentional acts, that
 11 there would be no workers' comp coverage or no CGL
 12 coverage?
 13 A No, there is no CGL coverage, because there was
 14 no stopgap coverage. And bodily injury to employees is
 15 simply not covered under the policy.
 16 Q So you, was it you that made the determination,
 17 because of the fact that the policy said no coverage, that
 18 notwithstanding what Sherner had to say, the Sherner
 19 decision had to say, it didn't matter, because there was
 20 no coverage period, regardless of what Montana law said?
 21 A Correct. There was no coverage under the
 22 Weissman policy since employer's liability through stopgap
 23 was not purchased and was not attached as an endorsement
 24 to this policy.
 25 Q What, if anything, is the impact or the

81

1 ramifications of a producer who sells a policy that is not
 2 licensed?
 3 A I haven't got a clue.
 4 Q Does that affect you at all?
 5 A No, it's not a claims issue.
 6 Q So if there was a claim under a policy that was
 7 written by a nonlicensed producer or agent, would that not
 8 have any effect on a claim that was made under that
 9 policy?
 10 A Not to my knowledge.
 11 Q Okay.
 12 A I don't, I have nothing. I don't know anything
 13 about that.
 14 Q Home Bates stamp document Number 0000266 is a
 15 speed message partially in typewriting -- you've got it in
 16 front of you -- and partially in handwriting. Was that
 17 document in the file that you requested to be obtained in
 18 storage when Mr. Pfennigs initially contacted you in April
 19 of 2000?
 20 A I believe so, yes.
 21 Q And were all of those policies or, yeah, those
 22 two policies, the WC policy and the GL policy referenced
 23 by Ms. Arndt, were those in that file also that you found
 24 in storage?
 25 A Yes.

82

1 Q And, to your knowledge, were there any other
 2 policies applicable to Weissman for this particular period
 3 of time when Mr. Hubbard was injured?
 4 A If there were, they were not issued by the Home,
 5 because I could not find any other policies issued by the
 6 Home.
 7 Q Even today?
 8 A Even today.
 9 Q So it's just these two and these two only that
 10 we're talking about?
 11 A For this time frame, yes.
 12 Q I would like to ask you -- in Home Bates stamp
 13 document Number 500087, I want to show that to you. I
 14 don't have it in that.
 15 MR. CLARKE: Okay. It's in here. It will be in
 16 here, not that one. That's the underwriting file.
 17 A Okay.
 18 Q (BY MR. GALLIK) Did you have occasion to look
 19 at this portion of the file at any time?
 20 A This was just in the underwriting file that I
 21 looked at for this policy, yes.
 22 Q When did you look at this underwriting file?
 23 A Whenever it was that I received it from New
 24 Hampshire.
 25 Q And approximately when in the time line do you

83

1 suppose that was, if you can help me out?
 2 A Probably between July and October sometime or
 3 June and October.
 4 Q Of 2000?
 5 A Yes.
 6 Q And do you recall seeing this Document 500087?
 7 A Yes.
 8 Q Tell me what this document is.
 9 A It's an application for insurance.
 10 Q To whom?
 11 A To whomever it is that they submitted it to.
 12 Q And was this submitted to the Home?
 13 A Since it was in the underwriting file, yes.
 14 Q And on the portion that says premises
 15 operations, there's typewritten per attached. Underneath
 16 that it indicates in capital letters employee exclusion
 17 deleted, with the word deleted triple underlined. What
 18 does that mean?
 19 A I don't have a clue. All I know is that it says
 20 that on the underwriting. I haven't got a clue what they
 21 mean by that from an underwriting standpoint. But from
 22 the claim file and looking at the policy, that employee
 23 exclusion was deleted and another one substituted in its
 24 place under L, I think, 6178, which deleted, bodily injury
 25 to any employee of the insured is deleted and replaced by

84

1 the following. So I presume that that's what it meant
 2 since that's what is in the policy.
 3 Q In your experience dealing with insurance
 4 policies and the like, if there has been a deletion or an
 5 endorsement, when one item is deleted and another is put
 6 in its place, are they normally set forth that way, one is
 7 deleted and in its place there will be an endorsement?
 8 A Yes.
 9 Q Have you ever dealt with applications from Fred
 10 S. James or Sedgwick James, besides this one, of insureds?
 11 A I couldn't tell you for sure. I don't know.
 12 I've dealt with seeing underwriting files before, but I
 13 couldn't tell you if they came from Sedgwick James or not.
 14 Q Given the fact that the disclaimer in '91 and
 15 again by yourself in 2000 based upon the endorsement
 16 related to the employee exclusion, did these words bother
 17 you?
 18 A No, because there was another endorsement that
 19 took its place.
 20 Q And anywhere in those applications did you note
 21 what endorsement took its place for the one indicated as
 22 deleted?
 23 A No, it would have been in the policy. It
 24 wouldn't have been in the application.
 25 Q But normally, if one is deleted and the other is

85

1 added in its stead, it would be indicated as such in the
 2 policy?
 3 A Yes.
 4 Q How would the producer or the insured know that,
 5 if one exclusion was deleted, there would be another one
 6 put in its stead?
 7 A They get a copy of the policy.
 8 Q What was the renewal time frame on this policy,
 9 if you know?
 10 A Well, the renewal date would have been 4/1/86,
 11 because the prior policy would have expired on that date.
 12 Q And it went for a year; correct?
 13 A Uh-huh, yes.
 14 Q And then, if it was to be renewed, let's say,
 15 let's take this example that we're looking at now,
 16 Document 500087, if this were to be reviewed after the
 17 expiration date, would there be another application or
 18 acord?
 19 A No, I don't know that there would be another one
 20 if it was simply renewed after the expiration date. If it
 21 was renewed after and there is a gap in coverage and they
 22 didn't take care of that gap, there would be a different
 23 effective date.
 24 Q Well, let me ask you this then, it's true, is it
 25 not, that the Home insured Carl Weissman prior to 4/1/86?

86

1 A Yes.
 2 Q Why would they take an application on 1/18/85?
 3 A Because a broker may have submitted this to
 4 several other people, not just the Home Insurance Company,
 5 as I said before, to see what kind of rate and what it is
 6 they can get for their client. So they generally start
 7 this well before the time frame, so they can discuss it
 8 with their client.
 9 Q Who would this acord, Document 500087, have been
 10 submitted to at the Home?
 11 A The underwriting department.
 12 Q And, to your understanding or knowledge based
 13 upon your review of the files here, would that have been
 14 to Mr. Wood?
 15 A Could have been to anybody in the underwriting
 16 department.
 17 Q I want to go now to the same file, the 5000 or
 18 500,000 I guess is the, and I want to talk about 500035, I
 19 believe. No, I'm sorry, it's 34. It's the notes from
 20 Mr. Wood. You have those. Your counsel has been kind
 21 enough to put those in front of you. Was this a part of
 22 the file that you retrieved when Mr. Pfennigs first
 23 tendered the second amended complaint defense to you?
 24 A No.
 25 Q When did you first see this document?

87

1 A When I got the underwriting file. So, again,
 2 sometime between, you know, late June or early July and
 3 October. I don't exactly recall when.
 4 Q So July 2000, something like that?
 5 A Somewhere, whenever it was that I would have
 6 received it from New Hampshire.
 7 Q How would we determine what that date was? What
 8 is the best way to do that?
 9 A There is no way. They just come in.
 10 Q No cover letter, no nothing?
 11 A No cover letter, no nothing.
 12 Q Did you speak with anybody with regard to
 13 500034, Mr. Wood's notes?
 14 A No.
 15 Q And I'm making the assumption that those are
 16 Mr. Wood's notes. Do you make that same assumption with
 17 me?
 18 A Well, I see Dave Wood above this 3/15, and it
 19 looks like the same signature below. So I'm presuming it
 20 is too, but I don't know his writing.
 21 Q Can you read Mr. Wood's writing?
 22 A A little bit. It's no worse than some of the
 23 doctors that I've had to read.
 24 Q Well, I can appreciate that. I'm probably not
 25 quite as good at reading as you may very well be. My

88

1 question is can you read the first or the second paragraph
 2 after it says no sign of stopgap, where it says --
 3 A UW.
 4 Q Which means?
 5 A Underwriter.
 6 Q Okay.
 7 A Noted copy of audit, that she checked it against
 8 the '86 policy for -- I don't know what that other word
 9 is.
 10 Q That's the word I wanted you to get for me?
 11 A I haven't got a clue.
 12 Q Then the next paragraph down, can you read that?
 13 A Correspondence from Chris Bulger in July and
 14 August 1986 about correction of the named insured. NI is
 15 named insured.
 16 Q Do you have any knowledge of whether someone had
 17 requested Mr. Wood to make notations, such as we're
 18 talking about in 500034?
 19 A Well, the only thing that I can note is that he
 20 has a note 3/15/91, I told Gary Bulger. So perhaps Gary
 21 Bulger called him. That's the only thing I can think of,
 22 since there is no letter in the underwriting file, but I
 23 don't know. I wasn't there.
 24 Q On Home Document 00008, I'm going to try and go
 25 in order for a little while here, at least at the

89

1 beginning of this thing, and I apologize for jumping back
2 and forth. But I want to start actually with 00007.
3 MR. CLARKE: Are you still in the claims
4 underwriting file?
5 MR. GALLIK: The claims.
6 MR. CLARKE: All right.
7 MR. GALLIK: The 5000 are underwriting; correct?
8 MR. CLARKE: Right.
9 Q (BY MR. GALLIK) I'm back on the claims now the
10 00s. And these are your notes. You have those in front
11 of you, I see; correct?
12 A Yes.
13 Q Where do these come from?
14 A These are just notes that I've typed into the
15 computer, some of them. And, for instance, a payment was
16 issued. And once the check has been issued, it
17 automatically gets put onto the computer system.
18 Q And what are the guidelines for what goes onto
19 the computer or what doesn't go onto the computer?
20 A There aren't any written guidelines. It's just
21 what I said before, what an adjustor, in their best
22 determination, feels it's appropriate to communicate. So
23 anybody that follows them or has to take over the file or
24 do something knows what is going on and what has happened.
25 Q You will agree with me that Home Document 7, 8

90

1 and 9 do not set forth all of your involvement or
2 correspondence with regard to this file subsequent to
3 April of 2000; correct?
4 A Correct.
5 Q And the reason these made it into the computer,
6 these meaning 7, 8 and 9, there's no special reason why
7 these notes are there and some other notes aren't there or
8 are someplace else?
9 A No, there's no reason at all.
10 Q Okay. If you will look to the second entry on
11 Document 8, Home Document 8, and it looks like it's dated
12 06/07 2000. When it says event, what does doc note mean?
13 A Documentation note.
14 Q And on the one above that, the 6/19 2000, it
15 says event, C-O-V-R-G-E?
16 A Coverage.
17 Q So would that first one, 6/19 2000, be a note
18 with regard to your determination regarding coverage, or
19 what does that mean?
20 A That just means I'm just taking a look at
21 coverage and looking at whatever the policy, what it is
22 that I'm finding, what I found in terms of the coverage.
23 Q In that first notation on Document Home 8, you
24 indicate that it is not known if umbrella coverage was
25 procured. Now, did you note that because of the fact that

91

1 the application which listed omission as providing
2 employee's liability coverage also had an application for
3 umbrella coverage?
4 A Well, there was an application for umbrella
5 coverage in there, but I don't know whether it was
6 procured or not. I could find no evidence that an
7 umbrella policy was ever procured, at least not from Home.
8 Q In that same notation, 6/19 2000 on Home
9 Document 8, you indicate that I have asked Trish to follow
10 up on this with Manchester in relation to umbrella
11 coverage. Who is Trish and Manchester?
12 A Trish was my CA and Manchester is New Hampshire,
13 or was my CA.
14 Q What did Trish tell you after she followed up
15 with Manchester?
16 A They had no, they had no information regarding
17 that Home ever issued an umbrella coverage that they could
18 find.
19 Q If an application is taken by the insured and
20 they determine that they're not going to provide the
21 policy requested, is there generally a letter or some sort
22 of notification as, hey, look we're not going to give you
23 coverage?
24 A No, generally all it is, what an application is
25 generally used for is to see what the cost is going to be,

92

1 and that information is then passed on to the broker for
2 whoever the insured may be. And then they make a
3 determination as to whether or not they want to go with
4 that coverage or not. So it's informational purposes to
5 determine premium.
6 Q In that same notation on, that you made for 6/19
7 2000 on Home Document 8, you talk about you've had the
8 opportunity to speak with Farid Bahou in the New York
9 office. He sent me samples of the employer liability.
10 Tell me about the discussions that you had with Mr. Bahou,
11 who he is and the reason you contacted him?
12 A He was a former underwriter for Home, and I
13 contacted him to find out whether or not employers
14 liability or stopgap coverage was available in 1985 or in
15 1987.
16 Q How come?
17 A And he told me it was. Well, if it wasn't there
18 and if it wasn't available, that would be a reason why it
19 wasn't there.
20 Q So on 6/19 2000, you did not know whether Home
21 provided employer's liability coverage; is that true?
22 A That's true. Well, I knew they had provided it.
23 I didn't know if they had provided it at that point in
24 time, because I wasn't employed by the Home then. So I
25 had no clue of what was available.

93

1 Q The copy of the policy that we've been provided,
 2 and I'll just refer you to, let's go to the forth one, the
 3 broad form comprehensive general liability endorsement
 4 form L-6111, which has Home Bates stamp 66 through 71, the
 5 amendatory endorsement form L-6178 has Home Bates stamp 78
 6 on it. And, likewise, Home Bates stamp Number 53 through
 7 57 is the defendants' general liability policy issued to
 8 the Home, and in those documents, if you have them in
 9 front of you, either with your counsel or they're in those
 10 documents, whichever one is easier. Each of those
 11 documents, at least the ones provided to me, has a big
 12 slash down there. What does that mean?
 13 A I haven't got a clue. That's the way that they
 14 came, that they were in the underwriting file.
 15 Q Is that standard for the originals of these
 16 policies to have the big slash like that on there?
 17 A We don't have the originals of the policies.
 18 Q Who does?
 19 A The insureds or their brokers.
 20 Q Okay.
 21 A These are just copies.
 22 Q Certified copies; correct? Well, yeah, they're
 23 copies, okay.
 24 A Well --
 25 Q You don't know how that slash got on there?

94

1 A No.
 2 Q And that has no significance to you whatsoever?
 3 A No.
 4 Q Did you ever inquire about that?
 5 A No.
 6 Q Did you ever request a coverage opinion with
 7 regard to whether or not the Sherner decision and the
 8 cases proceeding it would change any coverages that you
 9 had in Montana?
 10 A No, not that I recall.
 11 Q Did you ever have a request of anybody to
 12 determine whether the Sherner decision would change this
 13 CGL policy issued to Weissman's as far as whether there
 14 was coverage or not?
 15 A No.
 16 Q And that was not part of the coverage opinion
 17 that you requested from Mr. Habein?
 18 A Not that I recall.
 19 Q Who else requested coverage opinions besides
 20 yourself?
 21 A Nobody.
 22 Q So if you didn't make that request, that wasn't
 23 done, am I correct?
 24 A That is correct.
 25 Q So it's just that you wanted to make sure you

95

1 were right, the reason why you asked Mr. Enrico Montoya to
 2 look at the policies with regard to the Sherner decision?
 3 A It had nothing to do with the Sherner decision.
 4 It was just the policy. I only got a copy of the Sherner
 5 decision for my own curiosity to what it was that the
 6 decision said. The decision isn't going to affect, to my
 7 knowledge, the decision wasn't going to affect the
 8 coverage, because there was no employer's
 9 liability/stopgap coverage procured under this policy. So
 10 the decision wasn't going to change the GL policy in any
 11 way, shape or form.
 12 Q And so on Home Document 8, the entry of 6/6/02,
 13 you note that you called Joel Ross, general counsel to
 14 discuss with him. What was it that you called to discuss
 15 with him?
 16 A I called to let him know that there was a
 17 challenge to the disclaimer and the basis for the
 18 challenge to the disclaimer and the fact that -- well, the
 19 basis was this alleged representation that was made by an
 20 underwriter. Since that really is not a claims issue, but
 21 is potentially, as I said before, could affect the Home, I
 22 called him to let him know about it.
 23 Q How did he respond?
 24 A Well, he agreed with my decision to go ahead and
 25 pull all of the policies and, once we got them, that

96

1 we would go ahead and assign it out to coverage counsel
 2 for review.
 3 Q It's true, is it not, that Mr. Ross was
 4 concerned about this issue with regard to Dave Wood and
 5 the sole remedy or exclusivity?
 6 A I don't know. I don't know that I could say
 7 that he was concerned about it, but he wanted me to follow
 8 up with it and get whatever information I could, which was
 9 just as a matter of course, because this is an assertion
 10 that had been made by the insured's personal counsel.
 11 Q In that same notation, Home Document 8, your
 12 entry 6/6 200, it says quote, "Suggested we get a copy of
 13 Montana Supreme Court case and review to find out if it
 14 applies retroactively," end quote. Who suggested that?
 15 Was that your suggestion or Mr. Ross'?
 16 A I couldn't tell you right now. I couldn't tell
 17 you right now whose it was. Probably, you know, it might
 18 have been Joel's. It could have been mine. I don't know.
 19 Q Okay. Why? Regardless of whose suggestion it
 20 is, why? If it makes no never mind as to coverage, why do
 21 you even need it?
 22 A Just covering the bases and doing what we can
 23 do.
 24 Q Okay.
 25 A Investigating everything that is possible,

97

1 whether it's remote or not.

2 Q So in your mind, on 6/6 2000, it was a
3 possibility that the Sherner decision could have some
4 effect on this claims file?

5 A I didn't think it would because there was no
6 stopgap. I don't know how it would have applied, if
7 there's coverage under the workers' comp policy, how it
8 applies. I don't know even if it would. I couldn't tell
9 you, because I didn't know what the decision said.

10 Q Well, I guess my question is -- maybe not
11 getting it across very good, but you had this discussion
12 with the general counsel on this about the Sherner
13 decision. And a suggestion was made either by you or he
14 that you get the case, review it to find out if it applies
15 retroactively. What impact -- what if it had?

16 A I still wouldn't have, it still wouldn't have
17 made any difference to the policy, but it's nice to know
18 what it was that it said and what it was that they were
19 basing their decision on.

20 Q Did it have anything to do with the fact that
21 there had been the allegation by Mr. Pfennigs that the
22 Home, through its underwriter, had represented that it
23 didn't need stopgap because Montana is the sole remedy in
24 the state?

25 A No.

99

1 Q And did you send that on, that meaning the
2 Sherner decision, on to Mr. Ross; or did you just call him
3 and tell him that I've got it and it doesn't apply
4 retroactively?

5 A I would have sent it on to him. It went with
6 the entire claim file, because he got a copy of that.

7 Q Did you talk with him about it after you had
8 gotten the copy?

9 A I don't recall having a conversation about it.

10 Q Did he ever bring that issue up to you again
11 after 6/6 2000?

12 A I don't recall us ever having a conversation
13 about it, and I don't recall him ever discussing it with
14 me.

15 Q How many discussions did you have with Mr. Ross,
16 if you can recall, between April of 2000 and October of
17 2000?

18 A Well, I had that one with him in June.

19 Q I know it's difficult, but I'm just looking for
20 your best recollection.

21 A I don't recall. I know that I had the one in
22 June, and I probably had a conversation with him in
23 October or at least sent him the file in October when
24 the -- was it in October? No, because his letter was the
25 May letter. I think I probably sent the file to him at

98

1 Q The bottom of that entry on Home Document 8
2 dated 6/6 2000 indicates, "Also suggests seeing if we can
3 find the former Home underwriter Dave Wood to see what he
4 recalls." Now, I'm assuming that that was a suggestion by
5 Mr. Ross; is that your assumption also?

6 A Yes.

7 Q Well, more than your assumption, did he make
8 that suggestion?

9 A I guess he did, because that's the way I have it
10 written down.

11 Q And because you wrote it also suggests, does
12 that refresh your recollection at all as to whether or not
13 it was Mr. Ross who initially suggested getting a copy of
14 Sherner to find out if it applies retroactively?

15 A Probably.

16 Q And did you inquire of him, as I'm inquiring of
17 you now, why, what difference does it make, who cares, we
18 don't have coverage?

19 A No.

20 Q And did you then get a copy of the Sherner
21 decision and review it to find out if it applied
22 retroactively?

23 A Yes.

24 Q And what was your decision?

25 A I think I said I didn't think that it did.

100

1 that point in time. Because of the allegation, he would
2 have wanted a copy of the file. And if anything else came
3 in, I would have sent him the correspondence. I don't
4 recall that I ever had a conversation with him, unless he
5 called me, and I don't recall anything on that. I just
6 kept him abreast of what Mr. Pfennigs' letters were
7 saying.

8 Q You also made another entry on that same day,
9 which is on the bottom of Document Home 08, and that is
10 entry dated 6/6 2000, event doc note, note coverage
11 disclaimed for loss originally in 1991. After that you
12 say, quote, "Retender in 2000, based upon recent Supreme
13 Court case allowing exemption for direct action by
14 employee against employer," end quote. It is your
15 understanding then that the retender in 2000 was because
16 of this recent Supreme Court decision on the exclusivity;
17 is that correct? Is my understanding --

18 A That's what I put down there. But when I
19 originally got the claim, I didn't know that there had
20 been a disclaimer in 1991, because Mr. Pfennigs never told
21 me. I made the assumption that they thought that maybe
22 there had been some type of change. I don't know what it
23 was that he thought, because he never ever discussed it
24 with me. And, I just assumed that it was a retender based
25 on the Sherner case.

101

1 Q And did anybody ever tell you that you were
2 wrong?
3 A No. But I never ever discussed it with
4 Mr. Pfennigs either. That was just my way of putting it
5 into the file.
6 Q So as of 6/6 2000, it was your understanding, as
7 the claims supervisor on this particular claim, that the
8 retender that was made by Mr. Pfennigs on behalf of Carl
9 Weissman & Sons in April of 2000 was based upon the
10 Sherner exception?
11 A I don't know what it was based on, because he
12 didn't tell me. All he told me is that the case was
13 dormant. And I didn't know what had gone on previously,
14 because he didn't let me know. When I did ask him, he
15 said he couldn't recall and he didn't have the file in
16 front of him. All he knew was it had been dormant for
17 some period of time. He did not tell me that Home had
18 disclaimed anything new about the disclaimer, and that's
19 why the Home file got closed.
20 Q So when you write in that note, quote, "Retender
21 in 2000, based on recent Supreme Court case" --
22 A That's my assumption.
23 Q Did you ever ask if that assumption was correct,
24 to anybody?
25 A No, because I wasn't getting any answers from

102

1 Mr. Pfennigs either when I had requested, you know,
2 information from him as to why he believed there was
3 coverage and what had changed from 1991 in the original
4 disclaimer nine years later in 2000. He still has never,
5 he still never responded to me about that.
6 Q Ever?
7 A Ever.
8 Q To this day?
9 A To this day.
10 Q The only thing that you were aware of as of the
11 date that you changed or that you entered these notations
12 on Home Document 8, I'm talking about the last entry on
13 6/6 of 2000, the only thing that you were aware of that
14 changed or potentially could have changed was the Sherner
15 decision; right?
16 A That's all I knew.
17 Q And that came to you from Mr. Pfennigs?
18 A No.
19 Q Who did it come to you from?
20 A It came to me from, I called workers' comp
21 counsel, former workers' comp counsel in Montana to get a
22 copy of the case. I asked Mr. Pfennigs for a copy of the
23 case. He never sent it to me.
24 Q But he was the one that informed you of it in
25 the first place, even though he didn't send you one?

103

1 A I think he may have commented on the fact that
2 there was a new case that had recently come down from the
3 Montana Supreme Court. But he didn't, he didn't go into
4 any details about it. I don't even think, I don't even
5 recall whether he told me the name of the case. That's
6 why I called outside counsel.
7 Q In that notation on Home Document 08, the last
8 one for 6/6 2000, the very last sentence before your name
9 indicates, well, the last two sentences, quote, "What is
10 different that they are now challenging the disclaimer
11 when they never challenged it before? Will respond to
12 counsel and advise him that we are taking his position
13 under consideration." What was his position that you were
14 taking under consideration?
15 A Regarding the allegation that Dave Wood said
16 something, and that's why I said that I would go back and
17 pull all of the files to see if stopgap had ever been
18 purchased.
19 Q And it had nothing to do with the Sherner
20 decision at this position?
21 A No, because he didn't mention the Sherner
22 decision in his letter. He only talked about the
23 allegation that Dave Wood had allegedly made
24 representations.
25 Q But you had talked with him about Sherner?

104

1 A At some point. I don't recall talking to him
2 about Sherner. He's the one that said there was a recent
3 Montana Supreme Court case, and he didn't give me the
4 name. And it was simply a part of the conversation I had
5 with him originally, I believe, in April of 2000.
6 Q On Home Document 7, which is the page before
7 that we've been talking about, we've got some other
8 notations starting with 1/4 2001 and then there's one for
9 10/17 2000. Actually there's three for 10/17 2000. Who
10 made the decision to retain coverage counsel on 10/17
11 2000?
12 A Well, I did. It was, that was based on the
13 prior conversation I had had with Joel Ross, that once we
14 got all of the policies, we would send them off to
15 coverage counsel in Montana.
16 Q And this coverage issue that you sent to
17 Mr. Habein on 10/17 2000, did that include questions with
18 regard to the underwriting file?
19 A I just sent him everything and a copy of the
20 complete file. I don't recall what was in the cover
21 letter. I couldn't tell you at this point in time,
22 because I don't remember.
23 Q You informed Mr. Pfennigs at or near that
24 October 17th, 2000 date that you were going to obtain
25 coverage counsel; correct?

105

1 A As I recall, yes.

2 Q You only informed Mr. Pfennigs that you were

3 going to retain coverage counsel once he told you that

4 they were going to confess liability?

5 A No, I had told him that we were -- that was what

6 we were going to do right from the beginning.

7 Q From the beginning, what are you talking about

8 from the beginning?

9 A From June forward.

10 Q Not April?

11 A No, not April.

12 Q So from June, those documents that we're talking

13 about, June 6th forward -- when did you first, how did you

14 first let him know, him being Pfennigs, that you were

15 going to get coverage counsel on this one?

16 A Well, I know I called him, and I had sent out

17 that letter to him, but I called him when we had got the

18 disclaimer, left him a message and said I'm going to pull

19 all of the underlying files to see if there was stopgap

20 purchased at any time prior to this loss date or after and

21 find out when that was. And, you know, as far as your

22 allegation regarding Dave Wood goes, I've recommended that

23 we retain coverage counsel to look at that. But that

24 probably would have been a voice mail message to him.

25 Q To Mr. Pfennigs?

106

1 A Yeah. And then I sent out the letter advising

2 him that we would continue our coverage investigation and

3 pull all of the underwriting files and all of the

4 policies.

5 Q On 10/17 2000; again I'm looking at Home

6 Document 7, where it says, it's the second to the last

7 one, where it says event S-U-P-D-I-A all in caps, what

8 does that mean?

9 A Supervisor diary.

10 Q And then it says note supervisor review. Who

11 was the supervisor?

12 A Me.

13 Q How come this is a supervisor review and the

14 others are just doc notes? What is the difference?

15 A Well, claims are all put onto diary. And you

16 have to go in at certain periods of time to review the

17 file, and this is just a diary review. And it's on a

18 different screen. And then you complete the screen, and

19 it goes over to the doc screen.

20 Q Are there written standards or guidelines as to

21 how often these types of reviews are done when you're

22 going to pull the file?

23 A It's all going to be on a case-by-case basis.

24 On certain cases, nothing is going to happen for six

25 months, when I know that there's nothing going to happen

107

1 for six months. Whereas you might have something that

2 there's a lot of things happening and you may want to

3 review that file every 15 days or every 30 days or

4 something a lot closer. It all depends on the case.

5 Q In that same note, you indicate that authorized

6 to retain coverage counsel on behalf of Home. Who has

7 authorized you?

8 A Joel.

9 Q Joel?

10 A Joel authorized me to retain coverage counsel.

11 Q As of that date?

12 A No, back in June.

13 Q Why was there a complete copy of the file

14 policies forwarded to Mr. Habein on 10/17 2000 and then on

15 1/4 2001 you again indicate, and I'm looking at Home

16 Document Number 7, copy of file sent to general counsel's

17 office of this date? Did Mr. Ross not have a copy of the

18 file?

19 A He probably did, but I sent him another copy,

20 because sometimes he doesn't recall getting them, and I

21 don't know what he does with them. So out of an abundance

22 of caution, I sent another copy of the file.

23 Q In your last notation, the supervisor review

24 notation on 10/17 2000, Home Document 7, you indicate that

25 there's never been a response to my letters. What do you

108

1 mean by that?

2 A Just what I said. There was never any response

3 to my letters, when I asked them on what basis are you

4 challenging the disclaimer, what is different in 2000 from

5 the original disclaimer in 1991, because the disclaimers

6 are basically the same, on the same basis, what has

7 changed that you believe that there's coverage. And

8 they've never ever responded. He never provided me copies

9 of any of the pleadings. He never provided me anything

10 dealing with the status of the case. He never provided me

11 anything that I requested.

12 Q You also indicate that, in that same notation on

13 Home Document 7, for the entry supervisory note 10/17

14 2000, that quote, "Now the contention is that the phrase,

15 quote, 'arising out of' is ambiguous based on some

16 automobile cases." Do you see that?

17 A Uh-huh, yes.

18 Q Where did you get that information?

19 A In a letter that he sent, that Bob Pfennigs sent

20 to me.

21 Q I thought you said he didn't give you any

22 information, didn't respond to your letters?

23 A Well, he didn't. That has nothing to do with

24 why he believes that there is coverage.

25 Q The fact that the arising out of language is

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|---|--|
| <p style="text-align: right;">109</p> <p>1 ambiguous has nothing to do with whether there was 2 coverage? 3 A I didn't think that was ambiguous. All it says 4 is arising out of the scope of employment. When 5 Mr. Hubbard in his 1998 complaint said he was in the scope 6 of employment of Carl Weissman at the time of the loss, I 7 didn't see where there was any ambiguity, when the 8 plaintiff had admitted he was in the course and scope. 9 Q And was that ambiguity that Mr. Pfennigs pointed 10 out, was that also part of the coverage opinion that you 11 requested from Mr. Habein? 12 A I don't recall that, no. 13 Q When you requested this coverage opinion from 14 Mr. Habein, did you do it in writing? 15 A I probably sent a cover letter, but I don't 16 recall what I said in it. 17 Q And that wouldn't be part of this file, would 18 it? 19 A No. 20 Q How come? 21 A I don't know. It's not, it wasn't in any of the 22 documents that I reviewed. 23 MR. CLARKE: Well, so the record is clear, 24 Counsel, of course that was redacted as part of the 25 attorney/client privilege. That's what is shown in the</p> | <p style="text-align: right;">111</p> <p>1 A They were increased to 15,000, because up above, 2 on 10/17, you'll see 15,522.16. And there was already a 3 payment of 522.16 made to Ugrin Alexander's office for 4 Invoice Number 23577. So since that 522.16 had already 5 been paid, then the outstanding reserve would have been 6 15,000. 7 Q Was it your intention to redact 00007? I'm 8 looking at this page that says right before 00007, 9 Counsel, it says, 00007, 12/12/00 entry redacted as 10 attorney client privilege? 11 MR. CLARKE: Right. That's to indicate so that 12 you understand that there is a portion of the page that is 13 blanked out. That is what the gap is for. And that's 14 what this page is intended to point out. That we did 15 redact a portion of 00007. 16 MR. GALLIK: I see. Thank you very much. 17 MR. CLARKE: Uh-huh. 18 Q (BY MR. GALLIK) And I take it that redacted 19 portion of 00007 had to do with an entry that indicated 20 what occurred between you and Mr. Habein in some 21 correspondence? 22 A I don't know, because I don't, I've not seen it. 23 I couldn't tell you what it's about. I don't recall. 24 Q Well, sometime between 10/17 2000 and 1/4 2001, 25 you had conversations with Mr. Habein?</p> |
| <p style="text-align: right;">110</p> <p>1 privilege log. 2 MR. GALLIK: I understand. 3 MR. CLARKE: Okay. 4 Q (BY MR. GALLIK) In the notation of supervisor 5 review 10/17 2000, Home Document 7, end of that one 6 indicates see hard copy of file for letter to coverage 7 counsel that sets out all facts and coverage issues. And 8 that's the letter you're talking about; correct? 9 A Yes. 10 Q And that is one of the letters that has been 11 redacted; correct? 12 A Yes. 13 Q Was it your -- did you go through and make the 14 redactions? 15 A No. 16 Q Counsel did that? 17 A Yes. 18 Q You finish up that entry that, by saying based 19 on retention of coverage counsel, expense reserves 20 increased. Tell me what that means. 21 A Well, we have to reserve for expenses. We can't 22 pay a bill if I don't have any reserves on the file. The 23 payment won't go through. 24 Q Do you know what they were and what they were 25 increased to?</p> | <p style="text-align: right;">112</p> <p>1 A In all probability, yes, but I don't recall. 2 Q Do you recall how many conversations you had 3 with Mr. Habein during that time frame? 4 A I recall I had one conversation with Mr. Habein, 5 and then there was another conversation with the associate 6 that was working on the file. But that's about all I can 7 recall. 8 Q How about written correspondence back and forth 9 to coverage counsel during this time frame? 10 A I don't recall anything beyond my original 11 letter. 12 Q Now, I would like for you to look at Home 13 Documents Number 10, 11, 12, 13. Those are all e-mails 14 that you're involved in; correct? 15 A Yes. 16 Q And they're all e-mails with regard to the 17 attempt to locate a former employee of Home named Dave 18 Wood; correct? 19 A Yes. 20 Q And on 10/19 2000 you were made aware of 21 Mr. Wood's address? 22 A No. 23 Q I'm looking at Document 10. 24 A Yeah, I know, I don't have an address. I just 25 knew that he was located in Washington state.</p> |

113

1 Q I'm looking at Document 10.
 2 A Document 10, I'm sorry.
 3 Q Right under the words that say Elizabeth
 4 Marcario, 10/19 2000?
 5 A Yes, I see it, yes.
 6 Q Did you contact Mr. Wood after that?
 7 A No, I did not.
 8 Q Do you know if anybody on behalf of Home or REM
 9 contacted Mr. Wood?
 10 A I don't know.
 11 Q You've never had any correspondence,
 12 conversations with Mr. Wood?
 13 A No. I just pass that information on to coverage
 14 counsel.
 15 Q Have you spoke with coverage counsel about his
 16 contact with Mr. Wood?
 17 A I never asked him about it.
 18 Q I'm looking at Document Home 13, and that is an
 19 e-mail as of 10/17 2000. Is that the first time that you
 20 had indicated that this claim may be headed for a bad
 21 faith suit?
 22 A Probably.
 23 Q Is that when you figured oh-oh here it comes?
 24 A Well, with what the contentions were that
 25 Mr. Pfennigs was making, I figured they're going to

114

1 probably do something and assign their rights to the
 2 plaintiff in all probability.
 3 Q And as of 10/17 2000, the anticipated bad faith
 4 suit was purely based upon an underwriting issue, as far
 5 as you were concerned?
 6 A I didn't know what it was going to be based on.
 7 I just figured that's where it was going to be heading.
 8 And I didn't have a clue what it was going to be based on.
 9 Q You wrote then the issue is purely an
 10 underwriting issue.
 11 A As far as locating Mr. Wood was concerned.
 12 Q Well, that's not what the e-mail says, Ms.
 13 Galasso. It says, "I have a file which may be headed for
 14 a bad faith suit, and the issue is purely an underwriting
 15 issue."
 16 A It fairly well could be. I didn't know. At
 17 least that was my call.
 18 Q Who is Myron?
 19 A He's our human resources director.
 20 Q Where is he?
 21 A Maitland, Florida.
 22 Q Who is Teri Scrivani?
 23 A His boss.
 24 Q And he's in --
 25 A She's in New York.

115

1 Q I'm sorry. And who is Debbie Skaduto.
 2 A Somebody from Zurich Risk Management Services.
 3 Q Have you ever talked with her?
 4 A No.
 5 Q Have you ever talked with Myron about Mr. Wood?
 6 A No, other than that e-mail.
 7 Q How about with Ms. Scrivani?
 8 A No.
 9 Q I'm looking at Document 14, Home Document 14,
 10 and that's an e-mail dated 10/17 2000, to Mr. Farid E.
 11 Bahou; am I saying that right?
 12 A Bahou.
 13 Q And Mr. Bahou, who was he?
 14 A He was the former Home underwriter. He's in New
 15 York.
 16 Q The underwriter that underwrote Carl Weissman &
 17 Sons' policies?
 18 A No, he was just in the underwriting department.
 19 Q How come you decided to send him this e-mail on
 20 Home Document 14?
 21 A Because he's the only one that could tell me
 22 about the stopgap endorsements and what the history was
 23 there. I had no knowledge.
 24 Q And you were aware of the fact that at the point
 25 in time that you wrote this e-mail, that the allegation

116

1 was that Mr. Wood indicated that Montana was a sole remedy
 2 and, therefore, stopgap or Coverage B employer's liability
 3 was neither needed nor available? You were aware that was
 4 the issue?
 5 A I was aware that that's what Mr. Pfennigs
 6 contended.
 7 Q Right. Okay. And you became aware of that
 8 through his letters to you?
 9 A Yes, his one letter to me.
 10 Q He only wrote you one letter?
 11 A On that issue, yes.
 12 Q You learned, as a result of that e-mail to
 13 Mr. Farid or Mr. Bahou, excuse me, that Home did, in fact,
 14 provide stopgap endorsements under the employer's
 15 liability coverage for Montana during the time of this
 16 claim; right?
 17 A Yes.
 18 Q And you learned that it was fairly inexpensive,
 19 like \$211?
 20 A Yes.
 21 Q You never talked to Dave Wood about it?
 22 A No.
 23 Q Did you talk with any other underwriters that
 24 had involvement with the underwriting of this claim?
 25 A No, I didn't know any other underwriters.

117

1 Q I'm looking at Number 15, Home Number 15. It's
 2 all a handwritten document. Do you know whose handwriting
 3 that is?
 4 A Mine.
 5 Q Do you know when you wrote that?
 6 A No, but it would have been when I received the
 7 underwriting file.
 8 Q So you reviewed the underwriting file?
 9 A Yes.
 10 Q What was the purpose of your review of the
 11 underwriting file?
 12 A Just to see if there had been any letters or any
 13 correspondence regarding that issue, on the stopgap
 14 coverage, if there had been a request on the application.
 15 Q And when you saw that application that said
 16 employee exclusion deleted in reviewing the underwriting
 17 file, did that cause you some concern?
 18 A No.
 19 Q And when you saw on the application that Carl
 20 Weissman & Sons was not self-insured and that there was no
 21 workers' compensation coverage in Montana, did that cause
 22 you any concern?
 23 A I didn't know that there wasn't any workers'
 24 compensation coverage in Montana. I was told that there
 25 was workers' comp and that Mr. Hubbard had received

118

1 workers' comp benefits.
 2 Q I mean from Home.
 3 A I knew that Home was not the workers' comp
 4 carrier.
 5 Q Did you ever check with Sedgwick James or their
 6 predecessor Fred S. James with regard to that application
 7 that you saw in the underwriting file that indicated the
 8 exclusion was deleted or the fact that there was an
 9 application for \$100,000 of coverage from Mission, did you
 10 ever check into that --
 11 A No.
 12 Q -- with Fred S. James?
 13 A No.
 14 Q Do you know if anybody from either REM or Home
 15 had contacted Fred S. James or its predecessor Sedgwick
 16 James with regard to this claims file?
 17 A I have no idea.
 18 Q You didn't inquire into that?
 19 A No.
 20 Q What they had to say wouldn't matter, is that
 21 the reason?
 22 A The policy is what the policy is. You know, if
 23 there's going to be an issue, the issue would have
 24 occurred at the time that the policy was issued, and I
 25 would have anticipated and expected that, if there was a

119

1 problem with the policy, that the broker at the time that
 2 the policy was issued would have been in contact with the
 3 underwriting seeking clarification in writing or, you
 4 know, doing something at that point in time to point out
 5 if there were any errors or if there were any problems.
 6 And that would have been part of the underwriting file,
 7 but I could find nothing.
 8 Q Now, on October 25th, we have been talking about
 9 that October 17th, 2000 date when you made all those
 10 entries and the supervisor's note. On October 25th, 2000,
 11 you wrote an e-mail to Mr. Pfennigs with a copy to
 12 Mr. Habein. Therein you indicated that "Mr. Pfennigs:
 13 Please be advised that Home Insurance Company has retained
 14 coverage counsel in this matter. Coverage counsel is
 15 Peter Habein, Esq., of the Crowley Law Firm. His phone
 16 number is (406) 255-7208. Should you have any questions,
 17 please do not hesitate to contact Mr. Habein." You sent
 18 that; right?
 19 A Yes.
 20 Q Did you get a response from Mr. Pfennigs to this
 21 e-mail?
 22 A I don't recall. I mean I remember sending it.
 23 I don't know. I don't -- is there a document that you
 24 want me to look at?
 25 Q I've got the e-mail. I think it's probably been

120

1 one that has been redacted, because I didn't see it in
 2 yours. I've got a copy of the e-mail. You're more than
 3 welcome to see that. And why don't we just mark it, get a
 4 copy of it, and let's mark it as Exhibit A.
 5 (Deposition Exhibit A marked for
 6 identification.)
 7 A If he responded, I don't know about it. I don't
 8 recall.
 9 Q When you sent that e-mail that has been marked
 10 for identification as A, it was your intention to allow
 11 Mr. Pfennigs to inquire of Mr. Habein if he had any
 12 questions regarding coverage; right?
 13 A No, that was not my contention.
 14 Q Why did you write that e-mail?
 15 A We were in an adversarial position at that point
 16 in time, and Home was being represented by counsel. As in
 17 any case, it would have been inappropriate for
 18 Mr. Pfennigs to continue contacting me directly regarding
 19 the coverage issues when Home was being represented by
 20 counsel. He should have been directing any and all future
 21 correspondence directly to Mr. Habein at his office
 22 because he was Home's counsel.
 23 Q And you're aware of the fact that Mr. Pfennigs
 24 knew that Mr. Habein was Home's counsel as opposed to his
 25 client's counsel for the determination of coverage?

121

1 A That is correct.
 2 Q How do you know that?
 3 A Because I said Home. Didn't I say that Home has
 4 retained coverage counsel?
 5 Q Uh-huh.
 6 A They are Home's counsel.
 7 Q Well, didn't Home also retain defense counsel?
 8 A That was for the insured.
 9 Q Okay.
 10 A Coverage counsel has nothing to do with the
 11 insured. At that point that's an adversarial position,
 12 because Home is taking the position that there is no
 13 coverage. They are challenging that position. So Home
 14 has retained its own counsel with respect to coverage.
 15 Handling the defense had nothing to do with coverage.
 16 That is the insured's counsel, and that's what Mr. Zadick
 17 was retained to do.
 18 Q Right. So Home retained Zadick; true?
 19 A Correct, on behalf of Carl Weissman and for the
 20 benefit of Carl Weissman.
 21 Q And you told Mr. Pfennigs that when you informed
 22 him that Mr. Zadick had been retained as coverage counsel?
 23 A He was not coverage counsel.
 24 Q Or excuse me, defense counsel.
 25 A He was defense counsel for Carl Weissman.

122

1 Q And you made it clear. You didn't just say Home
 2 has retained defense counsel, Mr. Zadick, please refer
 3 everything to him?
 4 A I told him to provide copies of the pleadings
 5 and things that went on with the case so Mr. Zadick could
 6 adequately and appropriately represent Carl Weissman &
 7 Sons.
 8 MR. CLARKE: While, we're taking a little break
 9 in questioning here, just so you know, the particular
 10 e-mail that you've referred to, I believe is, let's see
 11 here, is in the file as Document 000177. It doesn't look
 12 the same thing, but it's got the same text.
 13 MR. GALLIK: Okay. Probably two different
 14 printers. 177?
 15 MR. CLARKE: Yeah.
 16 MR. GALLIK: Thank you. Yes, it is exactly the
 17 same.
 18 MR. CLARKE: Okay.
 19 MR. GALLIK: So for purposes of the record, we
 20 will refer, instead of Exhibit A to that e-mail dated
 21 10/25 2000, we will refer to it as Home Bates stamp 177.
 22 Q (BY MR. GALLIK) Is the claims file kept in the
 23 order that the Bates stamp are chronologically?
 24 A No, I think somehow they got out of order.
 25 Q Who put the redacted claims file together?

123

1 A I couldn't tell you. I have no clue.
 2 Q You didn't though?
 3 A I did not.
 4 Q It jumps around as far as the timing, and that's
 5 why it's a little bit difficult, and that's why I was
 6 asking if this is the way you kept the file. How are
 7 claims files kept? Let's talk about that a little bit.
 8 A Generally we try to keep them in date order with
 9 the most recent correspondence on top.
 10 Q What kind of files physically?
 11 A Like this with --
 12 Q Are we looking at some of the originals here?
 13 A Not to my knowledge, no.
 14 Q So they're two holed punched at the top?
 15 A Yes.
 16 Q And is there one for correspondence?
 17 A Not generally.
 18 Q They're not separated out. They're just one
 19 file with all documents just one on top of the other?
 20 A A lot of it depends on the size of the file.
 21 Initially it may be all together, but if it's going to be
 22 a huge file or potentially a big file like we see in
 23 construction defect, they may do some separations and put
 24 all of the pleadings together, and you may put all of the
 25 damages and testing results together and then

124

1 correspondence together.
 2 Q Did you categorize this claims file in any of
 3 those respects?
 4 A Not that I recall.
 5 Q So as you kept this claims file, did you just
 6 keep it in one two-hole punched file in chronological
 7 order, one thing as it came in on top of the other,
 8 whether it was correspondence or pleadings or policies or
 9 anything like that?
 10 A Policies I would have kept, other than for the
 11 policy that was referred to and as part of the file that I
 12 got from storage, those policies were already in the file.
 13 But when I got the underwriting files, I did keep those
 14 separate in a separate expander folder.
 15 MR. CLARKE: And so the record reflects, when we
 16 recognized that the documents were not in chronological
 17 order, we did give you a privileged log that does list
 18 things by chronological date.
 19 MR. GALLIK: Thank you.
 20 Q (BY MR. GALLIK) Were you aware of the defenses
 21 that Mr. Pfennigs was forwarding on behalf of Carl
 22 Weissman & Sons in the underlying case, that being Hubbard
 23 versus Carl Weissman?
 24 A I don't understand. You mean his response to
 25 his answers? His affirmative defenses, I don't

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| <p>1 understand.</p> <p>2 Q Okay. Let me try again. The underlying case in</p> <p>3 State District Court here in Montana, here in Great Falls,</p> <p>4 was Hubbard versus Weissman, Cause Number BDV-90-067. Did</p> <p>5 you know how and what defenses Mr. Pfennigs was going to</p> <p>6 defend your insured Carl Weissman & Sons in that</p> <p>7 underlying file? Did you know what he was saying? How he</p> <p>8 was defending it?</p> <p>9 A No, he never provided me any of the copies of</p> <p>10 that request from him. He never provided with anything.</p> <p>11 Q You keep telling me that. Let's get to that</p> <p>12 now. What did you request of him specifically that he</p> <p>13 failed to provide you?</p> <p>14 A At this time on my April 17th, 2000 letter,</p> <p>15 Bates stamp, Home Bates stamp 248 and 249, on Page 2, I</p> <p>16 said, "At this time we request you forward copies of all</p> <p>17 pleadings, as well as copies of any of the insured's file</p> <p>18 documents, copies of any medical reports, investigative</p> <p>19 reports, demands, correspondence, et cetera, with respect</p> <p>20 to this claim to Mr. Zadick," who would have forwarded</p> <p>21 them on to me then, and I never got anything. So I</p> <p>22 presume he never gave them to Mr. Zadick either, since I</p> <p>23 never got anything.</p> <p>24 Q Well, were you aware of the fact that Mr. Zadick</p> <p>25 had requested that file from Mr. Pfennigs?</p> | <p>125</p> <p>1 the intentional harm exception you reference in your</p> <p>2 letter of April 20th, 2000."</p> <p>3 Q So in that letter you were interested in getting</p> <p>4 from Mr. Pfennigs excess insurance under the workers'</p> <p>5 compensation policy?</p> <p>6 A Well, also information as to what has been going</p> <p>7 on for the last nine years, tell me.</p> <p>8 Q Right, okay. So why were you asking about</p> <p>9 excess insurance under workers' compensation policy which</p> <p>10 is applicable?</p> <p>11 A Because they may have had a duty to defend the</p> <p>12 insured.</p> <p>13 Q They meaning Home?</p> <p>14 A The excess carrier, whoever it may have been.</p> <p>15 Q What does that matter to you?</p> <p>16 A I'm trying to find coverage for the insured.</p> <p>17 Q I see. But as far as providing that information</p> <p>18 to you, Mr. Pfennigs -- you asked for excess on the</p> <p>19 workers' compensation policy, and it's your testimony that</p> <p>20 Mr. Pfennigs just didn't respond?</p> <p>21 A He didn't respond. I never received any</p> <p>22 information from him.</p> <p>23 Q And again on 248, which was your letter of April</p> <p>24 17, you indicated that at this time we request you forward</p> <p>25 copies of all pleadings, as well as copies of the</p> |
| <p>126</p> <p>1 A Yeah, I'm sure that he did request it. And that</p> <p>2 I also instructed him to do so. And I think in my letter</p> <p>3 also of June 6th, on that's Home 229 and 230, starting on</p> <p>4 229, the third paragraph, "It appears this claim as been</p> <p>5 ongoing since the insured was originally served with this</p> <p>6 suit in January of 1991. There apparently was a first</p> <p>7 amended complaint filed and served in this matter, yet it</p> <p>8 was never tendered to Home for consideration. The second</p> <p>9 amended complaint was apparently filed March 10th, 2000,</p> <p>10 and tendered on April 14th, 2000, which resulted in the</p> <p>11 aforementioned disclaimer. What has been going on in this</p> <p>12 litigation for the last nine years? Presumably your firm</p> <p>13 has been defending Carl Weismann & Sons since 1991 and is</p> <p>14 in the best position to advise us of the current status of</p> <p>15 the litigation. Is there any excess insurance under the</p> <p>16 workers' compensation policy which is applicable to this</p> <p>17 loss? Has the excess carrier been given notice of this</p> <p>18 claim? Please advise of the identity of any excess</p> <p>19 workers' compensation insurer, policy number, claim</p> <p>20 number, and the identity, phone number, address of the</p> <p>21 adjustor who is responsible for this claim at the excess</p> <p>22 level. If the excess workers' comp carrier has not been</p> <p>23 notified of this claim, then we suggest this be done</p> <p>24 immediately. We would also like to have a copy of the</p> <p>25 recent ruling by the Supreme Court of Montana regarding</p> | <p>128</p> <p>1 insured's file document, copies of medical report,</p> <p>2 investigative reports, demands, correspondence with</p> <p>3 respect to this claim to Mr. Zadick. That actually has to</p> <p>4 do with this claim; right?</p> <p>5 A Yes. In the defense of this claim.</p> <p>6 Q However, your request for information regarding</p> <p>7 excess was simply your trying to assist? It doesn't have</p> <p>8 anything to do with Home?</p> <p>9 A No, I would have tried to find out if there was</p> <p>10 coverage and contacted those people to see what their</p> <p>11 policy said and see if they would drop down, if they had</p> <p>12 any obligation to defend. I was trying to find coverage</p> <p>13 for the insured. And that's why I went to Mr. Pfennigs to</p> <p>14 get that information.</p> <p>15 MR. CLARKE: Do you mind if we take a break?</p> <p>16 MR. GALLIK: No, that's fine.</p> <p>17 (Whereupon, a brief recess was taken at 3:20 to</p> <p>18 3:27 P.M.)</p> <p>19 Q (BY MR. GALLIK) We are talking about</p> <p>20 correspondence between yourself and Mr. Pfennigs. Do you</p> <p>21 recall obtaining or receiving a letter from Mr. Pfennigs</p> <p>22 on September 6th of 2000?</p> <p>23 MR. CLARKE: 229.</p> <p>24 MR. GALLIK: And I'm sorry, I don't --</p> <p>25 MR. CLARKE: I'm wrong. It's 208.</p> |

129

1 MR. GALLIK: Bates stamp. Thank you, Counsel.
 2 Q (BY MR. GALLIK) Bates document Home 208, do you
 3 recall getting this?
 4 A Yes.
 5 Q Didn't, in that letter, Mr. Pfennigs provide you
 6 with the basis for the retender for the claim in 2000, and
 7 I direct your attention to the second full paragraph of
 8 the first page.
 9 A Yes.
 10 Q And you are also aware of the fact that in May
 11 of 2000 Mr. Zadick put both Mr. Pfennigs and Hubbard's
 12 counsel in the underlying case on notice that he was going
 13 to be taking over this claim?
 14 A Yes, because he had been assigned, but then we
 15 withdrew.
 16 Q Did you receive Mr. Zadick's file after you
 17 withdrew the defense?
 18 A No.
 19 Q So you really don't know then whether or not
 20 Mr. Pfennigs complied with your request of April 17th,
 21 2000, Bates Document 249, 248 and 249, wherein you
 22 requested all of the pleadings, copies of any documents,
 23 medical reports be forwarded to Mr. Zadick?
 24 A I have no idea.
 25 Q So you don't have a complaint about Mr. Pfennigs

130

1 not responding to the stuff that you asked for in his, in
 2 your letter of April 17, 2000 to him?
 3 A I haven't got a clue what he sent to Mr. Zadick.
 4 Q Well, Ms. Galasso, I thought we just --
 5 A Yeah, but --
 6 Q Let me finish my question. You had just
 7 explained to me several times that Mr. Pfennigs wouldn't
 8 supply you with documents you requested, and you pointed
 9 out two letters. I asked you specifically. You pointed
 10 out your letter of the 17th of April 2000, Bates Document
 11 249, and you also pointed out Bates Document 208, your
 12 letter to -- excuse me, it wasn't 208. It was a June
 13 letter, the June 6th letter wherein you asked for
 14 information with regard to workers' compensation. Now,
 15 we've identified that the stuff that you asked for
 16 workers' compensation had nothing to do with the coverage
 17 issue, what you were doing, you were trying to find him
 18 coverage, being a good person; right?
 19 A Yes.
 20 Q So that was one of the concerns that you had
 21 when I was asking you what you were complaining about
 22 Mr. Pfennigs not supplying you with information. The
 23 other one you identified was this Bates Document 249,
 24 which is the second page of your April 17, 2000 letter, in
 25 which you request that all of this information be

131

1 forwarded to Mr. Zadick. You don't know whether or not he
 2 did?
 3 A No, I do not. I presume he did not, though, as
 4 I said before, because I didn't receive a copy of it. And
 5 generally Mr. Zadick would forward on the pleadings and
 6 the medical information to us, so we could review it.
 7 Q But you're complaining about Mr. Pfennigs. You
 8 don't know whether he did or he didn't.
 9 A No, I don't know if he did or he didn't. I'm
 10 presuming he didn't, because I never received anything
 11 from Mr. Zadick.
 12 Q All right. And it's true, is it not, that on
 13 that September 6th, 2000 letter, Bates Document 208 Home,
 14 that Mr. Pfennigs informed you of the reason why he
 15 believed the denial of coverage was inappropriate based
 16 upon the exclusion of claims that have been arising out of
 17 language?
 18 A That's what it says.
 19 Q So what other information do you need from
 20 Mr. Pfennigs that you asked for?
 21 A I asked for everything that had gone on from
 22 1991 to 2000.
 23 Q And it's --
 24 A Copies of the pleadings, copies of anything. I
 25 had none of that.

132

1 Q When did you ask him for that? You said you
 2 talked to him once.
 3 A I asked him in that second letter I sent in
 4 June. I said, "Please explain to me what has gone on
 5 between January 1991 and 2000, because presumably your
 6 firm has been defending Carl Weissman all of this time and
 7 you are in the best position to let me know."
 8 Q Why is that important to you?
 9 A I would like to know what happened and what was
 10 going on. I don't know if it's going to have an impact or
 11 not. But not knowing, I can't analyze something when I
 12 don't have any information.
 13 Q Let's get back to what information you did have.
 14 You knew about the complaint, the original complaint filed
 15 in '91; right?
 16 A Yes. No, in 1990.
 17 Q 1990, okay. You knew about the second amended
 18 complaint, because it was retendered to you in 2000;
 19 right?
 20 A Yes.
 21 Q And, thereafter, you knew about the third and
 22 fourth amended complaints; correct?
 23 A I received them, yes.
 24 Q So you were aware of the fact that in 1990 the
 25 complaint was filed. It was amended in 2000, amended

1 again a little bit later two more times. What other
 2 information did you need?
 3 A Well, I would have liked to know what the
 4 defenses were and how they responded, what was the answer.
 5 Q Did you ever request that information from
 6 Mr. Pfennigs?
 7 A Well, I asked him to send to it Mr. Zadick, and
 8 I didn't get it.
 9 Q And you don't know --
 10 A I don't know whether he did or not.
 11 Q And you didn't check it?
 12 A And then I asked him again in another letter
 13 what happened, tell me what has been going on in this
 14 lawsuit. Mr. Pfennigs is a defense attorney. I mean or
 15 he's a competent counsel and a litigator, and I know that
 16 he's handled claims before for insurance carriers.
 17 Presumably he would have been providing me the information
 18 as the insured's personal counsel that I would need for my
 19 file.
 20 Q Why if you disclaimed back in 1991?
 21 A Well, he's challenging the disclaimer and he's
 22 asking me to reconsider. Well, let me know what is
 23 happening. Let me have the information. I can't
 24 reconsider on nothing.
 25 Q So you wanted his answer. What else did you

1 want? Did you want the discovery that was done? Did you
 2 want copies of motions? What?
 3 A Well, I didn't -- whatever. He didn't even have
 4 to send it to me. He could put it in a letter. This is
 5 what has been happening, we responded to this, a copy of
 6 the response probably would have been appropriate.
 7 Plaintiff's deposition was taken, and nothing was
 8 ascertained, just some information.
 9 Q And what would you have done with that
 10 information?
 11 A I would have reviewed it. I would have sent it
 12 on to coverage counsel. I would have taken a look at
 13 everything to see is there anything that's not in the
 14 complaint. I would have tried to do whatever I could to
 15 find coverage.
 16 Q Was it your decision to retain Mr. Habein as
 17 coverage counsel based upon the suggestion or the
 18 encouragement by Mr. Pfennigs in his letter of September
 19 6th, 2000 to you Bates stamped Home Document 208, 209?
 20 A This came in when I was on vacation. I didn't
 21 even see it until the end of September, when I would have
 22 came back from vacation. It came into our office, it's
 23 stamped received September 12th, Brea. It would have come
 24 in while I was on vacation. So I wouldn't have seen it.
 25 Q When did you see it?

1 A It was sometime when I got back, but I would
 2 have had a stack of mail to go through.
 3 Q But you eventually saw this?
 4 A Eventually. I don't know if it was in late, the
 5 last week of September or the first week of October.
 6 Q But it certainly would have been before October
 7 25th; correct?
 8 A Yes, in all probability, yes.
 9 Q So my question is was it the encouragement of
 10 Mr. Pfennigs in this letter that you determined that you
 11 were going to hire Mr. Habein as coverage counsel?
 12 A No, that had been determined back in June when I
 13 had spoken to Joel Ross that we were going to retain
 14 coverage counsel. I just didn't know who, because I
 15 didn't have any idea of who was doing coverage in Montana.
 16 I had never dealt with a coverage issue in Montana.
 17 Q Did you ever tell Mr. Pfennigs that you were
 18 going to retain coverage counsel back in June?
 19 A Probably when I left him the voice mail message
 20 that we are going to get all of the information, and once
 21 we got it, we were going to send it on to coverage counsel
 22 back in June.
 23 Q In June?
 24 A Back in June.
 25 Q And you didn't write that in an e-mail or a

1 letter or notate it any place in your file? Is there any
 2 place in your file where there's a document that indicates
 3 that in June you intended to get coverage counsel?
 4 A Just in my file, in my doc notes, I don't
 5 recall. In a letter I said that we would be continuing
 6 our coverage investigation.
 7 Q Well, I'm going to hand you my copy of your
 8 redacted file. And if you could show me where in this
 9 redacted file, your doc notes, it shows that you
 10 documented the fact that you were going to retain coverage
 11 counsel in June of 2000?
 12 A I just didn't put it down here, but it would
 13 have been in my discussion with Joel back in June.
 14 Q You told Joel in June?
 15 A Yeah. It would have been in my discussion,
 16 because that's who would have authorized me to obtain
 17 coverage counsel.
 18 Q Joel would have documented it someplace?
 19 A I haven't got a clue. I doubt it. I don't know
 20 what he does, but I never see his notes on a claims file.
 21 Q So he has a separate claim file than you?
 22 A No. If he writes notes, I don't see him.
 23 Q Wouldn't it be in the claim file that you
 24 produced?
 25 A I don't know what he does. He's general counsel

137

1 for the Home. I don't know what he does.
 2 Q Well, my question --
 3 A I've just sent him a copy of my file.
 4 Q Once a file is closed, let's say, claims file,
 5 is everything, regardless of what Home employee or agent,
 6 whether it's REM, whether it's whomever, is everything
 7 that has been produced for that particular claims file put
 8 into the claims file, or is there a little claim file for
 9 general counsel, is there a little claims file for claims
 10 manager? How does it work? Doesn't it all get collected
 11 up into one file, one claims file, everybody's work?
 12 A I don't know. I only know about the claim files
 13 I've handled. If I pull something back from storage, it
 14 is whatever is there. Sometimes there's documents that
 15 come in after a file has been sent or after a file has
 16 been closed that maybe don't make it into a claims file.
 17 And sometimes we'll get something, a piece of mail that
 18 somehow got filed in error. I don't know.
 19 Q All right. Let me ask you this: To this date,
 20 as you sit here today, have you ever seen a document from
 21 anybody, whether it's yourself, whether it's Mr. Ross, or
 22 anybody else involved with this claim, that shows that you
 23 were going to retain coverage counsel in June?
 24 A I guess I didn't document it, no.
 25 Q Okay. Now, you got several letters subsequent

138

1 to the September 6th, 2000 letter. Did you ever respond
 2 to that September 6th, 2000 letter?
 3 A No, I didn't.
 4 Q Why?
 5 A I didn't, number one, I wasn't around until,
 6 like I said, I didn't receive it until sometime in
 7 September, October. And by October I sent everything out,
 8 and I figured, if there was going to be response, it would
 9 come from coverage counsel.
 10 Q Now, with regard to that e-mail, and that again
 11 was -- I want to use your document number, because it has
 12 the, well, the e-mail to Mr. Pfennigs, carbon copy to
 13 Mr. Habein, dated 10/25 2000. We've identified it. You
 14 know the one I'm talking about; right? Was that in
 15 response to any correspondence that you received from
 16 Mr. Habein?
 17 A I don't know.
 18 Q Or excuse me Mr. Pfennigs?
 19 A What is the date again?
 20 Q I'll find it. I'm sorry.
 21 A Here it is. It's 10/25. It's 177, Home 177.
 22 Q Yeah. Okay. Let's go to -- okay. Is 177 is
 23 that in response to an inquiry by Mr. Pfennigs?
 24 A A 10/24 letter.
 25 Q Okay.

139

1 A Which is Home 179.
 2 Q And is that the first time that you advised
 3 Mr. Pfennigs that you had retained coverage counsel?
 4 A It was the first time I certainly advised him of
 5 the identity of coverage counsel. Like I said, I think I
 6 told him in a voice mail message back in June that you
 7 would continue the coverage investigation, that we would
 8 probably be retaining coverage counsel on behalf of Home,
 9 after we got all of the documents. I did not put that
 10 into my June letter to him, other than telling him that we
 11 were going to continue the coverage investigation and
 12 obtain all of the underwriting files and all of the
 13 policies and review everything.
 14 Q In Home Document 179, he indicates, he meaning
 15 Mr. Pfennigs, indicates that he assumes you received his
 16 fax of October 13th. Was his assumption correct?
 17 A I don't know. I couldn't tell you at this point
 18 in time.
 19 Q Well, it's in your file as Home Document 181;
 20 right?
 21 A Yeah. That's the letter. I don't think that
 22 was the fax, but I can't tell.
 23 Q And at that point in time, you received the
 24 plaintiff Hubbard's motion to file the third amended
 25 complaint, along with a copy of the third amended

140

1 complaint?
 2 A That's in the file, yes.
 3 Q And then he also provided you with a fourth
 4 amended complaint in Document 181, and indicated that you
 5 should consider the fourth amended complaint as the
 6 most --
 7 A 181 is the third amended complaint.
 8 Q Keep going. Second full paragraph, first page
 9 on Document 181.
 10 A Yeah, I'm also faxing to you with this letter
 11 the plaintiff's motion to file his third amended
 12 complaint.
 13 Q Keep going.
 14 A As you'll see the motion was filed some time
 15 ago, but only recently granted by the judge. I have not
 16 yet been served with the third amended complaint. And I
 17 think that point is now moot, as the plaintiff has once
 18 again moved to amend his complaint one more time. I know
 19 of no grounds to resist the amendment, and I believe you
 20 should consider the fourth amended complaint as the most
 21 recent pleading.
 22 Q Did you ever get a fourth amended complaint?
 23 A If it's in the file, I did. And it says it's
 24 attached to this. Here it is right here, Document 184.
 25 Q In Document 181 and 182, that being Mr.

141

1 Pfennigs' letter to you October 14th, 2000. The bottom of
 2 the page, he indicates, "While I believe Home has already
 3 breached its contract, I'm going to allow it one more
 4 opportunity to assume its duties and responsibilities
 5 under the policy. If you have -- well, by the 20th, if
 6 you haven't either indemnified or assumed the duty to
 7 defend, going to take whatever steps necessary. Did you
 8 respond to this letter?
 9 A No.
 10 Q And then he writes you again on the 24th saying,
 11 I haven't heard from you, but we're going to take steps to
 12 protect his client from the judgment. And it's that
 13 letter of October 24, 2000 from Pfennigs to you, Document
 14 179 that prompted you to respond to the e-mail?
 15 A Yes.
 16 Q Why did you advise him on 10/25 2000 that Home
 17 has retained Mr. Habein as coverage counsel? You say
 18 please be advised. Hadn't you already advised him?
 19 A I hadn't told him the name, I don't think. That
 20 was my oversight, part being on vacation and coming back
 21 and everything else. I couldn't tell you also what else I
 22 had going on then. I could have been out of the office on
 23 mediations for different clients. I don't know.
 24 Q Well, I would like you to look at Home Document
 25 176, please.

142

1 A (Witness complies.)
 2 Q Do you recall getting that e-mail?
 3 A Yes.
 4 Q And is it true that 177 is actually in response
 5 to the e-mail from Mr. Pfennigs that is on 176?
 6 A Yes.
 7 Q And Mr. Pfennigs asks you the opportunity for
 8 Home to retain coverage counsel and assume its duties
 9 under the policy has been lost. He indicates that he
 10 wanted the Home to retain coverage counsel; right? How
 11 come he's saying that the opportunity for Home to retain
 12 coverage counsel is lost if you told him that you were
 13 getting coverage counsel on board some five months
 14 earlier?
 15 A I don't know.
 16 Q Did you have correspondence with Mr. Habein
 17 prior to 10/25 2000 with regard to this claim?
 18 A I don't know what date it was that I sent him my
 19 letter.
 20 Q Would have been in June; right?
 21 A No, it would have been after we had gotten all
 22 of the policies and things. So it probably would have
 23 been in October after I got back from vacation.
 24 MR. CLARKE: May I show her the --
 25 MR. GALLIK: Sure, please, whatever.

143

1 MR. CLARKE: Showing her the privileged claims
 2 log by chronological order.
 3 THE WITNESS: Okay. So it would have been
 4 October 17th.
 5 MR. CLARKE: And it shows October 17th as her
 6 letter that has been redacted.
 7 MR. GALLIK: October 17th, a letter -- let me
 8 find that.
 9 MR. CLARKE: Yeah, there we go. So that you
 10 know the numbers are 192 to 195 that were redacted.
 11 Q (BY MR. GALLIK) When did you first contact
 12 coverage counsel Habein? Was that October 17th?
 13 A Well, that was when my letter went out. I don't
 14 know if there was a phone call or anything beforehand,
 15 that I don't know.
 16 Q But you don't have any other documentation with
 17 regard to contacting Mr. Habein before October 17th of
 18 2000?
 19 A Not that I recall.
 20 Q Had you provided Mr. Zadick with a copy of your
 21 claims file when you retained him to defend Carl Weissman
 22 back in April of 2000?
 23 A I didn't have the claim file at the time that I
 24 retained Mr. Zadick. The only thing I had was the second
 25 amended complaint and Mr. Pfennigs' letter, and that was

144

1 supplied to Mr. Zadick.
 2 Q How about the little file that you got?
 3 A No, I did not, because at that point in time,
 4 once I had reviewed that file, we sent out the disclaimer
 5 letter on the 20th of August or of April, and I didn't
 6 believe that Mr. Zadick needed to see that. It had to do
 7 with coverage. It had nothing to do with him defending
 8 Carl Weissman & Sons.
 9 Q Did you ever have occasion to review the
 10 transcript of the summary judgment motion in the
 11 underlying case of Hubbard versus Carl Weissman & Sons?
 12 A No, none of that was ever sent to me.
 13 Q Okay.
 14 A Nor was I ever told that a summary judgment
 15 motion had been made.
 16 Q Who is Bill Bulmer, B-U-L-M-E-R? Do you know
 17 Bill Bumer, B-U-M-E-R? I'm looking at the privileged log
 18 00037
 19 MR. CLARKE: Are you looking at the
 20 chronological or --
 21 MR. GALLIK: No, I'm in the Bates. I didn't
 22 bring my chronological.
 23 A Bill Bumer.
 24 Q (By MR. GALLIK) Yeah, Bill Bumer.
 25 A He is the workers' comp claims manager.

145

1 Q Was your discussion with regard to the workers'
 2 compensation policies with Mr. Burner?
 3 MR. CLARKE: Well, we've objected to the
 4 production of that document on the basis that it's work
 5 product. This document is dated after the date that the
 6 present litigation was filed. So that's our objection.
 7 If you're asking for the content of the privileged
 8 document, I think you're seeking to invade that privilege,
 9 and we're objecting on that basis.
 10 Q (BY MR. GALLIK) I'm not looking for the
 11 content. Were you discussing the workers' compensation
 12 file with him? You weren't discussing the CGL, if he's
 13 with the workers' comp; right?
 14 A Probably not. I don't recall.
 15 Q Who is Michael Robinson?
 16 A He's in the reinsurance department.
 17 Q Who is George Ertle?
 18 A He's in New York. He is a claims analyst in New
 19 York.
 20 Q Is Mr. Burner a lawyer?
 21 A I don't think so.
 22 Q Were you talking with him in your e-mail of
 23 5/18/01, which has been redacted under work product, as
 24 your legal counsel?
 25 A No.

146

1 Q Have you ever had occasion to correspond,
 2 whether verbally or in writing, with either Randy Skorheim
 3 or Michael Tramelli with regard to this particular claim?
 4 A No.
 5 Q Is Matthew McLean an associate of Mr. Habein's
 6 at the Crowley firm? I'm just going through your
 7 privileged log, and I'm now on Page 5, at Document 117.
 8 A I think so.
 9 Q Okay.
 10 A I think that's who he is, yeah.
 11 Q Mr. Skorheim corresponded with you on 3/23/01,
 12 and that's Document Number 118. Does that help to refresh
 13 your recollection as to any correspondence that you had
 14 with either Mr. Skorheim or with Mr. Tramelli?
 15 A He may have sent me a letter. I never responded
 16 to him.
 17 MR. CLARKE: So the record is clear, that
 18 particular letter is the one that encloses the complaint
 19 in this action.
 20 Q (BY MR. GALLIK) When did you receive your
 21 coverage opinion?
 22 A I don't know offhand.
 23 Q I'm guessing it's Number 117, but I don't know
 24 for sure. And the reason I'm guessing that, I'm looking
 25 at your privilege log on Page 5, and that you had thanked

147

1 Mr. McLean on 12/12 2000, Document 139, for his coverage
 2 opinion and earlier Document Number 117 is a letter -- oh,
 3 it's from you to him, so I guess that wouldn't be.
 4 MR. CLARKE: If we can speed things along, I
 5 believe the one you're looking for is Document 162 to 175
 6 dated November 13th, 2000.
 7 MR. GALLIK: Okay, okay, good. Thank you. I'm
 8 getting close guys. I just want to make sure because
 9 she's from California. I'm not going to get a second bite
 10 at the apple. So please bear with me for a couple of
 11 minutes here.
 12 THE WITNESS: That's fine.
 13 Q (BY MR. GALLIK) I'm looking at your privileged
 14 log for the claims file Bates Stamp on Page 7 at the
 15 bottom of that documents 210 through 214, you obtained a
 16 copy of the Pablo versus Mora Supreme Court opinion?
 17 A No, I didn't. Mr. Pfennigs sent it in his
 18 letter. He attached it, that was an attachment to his
 19 letter.
 20 Q Well, you got it from him, you obtained it?
 21 A Yes, Mr. Pfennigs sent it.
 22 Q And did you, what did you do with that case?
 23 A I read it.
 24 Q Did you send it on to Mr. Ross?
 25 A I don't know if I sent it to him. I know I

148

1 would have sent it on to coverage counsel.
 2 Q On September 6th?
 3 A It would have been part of the file that went to
 4 coverage counsel.
 5 Q Would it have been sent shortly after September
 6 6th, or would it have been sent to coverage counsel with
 7 the entire file?
 8 A With the entire file.
 9 Q When did you send that again, I'm sorry?
 10 A I think it was in October.
 11 Q Okay.
 12 A That was a letter that came in while I was on
 13 vacation.
 14 Q Did you, after review of Pablo versus Mora, did
 15 you believe that it had any impact on this file, this
 16 claims file?
 17 A No.
 18 MR. CLARKE: I just want to be sure that you
 19 weren't after a legal conclusion there. Just her opinion;
 20 is that correct?
 21 MR. GALLIK: That is correct.
 22 Q (BY MR. GALLIK) I'm looking at Page 7 of the
 23 Bates stamp privileged log at Documents 192 through 195,
 24 which has been objected to and redacted pursuant to
 25 attorney/client privilege. Is that the letter, the cover

149

1 letter that sends the entire file to Mr. Habein for a
 2 coverage opinion?
 3 A Probably.
 4 Q Is it your understanding that, upon retention of
 5 defense counsel for Carl Weissman in this case, that by
 6 retaining Mr. Zadick, the Home has taken control of the
 7 defense of this matter?
 8 A No.
 9 Q What was, during the time frame that the Home
 10 had retained Mr. Zadick as defense counsel, who was in
 11 charge of the file from a defense point of view?
 12 Mr. Pfennigs or Mr. -
 13 A Well, Mr. Pfennigs until such time Mr. Zadick
 14 entered an appearance. Mr. Pfennigs was still counsel.
 15 Q When you retain defense counsel, is it your
 16 intention that they appear, enter their appearance?
 17 A Yeah, if they've got the time to. But we
 18 disclaimed coverage three days later and withdrew from the
 19 defense.
 20 Q So you intended for Mr. Zadick to make an
 21 appearance on behalf of Carl Weissman & Sons?
 22 A Yes, provided there was going, I assumed that
 23 there was coverage at the time. I gave the insured the
 24 benefit of the doubt and reserved my rights.
 25 Q What was the basis for your assumption that

150

1 there was coverage at the time?
 2 A Well, Mr. Pfennigs never let me know that the
 3 original file had been disclaimed. And I knew that the
 4 more current policies in the '90s did have stopgap
 5 coverage. I didn't know that there wasn't any stopgap
 6 coverage in that policy for '86/87. And Mr. Pfennigs
 7 never gave me any indication that there wasn't.
 8 Q In that letter that you sent to Mr. Zadick dated
 9 April 20, 2000, Home Bates stamp 238, you indicated in the
 10 second full paragraph, "Enclosed please find a copy of our
 11 complete file in regard to this claim." What is that?
 12 What was the complete file?
 13 A It would have just been the stuff that I
 14 received from storage.
 15 Q So you did send --
 16 A I guess. Which letter is this?
 17 Q I'm talking about 238. Because my recollection
 18 of your earlier testimony was that you didn't send that.
 19 A I didn't think I did.
 20 Q But maybe you did?
 21 A But I guess I did. Oh, and I also informed him
 22 that we disclaimed coverage.
 23 Q Well, I understand that. That's not my
 24 question.
 25 A Yeah.

151

1 Q So 238 and 239 again refreshes your recollection
 2 that you did, in fact, send a copy of the file to
 3 Mr. Zadick that you had obtained from storage?
 4 A Yes, I didn't remember that I had, I'm sorry.
 5 Q So we need to go back then. If that's the case,
 6 you knew full well, as of the 20th, that you had once
 7 disclaimed coverage.
 8 A Yeah, but I didn't know on April 17th when I
 9 assigned it to him.
 10 Q Who did Mr. Zadick represent when he, when you
 11 had retained him as defense counsel? Who did he
 12 represent?
 13 A Carl Weissman & Sons.
 14 Q Didn't represent the Home, didn't represent REM,
 15 didn't represent you?
 16 A No.
 17 Q Do you know from your discussions with
 18 Mr. Zadick if he became aware of what defenses were being
 19 provided by Carl Weissman & Sons to the underlying action
 20 by Hubbard?
 21 A I do not know.
 22 Q To this day do you know what the defenses were?
 23 As we sit here today, do you know what Carl Weissman &
 24 Sons' defenses were in the underlying case?
 25 A I know I looked at Jardine's file yesterday, and

152

1 I think I saw the response that they were alleging that he
 2 was in the course and scope of his employment and that it
 3 was exclusive remedy, I believe.
 4 Q That's your understanding?
 5 A That's my understanding.
 6 Q Did you go over and look at the file at
 7 Mr. Pfennigs' office? You said you looked at it
 8 yesterday.
 9 A No, it was whatever was here.
 10 Q Oh, okay. Tell me what your understanding is,
 11 given your history in the insurance business, of the
 12 difference between a duty to defend and indemnify in a CGL
 13 policy?
 14 A I'm not exactly sure what you mean.
 15 Q Well, let's start it this way: Is there a
 16 difference from the insurer's point of view as to when the
 17 duty to defend comes in to play versus when there's an
 18 indemnification required?
 19 A You don't, if there is no duty to defend, you're
 20 not going to have a duty to indemnify. And if you have a
 21 duty to defend, you may not necessarily have a duty to
 22 indemnify.
 23 Q So is it your understanding that the duty to
 24 defend -- how do you make a determination, based upon your
 25 experience in the insurance, when there is a duty to

153

1 defend?

2 A You have to review the policy, the complaint,

3 and whatever information, you know, whatever information

4 you can gather to see whether or not coverage is going to

5 apply to the particular loss.

6 Q And there are some points in some files, is it

7 not true, that you can have the duty to defend, but no

8 duty to indemnify; is that correct?

9 A That is correct, in some files.

10 Q Okay. So tell me what happens. I mean when

11 there's a duty to defend but no duty to indemnify, in your

12 own understanding?

13 A I can relate it to construction defect

14 litigation. That's the easiest.

15 Q Sure.

16 A My insured may have completed his operations.

17 Say I have three months left on a policy, and my insured

18 completes his operations within those three months, and

19 let's say my insured is the drywall on a home.

20 Q Uh-huh.

21 A I may have a duty to defend my insured because

22 there may very well be a potential for property damage or

23 bodily injury occurring during those three months that I

24 provide coverage. When I get additional information,

25 let's say that the homeowners don't even purchase the home

154

1 until five months or two months after my policy expires,

2 until I get their damages and we find out from them when

3 they began noticing damages or what their allegations are

4 with respect to the drywall, I may not have a duty to

5 indemnify because there was no damage that occurred during

6 those three months. Maybe all of the damage occurred a

7 year later or started to occur a year later.

8 Q Let me get at it this way: Does REM or Home

9 have any policies, procedures, guidelines, or the like

10 that indicates when the duty to defend comes in to play

11 versus the duty to indemnify?

12 A It is only going to be, it will be on a

13 case-by-case basis.

14 Q So the answer is no?

15 A No. It's going to be what the policies say and

16 what the cases and complaints are.

17 Q Do you have any counsel in your office that

18 actually work as lawyers? I know you're a lawyer, but you

19 don't work as one.

20 A Not -- no, we do not.

21 Q And is it Mr. Ross that you generally use if

22 there is a legal question that comes up in your work?

23 A That all depends.

24 Q Who else would you talk to? What other lawyers

25 have you talked to about legal issues in your work?

155

1 A Any number of them. I mean I may just -- they

2 don't necessarily work for me.

3 Q Who work for you?

4 A They don't necessarily work for me. I have a

5 lot of attorney friends that do coverage work, and I may

6 give them a call and say, hey, listen give me an

7 off-the-cuff here, do you got any ideas on maybe where

8 I should look or be doing under a certain circumstance.

9 Q I understand that. Let me limit my question

10 then to those who are employed by REM or Home.

11 A Okay. What was that again you wanted to know?

12 Q What I really want to know is, besides Mr. Ross,

13 what other lawyers that work for REM or Home, excluding

14 Mr. Habein or his associate, have you spoke with regarding

15 this claim?

16 A Nobody.

17 Q So it's Mr. Ross and Mr. Habein and Mr. Zadick?

18 A Well, I didn't talk to him about the coverages,

19 other than the letters.

20 Q So just Habein, his associate, and Mr. Ross?

21 A Yes.

22 Q Had you used Mr. Habein for coverage opinions in

23 the past?

24 A No, because I never had a case in Montana

25 involving any potential coverage issues.

156

1 Q Had you spoke with any who had used Mr. Habein

2 as coverage counsel for opinions in the past?

3 A No.

4 Q And how did you come up with his name?

5 A I called our litigation VP and asked him for the

6 name of who he might, who he might recommend for coverage

7 counsel in Montana.

8 Q Have you ever attempted to talk with Judy Arndt

9 or Janet Davey at either Sedgwick James or Fred S. James?

10 A No.

11 Q How would I go about finding out who the third

12 member of the initial team was that made the determination

13 to disclaim coverage in '91?

14 A I don't know.

15 Q I guess I ask it in an interrogatory, huh?

16 A I don't have a clue.

17 Q Document Number 2 is dated '94. What is that?

18 A I don't know.

19 Q This document, your --

20 A This is just the cover sheet of this. This is

21 what is on the front of the manila folder.

22 Q Oh, of the whole claims file?

23 A Yes.

24 Q What is this diary control at the bottom, what

25 does that mean?

157

1 A That's what I told you, remember there are diary
2 dates that people have to review the file. And those are
3 just the diary dates that somebody put down.
4 Q What is that second date?
5 A Looks like March 5th, 1991.
6 Q I guess what I'm looking for is, on the
7 chronological privileged log, Page 5, it indicates that
8 Document Number 2 is a recovery activity dated 6/6/94.
9 And I'm trying to figure out where you get 6/6/94?
10 A I don't know.
11 MR. CLARKE: It must be an error on our part,
12 because I don't see the date anywhere on there.
13 MR. GALLIK: I don't either. That's what I was
14 trying to get at.
15 THE WITNESS: That's the April fastener.
16 MR. CLARKE: Yeah.
17 MR. GALLIK: Counsel, I'll just assume that
18 that's an error, unless I hear differently from you. Can
19 you make a note to find out if there was some reason why.
20 MR. CLARKE: Sure. I'll check it, uh-huh.
21 Q (BY MR. GALLIK) What is the basis, if you know,
22 that you allege that Sedgwick James was an independent
23 insurance broker acting on behalf of Carl Weissman & Sons
24 in submitting application?
25 A Because I knew that's what Sedgwick James was.

158

1 Q How did you know that?
2 A Because we've dealt with them with other
3 insureds in the past. They've represented other insureds,
4 and I worked with them. They've represented other people
5 that had dealings with at other insurance companies.
6 Q From the claimant's perspective, have you ever
7 known a claimant to believe that an independent insurance
8 broker was the insurer's representative or agent?
9 A I haven't got a clue what claimants believe.
10 Q Was there anything that you're aware of that the
11 Home did to notify or confirm to Carl Weissman & Sons that
12 Sedgwick James or Fred S. James was their broker and not
13 an agent of the Home?
14 A Well, Fred S. James sent in applications on
15 behalf of Carl Weissman as their broker. Carl Weissman
16 did not deal directly with the Home. They dealt with Fred
17 S. James, who dealt on their behalf.
18 Q Right I understand that. And it's on their
19 behalf the part of the testimony that I'm wondering about.
20 Have you ever received any confirmation that tells the
21 insured that the broker is representing them and not the
22 insurer?
23 A I don't understand your question, because
24 there's --
25 Q Okay. Let me ask it again.

159

1 A I don't understand your question.
2 Q Sure. Let me ask it again. I'll try better.
3 Fred S. James or Sedgwick James isn't Home, isn't REM,
4 isn't Carl Weissman's. They are an independent broker.
5 Is that your testimony?
6 A Well, yes.
7 Q Yes or no?
8 A Yes, yeah, they're not related to --
9 Q Okay. And it's your testimony that Fred S.
10 James represents the consumer, the insured?
11 A Yes.
12 Q And that REM represents the Home?
13 A Yes.
14 Q So what, if anything, are you aware of that put
15 Carl Weissman & Sons on notice that the administrator REM
16 was the agent of the Home and Sedgwick James, the broker,
17 was the agent of the consumer?
18 A I presume, I just presume Carl Weissman knew it,
19 because they're the ones that retained Fred S. James.
20 Q But it was your understanding that it's just an
21 assumption that they knew that?
22 A I don't have any clue what they knew.
23 Q How does it work when a claim comes in normally?
24 This case we've got the claim being provided to the Home
25 by Fred S. James. Is that normally the procedure?

160

1 A Generally, yes.
2 Q How does that work? Once the claim comes in
3 from the independent broker, then what happens?
4 A If there is a policy period that is applicable,
5 then the file usually gets opened.
6 Q Okay. And then what happens?
7 A Well, then they determine, they have to go
8 through and determine, you know, the coverage issue, the
9 coverage concerns, does the policy apply, is the loss date
10 within the policy, are there any exclusions or
11 endorsements to the policy that might apply to the loss.
12 You're going to go through your whole analysis at that
13 time to ascertain whether or not coverage is going to be
14 applicable. Just because a claim is made doesn't mean
15 that it's going to be covered.
16 Q Have you had an opportunity to review the
17 Montana Unfair Claims Practices Act?
18 A Not recently, no.
19 Q Ever?
20 A I think I probably looked at it at one point in
21 time when we started handling the Montana claims when the
22 Denver office closed.
23 Q Are you aware of the fact that the Unfair Claims
24 Practices Act in Montana requires standards to be adopted
25 for claims handling, which include prompt, reasonable

161

1 investigation?
 2 A Yes.
 3 Q What standard has the Home adopted pursuant to
 4 the Montana Unfair Claims Practices Act for the prompt and
 5 reasonable investigation?
 6 A We try and do same day contact or 24-hour
 7 contact, sending an acknowledgment letter out to the
 8 insured or their counsel advising them that we've received
 9 it, and then letting them know if there's any kind of
 10 coverage issues or any additional information that we
 11 need, trying to get that information and providing as
 12 prompt an analysis that we can.
 13 Q And is that written down anywhere?
 14 A Not to my knowledge.
 15 Q Do you consider that to be a trade secret?
 16 A No, I consider that probably just overall good
 17 claims handling that is required pretty much by every
 18 state.
 19 Q You don't know whether Mr. Andrea examined or
 20 what he examined to make his initial determination, do
 21 you?
 22 A I know that he examined the policy because he
 23 requested it. And I know that he reviewed it, because he
 24 sent out the disclaimer that quoted it.
 25 Q Are the numbers of amendatory endorsements

162

1 important?
 2 A Are the numbers --
 3 Q Let me ask it again. That was a poor question.
 4 In this case we have an amendatory endorsement. It's the
 5 one that we've been calling the employee exclusion. I
 6 think it's 61 something.
 7 A Yes, I know which one you're talking about.
 8 Q Which number is it, do you know? You don't have
 9 to look. We know which one we're talking about.
 10 A 6178.
 11 Q And if you look at the front page, the dec page
 12 of the CGL policy, at the very bottom, it just lists what
 13 amendatory endorsements are next to that policy; right?
 14 A It lists all of the endorsements on that policy
 15 including the policy form.
 16 Q So it lists those. So reference to those
 17 numbers is important; correct?
 18 A Yes.
 19 Q And a mistake with regard to one of those
 20 numbers could be important too?
 21 A I don't understand what you mean by mistake.
 22 Q Well, we're talking about 6178. If someone were
 23 to say Endorsement Number 61, that wouldn't necessarily
 24 tip you off that it's the employee exclusion. You would
 25 need to know 6178?

163

1 A Well, you have to go look it up, and there's
 2 form books for that.
 3 Q But that number is important, because that's
 4 what you go to look up; right?
 5 A Right. And that's how you put a policy
 6 together, by those form numbers.
 7 Q So if those numbers are wrong, that's important?
 8 A I guess. I don't know why the numbers would be
 9 wrong though.
 10 Q I'm just asking, because policies are put
 11 together with endorsement numbers, it's important that
 12 those numbers be correct, that's all.
 13 A Okay, yeah.
 14 Q Is that correct?
 15 A Yeah, I would agree with you there, yes.
 16 Q Do you know how the policy, the CGL policy has
 17 that one provision that calls for the use of force
 18 intentional acts? Are you tracking with me on that?
 19 Isn't there a provision in a Home CGL policy, or in lots
 20 of CGL policies, that indicates that a use of reasonable
 21 force to protect property and person is covered, even if
 22 it's an intentional act? Am I correct?
 23 A On some of the newer policies, there's something
 24 that is similar to that, but I don't know the exact
 25 wording right now.

164

1 Q Let me ask you this: Did that particular
 2 provision of the CGL policy or its amendatory
 3 endorsements, wherever it was, I think it's in the CGL,
 4 did that have any role at all in your determination to
 5 disclaim coverage the second time?
 6 A I don't understand the question.
 7 Q You understand the provision I'm talking about,
 8 the one that says you can use reasonable force to protect
 9 person or property and the intentional act will be
 10 covered?
 11 MR. CLARKE: Well, I'm going to object to the
 12 question, because that language doesn't appear in this
 13 form, or I'm not aware that it is.
 14 MR. GALLIK: Okay. Let's get to the dec page.
 15 A Here's the dec page, and here's the policy.
 16 Q (BY MR. GALLIK) Never mind. It's not
 17 important. It's not important. Let's try another
 18 question. I want to talk about the dec page of the
 19 workers' comp and employer's liability policy, 000085,
 20 okay. What is Part 1, I'm looking at 3-A, and it says
 21 workers' compensation insurance. Part 1 of the policy
 22 applies to the workers' compensation law of the states
 23 listed here. What is Part 1?
 24 A That is just the workers compensation.
 25 Q What is Part 2?

165

1 A Employer liability insurance.
 2 Q And what does employer's liability insurance
 3 cover?
 4 A When an insurer is sued in a civil action by the
 5 employee, this would cover the defense of the insured in
 6 the civil action.
 7 Q What is Part 3?
 8 A That I don't know. I couldn't tell you.
 9 Q Well, on this dec page 000085, it indicates
 10 that, under 3-C, other states insurance, Part 3 of this
 11 policy applies to all states except Nevada, North Dakota,
 12 Ohio, Washington, West Virginia and Wyoming, states
 13 designated in 3-A and states listed on the attached
 14 endorsement. That would then indicate that Part 3 is
 15 valid in Montana. Am I --
 16 A I don't know what Part 3 is, so I can't answer
 17 your question.
 18 Q Just from reading this, even though we don't
 19 know what it is, would you agree with me that from reading
 20 this dec page that Part 3 is valid in Montana?
 21 A I can't say that, because I don't know what Part
 22 3 is. I don't know what it references, and I don't know
 23 what it is.
 24 MR. CLARKE: I would have to point out here,
 25 Counsel, that the record is really clear that Weismann

166

1 purchased its workers' compensation policy from the State
 2 Fund under the year in question. That is who is paying
 3 your client's benefits.
 4 Q (BY MR. GALLIK) That's fine. But my question
 5 is you don't know what Part 3 is?
 6 A No, I do not.
 7 Q And you don't know if Part 3 provides coverage
 8 in Montana for Carl Weismann & Sons pursuant to the
 9 stipulation?
 10 A I haven't got a clue, because I don't know what
 11 Part 3 is.
 12 Q Did you do that investigation to determine what
 13 Part 3 was during your determination to disclaim liability
 14 both on workers' comp and CGL?
 15 A That's why I gave it to workers comp for them to
 16 make that determination.
 17 Q So there would be someone else from the workers'
 18 comp side that would be better able for me to ask these
 19 questions to?
 20 A Yes.
 21 Q And that would be Mr. Enrico Montoya?
 22 A That would probably be true.
 23 Q But your investigation and determination of
 24 noncoverage here had nothing to do with investigating Part
 25 3 of the workers' comp?

167

1 A No.
 2 Q Is that true?
 3 A That is correct. It's only, I think as my
 4 letters pointed out, as my letter pointed out, 3-A says
 5 that the policy only applies to California and Idaho, and
 6 part, and 3-B, which is the reference to employer's
 7 liability insurance, says Part 2 of the policy applies to
 8 work in each state listed in Item 3-A, which is only
 9 California and Idaho. And based just on that, I said I
 10 didn't think, it didn't appear that coverage would be
 11 applicable under this particular workers' comp policy, but
 12 that was all I based that on.
 13 Q But as you sit here today, you don't know,
 14 again, what Part 3 is and whether Part 3 is applicable to
 15 Montana?
 16 A I have no clue and I never referenced it.
 17 Q And it was not a part of your investigation?
 18 A No, it was not.
 19 Q Well, isn't Part 3 -- strike that, please. What
 20 I would like for you to do is to pull out your CGL basic
 21 form, which is Bates stamp Number 54 through 57, and then
 22 also pull out the endorsement L-6178.
 23 MR. CLARKE: Do you have a page number for that?
 24 MR. GALLIK: Yes, I do. That would be 78.
 25 Q (BY MR. GALLIK) And let me understand if I'm

168

1 correct here, that the amendatory endorsement 6178 simply
 2 replaces Exclusion J in the basic form CGL H21013F; is
 3 that correct?
 4 A It deletes exclusion J and replaces it with
 5 this.
 6 Q And it makes no other changes at all. It just
 7 literally takes out what J says, takes it out, and what
 8 the amendatory endorsement does puts it right in there?
 9 A Yes. This is what you would read instead of
 10 Exclusion J. This is the Exclusion J that you would look
 11 at.
 12 Q Now, I notice on some of the policies,
 13 particularly Exclusion J there, it doesn't have any
 14 signatures on it or acceptances on it. How does that
 15 work? Can you tell me? If you notice on 78 there's no
 16 authorized representative signature. There's a big slash
 17 through it, a couple of check marks.
 18 A I don't know anything about it, unless this is
 19 just the office's copy. I don't know what was sent to the
 20 insured.
 21 Q Well, is there any significance behind the fact
 22 that there's no signature on it by an authorized
 23 representative?
 24 A No.
 25 Q And why not?

169

1 A Because this is our copy. This is what went
 2 out. And this is what was in the policy dec form, and
 3 this is the form that was there, and this is what is made
 4 a part of the policy.
 5 Q But this is a certified copy of the policy,
 6 according to the discovery that I received?
 7 A But our copy doesn't necessarily reflect what
 8 was sent out to the insured. It's just going to have the
 9 forms that are there.
 10 Q So is it your understanding that an original
 11 will have an authorized representative signature on 00078
 12 in order to be effective?
 13 A I don't know. I've never seen a policy that has
 14 been sent to an insured.
 15 Q So you don't have any professional experience
 16 with that?
 17 A None. I have never seen a policy sent to an
 18 insured.
 19 Q Nor have you seen one that is not signed but
 20 still effective?
 21 A I have seen those that are not signed and are
 22 still effective.
 23 Q How come? What is the reason for having an
 24 authorized signature on there, if it's not signed?
 25 A I haven't got a clue.

170

1 Q That's fair. When did you first decide that the
 2 disclaiming of coverage would be based upon the definition
 3 of occurrence?
 4 A I don't know what you're talking about.
 5 Q Well, in the CGL it defines the word occurrence;
 6 right?
 7 A Yes.
 8 Q And you have disclaimed and denied coverage
 9 based upon the fact that there was no occurrence; correct?
 10 A I don't think I did that.
 11 Q Okay.
 12 A I don't think my letter mentioned occurrence.
 13 MR. CLARKE: No, I'm pretty sure the letter
 14 didn't.
 15 Q (BY MR. GALLIK) Okay.
 16 MR. CLARKE: Not that we haven't taken that
 17 position in this suit.
 18 MR. GALLIK: I understand, Counsel, and I want
 19 her to testify, not you.
 20 A My original reservation of rights only said that
 21 there were intentional acts pled.
 22 Q (BY MR. GALLIK) Let's talk about the
 23 reservation of rights then. Had you not reserved rights,
 24 what would have been the ramifications of that?
 25 A I don't, I don't know. That's a legal question.

171

1 I haven't got a clue.
 2 Q Well, let me ask you this: What does, to you,
 3 in your position as a claims supervisor for REM, what does
 4 the term reservation of rights mean?
 5 A It means that there may be some coverage issues
 6 that we don't know about at this point in time and
 7 additional information is needed, but we're putting the
 8 insured or their representative on notice that there are
 9 potential coverage issues that will be addressed. They
 10 may not be addressed right now because we have
 11 insufficient information to make a full coverage
 12 determination.
 13 Q And if you don't reserve rights, what is the
 14 difference? Then what does that mean?
 15 A Well, it could mean nothing, you know, and
 16 depending on how long a period of time goes by, it could
 17 mean that you are going to provide coverage regardless of
 18 any coverage issues.
 19 Q Does the failure to reserve rights in a
 20 determination have any significance as far as the claim
 21 from your perspective?
 22 A Not necessarily, no.
 23 Q So it really doesn't matter if you reserve
 24 rights or don't reserve rights?
 25 A Again, it all depends on what the timing is.

172

1 Q But, as far as you know, there's no legal
 2 ramifications for your reserving rights versus your not
 3 reserving right?
 4 A You would have to do it in the context of the
 5 claim.
 6 Q Well, of course, and that's what I'm asking. If
 7 you do it versus if you don't do it, what is the legal
 8 difference?
 9 MR. CLARKE: Are you after a legal conclusion or
 10 her understanding?
 11 Q (BY MR. GALLIK) No, her understanding. She's
 12 the claims supervisor.
 13 A Well, again, it would have to be in the context
 14 of the claim. If I get a bodily injury claim on a slip
 15 and fall that's a GL policy, I'm not going to issue a
 16 reservation of rights, because there's no potential for
 17 coverage issues, because clearly that's what a GL policy
 18 is meant to cover is when a third-party is on your
 19 premises and say they slip and fall and injure themselves,
 20 that precisely is what a GL policy is going to cover, and
 21 why would I issue reservation of rights.
 22 Q So you reserve rights when there is a potential
 23 for coverage?
 24 A Potential for coverage issues.
 25 Q If you would look at Number 2 again, this one

173

1 has got me baffled. Right here it says confirmation of
 2 coverage. I'm looking at Document Number 2, and it says,
 3 "Yes, via daily." What does that mean?
 4 A A daily is just something that Home did that
 5 basically said that there was coverage, you know, and it
 6 just gave you the policy number and exception dates,
 7 expiration dates. I don't remember. I wasn't there in
 8 '91, so I don't know how they had their dailies. And I
 9 don't have it. I don't know if I've even got an example
 10 in here of what a daily was. They could get it off of the
 11 old Home system.
 12 Q Does the endorsement L-6178, and that's Bates
 13 stamp Number 78, the employee exclusion, does that modify
 14 the broad form?
 15 A It has nothing to do with the broad form.
 16 Q What's the difference between a regular CGL and
 17 a broad form?
 18 A All depends on what policy you're talking about.
 19 Q This one.
 20 A In this one there was no broad form coverage
 21 under the basic policy.
 22 Q Really. Are you sure?
 23 A Positive.
 24 Q Okay.
 25 A You had to have a board form endorsement.

174

1 Q Do you know what number the broad form
 2 endorsement is?
 3 A Not offhand.
 4 Q Okay.
 5 A It's L-6111, Bates stamp 66 through 71, no,
 6 yeah, 71.
 7 Q And you're looking at the broad form
 8 comprehensive liability insurance; correct?
 9 A Yes.
 10 Q So there was one?
 11 A Yes.
 12 Q So your testimony a minute ago was wrong?
 13 A No, it is not. The plain CGL policy, your basic
 14 CGL policy does not provide for broad form coverage,
 15 unless you purchase broad form coverage and it is added to
 16 the policy, which it was by this endorsement.
 17 Q And did 6178, the employee exclusive, have
 18 anything to do with the amendment of the broad form
 19 policy?
 20 A No.
 21 Q What is broad form, broad form comprehensive
 22 liability insurance, what is that?
 23 A The broad form basically goes to your
 24 contractual liability coverage. It expanded the term of
 25 an incidental contract to include contract that an insured

175

1 would have in their ordinary scope of business. So it
 2 provided for some limited contractual coverage in the
 3 event there is bodily injury or property damage and
 4 they're sued for a breach of contract say in a
 5 contractor/subcontractor dispute. There may be some
 6 limited coverage there in the event that property damage
 7 or bodily injury occurs and there's contractual
 8 obligation. So there would be some coverage there. It
 9 also, from the basic form, it also provided coverage for
 10 personal injury and advertising injury, which wasn't
 11 provided just under the primary, plain, ordinary policy
 12 form. Personal injury and advertising injury were not
 13 included under those, as well as completed operations
 14 coverage.
 15 Q So if I understand it correctly, you've got the
 16 regular CGL policy. Then you've got a broad form
 17 endorsement to this, a board form comprehensive general
 18 liability insurance. That's what it's called?
 19 A Yes, it increases in some aspects portions of
 20 the coverage.
 21 Q But it doesn't include the regular CGL policy?
 22 A Yes, it does.
 23 Q So it's like a wrap-around? It's like the broad
 24 form is the regular CGL and then some?
 25 A Yes.

176

1 MR. GALLIK: It's 5:00. I promised you we would
 2 get out of here, so we're going to. Thanks.
 3 WITNESS EXCUSED
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1 CERTIFICATE OF WITNESS

2 PAGE LINE CORRECTION

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13 I hereby certify that this is a true and correct

14 copy of my testimony, together with any changes I have

15 made on this and any subsequent pages attached hereto.

16 Dated on this the _____ day of _____ 2002.

17

18 _____

19 ANN GALASSO, Deponent.

20 SUBSCRIBED AND SWORN to before me this _____ day of

21 _____ 2002.

22

23 _____

24 NOTARY PUBLIC FOR THE STATE OF _____

25 Printed Name: _____

 Residing in _____

 My commission Expires: _____

1 CERTIFICATE OF REPORTER

2

3 STATE OF MONTANA)

4) ss.

5 County of Cascade)

6 I, Joan P. Agamenoni, Court Reporter and Notary

7 Public for the State of Montana, residing in Great Falls,

8 Montana, do hereby certify:

9 That I was duly authorized to and did report the

10 deposition of ANN GALASSO in the above-entitled cause;

11 That the reading and signing of the deposition

12 by the witness have been expressly reserved.

13 That the foregoing pages of this deposition

14 constitute a true and accurate transcription of my

15 stenotype notes of the testimony of said witness.

16 I further certify that I am not an attorney nor

17 counsel of any of the parties, nor a relative or employee

18 of any attorney or counsel connected with the action, nor

19 financially interested in the action.

20 IN WITNESS WHEREOF, I have hereunto set my hand

21 and seal on this the 26th day of June, 2002.

22

23 _____

24 Joan P. Agamenoni

25 Court Reporter

 Notary Public, State of Montana

 Residing in Great Falls, Montana.

 My Commission expires: 5/24 2004.

STIPULATION

This stipulation made this 13th day of November, 2000, by Plaintiff John A. Hubbard of Great Falls, Montana, and Defendant Carl Weissman & Sons, Inc. of Great Falls, Montana.

RECITALS

The parties to this stipulation are currently involved in an action filed in the Montana Eighth Judicial District Court, Cascade County, Cause Number BVD-90-067 entitled John A. Hubbard v. Carl Weissman & Sons, Inc. Trial of the cause is currently scheduled to begin before the aforementioned court on January 8, 2001.

The claim being made against Carl Weissman & Sons, Inc. by John A. Hubbard arises as the result of an accident occurring on or about January 22, 1987, when during the course and scope of his employment with Carl Weissman & Sons, Inc., John A. Hubbard's arm became entangled in the gears of a crane, causing him to suffer serious bodily injury.

On January 22, 1987, the date of the aforementioned accident, Carl Weissman & Sons, Inc., was insured under a comprehensive general liability policy issued by The Home Insurance Company as policy number GL-1 48 82 51. Carl Weissman & Sons, Inc. is unaware of any other insurance policies that may be applicable to the claims made by John A. Hubbard in Cause No. BDV-90-067.

Carl Weissman and Sons, Inc. has informed John A. Hubbard that The Home Insurance Company has refused numerous times to defend or agree to indemnify Carl Weissman & Sons, Inc. for the claims made against it by John A. Hubbard.

Carl Weissman & Sons, Inc. has confessed its liability for the injuries suffered by John A. Hubbard in the aforementioned cause by a separate document that will be filed with the Court in this matter. The purpose of the confession of liability, as well as this stipulation is to avoid any personal or corporate liabilities to all of the parties identified herein that may be occasioned by The Home



Insurance Company's refusal to either indemnify or defend its insured in the above described civil
on. The parties that are specifically included in this stipulation as those protected from personal
and corporate liability by this stipulation, as well as the covenant not to execute, are those identified in
the Named Insured Endorsement of policy number GL-1 48 82 51 to wit: Carl Weissman and Sons,
Inc., National General Supply, Inc., Northwest Fence Products, Co., North Warehouse Distributors,
Inc., Three W's, Inc., Two Eighteen Corporation, Third Avenue Corporation, Steel Warehouse
Corporation, Montana Compressed Steel Corporation, Maurice and Leonard Weissman, DBA: The
Three W's, a partnership, Carl Weissman and Sons, Inc., DBA: Weissman Coecess Store, Northwest
Fence Erectors Company, Leonard B. Weissman, Maurice B. Weissman, Jerrold A. Weissman, as well
as the officers, directors, stockholders, employees and agents of any of the aforementioned persons
and/or entities. A copy of the confession of liability that has been entered into by the parties is attached
to this stipulation as Exhibit A and is incorporated by reference.

In consideration of the foregoing recitals, the parties stipulate and agree as follows:

CONFESSION OF LIABILITY

Carl Weissman & Sons, Inc. confesses liability for the injures suffered by John A. Hubbard and
agrees to sign a Confession of Liability for the matters set forth in Plaintiff's Fourth Amended
Complaint. A copy of Plaintiff's Fourth Amended Complaint is is attached as Exhibit B and by
reference incorporated.

ASSIGNMENT

Carl Weissman and Sons, Inc., for value received, hereby agrees to and does assign and setover
to John A. Hubbard, his heirs, personal representatives, administrators, successors and assigns, all
rights, claims, demands or causes of action it may have against The Home Insurance Company for
liability it has to John A. Hubbard through policy number GL-1 48 82 51. This assignment includes all

claims arising as a result of the matters to which Carl Weissman & Sons, Inc. has confessed liability, as well as any claims arising as a result of breach of contract, bad faith, violations of MCA § 33-18-242 or any other claim arising by reason of The Home Insurance Company's refusal to provide a legal defense to Carl Weissman & Sons, Inc. as required by its policy, as well as any claims arising as a result of The Home Insurance Company's refusal to provide liability coverage for the claims of John A. Hubbard. However, Carl Weissman & Sons, Inc. specifically retains any rights to coverage it may be entitled to under its policy for all covered losses which may arise or exist other than the claims made by John A. Hubbard for which Carl Weissman & Sons, Inc. has confessed liability.

COOPERATION

Carl Weissman & Sons, Inc. agrees to cooperate with John A. Hubbard, as requested, in all further litigation of this matter, including, but not limited to, providing affidavits, testifying by deposition or testifying at trial. Carl Weissman & Sons, Inc.'s promise of cooperation is procedural in nature, and this agreement only requires that it respond in a truthful manner to any issues that it is asked to address.

COVENANT NOT TO LEVY EXECUTION

In consideration of the confession of liability and assignment of rights made herein by Carl Weissman & Sons, Inc., as well as the payment of \$100.00 by Carl Weissman & Sons, Inc. to John A. Hubbard, as well as other good and valuable consideration, the receipt of which is hereby acknowledged, John A. Hubbard, on behalf of himself, his heirs, executors, and assigns, agrees that he will not individually, jointly or otherwise levy an execution on or in any manner seek at anytime to attach, encumber or otherwise seek to collect or enforce any judgment that he might receive in Cause No. BDV-90-067, or any part thereof, against the assets, property or income of Carl Weissman & Sons, Inc., National General Supply, Inc., Northwest Fence Products, Co., North Warehouse Distributors,

Inc., Three W's, Inc., Two Eighteen Corporation, Third Avenue Corporation, Steel Warehouse Corporation, Montana Compressed Steel Corporation, Maurice and Leonard Weissman, DBA: The Three W's, a partnership, Carl Weissman and Sons, Inc., DBA: Weissman Coces Store, Northwest Fence Erectors Company, Leonard B. Weissman, Maurice B. Weissman, Jerrold A. Weissman, as well as the officers, directors, stockholders, employees and agents of any of the aforementioned persons and/or entities.

Nothing in this covenant shall be construed as restricting in any matter John A. Hubbard's right to pursue an action to recover the amount due upon any judgment entered in this action against The Home Insurance Company based upon the assignment set forth herein.

RESERVATION OF RIGHTS

This Assignment, in particular John A. Hubbard's covenant not to levy or in any other manner seek to enforce any judgment entered in this action against all parties identified herein is not intended and shall not be construed to release The Home Insurance Company from liability to Carl Weissman & Sons, Inc. or from liability to John A. Hubbard as an assignee for the negligence, and/or intentional conduct as well as any other claim, including claims for breach of contract, bad faith and/or breach of the Unfair Claims Practices Act against The Home Insurance Company, or any other appropriate party.

AGREEMENT TO INDEMNIFY

In the event that The Home Insurance Company, or any other party against whom John A. Hubbard seeks to enforce the rights granted by this stipulation, should attempt to bring a claim arising out of policy number GL-1 48 82 51, or the defense or settlement of Cause No. BDV-90-067 against Carl Weissman & Sons, Inc., John A. Hubbard agrees and covenants that he will defend all such claims, and that he will indemnify and hold harmless Carl Weissman & Sons, Inc., as well as the other parties identified herein, subject to the right of John A. Hubbard to seek reimbursement from The

Home Insurance Company for any defense costs and any sums paid pursuant to this Indemnity and
Held Harmless Agreement.

IN WITNESS WHEREOF the parties hereto have set their hands and seal on the day and year
first written above.

John A. Hubbard

JOHN A. HUBBARD

SUBSCRIBED AND SWORN TO before me this 17th day of November, 2000.

(NOTARIAL SEAL)

Joseph J. Buenavente
NOTARY PUBLIC for the State of Montana
Residing at Chouteau County Montana
My commission expires: May 12, 2002

Approved by:

Randall O. Skorheim
RANDALL O. SKORHEIM

Michael B. Tramelli
MICHAEL B. TRAMELLI

CARL WEISSMAN & SONS, INC.

By *Scott A. Periman*
Its President

SUBSCRIBED AND SWORN TO before me this 13th day of November, 2000.

(NOTARIAL SEAL)

Robert B. Pfennig
NOTARY PUBLIC for the State of Montana
Residing at *Card Falls*, Montana
My commission expires: *Nov 15, 2002*

Approved by:

Robert B. Pfennig
ROBERT B. PFENNIGS

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

JOHN A. HUBBARD,
Plaintiff,

vs.

CARL WEISSMAN & SONS INC.,
Defendant.

CAUSE NO.: BVD-90-067

JUDGEMENT AND ORDER

A confession of Liability was filed herein by the Defendant on November 13, 2000.

Based on the testimony and evidence submitted at a hearing on damages herein, the Defendant is hereby ordered to pay to the Plaintiff the sum of \$2,389,000.00 in damages in the above entitled matter.

Further, interest shall accrue at the statutory rate of 10% from the date of this judgement.

The Clerk shall enter this judgement forthwith.

DATED this 20 day of Dec., 2000.

MARGE JOHNSON

District Judge

cc: Randall O. Skorheim
Michael Tramelli
Robert Pfennigs