
Depo of Thomas M. Bistline (Monsanto v Aetna) August 10, 1993 Cr.56353.0

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CONDENSED TRANSCRIPT AND CONCORDANCE

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[1] IN THE SUPERIOR COURT
 [2] OF THE STATE OF DELAWARE
 [3] IN AND FOR NEW CASTLE COUNTY
 [4] -----x
 [5] MONSANTO COMPANY, :
 [6] Plaintiff, :
 [7] : Civil Action Number
 [8] v. : 88C-JA-118-1-CV
 [9] AETNA CASUALTY & SURETY COMPANY, :
 NON-ARBITRATION
 [10] et al., : CASE
 [11] Defendants. :
 [12] -----x
 [13] DEPOSITION OF THOMAS M. BISTLINE
 [14] Washington, D. C.
 [15] Tuesday, August 10, 1993
 [16] Deposition of THOMAS M. BISTLINE, called for
 [17] examination pursuant to notice of deposition, at the law
 [18] offices of Nussbaum and Wald, One Thomas Circle, N.W.,
 Suite
 [19] 200, at 10:06 a.m. before JULIE BAKER, a Notary Public
 [20] within and for the District of Columbia, when were present
 [21] on behalf of the respective parties:
 [22] - continued -

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[1] CONTENTS
 [2] WITNESS EXAMINATION
 [3] Thomas M. Bistline
 [4] by Mr. Leimkuhler 4
 [5] EXHIBITS
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 [7] Exhibit E-1 - Rule 26 statement 4

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[1] PROCEEDINGS
 [2] Whereupon,
 [3] THOMAS M. BISTLINE
 [4] was called as a witness and, having first been duly sworn,
 [5] was examined and testified as follows:
 [6] MR. LEIMKUHLER: Why don't we have this
 marked as
 [7] Bistline Exhibit E-1.
 [8] (Bistline Exhibit E-1 identified.)
 [9] EXAMINATION
 [10] BY MR. LEIMKUHLER:
 [11] Q Good morning, Mr. Bistline.
 [12] A Mr. Leimkuhler.
 [13] Q Good to have you back.
 [14] A Thank you.
 [15] Q Mr. Bistline, could you take a look at what's
 [16] been marked Bistline Exhibit E-1 and identify it for me.
 [17] please.
 [18] A Yes. This is a document, two pages, entitled
 [19] "Rule 26 Statement for Thomas M. Bistline, Esq."
 [20] Q Can you describe for me the significance of this
 [21] document as it relates to the expert testimony that you
 [22] intend to give in this litigation.

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[1] A This document summarizes, Mr. Leimkuhler, the
 [2] various topics on which I anticipate I will testify as an
 [3] expert in this case.
 [4] Q Let me read for you what has been set forth in
 [5] Exhibit E-1 under the heading "Subject Matter of
 [6] Testimony." And I quote "Mr. Bistline is expected to
 [7] testify as to the necessity for and the reasonableness of
 [8] the sums expended by Monsanto in litigating and, in some
 [9] instances, settling the various third-party actions arising
 [10] in connection with the Brio site. Mr. Bistline's testimony
 [11] will concern the period from April 1990 to date."
 [12] Does what I've just read accurately capture the
 [13] subject matter of what your expert testimony will be in
 [14] this litigation?
 [15] A Yes, it does.
 [16] Q Are there any other subjects that you intend to
 [17] offer testimony about in your capacity as an expert?
 [18] A Not that I'm aware of at this point, no.
 [19] Q Do you intend to offer expert testimony
 [20] concerning the numerical amounts that have been spent by
 [21] Monsanto in connection with the Brio third-party actions?
 [22] A I believe that testimony has already been

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[1] provided. I think I spoke to that in the 30(b)(6)
 [2] deposition. That will be part of the testimony, that the
 [3] amounts that were expended were reasonable. I think we
 [4] need to know what those amounts are.
 [5] Q My question: Is it a subject of your expertise
 [6] as will be utilized by Monsanto in this litigation to
 [7] testify about the amounts that have been spent by Monsanto
 [8] in connection with the Brio private actions?
 [9] A I don't believe that's a topic of expert
 [10] testimony, Mr. Leimkuhler. That's a factual matter, in
 my
 [11] view.
 [12] Q In any event, you will not be testifying about
 [13] amounts as an expert; is that right?
 [14] A My understanding is that the topic of the amounts
 [15] as amounts will not be the subject of my expert testimony.
 [16] The reasonableness of the amounts expended and the
 [17] necessity for them will be topics that I intend to address.

[18] Q Can you identify for me which of the Brio private
[19] actions, or third-party actions, will be the subject of
[20] your testimony as an expert?

[21] A In general, I can tell you that it will be the
[22] latter part of the Slaughter case. As I think you know, I

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[1] assumed responsibility at Monsanto for the day-to-day
[2] management of the Brio third-party litigation in April of
[3] 1990. At that time, the Slaughter case was in the
[4] appellate - actually, not quite appellate, it was in a
[5] post-trial motion phase. So I will be testifying with
[6] respect to Slaughter and the progress of that case and
with

[7] respect to those cases which were on file then in April of
[8] 1990 and which were filed against Monsanto subsequent
to

[9] April of 1990 up until the present. There were - I forget
[10] the precise number - but something on the order, I think,
[11] of 30 or 35, perhaps more, cases which were commenced,
and

[12] I believe that the pleadings in all those cases certainly
[13] are documents that have been provided to the Defendants
in
[14] this case.

[15] Q Do you recall that about a month and a half ago,
[16] you gave testimony as a Rule 30(b)(6) witness on behalf of
[17] Monsanto?

[18] A Yes, I remember.

[19] Q And do you recall during that deposition that you
[20] identified litigation in which Monsanto was involved that
[21] concerned the Brio site?

[22] A Yes.

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[1] Q Other than the litigations that you identified
[2] during that 30(b)(6) deposition, are you aware of any other
[3] actions in which Monsanto is involved with respect to the
[4] Brio site which will be the subject of your expert
[5] testimony in this case?

[6] A Not that I'm presently aware, Mr. Leimkuhler, no.

[7] Q Let's go back to Exhibit E-1 on the first page
[8] under the heading "Summary of Bases and Grounds for
[9] Testimony." Let me read as quickly as possible the first
[10] two paragraphs of that section.

[11] "Mr. Bistline is expected to testify that the
[12] sums expended by Monsanto in connection with the Brio
[13] third-party actions were reasonable and necessary. These
[14] sums, which, for the most part, are set forth in Exhibits
[15] 1(C)-(E) of Mr. Bistline's 30(b)(6) deposition (expenses
[16] incurred through 1992), include, but are not limited to,
[17] attorney's fees, expert/consultant fees, and other
[18] necessary and reasonable litigation expenses."

[19] Let me stop right there and ask you - I'm sorry,
[20] let me read the next paragraph also. "Mr. Bistline is
[21] expected to testify that the settlement amounts incurred by
[22] Monsanto in connection with certain Brio third-party

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[1] actions, i.e., Acosta, Aguilar and Hardage, were
[2] reasonable."

[3] Other than the opinions that are identified in
[4] those paragraphs that I just read, do you intend to offer
[5] any other opinions in this litigation?

[6] A Not that I'm aware of at this time, no.

[7] Q Could you identify for me the field of knowledge
[8] or learning in which you are holding yourself out as an
[9] expert?

[10] A I believe, Mr. Leimkuhler, I have expertise in

[11] the management of the defense of major toxic tort
[12] litigation, particularly as it pertains to chemical
[13] manufacturers, Monsanto in particular, the handling, the
[14] defense, tactics, strategy and settlement of those cases.
[15] That's what I've been doing for the past 11 years.

[16] Q Is there a particular course of study or an
[17] educational degree that one can seek in order to become an
[18] expert in that field?

[19] A In general, I think a law degree is the
[20] educational degree that one would require to undertake
this

[21] sort of activity.

[22] Q Other than a law degree - I'm looking for

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[1] something -

[2] A Something beyond a law degree?

[3] Q - beyond a law degree, or more precisely,
[4] focused on the field of management of major toxic tort
[5] litigation.

[6] A I know of no educational program that provides
[7] expertise in that area. In my view, that's a matter that
[8] is acquired by experience.

[9] Q Does your field of expertise have any standards
[10] of conduct by which an expert practicing in that field of
[11] expertise must abide by?

[12] A Other than the rules of conduct that guide all
[13] lawyers in their practice? Is that what you're referring
[14] to?

[15] Q Well, my question goes beyond that. I assume as
[16] a lawyer, you abide by the Professional Code of Ethics. Is
[17] there anything in particular that is germane to the field
[18] of management of major toxic tort litigation that embraces
[19] a separate or a supplemental code of conduct or standard of
[20] conduct?

[21] A I'm aware of no writing that would embody that.

[22] Q Or any unwritten body of standards?

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[1] A I'm uncertain what you mean by "standards."

[2] Q Your testimony is that you're aware of no written
[3] standards or guidelines for conduct of the practitioner of
[4] management of major toxic tort litigation; is that right?

[5] A I'm aware that it is a topic that's frequently
[6] discussed by people who practice in the area, but in terms
[7] of a code of conduct similar to the rules of ethics that
[8] guide all lawyers, I'm not aware that any such writing or
[9] thing exists of that nature.

[10] Q Either in written or unwritten form?

[11] A That's correct.

[12] Q Your answer seemed to focus more on a code or
[13] conduct of ethics. What about a standard of competence?
[14] Is there any sort of standard of competence, written or
[15] unwritten, that pertains specifically to the management of
[16] major toxic tort litigation?

[17] A I'm not aware of any single, written embodiment
[18] of that that applies to all of the attorneys that I know
[19] that practice in this area. I'm aware that we all share a
[20] lot of practices in common, in terms of the manner in
which

[21] we approach cases, in what we like to do to control
[22] expenses, to assure positive outcomes, to deal with

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[1] particular kinds of situations that may occur in common
in

[2] those cases. And I believe I said that those matters are
[3] discussed frequently at ABA meetings and other meetings
[4] where lawyers gather to discuss what it is they do for a

(5) living, and it's in that context that I think a lot of
(6) information is shared among those of us who are in this
(7) field.

(8) Q Out of those discussions and that sharing of
(9) information, has any sort of unwritten standard of
(10) competence or conduct arisen, in your view?

(11) A Not in terms of competence or conduct. We share
(12) more practical insights into how we have handled
particular -

(13) situations that have proven successful in a given case that
(14) might be helpful to our peers of other companies or an
(15) outside practice who face similar situations.

(16) Q Are there any treatises or textbooks which relate
(17) specifically to the management of major toxic tort
(18) litigation?

(19) A I believe DRI published in one of its - it was
(20) either a magazine or one of its special publications a
(21) couple of years ago, an article on the defense of toxic
(22) tort litigation. It is a topic that is addressed

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(1) periodically in publications like the BNA Toxics Law
Report
(2) or the Mealey's Toxics Litigation Report or something
like
(3) that.

(4) There are several publications of that nature,
(5) Mealey's, the BNA publication that I referred to and
(6) others, that track cases, toxic tort cases, and contain
(7) commentaries on various aspects of tort law or
management

(8) of toxic tort cases. Various aspects of that have been
(9) treated by organizations like the Product Liability
(10) Advisory Council, PLAC, and other groups that are
(11) interested in the development of the law of torts and
(12) product liability.

(13) Q What is the Product Liability Advisory Council?

(14) A It's a group of legal professionals engaged in
(15) the defense, either as inside counsel or outside counsel,
(16) of product liability cases. The main function of PLAC is
(17) to - it's twofold really. It is to provide amicus briefs
(18) on significant issues of product liability facing appellate
(19) courts, both at the state and federal level, and to provide
(20) information and education to its members on the law of
(21) products liability.

(22) Q Are you a member of PLAC?

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(1) A I'm on the executive committee.

(2) Q How long have you been a member of PLAC?

(3) A Four years now.

(4) Q What are the requirements of membership in PLAC?

(5) A Being a lawyer, an in-house - there are two
(6) classes of members. There are corporate members and
(7) sustaining members. For a corporate member, the
(8) requirement is that you be involved in the defense of
(9) product liability litigation. For a sustaining member,
(10) that is a person in outside practice, the requirement is
(11) that the attorney be engaged in the defense of product
(12) liability litigation as an outside counsel. Membership is
(13) by invitation.

(14) Q Was there anyone else - withdraw the question.
(15) I take it when you became a member, it was by
(16) invitation?

(17) A That's correct.

(18) MR. LEIMKUEHLER: Off the record.

(19) (Discussion off the record.)

(20) BY MR. LEIMKUEHLER:

(21) Q At the time that you were invited, was anyone
(22) else on Monsanto's legal staff invited to be a member?

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(1) A Yes.

(2) Q Who else was invited?

(3) A Mr. Robert Berendt, who's my immediate
(4) supervisor.

(5) Q Anyone else?

(6) A No.

(7) Q Was Mr. Krchma invited to be a member?

(8) A No, I don't believe so.

(9) Q Has Mr. Krchma ever been a member?

(10) A Of PLAC?

(11) Q Yes.

(12) A I don't believe so.

(13) Q Is there anyone else in Monsanto's law

(14) department, other than yourself or Mr. Berendt, who is

(15) either presently or at some time has been a member of PLAC?

(16) A I don't believe so.

(17) Q When you became a member but before you became
(18) part of the executive committee, did you have any
(19) responsibilities as a member?

(20) A When I first became a member of PLAC, I was on
(21) the case selection committee. That was my first
(22) affiliation with PLAC.

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(1) Q And what was - can you describe that
(2) responsibility for me.

(3) A The case selection committee is a committee of
(4) inside corporate counsel who review pending cases to
(5) determine which present issues that are significant and
(6) meritorious enough to warrant PLAC's participation as
an

(7) amicus in the appellate process.

(8) Q Does the case selection committee also
(9) participate in drafting the amicus briefs?

(10) A Yes.

(11) Q Did you personally participate in drafting amicus
(12) briefs for PLAC?

(13) A Yes.

(14) Q How many?

(15) A The year I was on that committee, I acted as

(16) liaison for, I believe, three or four different cases.

(17) Q Can you tell me what issues you wrote about?

(18) A The briefs addressed protection of trade secret
(19) information, the issue of open and obvious danger as it
(20) interacts with the failure to warn, an issue on spoliation
(21) of evidence by a plaintiff's expert and, of course, my
(22) favorite, which is junk signs.

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(1) MR. KRAMER: I'm sorry, I couldn't hear that.

(2) THE WITNESS: Junk signs.

(3) BY MR. LEIMKUEHLER:

(4) Q Did you participate in the Merrill/Dow case as
(5) amicus?

(6) A PLAC submitted a brief on the Daubert case. I
(7) wasn't on case selection at that time, but I did see and
(8) comment on a copy of the draft brief before it was
(9) submitted.

(10) Q You were on the case selection committee for one
(11) year. Did you have another committee assignment after
(12) that?

(13) A The executive committee.

(14) Q What are the prerequisites of membership on the
(15) executive committee?

(16) A Having been a member of the case selection - I

(17) believe all the members of the executive committee have
 (18) been on the case selection committee and been invited to
 (19) become a member of the executive committee.
 (20) *Q How large is the executive committee?*
 (21) A I think there are 12 members. That includes the
 (22) executive director of PLAC.

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(1) *Q Do you know what the overall membership of PLAC*
 (2) *is?*
 (3) A There are 100 corporate members and 300
 (4) sustaining members.
 (5) *Q Your participation in the executive committee did*
 (6) *not involve an election?*
 (7) A No.
 (8) *Q It was purely by invitation?*
 (9) A Purely by invitation of the members of the
 (10) executive committee.
 (11) *Q Do you have a particular title within the*
 (12) *executive committee?*
 (13) A No.
 (14) *Q Do you have a particular function within the*
 (15) *executive committee?*
 (16) A Other than to be a member and go to the
 (17) meetings? No.
 (18) *Q What is the executive committee's responsibility?*
 (19) A We are responsible for the day-to-day operations
 (20) of the organization, planning for meetings. We have
 (21) meetings twice a year, getting reports from the case
 (22) selection committee on issues that they are participating

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(1) in, hearing from our action groups which are - I would
 (2) analogize them to various sections of the ABA litigation
 (3) section - which focus on particular subject matters of
 (4) interest to people in litigation practice.
 (5) *Q Anything else?*
 (6) A We hear reports from our treasurer on budget and
 (7) get an annual report from the auditors, that our books
 (8) and records are in order. It's an administrative committee.
 (9) *Q Are there any action groups within PLAC which*
 (10) *deal specifically with the management of toxic tort*
 (11) *litigation?*
 (12) A As a topic - as a discrete topic, no. Many of
 (13) the areas touch on issues that affect the management of
 (14) toxic tort litigation.
 (15) *Q Can you give me some examples of those?*
 (16) A The experts of evidence committee, which has been
 (17) focused on the development of the law in the admissibility
 (18) of scientific evidence, principally in toxic tort cases;
 (19) the civil procedure committee, which has been focusing on
 (20) the proposed amendments to Rule 26 and automatic
 (21) disclosure
 (22) as opposed to the more traditional discovery we're all
 used
 (22) to as lawyers. There's the ALI committee, which is
 working

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(1) with - not working with, but commenting on, formulating
 a
 (2) PLAC position with respect to the proposed revision of
 the
 (3) restatement of torts. There is a committee that is focused
 (4) on the issue of protective orders and efforts to convince
 (5) the courts of the legitimacy of protecting intellectual
 (6) property, possession and propriety of manufacturers.
 Those

(7) are the main ones that I can think of that affect the area
 (8) of my interest.
 (9) *Q Let me draw the question a little bit more*
 (10) *narrowly. Do any of the action groups address issues*
 (11) *relating to management of toxic tort litigation to the*
 (12) *extent it concerns efficiency in litigation and containment*
 (13) *of defense costs?*
 (14) A No.
 (15) *Q Does any of your work with PLAC involve issues of*
 (16) *maintaining the efficiency of the litigation of toxic tort*
 (17) *matters or of containing defense costs?*
 (18) A Efficiency, yes, because I believe certainly in
 (19) the area of expert witness - the admissibility of
 (20) scientific expert witness testimony and the discovery
 (21) disclosure issues that are ongoing at the present time
 (22) regarding the proposed amendments to Rule 26. I think
 those

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(1) go to the efficiency of the litigation process overall.
 (2) Cost containment, there is no committee that I know of
 (3) within PLAC that deals specifically with that issue.
 (4) *Q I understand how rule changes could affect*
 (5) *efficiency of litigation. My question really is addressed*
 (6) *more to, given a certain playing field in litigation, does*
 (7) *PLAC in any way address issues of how corporate counsel*
 can
 (8) better control the defense costs that are incurred in
 (9) connection with toxic tort cases.
 (10) A On that specific narrow issue? No, not that I'm
 (11) aware of. No group has that as its sole focus.
 (12) *Q Or relates in any way to issues concerning the*
 (13) *control of defense costs?*
 (14) A Again, on that very narrow issue, I'm not aware
 (15) of any group that has that as its sole focus.
 (16) *Q Does any aspect of your involvement in PLAC*
 (17) *involve issues concerning analysis of settlement?*
 (18) A That's a topic that's frequently discussed,
 (19) certainly at the meetings, and I believe that one of the
 (20) firms in PLAC in connection with one of the PLAC
 (21) members
 (22) developed a pilot program for the early analysis and
 evaluation of claims for settlement.

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(1) MR. LEIMKUHLE: I'm sorry, can you read that
 (2) back for me.
 (3) (The reporter read the record as requested.)
 (4) BY MR. LEIMKUHLE:
 (5) *Q Can you describe what the pilot program consisted*
 (6) *of?*
 (7) A I just have a general awareness of this,
 (8) Mr. Leimkuhler, but it was, to my recollection,
 (9) identification of a particular type of case that this
 (10) corporate member had on a fairly repetitive basis, certain
 (11) activities that counsel were to perform as a matter of
 (12) first priority, certain records that were to be obtained,
 (13) certain information that was to be obtained from the
 (14) plaintiff in the case and submitted to a member of the law
 (15) staff of the corporate member. And then that case would
 be
 (16) analyzed to determine whether it was one in which
 (17) settlement should be pursued as a matter of first priority
 (18) or whether the case should be, rather resisted vigorously
 (19) on the merits.
 (20) *Q Did you have any individual involvement in that*
 (21) *study?*
 (22) A Not individual, no. Again, as I said, I was

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[1] aware of it in general and heard and participated in some
 [2] discussion with respect to results in terms of cost
 [3] containment and efficiencies that this particular member
 [4] believed resulted from the use of that program.

[5] *Q Did you learn anything about settlement analysis
 [6] from this pilot study that you applied to your work at
 [7] Monsanto?*

[8] A I don't recall anything specific that I learned
 [9] from that. It was a piece of information that, in
 [10] appropriate circumstances, provided a model for a
 method

[11] that could be used to analyze cases to determine whether
 [12] they should be settled or resisted on the merits.

[13] *Q Do you know whether that model - withdrawn.*

[14] Did you or anyone else at Monsanto apply that
 [15] model to any of the Brio private actions that are at issue
 [16] in this case?

[17] A The model was not appropriate for application to
 [18] these kinds of cases.

[19] *Q Does PLAC sponsor seminars?*

[20] A Yes.

[21] *Q Have you spoken at any of these seminars?*

[22] A Not at a PLAC seminar, no.

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[1] *Q Have you attended any of the PLAC seminars?*

[2] A Yes.

[3] *Q At any of the PLAC seminars that you attended,
 [4] has the issue of overseeing litigation costs in toxic tort
 [5] cases been addressed?*

[6] A It's been touched on. I don't recall any talk
 [7] that focused specifically on that narrow subject.

[8] *Q Have any seminars that you attended addressed the
 [9] issue of analyzing the potential settlement of toxic tort
 [10] cases?*

[11] A Are you speaking of PLAC now or just any
 [12] seminar?

[13] *Q PLAC.*

[14] A I don't recall that just in terms of toxic tort
 [15] cases, Mr. Leimkuhler.

[16] *Q Are you a member of any other organizations of a
 [17] similar nature to PLAC, and I don't necessarily mean by
 [18] subject matter, but organizations such as Bar committees?*

[19] A I'm a member of the American Bar Association
 [20] litigation section and I believe the corporate counsel
 [21] subgroup of the litigation section. I think I paid my dues
 [22] for that this year.

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[1] *Q Can you describe your activities in the ABA
 [2] litigation section?*

[3] A I attend seminars. Occasionally, I speak at
 [4] litigation section, the corporate counsel section
 [5] seminars. I've also spoken at a tort and insurance
 [6] practice section seminar.

[7] *Q What topics have you spoken on as part of the
 [8] corporate council subsection of the litigation section of
 [9] the ABA?*

[10] A I have addressed management of litigation, the
 [11] toxic tort litigation. I have addressed use of computer
 [12] support to control costs and assure accuracy and
 [13] consistency, particularly in discovery responses. I've
 [14] addressed the issue of the admissibility of scientific
 [15] evidence in toxic tort cases. I've addressed the issue of
 [16] the use of jury consultants in evaluating and developing
 [17] strategies for the defense of toxic tort cases. And that's
 [18] all I can recall at the moment.

[19] *Q You said you also spoke at a TIPS seminar?*

[20] A Yes.

[21] *Q That's all caps, T-I-P-S. Can you tell me what
 [22] the topics were that you addressed?*

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[1] A I spoke at one TIPS seminar that was last
 [2] September in New York, and I addressed the issue
 relating

[3] to the inside counsel's role in the management of
 [4] litigation, particularly toxic tort litigation.

[5] *Q Was that presentation similar to the seminar that
 [6] you spoke at for the litigation section?*

[7] A Yes.

[8] *Q Similar in content?*

[9] A Similar in content, yes.

[10] *Q Other than ABA seminars, have you spoken at any
 [11] other continuing legal education seminars or seminars of
 [12] any kind?*

[13] A No - let me take that back. Yes, I have spoken
 [14] at two in-house Monsanto seminars for the members of
 the
 [15] Monsanto law department.

[16] *Q What were the subjects you addressed at the
 [17] in-house seminars?*

[18] A The application of computer technology to large
 [19] toxic tort cases that, of course, everybody in-house at
 [20] Monsanto was aware of, the Agent Orange case and the
 dioxin

[21] cases that we had. And I addressed the - what precisely
 [22] was the issue? It was right after the Bhopal incident, and

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[1] it was kind of a two-topic discussion of the legal
 [2] standards applicable to the chemistry in connection with
 [3] issues like mass exposures, which was a very current
 topic,

[4] and what some of the things that Monsanto had done in
 the

[5] wake of that to assure ourselves that a similar situation
 [6] would not occur with any of our operations.

[7] *Q Can you think of any other seminars that you've
 [8] spoken at other than the ones you've just mentioned?*

[9] A Those are all that I can recall, Mr. Leimkuhler.

[10] *Q At the seminars where the topics of the
 [11] management of toxic tort litigation were addressed by you,
 [12] can you tell me the specific issues that you discussed, to
 [13] the best of your recollection?*

[14] A Sure. Several. First of all, the need for
 [15] in-house counsel to be involved in the management, the
 [16] day-to-day decisionmaking with respect to significant
 [17] cases; to meet and confer with counsel to set clear lines
 [18] of communication; to agree upon strategy and how
 strategy
 [19] is to be implemented; to provide for the appropriate and
 [20] regular flow of communications, both from counsel inside
 [21] the company and from inside the company back to outside
 [22] counsel; the necessity for inside counsel to be familiar

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[1] with the main scientific issues involved in toxic tort
 [2] cases that inside counsel may be responsible for
 [3] supervising, and in general, how Monsanto has met that
 [4] challenge; the importance of knowing the identity of your
 [5] adversary's expert witness, chief, medical or scientific
 [6] witness and some thoughts on how to go about obtaining
 [7] material for effective cross-examination; the importance
 of
 [8] outside counsel being efficient, prompt when projects are

[9] in the works, and the importance for inside counsel
 [10] carefully to scrutinize costs; to assure that work being
 [11] done by outside counsel is both appropriate in terms of
 [12] the
 [13] type of case being undertaken and also, that it's not
 [14] something that with a little bit of planning and effort can
 [15] be done by in-house personnel at more reasonable cost;
 [16] also
 [17] giving outside counsel a view of the role of an inside
 [18] lawyer in terms of communicating with senior
 [19] management and
 [20] the client and what's important in that regard. Those, in
 [21] general, are the topics.
 [22] MR. LEIMKUHLER: Let's go off the record for a
 moment.
 (Discussion off the record.)
 BY MR. LEIMKUHLER:

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[1] Q Do you recall the points that you made at the
 [2] seminar concerning the management of toxic tort cases that
 [3] concerned the inside counsel's scrutiny of costs incurred
 [4] by outside counsel?
 [5] A I don't recall the precise words I used, if
 [6] that's your question.
 [7] Q No, that's not. You had identified two general
 [8] areas that you addressed. One was whether the expenditures
 [9] were appropriate for the type of case involved, and second,
 [10] whether work being done by outside counsel would be more
 [11] efficiently done by inside counsel.
 [12] A Right.
 [13] Q Let's take the first one. Do you know what
 [14] points you made in connection with ensuring that the costs
 [15] expended by outside counsel were appropriate for the type
 [16] of case?
 [17] A That was a general thought, and I believe the
 [18] point I made there was counsel needed to keep in mind,
 [19] ultimately, what the value of the case would be, and that a
 [20] 48-state or 50-state survey on a particular legal topic
 [21] might be appropriate in one case but totally
 [22] inappropriate
 in another case or a different kind of case. And again, in

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[1] that general vein, it is appropriate and I think probably
 [2] incumbent upon inside counsel not to reinvent the wheel
 [3] every time a project is undertaken.
 [4] For example, research of that nature which is
 [5] done in one case ought to be available, and it ought to be
 [6] part of inside counsel's job to see that that kind of
 [7] research is available to other counsel in other parts of
 [8] the country who may be handling cases for your company
 that
 [9] face similar issues, as an example of the kind of
 [10] efficiency I was talking about.
 [11] Q Did you prepare an outline that was distributed?
 [12] A I believe so, yes.
 [13] Q Do you still have a copy of it in your files?
 [14] A I don't know the answer to that. I don't know
 [15] whether it's still there or not.
 [16] MR. LEIMKUHLER: Peter, I'd like to get a copy of
 [17] that.
 [18] MR. TRACEY: To the extent that it exists, we'll
 [19] undertake to look for it.
 [20] MR. LEIMKUHLER: Sure.
 [21] BY MR. LEIMKUHLER:
 [22] Q Did the seminar that you gave -

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[1] A It wasn't a seminar. It was, I think, about a
 [2] 20- or 25-minute talk in a three-day seminar.
 [3] Q Did the talk that you gave at the litigation
 [4] section seminar differ in any respect from the talk that
 [5] you gave before the TIPS section seminar?
 [6] A I think they were approximately the same. They
 [7] addressed generally the same kinds of issues.
 [8] Q Was there a separate outline that you prepared
 [9] for distribution at the TIPS seminar?
 [10] A Yes.
 [11] Q And do you know whether you have a copy of that
 [12] outline?
 [13] A I may have. I think it was included in the
 [14] handouts from that seminar.
 [15] MR. LEIMKUHLER: With regard to that, with
 regard
 [16] to both the litigation section and TIPS section seminars,
 [17] if you could undertake to determine whether you have
 [18] copies
 [19] of those outlines.
 [20] MR. TRACEY: From what the witness is saying, my
 [21] understanding is that if they exist, they would be in his
 [22] files, and we'll undertake to look through his files to
 determine if, in fact, we have them.

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[1] BY MR. LEIMKUHLER:
 [2] Q Do you recall the date of the litigation section
 [3] seminar concerning management of toxic tort litigation?
 [4] Not the precise date, but the approximate date.
 [5] A It was in about '88 or '89, Mr. Leimkuhler. I
 [6] think that's when it was.
 [7] Q What about the TIPS seminar?
 [8] A The TIPS seminar was last September.
 [9] Q September '92?
 [10] A Yes.
 [11] Q Could you describe the points that you made at
 [12] the litigation seminar concerning the use of computer
 [13] support to control costs?
 [14] A Again, that was a short topic, in the area of 20
 [15] to 25 minutes, describing what I call at Monsanto our
 "PCB
 [16] discovery database," which in essence, contains all of the
 [17] interrogatories that have been posed to us, the answers
 [18] that we had given to those interrogatories, the demands
 [19] for
 [20] production of documents that have been made and our
 [21] responses to those demands, and an explanation of how
 [22] we
 set that up, why we set it up, and again, in general terms,
 how it has helped us in terms of both efficiency and

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[1] consistency in responding to discovery in that type of
 [2] case, PCB case.
 [3] Q Was that database set up in-house?
 [4] A Yes.
 [5] Q Does a similar database exist for the Brio
 [6] actions?
 [7] A Not in-house, no. I don't know whether it would
 [8] at home. Primm has - they probably have the answers on
 a
 [9] word-processing system, but I don't know that there is a -
 [10] I know there is not a computerized database of those
 [11] responses, fully complete computerized database of those
 [12] responses. We have some on a database but not all
 [13] them.
 Q With regard to - withdraw the question.

(14) Tell me what points you made at the computer
 (15) support seminar as they concerned the control of defense
 (16) costs.
 (17) A Are you talking about the one in-house?
 (18) Q No, the ABA seminar.
 (19) A That was the one that I was talking about, the
 (20) use of that discovery database as a means of conserving
 the
 (21) time of outside counsel in framing responses to discovery
 (22) and identifying a core set of documents which would be

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(1) responsive to particular types of discovery demands.
 Both
 (2) of those result in significant savings in outside legal
 (3) costs.
 (4) Q Did any aspect of your talk on jury consultants
 (5) concern cost control?
 (6) A I touched on the cost control as an aspect of the
 (7) appropriate use of a jury consultant, yes.
 (8) Q Can you tell me what you recall discussing
 (9) concerning cost control in that context?
 (10) A In general, I guess my comments were twofold in
 (11) that regard. First, it was my recommendation that if a
 (12) jury consultant is to be employed in a case, the consultant
 (13) should be employed earlier rather than later so that
 (14) important things can be explored, and discovery needs
 with
 (15) respect to those things and issues can be identified and
 (16) addressed earlier rather than later.
 (17) Second, I guess the primary importance of the use
 (18) of a jury consultant is to assess the recent activity of a
 (19) likely jury to the particular things that in my case, and
 (20) in the defense of toxic tort cases, we are likely to
 (21) address to the jury in the company's defense; whether
 there
 (22) are particular portions of the defense that a jury is

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(1) likely to find credible or not credible; if not credible,
 (2) how to go about addressing that particular issue in the
 way
 (3) the jury can understand it better, that we can
 communicate
 (4) it better to a jury; and ultimately, to assess the value of
 (5) the case in terms of our opportunity to prevail, or if
 (6) we're not going to prevail, what a range of potential loss
 (7) might be to the company.
 (8) Q Have you attended any seminars, other than those
 (9) at which you've spoken, where the issue of controlling
 (10) defense costs has been the subject of a talk?
 (11) A Certainly.
 (12) Q Can you identify which of those you've attended?
 (13) A I've attended a couple of litigation section
 (14) seminars, one here in Washington. I don't recall whether
 (15) the other one was in New York or California - I just don't
 (16) recall, it's been several years ago - at which a speaker
 (17) or maybe two speakers addressed the issue of techniques
 (18) that had been employed by that individual, typically
 (19) in-house counsel, to supervise and control costs for
 (20) outside counsel.
 (21) I attended a seminar given by Litigation
 (22) Sciences, at which, not surprisingly, they advocated use of

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(1) jury consultants, and in particular, Litigation Sciences,
 (2) in an effort to assist in litigation strategy and identify
 (3) cost savings. PLAC has had - well, I mentioned the case
 (4) settlement pilot program earlier, and that was part of a

(5) morning session at one of their programs, I believe, that
 (6) dealt with, in general, litigation management and cost
 (7) control.
 (8) Quite frankly, it's my experience that whenever I
 (9) go to an ABA seminar, TIPS seminar or corporate counsel
 (10) seminar, that there will be one or more speakers who
 (11) address issues of how to control outside counsel costs.
 (12) Q I think you identified three ABA seminars, an LSI
 (13) seminar and then a PLAC seminar at which these issues were
 (14) addressed by speakers; is that right?
 (15) A That I can recall at the moment, yes, apart from
 (16) seminars in which I was a speaker.
 (17) Q How long were the talks that were given by the
 (18) cost control speakers at each of those seminars?
 (19) A Typically, they're 20- to 25-minute
 (20) presentations.
 (21) Q Are there any aspects of your formal education
 (22) that you consider to bear directly on the issue of

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(1) controlling the costs incurred by outside counsel?
 (2) A No. Unfortunately, it's my experience that law
 (3) school doesn't do much to prepare you to practice law
 other
 (4) than acquaint you generally with legal topics, show you
 (5) where the library is.
 (6) MR. LEIMKUHLER: Off the record.
 (7) (Discussion off the record.)
 (8) BY MR. LEIMKUHLER:
 (9) Q Have I exhausted your recollection of the
 (10) seminars at which you've spoken concerning issues of either
 (11) cost control or analysis of settlement?
 (12) A I believe so, yes. I can't recall anything as I
 (13) sit here.
 (14) Q Have you, in fact, spoken at a seminar concerning
 (15) settlement analysis?
 (16) A Not specifically, no. I have addressed the
 (17) topic, again, as part of a group of topics related to
 (18) management of litigation. But I have not spoken
 (19) specifically and solely on that as the single topic of the
 (20) presentation.
 (21) Q You're referring to the two seminars at which you
 (22) spoke on management of toxic tort cases?

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(1) A That's correct.
 (2) Q Tell me the points that you made concerning
 (3) settlement analysis in the context of those seminar talks.
 (4) A In general, that settlement is a topic that needs
 (5) to be addressed with management, that it's important for
 (6) inside counsel to keep his or her management apprised of
 (7) both the progress of litigation and the expectation as to
 (8) outcome; and I guess what I would call the company's
 (9) exposure, what it might cost if an adverse verdict is
 (10) returned, and in conjunction with that, what counsel's
 (11) estimation of the settlement value of the case is; that it
 (12) is important for inside counsel to keep in mind that in a
 (13) business view, the economic value of the case is a very
 (14) important consideration in determining what strategy is
 to
 (15) be employed, and that, I believe, it is part of inside
 (16) counsel's duty to keep an open mind with respect to the
 (17) settlement of cases.
 (18) Q Did your talk include - withdrawn.
 (19) Did the talks that you gave at the litigation
 (20) section and TIPS section seminars include discussion of
 (21) parameters to consider in determining whether or not a
 (22) settlement is advisable?

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[1] A I touched on that, yes.
 [2] Q In what respect?
 [3] A That in evaluating the settlement potential of
 [4] the case, simply aside from the money involved, other
 [5] considerations might come into play, such as, if your
 [6] client is faced with a product or a situation in which
 [7] similar cases are likely to be filed in the same
 [8] jurisdiction or other jurisdictions around the country,
 [9] that it's important to take a broad view of the litigation
 [10] and not focus narrowly on an individual case, that that
 [11] can
 [12] affect how a case appropriately is valued for settlement
 [13] purposes. And I think I may have commented on just a
 [14] personal dynamic that is sometimes involved, that
 [15] extreme
 [16] antagonism of counsel is typically counterproductive to
 [17] the
 [18] resolution of the case that should be settled.
 [19] Q At any of the talks that you've given, have you
 [20] addressed parameters to be considered in arriving at a
 [21] specific amount or specific range that would be considered
 [22] a reasonable settlement amount?
 [1] A Other than simply to encourage counsel to have in
 [2] mind, as part of that judgment, the company's exposure
 [3] or
 [4] client's exposure to an adverse verdict, I'm always on the

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[1] defense side in these cases, so that's my evaluation.
 [2] That's the only specific comment I can recall making in
 [3] that regard.
 [4] Q In other words, none of your talks included the
 [5] discussion of here's how you go about determining whether a
 [6] particular set amount is reasonable or unreasonable?
 [7] A That's correct.
 [8] Q Have you attended any seminars or received any
 [9] other training at which the issue of evaluating settlement
 [10] has been discussed?
 [11] A Yes. I believe a couple of the seminars that I
 [12] have attended have had people who've addressed that.
 [13] Q Can you tell me what the nature of those
 [14] discussions were?
 [15] A The most recent one was the September 1992 TIPS
 [16] seminar in which there was a panel discussion from the
 [17] plaintiffs' and the defendants' perspective in evaluating
 [18] cases for settlement. I can't recall specifically. I
 [19] think Stan Chesley was on the panel, and I can't recall
 [20] who
 [21] all else was on there. I remember Mr. Chesley because he
 [22] arrived late, spoke out of order and left early.
 [1] Q He probably had another settlement to catch -

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[1] another seminar to catch.
 [2] A He had another case he was trying to settle. I
 [3] recall his explanation.
 [4] Q Any others you can remember?
 [5] A I know that - I believe that the seminar that I
 [6] attended here in Washington several years ago had a
 [7] discussion of the settlement of cases, and I can't
 [8] recall - I think Tom Henderson was on one of those
 [9] panels. I recall him because I frequently see him on the
 [10] other side of cases. There may have been others,
 [11] Mr. Leimkuhler. I just don't recall them specifically at
 [12] this time.
 [13] Q About how long did these discussions last? Were
 [14] these in the 20- to 25-minute range?

[15] A The individual presentations were in the 20- to
 [16] 25-minute range, and the panels would last anywhere
 [17] from an
 [18] hour to two hours, depending on the number of speakers
 [19] and
 [20] the time allotted.
 [21] Q Other than PLAC and the ABA, are there any other
 [22] professional organizations that you belong to?
 [1] A I'm a member of the Bar Association of
 [2] Metropolitan St. Louis.

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[1] Q Are you an active member?
 [2] A I occasionally go to meetings. I'm not terribly
 [3] involved with that organization.
 [4] Q Have you ever attended any seminars sponsored by
 [5] that Bar association, either as a speaker or as an
 [6] attendee?
 [7] A Yes, I did attend a seminar they gave. It's been
 [8] several years ago, and I can't recall what the topic was.
 [9] I can remember going, but I don't remember what
 [10] specifically the topics were. It was in St. Louis,
 [11] obviously.
 [12] Q Did the topic have anything to do with the
 [13] management of toxic tort cases?
 [14] A I don't believe so. I believe it was in
 [15] connection with recently revised Missouri court rules,
 [16] and
 [17] there was a presentation given on legal ethics, conflicts
 [18] of interest in representing different interests as it
 [19] applied to - I believe as it applied to CERCLA cases.
 [20] Q Any other organizations?
 [21] A No.
 [22] Q Did you ever give a seminar for the Bar
 [1] Association of St. Louis?

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[1] A No.
 [2] Q Have you written any legal articles?
 [3] A No - well, let me - some of the discussions
 [4] that I have given at seminar appear in the written
 [5] materials. I coauthored an article on the medical
 [6] monitoring claim that arose in one of my cases.
 [7] MR. LEIMKUHLER: Peter, let me just make a
 [8] blanket request for any articles that Mr. Bistline has
 [9] written or any outlines that he's prepared to the extent
 [10] that they still exist in his files or that you otherwise
 [11] have access to.
 [12] MR. TRACEY: We'll make that search.
 [13] MR. LEIMKUHLER: Okay.
 [14] BY MR. LEIMKUHLER:
 [15] Q Have you participated in any way in the creation
 [16] of any articles other than to the extent the outlines would
 [17] be considered articles?
 [18] A No.
 [19] Q Have you participated in the preparation of any
 [20] textbooks or case books or treatises?
 [21] A No.
 [22] Q By the way, with regard to the in-house seminar,

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[1] did you prepare an outline for the two in-house seminars
 [2] that you gave?
 [3] A Yes.
 [4] MR. LEIMKUHLER: And Peter, I'd like to have
 [5] those included in the materials that are the subject of our
 [6] request.
 [7] MR. TRACEY: These are the in-house seminars that
 [8] were done for the law department?

[9] THE WITNESS: Yes.
 [10] MR. TRACEY: Without taking a position here - I
 [11] would like to take it under advisement because I think
 [12] there may be an attorney-client issue to the extent those
 [13] appeared solely for internal use in the law department. So
 [14] I won't say no, but I would like at this point to take that
 [15] under advisement.
 [16] MR. LEIMKUHLER: Without agreeing that any
 [17] privilege would attach, you certainly are free to take
 [18] whatever position you want.
 [19] MR. TRACEY: I understand.
 [20] BY MR. LEIMKUHLER:
 [21] Q Earlier you mentioned articles or commentaries
 [22] that appear in Mealey's or in the BNA Toxic Torts Report

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[1] relating to the field of management of toxic tort cases.
 [2] Are there any articles in particular that you
 [3] consider to be learned or authoritative concerning the
 [4] management of toxic tort cases?
 [5] A None that I can identify for you offhand, no.
 [6] Q Or articles that, from your understanding, are
 [7] considered to be standard works in the area of the
 [8] management of toxic tort cases?
 [9] A Not that I can think of at this moment, no.
 [10] Q Any articles that you can identify that you, in
 [11] particular, have relied upon in your work in the area of
 [12] managing toxic tort cases?
 [13] A No.
 [14] Q How about any books or treatises? Are there any
 [15] that address the issue of the management of toxic tort
 [16] cases that you consider to be particularly learned or
 [17] particularly useful to you in your work?
 [18] A No.
 [19] Q Are there any articles or books or treatises that
 [20] you keep in your office or keep in a location that are
 [21] easily accessible to you for your use in managing toxic
 [22] tort cases?

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[1] A On that particular topic?
 [2] Q Yes.
 [3] A No.
 [4] Q Are there other individuals in the legal
 [5] profession that you consider to have expertise in the
 [6] management of toxic tort cases that is similar in quality
 [7] to the expertise that you profess to have?
 [8] A Yes.
 [9] Q Can you identify some of those people?
 [10] A Certainly. At General Electric, there's a fellow
 [11] I deal with all the time named Tom Hill, a fellow named
 [12] Doug Barth at Westinghouse, Jim Schomper at du Pont -
 [13] du Pont obviously has a very large in-house law staff -
 [14] and I wish I could remember the name of the other fellow I
 [15] spoke to frequently there, but his name escapes me at the
 [16] moment. Several individuals at Dow. I'm going to have to
 [17] go back and look at my Rolodex.
 [18] Q Is there anyone else at Monsanto who you consider
 [19] to have expertise of a similar quality to you?
 [20] A Any of the lawyers in Monsanto's litigation group
 [21] have expertise of varying degrees in the management of
 [22] these kinds of cases. Bob Berendt, my supervisor, is one

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[1] of the best I know anymore. Steve Krchma in the
 [2] environmental group also has - although, I think, to some
 [3] extent unwillingly, when he got involved in the Slaughter
 [4] case - a great deal of expertise in this area.
 [5] Q Why do you say unwillingly?

[6] A He didn't join Monsanto to be a litigation
 [7] lawyer. It just kind of worked out that way for him.
 [8] Q What was Mr. Krchma's interest as you understand
 [9] it?
 [10] A Mr. Krchma is an environmental lawyer, but he
 [11] handles CERCLA litigation and has a great deal of
 [12] expertise
 [13] in that area. But Dave Snively, Cornell Boggs, Michael
 [14] Newport, Marty Zucker, all members of Monsanto's
 [15] litigation
 [16] group, are all experienced managers of this kind of
 [17] litigation.
 [18] Q Do you recognize anyone in the academic arena as
 [19] having expertise similar in nature and quality to yours?
 [20] A I don't know if Don Elliott is still with Yale
 [21] law school or not. I think he's with Fried, Frank or
 [22] counsel to Fried, Frank in New York at this point, but I
 believe he's still teaching civil procedure at Yale. He
 certainly has a high degree of expertise in this area.

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[1] Q In the management of toxic tort cases?
 [2] A In the management of toxic tort cases. He
 [3] consulted with General Electric for several years in a
 [4] hands-on capacity in assisting them with the management
 [5] of
 [6] their cases.
 [7] Q And that management would include cost control
 [8] issues?
 [9] A Yes.
 [10] Q And settlement analysis issues?
 [11] A I assume so, yes.
 [12] Q Are there any lawyers who work for insurance
 [13] companies that you believe have expertise similar in nature
 [14] and quality to yours?
 [15] A I don't deal with lawyers who work for insurance
 [16] companies very much. I deal much more with in-house
 [17] counsel at others in my industry and, through PLAC, with
 [18] other in-house counsel in other industries, so I'm just not
 [19] as familiar with insurance company law staffs as I am with
 [20] industry law staff.
 [21] Q Notwithstanding any personal knowledge, are there
 [22] lawyers who work for insurance companies that have a
 reputation as having expertise in the area of managing

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[1] toxic tort cases?
 [2] A I personally don't know of anyone,
 [3] Mr. Leimkuhler.
 [4] Q Do you employ any type of methodology to
 [5] determine whether defense costs are reasonable and
 [6] necessary?
 [7] A I don't have a written methodology that I follow.
 [8] Q I'm not asking for a written methodology. I'm
 [9] asking you, in the context of practicing in your area of
 [10] expertise, is there a methodology that you follow to
 [11] ascertain whether costs are reasonable and necessary?
 [12] A In general, yes.
 [13] Q Could you describe that methodology for me.
 [14] A Certainly. Primarily, the criterion is one of
 [15] what is the potential exposure that the company faces in
 [16] any particular case, what are the issues involved and what
 [17] is the quality of the opposing counsel. Those are the
 [18] primary ingredients in determining what is going to be
 [19] required to defend a case, what level of expense will be
 [20] necessary and whether that level of expense is reasonable
 [21] in connection with, ultimately, the value of the case, what

[22] would be required to settle the case or what the verdict

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[1] potential in the case would be.

[2] *Q Tell me how the potential exposure factors into*
[3] *those issues.*

[4] *A If we have a case in which the injuries alleged*
[5] *are very minor, in which we are unlikely to see a case of a*
[6] *similar nature develop again, in which it is our*
[7] *assessment*

[8] *that the verdict potential of the case is very modest, it*
[9] *doesn't make much sense to spend hundreds of thousands*
[10] *of*
[11] *dollars in defense of that case.*

[12] *On the other hand, where a case is one which*
[13] *presents very grievous alleged injuries, in which the*
[14] *plaintiff for one reason or another may be very*
[15] *sympathetic*

[16] *and, in our opinion, have a lot of appeal to a potential*
[17] *jury, in which the quality of outside counsel on the other*
[18] *side is very high, and therefore, the value of the case*
[19] *just in terms of what it's going to take to settle and its*
[20] *verdict potential is high, then that kind of a case is one*
[21] *in which it is likely that outside counsel or defense costs*
[22] *are going to be high. It's just going to take more to*
[23] *defend it.*

[24] *Q You identified the issues as one factor to be*
[25] *considered.*

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[1] *A Right.*

[2] *Q Tell me how the issues involved impact the issue*
[3] *of the reasonableness or necessity of defense costs.*

[4] *A In a case where a company is likely to face cases*
[5] *of a similar nature. For example, when I was in outside*
[6] *practice, I did a lot of defense work for General Motors,*
[7] *and an allegation of a design defect in the General Motors*
[8] *product was one which was viewed with a great deal of*
[9] *seriousness, because if a plaintiff were to prevail before*
[10] *a jury on a claim that the design of a vehicle is*
[11] *defective, there is the potential for that finding to be*
[12] *applied in other jurisdictions to stop General Motors*
[13] *from*

[14] *litigating that again, which could create potentially, in*
[15] *any event, massive liability.*

[16] *Similar claims, basically claims which would stop*
[17] *a defendant from contesting a liability issue that is*
[18] *likely to be faced again and again and again, is one which,*
[19] *in my view as a defense counsel, needs to be defended very*
[20] *vigorously and which makes the case one in which - it's*
[21] *just a more serious case and one in which defense costs*
[22] *are*
[23] *likely to be higher rather than lower.*

[24] *Q Any other way in which the issues involved impact*

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[1] *the reasonableness or necessity of defense costs?*

[2] *A If the issues are novel or of first impression.*
[3] *It's obviously much more difficult and expensive when*
[4] *you're trying to convince a court of a novel proposition of*
[5] *law rather than applying settled law.*

[6] *Q You identified the quality of opposing counsel as*
[7] *the third primary factor.*

[8] *A Yes.*

[9] *Q How does that impact your view of the*
[10] *reasonableness or necessity of defense costs?*

[11] *A Well, I think anybody who has defended cases -*
[12] *let me just take Texas as an example - would understand*
[13] *that if Joe Jamail is on the other side, it's quite a*

[14] *different story than if you get a first-year student out of*
[15] *Houston's law school who is plaintiff's counsel. Once*
[16] *you've practiced law for a while, once you've been in court*
[17] *and seen cases tried, it's relatively easy to understand*
[18] *that an intelligent, vigorous, aggressive representation of*
[19] *the plaintiff is one which results in potential for higher*
[20] *verdicts for a plaintiff and higher defense costs for a*
[21] *defendant.*

[22] *Q Are there any other factors other than the three*

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[1] *that you identified that you consider in determining*
[2] *whether the level of expenses are reasonable and necessary.*
[3] *A Well, the location in which the case is brought*
[4] *is going to affect, certainly, the level of expense.*

[5] *Associated with that, I guess, would be the court in which*
[6] *the case is venued. I don't know whether I mentioned this,*
[7] *but again, the type of case involved here, whether this is*
[8] *a stand-alone case, one which doesn't have implications*
[9] *other than just for the case itself, it's not one that the*
[10] *company is likely to see again for whatever reason, or is*
[11] *it a case that is likely to - or allegations like it are*
[12] *likely to appear in other places with other plaintiffs.*

[13] *Q Any other factors?*

[14] *A Not that I can think of at the moment.*

[15] *Q So I take it with regard to the five items that*
[16] *you mentioned, the potential exposure, the issues involved,*
[17] *the quality of opposing counsel, the situs of the*
[18] *litigation and the particular court or its venue, those are*
[19] *all things that you would need to know before you could*
[20] *assess the reasonableness and necessity of defense costs.*
[21] *Is that fair to say?*

[22] *A Those are all issues that would go into my*

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[1] *evaluation of the reasonableness and necessity of defense*
[2] *costs, yes.*

[3] *Q In order to determine whether defense costs were*
[4] *reasonable or necessary, would you need to know how many*
[5] *lawyers were being assigned to the case?*

[6] *A I'm having trouble with the question because -*
[7] *how many lawyers are assigned to a case is a function of*
[8] *how serious the case is and how many are required. That*
[9] *is*

[10] *something that I think is ultimately within the control of*
[11] *the managing in-house counsel, but certainly it's possible*
[12] *to overstaff a case. It's also possible not to have enough*
[13] *lawyers on the case. I've been in both situations.*

[14] *Q I would assume that it's the role of in-house*
[15] *counsel to assess the nature and seriousness of the case,*
[16] *and from there, make a determination of how many lawyers*
[17] *appropriately should be staffed on the case. Is that fair*
[18] *to say?*

[19] *A That's correct.*

[20] *Q So in order to know whether costs are reasonable,*
[21] *you would have to know how many lawyers were working on*
[22] *the*
[23] *case?*

[24] *A I think that kind of puts the cart before the*

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[1] *horse, though. A serious case is going to require more*
[2] *assistance from counsel. A less serious case would*
[3] *require*

[4] *less by way of staffing.*

[5] *Q I understand that some cases will require more*
[6] *staffing than others, but for a particular case in which*
[7] *you understand its nature, for you to determine whether the*
[8] *costs being incurred by outside counsel are reasonable and*

[8] necessary, you would need to know how many lawyers outside
 [9] counsel has put on the case. Isn't that fair to say?
 [10] A Well, I would certainly want to know what the
 [11] proposed staffing was and have a voice in the level of
 [12] staffing, yes.
 [13] Q Looking at it in retrospect as well, that's one
 [14] factor you would need to know?
 [15] A I would want to assess the role played by any
 [16] particular lawyer that was active in the case.
 [17] Q Would you also need to know anything about the
 [18] experience of the lawyers that were on the case?
 [19] A Certainly. That's a preliminary investigation
 [20] that would occur, depending on circumstances. If
 Monsanto
 [21] didn't have a lawyer in whom we had trust and confidence
 in
 [22] a particular area, we would certainly interview a number
 of

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[1] lawyers for a new matter to determine who we felt best
 [2] represented our best interest in the case.
 [3] Part of that evaluation would be, has the lawyer
 [4] handled particular cases of this nature before? If she or
 [5] he has, what's the track record? Are there references
 from
 [6] people, so to speak, that would help us assess that
 [7] particular lawyer's confidence and abilities?
 [8] Q Let's assume that you've selected a particular
 [9] firm based on the lawyer who's going to be the lead for the
 [10] case. Within that firm, would you need to know the
 [11] experience of the lawyers assigned to the project to be
 [12] able to ascertain whether the expenditures were reasonable
 [13] and necessary?
 [14] A Well, I don't put it in the category of
 [15] determining whether expenditures are reasonable or
 [16] necessary. I would put that in the category of whether
 [17] it's reasonable to assign that particular lawyer to the
 [18] case. For example, if we have a very large, very serious
 [19] case in which the verdict potential is in the millions of
 [20] dollars, it would not be my expectation that the
 [21] second-in-command would be a person straight out of law
 [22] school.

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[1] On the other hand, if the case is very small and
 [2] doesn't require a great deal of work and effort, I wouldn't
 [3] want the firm's senior partner spending a great deal of
 [4] time on the matter.
 [5] Q What if you determined that a mid-level partner
 [6] was in the library doing fairly basic, straightforward
 [7] legal research? Would you consider that expenditure to be
 [8] a reasonable and necessary expenditure?
 [9] A It would depend upon the circumstances involved.
 [10] Q Can you explain that?
 [11] A If it's a novel legal issue and one in which
 [12] memoranda had been circulated that, for whatever reason
 had
 [13] been found it needed additional work, and the individual
 [14] partner that you had referred to, a mid-level partner, was
 [15] an individual who was known for his or her expertise in
 [16] writing briefs and doing legal research, I would consider
 [17] that appropriate.
 [18] Q What if it wasn't a novel or -
 [19] A Novel or important issue in the case?
 [20] Q What if it were not novel - I don't want to
 [21] suggest that any issue in the case is not important. But
 [22] let's assume it's a fairly straightforward issue in the

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[1] case. It's not novel or complex in nature.
 [2] A It's very difficult, Mr. Leimkuhler, to speculate
 [3] in the abstract about all of these circumstances. If what
 [4] you're telling me is that if this is a question of what is
 [5] the statute of limitations in a personal injury case and a
 [6] person 20 years out of law school has spent six hours or
 [7] seven hours researching that topic, I'd be on the phone
 [8] asking what the heck is going on here. So if that's your
 [9] question, you're right. That's not appropriate.
 [10] MR. LEIMKUHLER: Off the record.
 [11] (Discussion off the record.)
 [12] BY MR. LEIMKUHLER:
 [13] Q As a general matter, is it important for you to
 [14] know, in assessing the reasonableness of defense costs,
 [15] what particular functions are being served by what lawyers
 [16] and whether the functions being served are commensurate
 [17] with their experience?
 [18] A That's part of the staffing discussion, yes.
 [19] Q In retrospect, in looking at the bills, that
 [20] would be something that you would find important to know
 in
 [21] determining whether a bill was reasonable?
 [22] A Certainly.

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[1] Q Would you need to know anything about how the
 [2] case was being staffed from a support point of view?
 [3] A You mean clericals or paralegals?
 [4] Q Secretaries, paralegals, clerks.
 [5] A Possibly, depending upon the case. If it were a
 [6] case involving a large number of documents which were
 [7] external to the company, then I would want to have some
 [8] feel for who would be involved in handling those
 documents
 [9] and how they would be handled. Typically, aside from a
 [10] secretary and possibly a few paralegals, if a case does not
 [11] involve a large number of documents external to the
 [12] company, we usually try to keep the outside support staff
 [13] as small as possible. Those are things that we do more
 [14] efficiently inside Monsanto.
 [15] Q In assessing the reasonableness of legal fees,
 [16] would it be important for you to know the rates that are
 [17] charged by the various lawyers and support staff who had
 [18] been working on the case?
 [19] A Certainly. That would go into the location of
 [20] the case, where it's brought. The general costs for legal
 [21] services within that particular community is something
 that
 [22] goes into the calculus.

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[1] Q In determining whether legal bills or legal costs
 [2] are reasonable, is it important for you to have familiarity
 [3] with how long certain projects in a litigation should take
 [4] a lawyer?
 [5] A I'm not quite sure what you mean. Is your
 [6] question - well, let me just say I don't really understand
 [7] what your question is.
 [8] Q In determining whether a particular charge was
 [9] reasonable, would it be important for you to know the
 [10] degree of work that customarily goes into a particular
 [11] project or item of work?
 [12] A In other words, whether it's a simple project
 [13] that should take a short period of time, a complicated
 [14] project that's going to take longer, involve a more senior
 [15] person as opposed to a more junior person, those sorts of
 [16] things?

(17) *Q Right.*
 (18) *A That goes into the review of the reasonableness*
 (19) *of a charge, yes.*
 (20) *Q That is something that would be important for*
 (21) *you?*
 (22) *A In a given case, yes.*

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(1) *Q Would it be important for you to know information*
 (2) *concerning the types of experts that are needed for a*
 (3) *particular litigation?*
 (4) *A I think that would go to the issues in the case,*
 (5) *yes.*
 (6) *Q What about the rates for experts? Is that*
 (7) *something that you would normally consider?*
 (8) *A It depends upon the type of injuries alleged,*
 (9) *where the case is pending and who the experts are likely to*
 (10) *be or will be on the other side.*
 (11) *Q What, if anything, do you need to know about the*
 (12) *costs of duplication services, either in the firm itself or*
 (13) *outside duplication?*
 (14) *A It's our general policy that the Xerox machine*
 (15) *isn't a profit center for a law firm. We pay reasonable*
 (16) *costs for copying of documents. If it's more efficient to*
 (17) *be done in an outside copy service, then that's what we*
 (18) *anticipate.*
 (19) *Q Do you have a view as to what a reasonable cost*
 (20) *is for copying services that are done by a firm?*
 (21) *A I'd have to ask my paralegal. She's very good at*
 (22) *that.*

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(1) *Q But you don't have a view on that at this time?*
 (2) *A It depends upon where, what kind of service we're*
 (3) *talking about. If we're talking about copying, for*
 (4) *example, a large number of documents in which the*
 (5) *documents*
 (6) *are turned over to an outside vendor for copying, I think*
 (7) *that the going rate, depending on locale, is anywhere from*
 (8) *7 to 11 cents a page, something in that range. If we're*
 (9) *talking about in-house copying, if a lawyer is preparing*
 (10) *for a deposition and wants to copy a small group of*
 (11) *documents in preparation for a deposition, charges for*
 (12) *in-house Xeroxing vary from 10 to 20 cents a page in my*
 (13) *experience, depending upon the firm and locale.*
 (14) *Q Do you consider anything in that range to be*
 (15) *reasonable?*
 (16) *A Depending upon the locale, yes.*
 (17) *Q What about in Houston?*
 (18) *A I think Houston is on the higher rather than the*
 (19) *lower end of the cost spectrum for legal services around*
 (20) *the country.*
 (21) *Q Do you consider it to be an unreasonable cost*
 (22) *whenever a firm's copy machine is being operated at a*
 (23) *profit?*

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(1) *A That's certainly not what I anticipate from*
 (2) *outside counsel.*
 (3) *Q Would you consider that to be an unreasonable*
 (4) *cost?*
 (5) *A If I were aware that it were being done, I would*
 (6) *seek to have that changed. That would not strike me as a*
 (7) *cost that I would consider to be one that we would pay.*
 (8) *Q Would you consider that cost to be unreasonable?*
 (9) *A It is not one that I would pay. I would pay for*
 (10) *the cost of copying and not for a profit on the copying.*
 (11) *Q Is that because you would consider any profit*
 (12) *component to be an unreasonable cost?*

(13) *A No. It's because our policy is that we don't pay*
 (14) *lawyers for - we don't consider that Xerox machine to be a*
 (15) *profit center for the law firm. That's not something we*
 (16) *pay for. That's our policy.*
 (17) *Q So that policy does not go to the reasonableness*
 (18) *or unreasonableness of the copy cost? It's simply a matter*
 (19) *of Monsanto policy?*
 (20) *A That's the manner in which I would approach it.*
 (21) *Q Is it important to take into consideration*
 (22) *expenditures for hotels, car rentals, air travel in*

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(1) *determining whether legal costs are reasonable or*
 (2) *necessary?*
 (3) *A We have guidelines. I think we went into this at*
 (4) *one of my prior deposition sessions, about the fact that we*
 (5) *have guidelines on what we consider to be reasonable.*
 (6) *And*
 (7) *again, it depends upon the locale.*
 (8) *Q I'm not asking you to state Monsanto's corporate*
 (9) *policy. I'm asking what you believe to be reasonable or*
 (10) *unreasonable and what is important to consider as an*
 (11) *expert. So apart from what Monsanto's corporate practices*
 (12) *are, would it be important for you in assessing the*
 (13) *reasonableness and necessity of costs to consider things*
 (14) *such as air travel, car rentals, hotels, those sorts of*
 (15) *expenditures?*
 (16) *A Let me make sure I understand what your question*
 (17) *is. If your question is, is the level of those costs*
 (18) *something that I would consider important to look at in a*
 (19) *case, yes, and that would depend upon the kind of case*
 (20) *that's involved. If it's a case in which experts are*
 (21) *located around the country, witnesses are located around*
 (22) *the country, then travel is necessary in the defense of the*
 (23) *case. But if everybody is located in one place and there's*

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(1) *a lot of air travel going on, then that's something that*
 (2) *any in-house lawyer would look at and say what's going on*
 (3) *here? What's being done?*
 (4) *Q Those are issues that are important to consider*
 (5) *in determining whether costs are reasonable or not?*
 (6) *A I think they are issues that everyone would*
 (7) *address. You say "important." I mean, on a rank order of*
 (8) *things, I think it's more towards the bottom of the list*
 (9) *than toward the top, but it would certainly be something*
 (10) *that would be looked at.*
 (11) *Q When you are looking at whether legal costs are*
 (12) *reasonable or necessary, is it important for you to review*
 (13) *all the invoices that are presented for a particular*
 (14) *matter?*
 (15) *A Do you mean outside counsel's statements?*
 (16) *Q Yes.*
 (17) *A That is important for me to look at, yes.*
 (18) *Q What about bills that are submitted by other*
 (19) *vendors?*
 (20) *A It would depend on what type of service was being*
 (21) *provided and the size of the expenditure involved.*
 (22) *Q What types of services and what size of*

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(1) *expenditures do you consider it important to review in*
 (2) *order to determine whether costs are reasonable or*
 (3) *necessary?*
 (4) *A In general, I view it as necessary for an inside*
 (5) *attorney to participate in the selection of expert*
 (6) *witnesses and the determination of whether the fees*
 (7) *charged*
 (8) *by an expert witness and the amount of time spent by an*

(8) expert witness working on a case are appropriate and
 (9) necessary to the case. Certain types of support services,
 (10) a decision whether, for example, a computerized
 document

(11) support system is necessary and reasonable, and if it is,
 (12) what vendor will provide that support or will it be done
 (13) in-house by the law firm or by the client.

(14) *Q Any other vendors that -*

(15) - A If we're talking about a case involving a large
 (16) amount of documentation external to the company,
 perhaps a

(17) copying service, the pricing of copies, who's going to do
 (18) it, what the per-page charge is, are we sure we're getting
 (19) the best deal we can get. Those are the things I would
 (20) want to inform myself about.

(21) *Q Any others?*

(22) A Well, aside from testifying experts, I would also

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(1) put in the category consultants. That would be people
 whom

(2) we would not expect to testify but who for one reason or
 (3) another might be important for us to have working with us
 (4) on a case, jury consultants or scientific advisors, those
 (5) sorts of people. It may be necessary in some cases. It
 (6) may not be in others.

(7) *Q Any other vendors?*

(8) A It depends upon where the case is. Do we need an
 (9) external war room? Is the trial remote from counsel's
 (10) office? Do we need a satellite office? If we need a
 (11) satellite office, what sort of equipment needs to be there,
 (12) what sort of personnel needs to be there?

(13) *Q Those are things that you would inform yourself
 (14) of to determine whether the costs are reasonable?*

(15) A To determine whether they're necessary, and if
 (16) necessary, whether the costs are reasonable.

(17) *Q To determine whether costs are reasonable or
 (18) necessary, is it important that there be sufficient
 (19) documentation of expenditures on invoices?*

(20) A Certainly on outside counsel bills. On expert
 (21) witness bills, some level of detail, depending upon the
 (22) individual involved, our prior experience with that

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(1) individual, the issues involved, a greater or lesser degree
 (2) of detail may be required. Again, it would depend upon
 the

(3) service being provided and the level of expenditure
 (4) involved, how much detail would be required to support
 and
 (5) justify the expenditure.

(6) *Q What kind of documentation on outside counsel
 (7) bills do you consider to be sufficient for you to determine
 (8) the reasonableness and necessity of the cost?*

(9) A What costs, Mr. Leimkuhler?

(10) *Q The costs incurred by - the fees generated by
 (11) outside counsel.*

(12) A We're talking now about fees and not
 (13) disbursements or costs of that nature?

(14) *Q Right.*

(15) A I think it is necessary to have a description by
 (16) day of the activities engaged in by the legal professional
 (17) who is working on the case and the number of hours
 devoted

(18) to those activities. The description has to be in
 (19) sufficient detail to determine from the context of the bill
 (20) what activity is being engaged in so I can assess whether
 (21) the amount of time devoted by the individual involved is

(22) justified.

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(1) *Q What do you mean to say "in the context of the
 (2) bill"?*

(3) A It's possible to pluck - if we're talking about
 (4) a stack of bills, it's possible to pluck an entry out of
 (5) the bill and say this doesn't tell me what this lawyer or
 (6) this paralegal was doing. If I review the bill, it becomes
 (7) perfectly obvious what the lawyer or paralegal was doing
 in

(8) the context of the bill. That's what I meant in that
 (9) regard.

(10) *Q Would a good yardstick be that if you could
 (11) determine for yourself what the lawyer or paralegal was
 (12) doing in the context of the bill, then the information
 (13) given is sufficient, but if you can't determine what the
 (14) lawyer or paralegal was doing, then it's insufficient?*

(15) A That's a good rule of thumb. Certainly, if I
 (16) have a doubt when I review a bill as to what a lawyer was
 (17) involved in or a paralegal was involved in for the time
 (18) billed, it's my practice to make an inquiry of counsel to
 (19) find out what was going on.

(20) *Q Are there any other factors other than the ones
 (21) that we've discussed that you would need to know in order
 (22) to determine whether legal costs were reasonable and*

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(1) necessary?

(2) A None that I can think of as I sit here.

(3) *Q Once you have all that information, what do you
 (4) do with it to determine whether bills are reasonable or
 (5) necessary?*

(6) A Well, it all goes into the manner in which I
 (7) approach the handling of the case. Assessing the
 (8) reasonableness and appropriateness of costs is one part
 of

(9) that, but in the evaluation of strategy and tactics and
 (10) determining what needs to be done to defend a case and in
 (11) reviewing counsel's bills to determine whether what we
 have

(12) done and planned for has been done appropriately, all of
 (13) those factors are brought to bear in assessing the costs
 (14) incurred.

(15) *Q Do you believe that litigation budgets play an
 (16) important role in ensuring that the costs that are incurred
 (17) for a particular litigation are reasonable and necessary?*

(18) A I don't have a lot of faith in litigation
 (19) budgets, particularly for large, hotly contested cases.

(20) *Q Why not?*

(21) A A couple reasons. First of all, litigation is
 (22) inherently unpredictable. A case can gain a momentum of

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(1) its own that can be quite unanticipated at the outset. All
 (2) of what happens in a case is simply not within the control
 (3) of either side because the judge may have his or her own
 (4) ideas about what should happen and when. That can have

a
 (5) dramatic impact on the level of costs incurred in the case
 (6) and can be simply outside the ability to predict through a
 (7) budgetary mechanism.

(8) I think it's much more important in assessing the
 (9) reasonableness and necessity of costs for the person
 making

(10) that determination to be familiar with what's going on in
 (11) the case, to take an active role in managing the case and
 (12) making the decisions that need to be made.

(13) *Q Are litigation budgets unnecessary to the*

[14] effective control of costs to ensure that they're
 [15] reasonable and necessary?
 [16] A It depends upon what your definition of "budget"
 [17] is. An overall estimate of the level of expenses that's
 [18] likely to be incurred, I think, is useful in determining
 [19] whether what's happening is reasonable and necessary.
 [20] It's
 [21] certainly useful in communicating with management and
 [22] getting them to understand what's happening. But I don't
 think it is necessary to sit down and prepare a lengthy,

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[1] detailed budget for each case.
 [2] Q How much detail in a budget is necessary?
 [3] A Well, in most cases, in my experience, very
 [4] little detail is necessary in a budget. In fact, in some
 [5] cases, I don't even ask for a budget because I can
 [6] anticipate from my own experience approximately how
 much is
 [7] going to be involved in defending a case.
 [8] Q Are the Brio private action cases the type in
 [9] which some sort of budgetary mechanism is necessary to
 [10] control costs?
 [11] A Only in a sense that we asked for and received,
 [12] from time to time, an estimate of what counsel anticipated
 [13] defense costs to be in sort of a ballpark range just so we
 [14] could assure ourselves that we were thinking along the
 same
 [15] lines as counsel.
 [16] MR. LEIMKUHLER: Could you read back that last
 [17] answer, please.
 [18] (The reporter read the record as requested.)
 [19] BY MR. LEIMKUHLER:
 [20] Q Did you receive those in writing?
 [21] A Yes.
 [22] Q In your view, did you require anything more than

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[1] that?
 [2] A In the form of a budget, Mr. Leimkuhler?
 [3] Q Yes.
 [4] A No, I did not believe that I required more than
 [5] that.
 [6] Q Why did you believe that that level of
 [7] informality was sufficient?
 [8] A Because a great part of my working day, every
 [9] day, was involved in attending to these cases, speaking
 [10] with counsel, reviewing materials, discussing strategy and
 [11] reviewing submissions that were to be made before
 [12] discussing how depositions were to be approached, so I
 knew
 [13] what was going on and I had assured myself that it was
 [14] necessary to undertake the actions that were taken, that
 [15] people who were doing it were appropriately involved, and
 [16] from my review of counsel's statements, the amount of
 time
 [17] being spent was appropriate.
 [18] Q We were talking a moment ago about legal bills.
 [19] You indicated that you wanted to see the specific day in
 [20] which a service was provided, the number of hours and some
 [21] description of the services. What else, other than those
 [22] three items, would you want to see in a legal bill in order

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[1] to determine the reasonableness and necessity of the
 [2] charges?
 [3] A Are we talking just about the fees portion?
 [4] Q Just about the fees portion.
 [5] A Well, an identification of the person who is

[6] providing the service, obviously.
 [7] Q Anything else?
 [8] A No. I think that's generally what is required.
 [9] Q Hourly rate? I would assume you would want
 [10] that.
 [11] A That would appear somewhere on the bill. It
 [12] isn't necessary in each case description. That's
 something
 [13] we have an understanding with, typically with counsel.
 [14] Q With regard to disbursements, what's important to
 [15] have on a bill from outside counsel?
 [16] A You want to talk about what type of disbursement,
 [17] because it depends upon the type of disbursement.
 [18] Q Okay.
 [19] A If we're talking about travel, again, depending
 [20] upon the amount of travel involved, I may require from
 [21] counsel an itemization of expenses incurred on each trip,
 [22] airfare, hotel, meal, car rental, if that's involved,

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[1] incidental expenses.
 [2] Q At what level of expenditure would you want to
 [3] see those itemized expenses?
 [4] A I don't have something that's written in stone on
 [5] that. It depends on -- if there's going to be a lot of
 [6] travel involved in the case, then that's what I want to
 [7] see. If there's only incidental travel, I can typically
 [8] judge the appropriateness of those expenses simply by
 [9] seeing an entry for travel expenses.
 [10] Q In what category do the Brio private actions
 [11] fall?
 [12] A Somewhere in the middle. There wasn't a
 [13] horrendous amount of travel involved except during the
 time
 [14] period when we were looking for expert witnesses, and I
 was
 [15] either directly or indirectly involved in most of that. So
 [16] I had a good handle on what the travel expenses were
 likely
 [17] to be. I don't recall that I required an itemized
 [18] breakdown. There are cases that I have required that.
 [19] Q But you did not in the Brio case?
 [20] A My recollection is that I did not. I may have
 [21] questioned the specific item from time to time, but I
 [22] didn't require a detailed breakdown of all travel-related

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[1] expenses.
 [2] Q In what other circumstances do you require, and
 [3] for what other types of disbursements do you require
 [4] itemization on the outside counsel bill?
 [5] A Well, we asked for a breakdown of copying costs
 [6] by vendor in the Brio cases because of the large volume of
 [7] records that was necessary for us to accumulate for the
 [8] individual plaintiffs. That's the only case that I can
 [9] recall having had that. Typically, I also like to see
 [10] court reporter bills because sometimes they can get out of
 [11] hand, no offense intended.
 [12] MR. TRACEY: None taken, I'm sure.
 [13] THE WITNESS: Just wait until I see this
 [14] transcript.
 [15] MR. LEIMKUHLER: That's the tie-breaker.
 [16] THE WITNESS: Again, if there's a lot of
 [17] deposition activity, and the court reporting expenses are
 [18] large, I'll want to have some way of assessing that there's
 [19] control on those costs.
 [20] BY MR. LEIMKUHLER:
 [21] Q Have you done that with regard to the Brio

[22] actions?

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[1] A We had a mechanism set up for that.

[2] Q In what way were the disbursements broken out?

[3] A We had set up for the Brio cases what we called a
[4] revolving account. We established an account for the use
[5] of Woodard, Hall & Primm to pay for expenses such as

court
[6] reporters or document reproduction. Those expenses

were

[7] paid from that account in the first instance on the
[8] authority of Woodard, Hall & Primm. But the invoices for
[9] all of those expenses were required to be submitted to me
[10] in St. Louis for my review and approval on an individual
[11] invoice basis. And the account, then, was reimbursed for
[12] the expenses that I approved.

[13] Q Did those invoices include lawyer travel?

[14] A Typically not, no.

[15] Q What about lawyer meals and lawyer car rentals?

[16] A No. Those were not reimbursed for that.

[17] Q Or lawyer hotel stays?

[18] A No.

[19] Q On the bill, how were the copying disbursements
[20] broken out?

[21] A On what bill?

[22] Q You referred to a breakout of copying

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[1] disbursements on outside counsel bills.

[2] A What I was just talking about, that revolving

[3] account was not tracked through Woodard, Hall &
Primm's

[4] monthly statements. That was a separate line item for
[5] internal copying that was done at the firm that would
[6] appear on their bills. I believe it was carried under
[7] "duplicating."

[8] Q Is there any objective yardstick that can be
[9] applied in determining the reasonableness or necessity of
[10] legal costs, or is it something that is subjective, on a
[11] case-by-case basis only?

[12] A That's very difficult to answer that question in
[13] the abstract. The reasonableness and necessity of outside
[14] counsel bills is largely a matter of judgment by people

who
[15] participate in the area, who defend these kinds of cases
[16] and who understand what the cases involve. Objective
[17] guidelines, I think, can be useful in a general sort of
[18] way, but I think it's as much judgment as anything else
[19] that's involved.

[20] Q This is more or less a subjective approach on a
[21] case-by-case basis?

[22] A No, I didn't say that. Much of what goes on in a

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[1] case to determine whether it's reasonable and necessary is
[2] pretty general from case to case with few exceptions,
[3] unless you get just the very unusual kind of a case. And
[4] general guidelines, I think, are very useful and
[5] appropriate in those circumstances. If you're in a
[6] bet-your-company case, I think things may be a little
[7] different.

[8] Q Are any of the Brio private actions one that you
[9] consider to be a bet-the-company case?

[10] A Not individually, no.

[11] Q In the aggregate?

[12] A Even in the aggregate, while they were very
[13] serious cases, they were not bet-your-company cases.

[14] MR. KRAMER: Off the record.

[15] (Discussion off the record.)

[16] BY MR. LEIMKUHLER:

[17] Q Is it your view that it would be extremely

[18] difficult for someone coming in after the fact and looking
[19] at the expenses in a particular case to second-guess the
[20] judgment of the lawyers involved as to whether costs were
[21] reasonable or necessary?

[22] A It depends on who that individual would be. If

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[1] the individual were knowledgeable about this kind of
[2] litigation, I think that person might be able to arrive at
[3] a judgement, for the most part, from the records
available,

[4] although I think a discussion with the individuals
involved

[5] would be very helpful. I think an individual without the
[6] background in this kind of litigation would be
hard-pressed

[7] to make a reasonable judgment.

[8] MR. LEIMKUHLER: Let's break for lunch.

[9] (Whereupon, at 12:40 p.m., the deposition was

[10] recessed, to be reconvened at 1:40 p.m. this same day.)

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[1] AFTERNOON SESSION (1:53 p.m.)

[2] Whereupon,

[3] THOMAS M. BISTLINE

[4] resumed the stand and, having been previously duly sworn,
[5] was examined and testified further as follows:

[6] EXAMINATION (Continued)

[7] BY MR. LEIMKUHLER:

[8] Q Mr. Bistline, other than the factors that we

[9] discussed this morning, over the lunch break, did any other
[10] factors come to mind as things that you would deem

[11] important to know in order to assess whether defense costs
[12] are reasonable or necessary in a particular case?

[13] A No, sir, not in any general sense.

[14] Q Do you have a general methodology that you apply
[15] in order to determine whether an amount paid, or proposed
[16] to be paid, in settlement is a reasonable amount?

[17] A In general, yes.

[18] Q Could you describe the methodology for me.

[19] A In general, my approach to settlement is, again,

[20] to have in mind what kind of case is involved, whether it

[21] what I call a stand-alone case, one that is not likely to
[22] recur, one that does not involve issues that are going to

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[1] affect other cases that are pending against the company,
[2] keeping in mind where the case is, keeping in mind the
[3] nature of the allegations that are being made, and keeping
[4] in mind the level of expense that would be involved in
[5] defending the case.

[6] I would assess the likelihood of success on the
[7] merits and any adverse impact that would be associated with

[8] a jury verdict against the company and arrive at what I
[9] would believe to be an amount of money for which I would
[10] recommend at settlement, recognizing also that the ultimate

[11] decision on the settlement isn't mine. It's one that I
[12] recommend usually to my management.

[13] Q Why is the final say not yours in the context of
[14] your work at Monsanto?

[15] A Typically, it's because the nature of the matters
[16] I work on is such that the amounts of money involved tend
[17] to be significant, and decisions involving that level of
[18] expenditure at least have to be reviewed with and

approved

(19) by others above me in the company.
 (20) *Q Are those above you in the company in a better*
 (21) *position to assess whether a particular settlement is*
 (22) *reasonable?*

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(1) MR. TRACEY: I'll object to the extent it's
 (2) calling for speculation.

(3) THE WITNESS: I don't believe it's as much that
 (4) as it is just the nature of the manner in which companies
 (5) function. Matters which involve the expenditure of certain
 (6) sums of money require the approval or at least the
 (7) acquiescence of those in senior management. It's my job as
 (8) an attorney in charge of particular cases to make the case
 (9) for the reasonableness of the settlement that I believe
 (10) should be made, if that's the case, or to explain to my
 (11) superiors why I believe a proposed settlement is not
 (12) reasonable and should not be entertained.

(13) BY MR. LEIMKUHLER:

(14) *Q Tell me how the question of whether a case is*
 (15) *stand-alone in nature versus a case that may have an effect*
 (16) *on other matters, how that impacts your view of the*
 (17) *reasonableness or unreasonableness of a settlement amount.*

(18) A Certainly. In litigation in which we are likely
 (19) to see cases of similar nature brought again, likely by the
 (20) same plaintiff's lawyer or a lawyer associated with him or
 (21) her, settling cases for large amounts of money tends to
 (22) breed more cases, in my view. It encourages others to

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(1) believe that they can make money by bringing cases which
 (2) may lack merit.

(3) I believe it's important for a company which is
 (4) faced with, if not the actuality, then at least the
 (5) possibility of having a lot of cases brought on the same
 (6) subject - the same product, for example - to vigorously
 (7) defend its position, presume that that can be done rather
 (8) than to agree to settlements which reward people for
 (9) lawsuits that lack merit.

(10) On the other hand, if we have a case that we
 (11) recently had involving the business that we were no longer
 (12) involved in in which the costs for defense were large and
 (13) the settlement amount was relatively moderate, I
 (14) recommended and my management agreed that it was
 (15) appropriate to settle that case.

(16) *Q What effect does the locale of the case have on*
 (17) *the issue of whether a particular settlement amount is*
 (18) *reasonable?*

(19) A Cases are more expensive in different parts of
 (20) the country. That's just the way it is. It's more
 (21) expensive to settle a case in a large metropolitan area
 (22) than it is in a rural area. It's more expensive to settle

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(1) a case in a jurisdiction which historically awards larger
 (2) verdicts than in a more moderate jury award area, so the
 (3) expectations of people who bring lawsuits are different in
 (4) some parts of the country than they are in others.
 (5) Certainly, the expectations of plaintiff's counsel are
 (6) different in some parts of the country than they are in
 (7) others.

(8) *Q What is it about the nature of the allegations*
 (9) *that must be considered to determine whether a particular*
 (10) *settlement amount is reasonable?*

(11) A Again, that it is related, Mr. Leimkuhler,
 (12) somewhat to the type of case that I mentioned earlier. If
 (13) there is an allegation that exposure to a particular
 (14) Monsanto product causes a specific disease, and we are

(15) likely to see that claim again, then it may be more
 (16) important to defend that case and obtain a jury verdict in
 (17) our favor than it would be if it were a different kind of
 (18) claim that the product caused a different condition or
 (19) breached a warranty, some other type of allegation that
 we
 (20) were either less likely to see again or which was going to
 (21) be less likely to come to the notice of people who would
 (22) bring additional lawsuits.

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(1) *Q Anything else about the nature of allegations*
 (2) *that must be considered?*

(3) A Also, I think in some circumstances - it's
 (4) important for a company to defend itself against
 (5) allegations of improper conduct which lack substance and
 (6) which need to be demonstrated to lack substance by a
 (7) vigorous defense, if not a jury verdict in a defense favor.

(8) *Q Anything else?*

(9) A That's all I can think of on that topic at the
 (10) moment.

(11) *Q What about the level of expense necessary to*
 (12) *defend the case? What impact does that have on the*
 (13) *settlement calculus?*

(14) A Well, a case that is going to be very expensive
 (15) to defend as opposed, say, perhaps to the amount of verdict

(16) potential, that is going to have an impact on what a
 (17) reasonable settlement amount would be, as opposed to a
 case

(18) that was going to be relatively easy and inexpensive to
 (19) defend.

(20) *Q Are you done?*

(21) A Yes, I am. I'm sorry.

(22) *Q Tell me what the assessment of the likelihood of*

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(1) *the success on the merits, what effect that has on the*
 (2) *settlement calculus.*

(3) A I think that's rather straightforward. If you've
 (4) got a good case and you think the chances are you're going
 (5) to win, the settlement value of the case is lower than if
 (6) you've got a problem in the case, and it's more probable or
 (7) more likely that a jury is going to return a verdict
 (8) against you. Those things have a pretty obvious impact on
 (9) the settlement value of the case.

(10) *Q The last item that you mentioned was the impact*
 (11) *of a possible jury verdict. Tell me what impact that has*
 (12) *on the settlement calculus.*

(13) A That, again, relates somewhat to earlier things
 (14) we've discussed, the likelihood of additional litigation,
 (15) the likelihood that there would be an encouragement of a
 (16) particular plaintiff's lawyer or group of plaintiffs'
 (17) lawyers to believe that there's more money to be made in
 (18) bringing this kind of case, or that for some reason the
 (19) company is reluctant to defend the type of allegation
 (20) that's being made in a particular case.

(21) *Q Is it important for you to know - in assessing*
 (22) *whether a particular settlement amount is reasonable, is it*

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(1) *important for you to know the identity of the plaintiffs*
 (2) *and who they are, their demographics?*

(3) A It can be. Again, it goes to, I think - that is
 (4) all wound up in the likelihood of success on the merits.

(5) *Q Is it ever not important to know who the*
 (6) *plaintiffs are?*

(7) A Only in the sense that if the settlement demand
 (8) is so small that it's simply not worth the time to go

[9] obtain that information, then in my opinion it's not
 [10] important.
 [11] *Q What if it's not insubstantial?*
 [12] *A If it's not an insubstantial amount of money,*
 [13] *then I think reasonable efforts probably need to be*
 [14] *undertaken to ascertain what the type of claim is that is*
 [15] *being made.*
 [16] *Q I'm focusing on the identity of the plaintiff at*
 [17] *this point.*
 [18] *A I don't think you can separate that from the type*
 [19] *of claim that's being made. I think that's all one piece.*
 [20] *Q Is it important to distinguish whether the*
 [21] *plaintiffs are, say, adults as opposed to being children?*
 [22] *A That, again, goes to the nature of the claim and*

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[1] *the seriousness of the claim, the likelihood of success.*
 [2] *Q Would that be a factor that you'd want to know?*
 [3] *A That is a factor, yes. I'm sorry, I keep talking*
 [4] *over you and I shouldn't. I apologize.*
 [5] *Q That's all right. What proposed settlement*
 [6] *amount would you consider to be substantial, one that would*
 [7] *require you to know who the plaintiffs are?*
 [8] *A That really depends on the case. I can't give*
 [9] *you just a dollar amount in the abstract that that would*
 [10] *correspond to.*
 [11] *Q In determining whether a particular settlement*
 [12] *amount is reasonable, would it be important for you to have*
 [13] *an assessment of the jury pool from which the jury would*
 [14] *likely be selected?*
 [15] *A I'm not sure what you mean by the "assessment of*
 [16] *the jury pool."*
 [17] *Q Is it important for you to know the demographics*
 [18] *of the locale from which the jury will be selected if the*
 [19] *case were to go to trial?*
 [20] *A It could very well be, yes.*
 [21] *Q Is there ever a circumstance when it's not*
 [22] *important, other than the case is so insubstantial that*

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[1] *it's not going through the analysis?*
 [2] *A Or a case in which either the chance of success*
 [3] *on the merits are so high or so low, that a trial is*
 [4] *something which is to be avoided at all costs or is*
 [5] *something that is believed to be required because there is*
 [6] *no reasonable amount of money to settle the case.*
 [7] *Q Other than those circumstances, is it important*
 [8] *for you to understand the demographics of your jury pool?*
 [9] *A I think that's something that goes into*
 [10] *likelihood of success on the merits. That's a part of that*
 [11] *factor, yes.*
 [12] *Q Is it important to know who the judge is and know*
 [13] *the history of the judge's decisions in other cases in*
 [14] *which similar issues will be presented?*
 [15] *A Again, except for the unusual case, are you*
 [16] *talking about the ones we've excluded from other types of*
 [17] *questions of this sort?*
 [18] *Q The ones - I'm excluding cases where the*
 [19] *likelihood of success or failure is so obvious as to*
 [20] *obviate extensive analysis or where the amounts of*
 [21] *settlement would be de minimis; excluding those types of*
 [22] *cases, the very easy cases.*

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[1] *A There may be cases where that - well, let me*
 [2] *answer it this way: The identity of the judge and the*
 [3] *judge's history of ruling and predisposition one way or the*
 [4] *other usually is a factor that weighs in here. That goes*

[5] *both to the locale where the case is brought and the*
 [6] *chances for success on the merits.*
 [7] *There are cases, though, where it's not an*
 [8] *important factor - the ones you've already identified -*
 [9] *and there are simply cases in which, for whatever reason,*
 [10] *it's important that the case be tried.*
 [11] *Q In determining whether to - withdrawn.*
 [12] *In determining whether a settlement amount is*
 [13] *reasonable, is it important for you to know the material*
 [14] *facts that have been unearthed through the discovery*
 [15] *process?*
 [16] *A Yes, that certainly is part of the necessity of*
 [17] *assessing the case on the merits.*
 [18] *Q What about the legal issues of the case? Is it*
 [19] *important for you to understand the legal issues of the*
 [20] *case to determine whether a settlement is reasonable?*
 [21] *A Again, yes, that is part of the likelihood of*
 [22] *assessing the case on the merits.*

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[1] *Q Is it important to undertake any sort of written*
 [2] *or mathematical risk analysis to determine whether a*
 [3] *settlement amount is reasonable?*
 [4] *A I don't find that helpful personally. There are*
 [5] *those who do. If any individual finds it helpful, then I*
 [6] *would say yes. But it is not particularly helpful to me.*
 [7] *Q Why is it not helpful to you?*
 [8] *A I find it more helpful to discuss matters*
 [9] *verbally than to undertake a mathematical or some sort of*
 [10] *pro forma written exercise.*
 [11] *Q Is there anyone at Monsanto who, in your view,*
 [12] *feels differently about that, that such an analysis is an*
 [13] *important exercise to undertake?*
 [14] *MR. TRACEY: I'll object to these things. You're*
 [15] *asking for the subject of interpretations of others.*
 [16] *You can attempt to answer. You can attempt to*
 [17] *answer.*
 [18] *THE WITNESS: I didn't hear what you had said.*
 [19] *MR. TRACEY: Was what I said clear?*
 [20] *THE WITNESS: I know of no one at Monsanto that*
 [21] *finds it important to engage in either a written or*
 [22] *mathematical exercise.*

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[1] *BY MR. LEIMKUHLER:*
 [2] *Q To assess the reasonableness of a settlement or*
 [3] *proposed settlement?*
 [4] *A Correct. That's not to say that they may not do*
 [5] *it, but again, to view that as something that's essential*
 [6] *to do, I don't know of anybody who believes that at*
 [7] *Monsanto.*
 [8] *Q Or something that's important to do?*
 [9] *A Correct.*
 [10] *Q Do you know of anyone else at Monsanto who, in*
 [11] *fact, undertakes a written analysis or a mathematical risk*
 [12] *analysis in assessing the reasonableness of settlements?*
 [13] *A No.*
 [14] *Q Is it important for you to assess the quality of*
 [15] *opposing counsel in determining whether a settlement is*
 [16] *reasonable?*
 [17] *A Yes, that goes to both locale and likelihood of*
 [18] *success on the merits.*
 [19] *Q What about the ability of the lawyers*
 [20] *representing your interests? Is that something which is*
 [21] *important to consider?*
 [22] *A Well, I'd like to think if I didn't have*

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[1] *confidence in my lawyers, they wouldn't be my lawyers.*

[2] *Q So the answer is -*
 [3] *A That it's almost a given. If we get to the point*
 [4] *in the case where it's a serious case and we're*
 [5] *entertaining a trial-or-settle decision, we're going to*
 [6] *have full confidence in our counsel. That is an important*
 [7] *factor. If we don't, that's an issue that will have been*
 [8] *addressed before we get to the settle-or-trial decision.*

[9] *Q Is it fair to say that in toxic tort litigation,*
 [10] *that you've been involved in, that there is the potential*
 [11] *for many different possible outcomes? Is that fair to say?*

[12] *A I'm not sure what you mean by "many different*
 [13] *possible outcomes."*

[14] *Q If a case went to trial, you could have a defense*
 [15] *verdict or you could have a plaintiff's verdict, but within*
 [16] *the realm of potential plaintiff's work first, you could*
 [17] *have an extremely high damage awards, so you could have*
 [18] *damage awards which run the gamut from zero to whatever.*
 [19] *Isn't that fair to say?*

[20] *A I believe that's accurate. Whenever you walk*
 [21] *into the courtroom, you roll the dice.*

[22] *Q Is it important to consider, in addition to what*

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[1] *would be seen as the worst case scenario, the scenario with*
 [2] *the highest potential liability to the company, to consider*
 [3] *the potential for intermediate results and the*
 [4] *possibilities that such results might obtain?*

[5] *A I think that all is covered within what I used as*
 [6] *a shorthand expression, "likelihood of success on the*
 [7] *merits."*

[8] *Q So that's something that would be important to*
 [9] *consider?*

[10] *A Right. The ultimate exposure to the company and*
 [11] *what the level of that exposure is, yes.*

[12] *Q Is it important to have an understanding of the*
 [13] *negotiation process between the parties to date to*
 [14] *determine whether a potential settlement amount is*
 [15] *reasonable?*

[16] *A I'm not quite sure what you mean by negotiation*
 [17] *history of the parties to date.*

[18] *Q In other words, to have knowledge of what's*
 [19] *transpired between the parties in their efforts to try to*
 [20] *settle the case?*

[21] *A It may be. It may not be. I think that's a*
 [22] *situational circumstance.*

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[1] *Q In general, you can't make any characterization*
 [2] *of whether or not it's important?*

[3] *A In general, I would say that it may be useful*
 [4] *information, but I don't think it's absolutely essential to*
 [5] *the evaluation of whether a particular settlement demand*

or

[6] *settlement possibility is reasonable or not. I think there*
 [7] *are more important things to know.*

[8] *Q Well, if somebody were to come to you and ask*
 [9] *whether a particular settlement amount is reasonable, would*
 [10] *you want to have detailed information concerning the*
 [11] *discussions that had taken place between the parties?*

[12] *A If there had been. That would be a piece of*
 [13] *information that, if it were available, I would ask for.*

[14] *Q And in making your assessment, you would want to*
 [15] *know that information?*

[16] *A If it were available, just as an abstract matter.*

[17] *Q Would you want to know any ad damnum that had*
 [18] *been in the complaint?*

[19] *A No. I would not consider that to be terribly*
 [20] *important information. Most jurisdictions don't require*

[21] *ad damnum clauses and those that do, in my experience,*
 the

[22] *number is one that's pulled out of the air by the*

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[1] *plaintiff's lawyer.*

[2] *Q Would you want to know the amount of previous*
 [3] *settlement demands and previous counteroffers?*

[4] *A That could be important.*

[5] *Q Is it something that you would consider important*
 [6] *if you were asked to assess the reasonableness of a*
 [7] *settlement amount?*

[8] *A It would depend upon the situation,*

[9] *Mr. Leimkuhler.*

[10] *Q In what circumstances would it be important and*
 [11] *would it not be important?*

[12] *A It would depend upon the level of the settlement*
 [13] *situation that was proposed, the number of Plaintiffs*
 [14] *involved, the kinds of allegations that were made. I mean,*
 [15] *I'm having a hard time distinguishing this from the*
 [16] *question you previously asked about the history of*
 [17] *settlement negotiations between the parties. It may be an*
 [18] *important piece of information. It may not be. It depends*
 [19] *upon the situation.*

[20] *Q Like the previous, it's something you would want*
 [21] *to know. If you were being asked to pass on the*

[22] *reasonableness of the settlement, it would be something you*

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[1] *would want to know, in general?*

[2] *A In the abstract, probably, yes.*

[3] *Q So that's something that would be important to*
 [4] *know?*

[5] *A If I haven't mentioned it already, counsel's*
 [6] *assessment is a very important piece of information.*

[7] *Q What about the results of mock jury studies?*

[8] *A That could be important, again going to what I*
 [9] *think of in shorthand terms as an assessment of the*
 [10] *likelihood of success on the merits. Not all cases warrant*
 [11] *a jury exercise.*

[12] *Q What cases do?*

[13] *A I think those in which the cost of defense or the*
 [14] *company's exposure to damages is substantial. They're*
 not
 [15] *inexpensive to conduct and I think not always that*
 [16] *helpful. They frequently are, but they're not always that*
 [17] *helpful.*

[18] *Q Anything else that you can think of?*

[19] *A Not offhand.*

[20] *Q Let's assume you're in a situation where you're*
 [21] *asked to assess the reasonableness of a settlement amount,*
 [22] *and you're given all that information that we've*

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[1] *discussed. What do you do with that information?*

[2] *A I would most likely think about it. Obviously*
 [3] *discuss it with my boss, perhaps general counsel, outside*
 [4] *counsel. Depending upon the issues involved, there may*
 be

[5] *a technical or scientific expert that it would be important*
 [6] *to speak to. It may not be, but it would be just, in my*
 [7] *view, more a matter of weighing the various elements and*
 [8] *trying to discern what makes the most sense, what is in*
 the

[9] *company's best interest in a given situation.*

[10] *Q Would you create any written material as part of*
 [11] *your evaluation?*

[12] *A I may make - if this were a case that I were not*
 [13] *familiar with, not having been involved in the day-to-day*

[14] management of the case, I may take notes of the various
[15] discussions that I had with people whom I talked to about
[16] the case. There may be a report. If I were unable to
[17] speak directly with my boss or the general counsel, it may
[18] be necessary for me to create a written memorandum, but
[19] that would be situational. It wouldn't be something I
[20] would do as a matter of course.

[21] *Q Would it be important for you to make a writing*
[22] *of some sort to enable you to handle the various*

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[1] *information components, or is it something that can be*
[2] *completely done in your head?*

[3] *A It depends upon the case. If it's a small case,*
[4] *it could all be done in my head, especially if it were one*
[5] *that I had been responsible for handling. If it was a*
[6] *larger case that I had not been involved in, as I said*
[7] *before, I'd probably have some notes.*

[8] *Q What if it's a large case that you had had*
[9] *involvement in?*

[10] *A There would probably be a lot of written material*
[11] *that was available to me that I wouldn't have to create at*
[12] *the time settlement was being evaluated.*

[13] *Q So as part of evaluating the settlement or*
[14] *proposed settlement, you wouldn't need to create any*
[15] *additional paper?*

[16] *A It may well be that I would not.*

[17] *Q It's something that you would be able to work*
[18] *through in your head?*

[19] *A It may well be, yes.*

[20] *Q Would that be true for cases the size of the*
[21] *various Brio actions?*

[22] *A For many of them, yes.*

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[1] *Q Which ones?*

[2] *A The Aguilar case, the Hardage case. I don't*
[3] *believe there was any particular need to create extensive,*
[4] *additional written records. We did have quite a bit of*
[5] *written evaluation of various sorts for the Acosta cases,*
[6] *the results of the jury, the exploration - excuse me, the*
[7] *results of the jury simulation and other things of that*
[8] *nature that we looked at in evaluating that case.*

[9] *Q Did you create any written reports in connection*
[10] *with the Acosta settlement?*

[11] *A I don't know what you mean by "written reports."*
[12] *I took notes of various discussions. I may have written*
[13] *memoranda either to my boss or to Mr. Duesenberg or*
[14] *Mr. Dolan about conversations. Again, it depends on*
[15] *what*

[16] *you mean by a "report." There was a fair amount of*
[17] *written*

[18] *material related to settlement.*

[19] *Q Did you use those notes to form a view as to*
[20] *whether the Acosta settlement was reasonable?*

[21] *A I used those notes to provide me with information*
[22] *that I considered in evaluating the various settlement*
[23] *proposals that were made.*

[24] *Q What about the final settlement amount? Did you*

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[1] *have notes that you used to evaluate the reasonableness of*
[2] *the final settlement amount in Acosta?*

[3] *A Nothing that I created specifically for that*
[4] *purpose, no.*

[5] *Q Anything that had been previously created to*
[6] *review the reasonableness of the Acosta settlement?*

[7] *A Nothing specifically.*

[8] *Q Generally.*

[9] *A I think I've referred to some of the things that*
[10] *had been done. We had the jury simulation. We had -*
[11] *and*

[12] *I think all of this is set out in the 30(b)(6)*
[13] *deposition - we had settlement brochures from plaintiff's*
[14] *counsel that we looked at. We had Price Waterhouse*
[15] *working*

[16] *with us, both to evaluate the proposed - the settlements*
[17] *that Farm & Home, Crum & Forster had entered into with*
[18] *certain of the Acosta Plaintiffs. I had notes of various*
[19] *conversations that I had with people who had spoken with*
[20] *Mr. Jamail who was acting as lead counsel for the*
[21] *plaintiffs and others plaintiffs' lawyers. I believe I had*
[22] *notes of conversations I had with our outside counsel in*
[23] *discussing matters with them.*

[24] *Q Anything else?*

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[1] *A I may have had some notes that I had from*
[2] *discussions with Mr. Berendt and Mr. Duesenberg and*
[3] *Mr. Dolan, but I haven't mentioned that.*

[4] *Q Anything else that you reviewed?*

[5] *A Not that I can recall at the moment.*

[6] *Q I want to go back to some of your experience*
[7] *before you came to Monsanto. You attended Columbia for*
[8] *college; is that right?*

[9] *A That's correct.*

[10] *Q Were there any courses that you took there which*
[11] *bear on your expertise in the area of management of toxic*
[12] *tort litigation and, in particular, the issues concerning*
[13] *reasonableness of defense costs or the reasonableness of*
[14] *settlements?*

[15] *A I took a basic business accounting course that*
[16] *helped me understand just some very fundamental*
[17] *business*

[18] *concepts that you'd think is just part of my educational*
[19] *background.*

[20] *Q Nothing specifically directed toward your area of*
[21] *expertise?*

[22] *A No, other than gaining what I thought was a good*
[23] *preparatory education for law school.*

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[1] *Q Before you went to law school, you worked at*
[2] *Metropolitan Life; is that correct?*

[3] *A Correct.*

[4] *Q Is there anything that you did at Met Life that*
[5] *provided you with training or experience that specifically*
[6] *relates to the area of expertise that you say you have in*
[7] *the area of managing toxic tort cases?*

[8] *A Other than simply giving me some experience in*
[9] *the business world that I otherwise would not have had,*
[10] *nothing specific, no.*

[11] *Q I take it there was nothing involved at your job*
[12] *at the delicatessen in Fort Lee that relates specifically*
[13] *to this area of expertise?*

[14] *A That's correct, only the general emotional*
[15] *motivation necessary to continue law school.*

[16] *MR. TRACEY: Off the record.*

[17] *(Discussion off the record.)*

[18] *BY MR. LEIMKUHLE:*

[19] *Q I believe you testified previously that there was*
[20] *nothing in your legal education that specifically relates*
[21] *to issues involved in managing toxic tort cases; is that*
[22] *right?*

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[1] *A My somewhat facetious remark about law school*
[2] *not*

[2] preparing people particularly well to practice law was, I
[3] think, more facetious than what you're making it out to
[4] be. A good law school education is necessary to do this.

[5] *Q What courses or activities were you involved in
[6] at Columbia which were specifically directed to the area of
[7] expertise that you're here to testify about?*

[8] A I don't think anybody can function in this sort
[9] of a role without an understanding of the law of torts, of
[10] civil procedure, property, that go into it, to some extent,
[11] the process of legal reasoning and decisionmaking that
[12] our legal system is founded on. I think one has to understand
[13] that. And certainly for me, I acquired the basic
[14] understanding of those topics in law school.

[15] *Q Was there anything in your legal education that
[16] is specifically directed toward the issue of whether
[17] defense costs are reasonable or whether settlement amounts
[18] are reasonable?*

[19] A Specifically, no. In general, I would say that
[20] understanding the function of counsel, how lawyers go
[21] about

[22] doing what they do, to the extent that is something that
[23] one gains knowledge of in law school, is important in

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[1] assessing the reasonableness of costs fees and
[2] settlements.

[3] *Q You interned at Crummy, O'Neil, DelDeo & Dylan?*

[4] A And Dolan.

[5] *Q My apologies to - Ms. Dolan or Mr. Dolan?*

[6] A Mister.

[7] *Q Was there anything in your job responsibilities
[8] that bears on the area of expertise that you're testifying
[9] about today?*

[10] A To the extent that what I do today in my
[11] expertise in this area is a product of my general legal
[12] experience, the answer is yes.

[13] *Q Anything specifically directed towards this area
[14] of expertise?*

[15] A Nothing specifically directed towards this area
[16] of expertise.

[17] *Q What aspects of your position at Simpson, Thacher
[18] relate specifically to the area of expertise that you're
[19] here to testify about?*

[20] A I think several, Mr. Leimkuhler, and I'm not
[21] going to try to rank order them for you. But just covering
[22] them, I think gaining experience in the area of litigating
[23] large, complicated cases involving large amounts of
[24] money

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[1] and issues that are of importance for reasons other than
[2] simply that they involve large amounts of money is
[3] something that I first gained experience with at Simpson,
[4] Thacher & Bartlett; certainly an understanding of trial
[5] practice and what is good trial practice, what's good legal
[6] strategy, what is not; having been associated with some of
[7] the best product liability lawyers, certainly in the
[8] New York area if not in the country.

[9] So just the whole process of learning
[10] litigation: Learning how to handle big cases, what's
[11] involved with that; understanding the various things that
[12] go into putting together a big, complicated case;
[13] understanding through observation, obviously, more than
[14] by actually doing it, what the role of a lead trial counsel is
[15] and what makes a good lead trial counsel and what
[16] doesn't;

[16] understanding, also, the role of in-house counsel, the kind
[17] of things that a good client, a supportive client can bring
[18] to the table; and understanding what happens or what
[19] counsel has to do in a situation where that sort of client
[20] support is not brought to the table.

[21] Those are the kinds of things that I gained
[22] experience of at Simpson, Thacher.

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[1] *Q Who were the product liability lawyers that you
[2] worked with that you referred to as some of the finest in
[3] the country?*

[4] A Roy Reardon, R-e-a-r-d-o-n, Jim Barrett, Conrad
[5] Harper, Mel Cantor. Although he wasn't much older than
[6] me,

[7] Dennis Jacobs is probably one of the smartest lawyers I
[8] worked with. I think he's on the Second Circuit now. He
[9] wasn't particularly a products liability lawyer but
[10] Whitney

[11] North Seymour was just a tremendous all-around lawyer.
[12] Oh,

[13] I'm sure there are lots of folks I'm forgetting.

[14] *Q Are these all lawyers who, in your view, would be
[15] experts in the area of managing large toxic tort cases?*

[16] A I don't know about toxic tort cases because I
[17] didn't have experience with toxic torts there and have
[18] never seen any of those lawyers function in that area,
[19] although I would suspect that they would be very good at
[20] that.

[21] George Newcombe is another guy, although he
[22] graduated law school after I did, he is a first-rate lawyer
[23] in the products liability area.

[24] *Q How many trials did you participate in when you
[25] were at Simpson, Thacher?*

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[1] A Somewhere between 15 to 20.

[2] *Q 15 and 20?*

[3] A Yes.

[4] *Q How many of those were in the area of product
[5] liability?*

[6] A I think almost all of them were. All but three
[7] or four were in the product liability area.

[8] *Q Did you first chair any of those trials?*

[9] A I first chaired four, I think, before I left

[10] Simpson, Thacher. They were of the smaller variety.

[11] *Q Did you first chair any major tort cases or any
[12] large complex cases?*

[13] A Not first chair, no.

[14] *Q How many of the cases of the 15 or 20 did you
[15] second chair?*

[16] A As opposed to third chair or fourth chair?

[17] *Q Let me ask you this question: Does the term
[18] "second chair" have meaning to you?*

[19] A When you say "second chair," I would think of
[20] somebody who is the primary backup trial counsel, and I
[21] would say in about six or seven cases, I had that
[22] responsibility.

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[1] *Q How many of those would you consider to be large,
[2] complex cases?*

[3] A Oh, I guess only one would be a large, complex
[4] case.

[5] *Q What case was that?*

[6] A It was a General Motors product liability case.
[7] We had extensive discovery practice and several expert
[8] witnesses. It was not as large and complicated as some of
[9] the cases I've worked on since, but for the kinds of cases

[10] that were in the office at the time, it was a big one.

[11] Q What was your role on the remaining,
[12] approximately five to 10 cases that went to trial?

[13] A It would depend upon where in the hierarchy of
[14] the world I was at that point. I would either be assigned
[15] to research projects, witness preparation or some other
[16] aspect of the case.

[17] Actually, I think there was one other case that I
[18] was second chair that was a large complicated case. It was
[19] not a product liability case, though. It was a securities
[20] case. It's where I met one of Peter's partners for the
[21] first time, in fact.

[22] MR. TRACEY: Bob Payson.

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[1] THE WITNESS: Indeed.

[2] MR. LEIMKUHLER: Off the record.

[3] (Discussion off the record.)

[4] BY MR. LEIMKUHLER:

[5] Q What was your reason for going back to Crummy &
[6] DelDeo after you had begun work at Simpson, Thacher?

[7] A I had hoped to - two things, really. I hoped to
[8] broaden the scope of practice to determine whether the
[9] more

[10] general legal practice, rather than strictly a litigation
[11] practice would be something that I found interesting.

And
[12] also the hope that instead of a 70-hour work week, I'd
[13] have

[14] something on a more human scale.

[15] Q But you ended up returning to Simpson, Thacher;
[16] is that right?

[17] A Yes, I did.

[18] Q How long were you at Crummy & DelDeo in that
[19] period between Simpson, Thacher?

[20] A I think it was about four months.

[21] Q And what was your reason for returning to
[22] Simpson, Thacher?

A I decided that a general smaller firm practice
[22] was not one that was attractive and that even though the

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[1] hours were long and arduous at Simpson, Thacher, I
[2] missed

[3] that practice and wanted to get back to it.

[4] Q Did you try any cases while you were at Crummy &
[5] DelDeo?

[6] A No. I was not in litigation practice there. It
[7] was more of a general corporate trust and estates
[8] counseling sort of a practice rather than litigation
[9] practice.

[10] Q Were you ever invited to become a partner at
[11] Simpson, Thacher?

[12] A No, I was not.

[13] Q While you were at Simpson, Thacher, did you do
[14] any product liability work for any clients other than
[15] General Motors?

[16] A I don't recall, Mr. Leimkuhler. I don't believe
[17] I did.

[18] Q What percentage of the time that you were at
[19] Simpson, Thacher would you say you spent on product
[20] liability matters?

[21] A Overall in the several years that I was there,
[22] probably about 60 percent.

Q Did any of those product liability matters

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[1] involve toxic tort issues in any respect?

[2] A No.

[3] Q When you left Simpson, Thacher, where did you go?

[4] A Monsanto.

[5] Q What were your reasons for leaving Simpson,
[6] Thacher to go to Monsanto?

[7] A I was not offered the partnership and it was
[8] obviously time for me to move on.

[9] Q Why Monsanto?

[10] A It was a very attractive job. It is a very
[11] attractive job. It's a very enjoyable job, one that I felt
[12] utilized my knowledge of product liability law as well as
[13] experience with complex cases and gave me a chance to
[14] participate in some very high-visibility matters. I was
[15] also - I'm sorry, let me just add that I was very
[16] impressed with the professional competence of the people
[17] that I spoke to in the Monsanto law department and also
[18] with their general openness and friendliness, which I
[19] considered to be an important aspect of any job I would
[20] enter into.

[21] Q Let's set apart the Brio matters for the time
[22] being. Explain to me - and if you want to do it

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[1] chronologically, that's fine - explain to me your
[2] experience prior to working on the Brio matters in the area
[3] of managing toxic tort litigation.

[4] A Sure. When I first started at Monsanto in
[5] February of 1982, my assignment was to manage the
[6] day-to-day handling of three cases. First is the Agent
[7] Orange product liability litigation, which involved
[8] claims - I think the class eventually was estimated at
[9] 2-1/2 million persons - of injury from exposure to Agent
[10] Orange, which was a chemical herbicide used in the
[11] Vietnam

[12] War that allegedly contained 2378 TCDD, or dioxins as
[13] the

[14] press calls it, just a very large complex, very hotly
[15] contested case, very controversial case, very
[16] high-visibility case in terms of the press attention that
[17] was paid to the handling of the matter.

[18] The second case that I was involved in was
[19] related to the Agent Orange case, and that was the
[20] insurance coverage dispute between Travelers and
[21] Liberty

[22] over whether Liberty owed a duty to defend Monsanto in
[1] the

[2] Agent Orange case.

[3] And the third case that I was involved in was

[4] what we call for shorthand the Nitro case, which involved

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[1] claims of injury from exposure to dioxin brought by - I
[2] can't remember the number now - but a very large
[3] number of

[4] employees and former employees at Monsanto's Nitro,
[5] West

[6] Virginia plant. Actually, the chemicals were not confined
[7] to dioxin in the Nitro case. It was as a result of
[8] exposure to many chemical substances which allegedly
[9] resulted in injury to the plaintiffs.

[10] That was my assignment. When I started, I was to
[11] manage day to day the handling of those three cases.

[12] Q Had outside counsel been engaged in the Agent
[13] Orange case?

[14] A Yes.

[15] Q What responsibilities did you have with regard to
[16] oversight of outside counsel in that case?

A It was my responsibility initially to become
[16] familiar with the issues in the case and then to become

(17) involved in making the day-to-day decisions that need to be
 (18) made in handling any large case, what direction discovery
 (19) efforts were to take, helping to locate company documents,
 (20) company witnesses who would be involved in the case,
 (21) helping to, not draft, but revise the briefs, interrogatory
 (22) answers, participating in discussions of strategy and

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(1) tactics in the case.
 (2) I don't think there was any part of the case that
 (3) I wasn't involved in in terms of managing the day-to-day
 (4) activities.

(5) Q Who was your outside counsel in that case?

(6) A It was the firm of Townley & Updike.

(7) Q Were you responsible for reviewing the bills that
 (8) were submitted by the law firm and by other vendors in the
 (9) case?

(10) A Other vendors, probably not, because Townley &
 (11) Updike paid most of those or they were forwarded directly
 (12) to Liberty and Travelers for payment. But I did review,
 (13) prior to payment, Townley & Updike's bills.

(14) Q Did you have responsibility for recommending
 (15) whether they would be paid or not?

(16) A I had responsibility for reviewing those bills to
 (17) determine that the activities we were being billed for were
 (18) appropriate, were necessarily involved in the defense of
 (19) the case, that they were reasonable in terms of the amount
 (20) of time and the amount of charges, and if I had any
 (21) question about that, to raise the questions and resolve the
 (22) matter.

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(1) Q Was there someone above you in the law department
 (2) who had ultimate responsibility for approving the bills?

(3) A At that time - and I assume we're talking about
 (4) the early phases of the case - I don't believe Mr. Berendt
 (5) reviewed the bills, certainly not on a line-by-line basis.
 (6) If I had a question about something in a bill, my practice
 (7) would be to take it to him and discuss it with him before I
 (8) discussed it with counsel. But my recollection is that he
 (9) did not review the bill in detail, but that he was aware of
 (10) the amount of the bill and in general, what was going on in
 (11) the case.

(12) Q Irrespective of whether the bills of other
 (13) vendors were submitted directly to you or not, did you
 (14) review those expenditures to determine their
 (15) reasonableness?

(16) A I monitored the level of expenditures on court
 (17) reporters and travel and items like that, yes.

(18) Q Did either Travelers or Liberty provide you with
 (19) guidelines concerning what costs they intended to
 (20) reimburse?

(21) A No. They did not provide me with any written
 (22) guidelines. If a question arose with respect to a

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(1) particular bill, we may have had discussions on whether it
 (2) was an appropriate expense.

(3) Q Have you ever utilized any guidelines provided by
 (4) any insurance company in determining whether or not you
 (5) would accept any particular charges that were presented to
 (6) you by vendors?

(7) A I'm not sure what you mean by "utilized."

(8) Q Have you ever seen guidelines for defense costs
 (9) that were provided by insurance companies?

(10) A I don't recall whether I ever actually saw
 (11) internal guidelines from Liberty or Travelers or some

other

(12) insurance company on what those companies considered
 to be

(13) reimbursable expenses or expenses that they would pay
 on a

(14) Defendant's behalf.

(15) I read general articles on cases in which
 (16) disputes arose about particular items of costs just in the
 (17) general course of my reviewing advance sheets and toxic
 (18) tort periodicals like BNA or Mealey's. (Events, I think,
 (19) not advance.

(20) Q You don't recall reviewing any documents that
 (21) were provided by insurance companies regarding billing
 (22) guidelines?

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(1) A I don't remember anything in particular like
 (2) that. I remember having discussions with insurance
 company

(3) representatives from Liberty or Travelers or Tom
 Engelhardt

(4) on Underwriters' behalf on what they viewed billing and
 (5) reimbursement guidelines to be.

(6) Q Do you remember the substance of any such
 (7) conversations?

(8) A Not from that time period. There have been more
 (9) recent discussions with Mr. Engelhardt that I have
 (10) recollection of from that time period.

(11) Q What do you have recollection of concerning
 (12) billing guidelines in conversations you've had with
 (13) Mr. Engelhardt?

(14) A In the current time period you're talking about?

(15) Q Yes.

(16) A We currently have a discussion under way with
 (17) Mr. Engelhardt about whether or not the New Mexico
 gross
 (18) receipts tax is a reimbursable expense. The state of
 (19) New Mexico - no, it's Nevada, not New Mexico. The state
 (20) of Nevada imposes on outside counsel bills a small gross
 (21) receipts tax and Underwriters has declined to reimburse
 (22) that expense on the theory it's part of counsel's overhead

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(1) and therefore, not something that they're going to
 (2) reimburse Monsanto for.

(3) Q Any other subjects concerning billing guidelines
 (4) that you've discussed?

(5) A We've had discussions with Mr. Engelhardt in the
 (6) past over expenses associated with the creation and
 (7) maintenance of scientific literature databases by
 Monsanto

(8) for use in supporting outside counsel and outside experts
 (9) on topics like PCBs, dioxins, pentachlorophenol, benzene.
 (10) I think those are the science databases that we had
 (11) established.

(12) Q Did you have any involvement in the settlement
 (13) discussions relating to the Agent Orange litigation?

(14) A I did not have direct involvement in those, no.
 (15) I participated in discussions one step back from the
 (16) negotiations, but I was not directly involved in
 (17) negotiations.

(18) Q What do you mean "one step back"?

(19) A I participated in meetings, telephone conference
 (20) calls in which Mr. Berendt, who did negotiate that
 (21) settlement, would discuss with me or with others the
 issues

(22) that came up relating to settlement of that case. And I

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[1] was aware in general of the negotiations that occurred in
[2] the weekend prior to the settlement of that case in 1984.

[3] *Q Did you conduct any analysis of whether the Agent
[4] Orange settlement was reasonable?*

[5] A I did not do that personally, no.

[6] *Q Were there any legal bills submitted for payment
[7] for which Monsanto sought a reduction for any reason in the
[8] Agent Orange case?*

[9] - A I don't recall whether there were or not. I know
[10] that I would, from time to time, have discussions with
John

[11] Sabatta, who was at Townley & Updike, who was my main
[12] contact on what certain lawyers were doing or what
certain

[13] expenses were for, but I don't recall, Mr. Leimkuhler,
[14] whether I ever asked for a reduction in the amount of fees
[15] or expenses as a result of those discussions.

[16] *Q With regard to the insurance coverage dispute,
[17] did Monsanto engage outside counsel?*

[18] A Yes, we did.

[19] *Q Were you responsible for reviewing bills
[20] submitted by that counsel?*

[21] A Yes, I was.

[22] *Q Who was that counsel?*

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[1] A It was the law firm of Alexander & Green, and the
[2] lawyer's name was - I knew I would forget it when you
[3] asked me - Bob DeRight, D-e-R-i-g-h-t.

[4] *Q Was there some settled resolution of the
[5] insurance coverage dispute?*

[6] A Yes, there was.

[7] *Q Did you participate in negotiation of that
[8] settlement?*

[9] A I didn't directly, no. Mr. DeRight handled those
[10] discussions.

[11] *Q Did you have any occasion to perform an analysis
[12] of the reasonableness of the settlement that was reached?*

[13] A Oh, I instantly recognized that it was
[14] reasonable.

[15] *Q Did you perform an analysis or was that a
[16] visceral reaction on your part?*

[17] A It was a visceral reaction since Liberty had a
[18] duty to defend and agreed to share with Travelers in the
[19] settlement of the case, which is what we had sought, which
[20] had been our position all along. I didn't believe that
[21] that required deep analysis.

[22] *Q Were there any bills submitted by Alexander &*

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[1] *Green for which you sought a reduction?*

[2] A I don't recall.

[3] *Q What was the ultimate disposition of the Nitro
[4] case?*

[5] A Ultimately, the claims of eight plaintiffs, I
[6] believe it was, were tried and a defense verdict was
[7] returned in Monsanto's favor - that's redundant. A
[8] verdict was returned in Monsanto's favor for the claims of
[9] those individuals for injury from exposure of dioxin.

[10] A plaintiff's verdict was returned for a
[11] relatively nominal sum, I believe it was in the 200- to
[12] \$300,000 range - I could be wrong, but somewhere around
[13] there - in the case of one of those plaintiffs who
[14] suffered from a tumor, a bladder cancer exposure from a
[15] compound called paraphenyl biphenyl.

[16] *Q What was the amount of the verdict?*

[17] A I believe it was in the 2- to \$300,000 range,
[18] Mr. Leimkuhler, but I don't recall the specific amount.

[19] After that verdict was entered and upheld on appeal, the
[20] balance of the cases were disposed of for, I think, it was

[21] \$400,000.

[22] *Q That was a settlement?*

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[1] A Yes.

[2] *Q Did you participate in settlement discussions?*

[3] A I did not. I wasn't responsible for the case at
[4] that time. By the time that the case was tried and
[5] ultimately settled, Mr. Snively was involved in that.

[6] *Q I take it you didn't have occasion to perform an
[7] analysis of the reasonable settlement amount?*

[8] A That's correct.

[9] *Q Did you review the legal bills that were
[10] submitted in the Nitro case by outside counsel?*

[11] A Up until the time that Mr. Snively assumed
[12] responsibility, yes, I did.

[13] *Q Was there ever an occasion when you requested a
[14] reduction in any of the amounts that were submitted in the
[15] bills?*

[16] A Yes.

[17] *Q Who was the law firm?*

[18] A It's the Bowles, McDavid - the name of the firm
[19] at the time was Bowles, McDavid, Graff & Love.

B-o-w-l-e-s.

[20] *Q Where is that firm located?*

[21] A Charleston, West Virginia.

[22] *Q What was the basis for your request for*

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[1] *reduction?*

[2] A That I believe the work done by the particular
[3] lawyer was either nonproductive, required an excessive
[4] amount of time to complete or had not been properly
[5] authorized.

[6] *Q What was the nature of the work for which you
[7] sought a reduction?*

[8] A I believe there was some research projects
[9] undertaken that I had not authorized. There was analysis
[10] of some medical records, as I recall, that was duplicative
[11] of what we were doing in-house. There were simply things
[12] that took too long, too much time was spent on items, and I

[13] asked for reductions in the charges of items of that
[14] nature.

[15] *Q Do you have any estimate of the total amount of
[16] fees charged by the Bowles, McDavid firm while you were
[17] responsible for the Nitro case?*

[18] A I don't.

[19] *Q Any estimate at all?*

[20] A Mr. Leimkuhler, it would be just wild speculation
[21] on my part. It was simply too long ago.

[22] *Q Was more than \$1 million expended?*

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[1] A I believe so.

[2] *Q More than 5?*

[3] A No, I don't believe it was that much.

[4] *Q Do you know how much a reduction you sought?*

[5] A Several thousand dollars. It was not just on one
[6] bill. There were several instances. It was not frequent,
[7] but there were several instances in which I did seek a
[8] reduction.

[9] *Q In the aggregate, that amount is several
[10] thousands?*

[11] A Several thousand dollars, yes.

[12] *Q Less than 5000?*

[13] A No, more than that.

(14) *Q Less than 10?*
 (15) *A Less than 100, but I don't know how much. Again,*
 (16) *it was relatively infrequent, and I just don't have a clear*
 (17) *recollection of the amounts involved.*
 (18) *Q Do you have any estimate of how much in fees were*
 (19) *paid to the Townley & Updike firm in connection with the*
 (20) *Agent Orange case?*
 (21) *A I believe it was in the vicinity of 12 -*
 (22) *somewhere between 12- and \$15 million is my*
recollection.

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(1) *and that would be up to the time the case was settled in*
 (2) *1984 or final approval of the settlement was obtained in*
 (3) *'87, '88, somewhere in there.*
 (4) *Q Do you know how much in fees were paid to the*
 (5) *firm of Alexander & Green in connection with the insurance*
 (6) *coverage dispute?*
 (7) *A No, I don't.*
 (8) *Q Any order of magnitude?*
 (9) *A I can't even estimate those. It's simply been*
 (10) *too long ago.*
 (11) *Q What other cases were you assigned to before the*
 (12) *time that you were assigned to the Brio cases?*
 (13) *A I've been responsible since January of 1985 for*
 (14) *the day-to-day supervision of Monsanto's defense in PCB*
 (15) *cases. We have had, over that period of time, probably*
 (16) *300-or-so PCB cases brought against the company. 400 is*
 (17) *a*
 (18) *better estimate than 300.*
 (19) *Q Are they concentrated in any particular*
 (20) *geographic area or areas?*
 (21) *A There are a large number of cases pending in*
 (22) *state court in Pennsylvania, state and federal court in the*
Philadelphia area in Pennsylvania. There's a cluster of

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(1) *cases in Broome County, New York associated with the*
 (2) *Binghamton office building.*
 (3) *We had a number of cases in Louisiana,*
 (4) *Shreveport, associated with an incident involving a*
 (5) *transformer there. We have several places where we have*
 (6) *maybe one or two cases pending but they involve a large*
 (7) *number of plaintiffs.*
 (8) *City of St. Louis, we have, I think, five or six*
 (9) *cases with about 350 plaintiffs. Until recently, we were*
 (10) *involved in the Lone Star Steel litigation in Morris*
 (11) *County, Texas - if you read The Wall Street Journal,*
 (12) *you'll remember that one - which we recently negotiated a*
 (13) *favorable settlement for.*
 (14) *MR. LEIMKUHLER: I think this is a good time for*
 (15) *a break.*
 (16) *Were you finished with your answer?*
 (17) *THE WITNESS: We can continue the answer.*
 (18) *MR. LEIMKUHLER: We'll take a break and if*
 (19) *Mr. Bistline thinks of some more cases, we'll continue them*
 (20) *after the break.*
 (21) *(Recess.)*
 (22) *BY MR. LEIMKUHLER:*

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(1) *Q Let me ask you this follow-up. You were in the*
 (2) *process of giving an answer when we took a break.*
 (3) *A Yes.*
 (4) *Q Other than the cases and locales that you*
 (5) *identified right before the break, are there any other*
 (6) *locales where the PCB cases are being litigated or have*
 (7) *been litigated?*
 (8) *A In general, they are widely dispersed. I*

(9) *identified for you some of the areas where we have either a*
 (10) *large number of cases or large number of plaintiffs for*
 (11) *both. All I can say is that we have had PCB cases from*
 (12) *everywhere from Boston to Guam and a lot of points in*
 (13) *between.*
 (14) *As I said before, there have been about 400 cases*
 (15) *filed during the time I've been responsible for them.*
 (16) *Q Overall, there are about 300 to 400 cases?*
 (17) *A Filed, yes.*
 (18) *Q Where are the largest litigations filed?*
 (19) *A Currently pending, Mr. Leimkuhler?*
 (20) *Q Yes.*
 (21) *A I think the Paoli cases in Pennsylvania, the*
 (22) *various cases in the city of St. Louis. We have about 300*

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(1) *plaintiffs there. I guess the case in Guam is still*
 (2) *technically pending. It's on appeal in the Ninth Circuit,*
 (3) *but it has not been finally disposed of yet. There are*
 (4) *other cases.*
 (5) *There's a case in western Pennsylvania, the*
 (6) *Binghamton case in New York that I mentioned. I'd really*
 (7) *have to look at my PCB book to give you a much lengthier*
 (8) *catalogue than that. Kentucky. If I think long enough, I*
 (9) *can probably find one just about anywhere.*
 (10) *Q Is there one - withdraw the question.*
 (11) *I take it you have outside counsel litigating*
 (12) *these cases?*
 (13) *A We have many outside law firms defending the*
 (14) *company.*
 (15) *Q Do you have a national coordinator?*
 (16) *A Yes.*
 (17) *Q Who is that?*
 (18) *A The law firm of Smith, Helms, Mullis & Moore in*
 (19) *Greensboro, North Carolina.*
 (20) *Q Tell me the mechanism by which bills are*
 (21) *submitted and bills are paid in the PCB cases.*
 (22) *A All bills for services of outside counsel are*

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(1) *submitted either to me, if it's one of the cases I'm*
 (2) *directly handling, or to Mike Newport, who works with me*
 (3) *on*
 (4) *these cases, for our review.*
 (5) *If the amount of the bill exceeds \$20,000, then*
 (6) *it also requires Mr. Berendt's approval. It is then*
 (7) *submitted to the Monsanto Chemical Group accounts*
 (8) *payable*
 (9) *department, where I believe there is an additional*
 (10) *approval*
 (11) *protocol that's required.*
 (12) *If the bills exceed \$10,000, I think someone over*
 (13) *there has to sign them, too, the bills are paid directly by*
 (14) *Monsanto, and then Monsanto's risk management group*
 (15) *seeks*
 (16) *reimbursement for those fees and expenses from*
 (17) *Monsanto's*
 (18) *insurance carriers.*
 (19) *Q Have there been any bills submitted in the PCB*
 (20) *cases which have caused you to seek a reduction?*
 (21) *A Oh, yes.*
 (22) *Q Can you tell me about those circumstances?*
 (23) *A Over the period of eight years now that I've been*
 (24) *working on those cases, there have been many instances in*
 (25) *which I've sought and received reductions in PCB outside*
 (26) *counsel bills. In virtually every - maybe not every case*
 (27) *that has been brought but certainly the majority of them -*

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(11) I'd have to go back literally and investigate each case and
(12) try to catalogue that for you, but there have been
numerous

(13) instances in which that has been done.

(14) Q Can you generalize the basis for your seeking a
(15) reduction in those cases?

(16) A There could be a number of things. It could be
(17) work that either was not authorized before it was
(18) undertaken, work that, in my opinion or Mike's opinion,
too

(19) much time was spent on, costs that were either excessive
or

(20) not authorized, not appropriate.

(21) Q You're referring to disbursements?

(22) A Disbursements, yes. I think in general, as a
(1) general way of describing the reasons for the reductions,
(2) that probably accounts for it.

(3) Q Have you been responsible for any of the -
(4) withdraw the question.

(5) Do you have an estimate of how much in bills
(6) Monsanto has paid in connection with the PCB cases since
(7) you've been involved with them?

(8) A Probably between 75- and \$100 million.

(9) Q Do you have an estimate as to how much in
(10) reductions you have sought?

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(11) A Overall, I really don't. In some cases, they've
(12) been very substantial; in other cases, they've been
(13) relatively minor. I would say probably more than
(14) \$1 million, but how much more over that period of time, I
(15) really don't know.

(16) Q Have you been involved in the settlement of any
(17) of these cases?

(18) A Yes.

(19) Q How many settlements?

(20) A Again, I'd have to go back and investigate the
(21) files and determine that. We've settled a large number of
(22) these cases for relatively minor amounts, for the most
part.

(1) Q Are there any instances where, as part of a
(2) single settlement, Monsanto has paid over \$1 million?

(3) A For one of these PCB cases?

(4) Q Yes.

(5) A I believe there was one instance in which that
(6) was done.

(7) Q Did you participate in that settlement?

(8) A Yes, I did.

(9) Q What was your role?

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(1) A I was the person primarily responsible at that
(2) time for the case. This was back in 1985 or '86. There
(3) was a case that had been tried in '84, prior to my assuming
(4) responsibility for these cases, in Michigan in which a jury
(5) returned a verdict against Monsanto in favor of a farmer
(6) who had claimed that his dairy business had been
destroyed

(7) by the presence of PCBs and the coating that was put on
the

(8) inside of the silo in which he stored feed for his cattle.

(9) And just by happenstance, the jury returned a
(10) verdict in precisely the amount of the mortgage on the
(11) man's farm which, when prejudgment interest and
(12) post-judgment interest was added, came up to just over \$1
(13) million. And we were able to settle that case and a
number

(14) of other silo cases which were also pending in northern

(15) Michigan for, I believe, \$1.2 million.

(16) Q Any other substantial PCB settlements that you've
(17) been involved in?

(18) A The only other settlement that came close to that
(19) amount of money was one that we arrived at in the fall of
(20) 1991 in connection with a case that was being tried in
(21) St. Louis, the Glen Brown case. We had 10 plaintiffs out
(22) of the couple of hundred which were then pending in

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(1) St. Louis, 10 plaintiffs whose cases were tried beginning
(2) in, I think it was October of 1991.

(3) We were very unfortunate with the venire panel
(4) from which the jury in that case was selected. And as
(5) trial progressed, it appeared to me and to our trial
(6) counsel that several members of the jury were either
(7) antagonistic to Monsanto or thought the whole case was a
(8) big party. There was laughing and giggling and
exchanging

(9) of notes and general inattention to procedures in the
(10) courtroom. And we ended up settling that case, the claim
(11) of those plaintiffs for, I believe, \$800,000 prior to final
(12) argument.

(13) Q What was your role in the settlement of that
(14) case?

(15) A Although I didn't negotiate it directly with the
(16) plaintiffs' counsel, I was directly responsible for
(17) obtaining the company's approval, our CEO and general
(18) counsel, to approve the settlement, and communicated with

(19) the plaintiffs' counsel that we would agree with that
(20) amount.

(21) Q Did you undertake a settlement analysis in that
(22) case?

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(1) A Not specifically. The \$800,000 ended up being
(2) the number because that was the amount of the demand
that

(3) was on the table and it was one that we rejected prior to
(4) trial and at the appropriate time we inquired of the
(5) plaintiffs whether that was still an amount that was still
(6) on the table and we received an affirmative response so we
(7) decided to settle the case for that.

(8) Q You did not conduct any analysis with regard to
(9) the \$800,000 number?

(10) A Not specifically with regard to the \$800,000,
(11) Mr. Leimkuhler. What we had done prior to the trial of the

(12) case was to analyze, to the extent we could, what we
(13) thought a possible jury verdict was or would be and what
(14) the impact of that might be with respect to the other cases
(15) that were then pending in St. Louis. And it was our view
(16) that if we did not get a good jury or if the jury was not
(17) receptive to Monsanto's defense, that a verdict in the
(18) approximate amount of \$1.5 to \$2 million was a realistic
(19) possibility and that if the jury returned adverse findings
(20) on liability issues, we may have been estopped from
(21) contending liability with respect to the other plaintiffs
(22) in the case. Although we didn't have any good way of

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(1) estimating the impact of that, we felt that it would be a
(2) very expensive matter to settle or otherwise dispose of.

(3) Q Going back to the silo cases, did you conduct an
(4) analysis of the settlement of that case?

(5) A As I recall, yes. It's been a while ago, but we
(6) did at least discuss a broad range of issues related to
(7) that settlement. I don't recall if it was a written

[8] analysis, but the matter was thoroughly discussed and
[9] analyzed. And as I said, we settled, I believe it was five
[10] cases in total, four or five.

[11] Q Any other PCB cases for which there were
[12] settlements for a significant amount of money?

[13] A We recently settled the claims in the Lone Star
[14] Steel case, which I mentioned to you before. I don't know
[15] if you're familiar with that case. It is a case brought by
[16] approximately 3000 plaintiffs who are present or former
[17] employees of the Lone Star Steel plant in Dangerfield,
[18] Texas. It's Morris County. It's located in northeastern
[19] Texas, midway between Dallas and Shreveport. It's not a
[20] very nice place to be a defendant. Monsanto was one of, I
[21] think, 200 to 300 defendants in that case and we were part
[22] of a group that agreed to settle with the plaintiffs, a

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[1] group of chemical suppliers. And our settlement amount,
[2] I believe, was \$225,000.

[3] Q Were there other defendants in the silo cases?

[4] A I think there was. I think the Michigan silo
[5] company was a defendant in that case, and I believe they
[6] settled separately.

[7] Q And what about the Glen Brown case?

[8] A Monsanto was the only defendant in that case.

[9] Q Did you do a settlement analysis in the
[10] Dangerfield cases?

[11] A Again, I don't know what you would consider an
[12] analysis. We discussed the issues. I believe there may
[13] have been a memorandum written detailing the history of
[14] negotiations for Mr. Berendt. There may have been a
[15] memorandum that indicated what amounts other
[16] companies had

[17] been able to achieve separate settlements for in that
[18] case. But the verdict potential and the company's
[19] exposure

[20] in that case were almost impossible to quantify because of
[21] the lack of our ability to obtain any meaningful discovery
[22] or cooperation from the court to permit us to develop our
[23] case in any fashion.

[24] Q Other than the cases that you've mentioned and

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[1] the Brio cases, are there any other toxic tort cases for
[2] which you have managerial responsibility?

[3] A Yes.

[4] Q Can you identify those for me?

[5] A In general, I have responsibility for handling
[6] cases involving allegations of benzene exposure.

Monsanto

[7] is not a seller of benzene, but we are a company with a
[8] large presence in Texas Gulf Coast area, and we are one of
[9] what you'd call "usual suspects" that the plaintiffs round
[10] up when someone has a leukemia case to bring. And I
[11] have

[12] been involved in handling those cases for the company
[13] since, I guess, about 1984. There have been, during that
[14] period of time, probably 40 or 50 cases of that nature that
[15] have been brought against the company.

[16] Q Are those all in the Gulf Coast area?

[17] A For the most part. The majority of those cases
[18] are in the Gulf Coast area. There have been other cases
[19] involving claims of exposure to benzene that have been
[20] brought in other parts of the country, and I have handled
[21] those as well.

[22] Q Have any of those been settled?

[23] A Yes.

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[1] Q What's the largest single settlement amount
[2] that's been paid in those cases?

[3] A I'm going to set aside one case, which was a
[4] special circumstance because the plaintiff was a
Monsanto

[5] employee, and discuss that separately. But other than
[6] that, the largest amount that was paid in any of those
[7] cases was, I believe, \$70,000.

[8] Q That's the Monsanto share?

[9] A The Monsanto share was \$70,000. Typically, we
[10] pay 5- or \$10,000 to get out of those cases if we have to
[11] pay money to get out of them.

[12] Q Tell me about the Monsanto employee case.

[13] A That was the case of the family of Jack Skeen,
[14] S-k-e-e-n, who worked as a processor at Monsanto's
[15] Chocolate Bayou plant from about 1969 to 1985; I think it
[16] was '69 to '85, somewhere in that time frame. He
[17] developed

chronic myelogenous leukemia, which was diagnosed
sometime

[18] in the early '80s, from which he died in 1985. And his
[19] family retained John O'Quinn, who's a well-known
[20] plaintiff's lawyer in the Houston area.

[21] The case was tried in federal court in Galveston
[22] and initially the jury returned a verdict in the

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[1] plaintiff's favor of \$100 million. That verdict was set
[2] aside by the trial judge, and we retried the case on a
[3] bifurcated basis with causation being separated as a
[4] separate issue for first trial. The jury returned a
[5] verdict in the plaintiff's favor on causation, and at that
[6] point, we settled the case for \$7,250,000.

[7] Q Did you have a role in the settlement of that
[8] case?

[9] A Yes.

[10] Q What was your role?

[11] A I was the company's primary negotiator.

[12] Q What did you do to analyze the reasonableness of
[13] the settlement of that case?

[14] A Several things. First of all, keeping in mind
[15] the amount of the initial verdict that had been returned
[16] against us, we looked at what the proof had been, the
[17] manner in which plaintiffs had been able to introduce
[18] evidence of alleged gross negligence on the company's
[19] part

[20] in the first trial and determine that there was a risk
[21] there, again, that the jury would return a verdict against
[22] the company, although, I have to add here, without
[23] justification. That's a very safe plant to work in.

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[1] The size of the first verdict, the results of a
[2] mock trial exercise that we had conducted in which,
[3] although the mock juries - I believe there were three
[4] panels that conducted this before - all were disposed to
[5] returning a defense verdict, when asked, assume you were
[6] going to return a verdict for the plaintiffs, what would
[7] you do, and the verdicts for the plaintiffs were
[8] substantial.

[9] We also looked at whether or not it was likely
[10] that other cases of a similar nature could be brought and
[11] we concluded that there was only one other possibility.
We

[12] looked at generally the adverse nature of the publicity
[13] that had accrued to the company and would have accrued
[14] had

[14] the trial continued and determined that it was in our best
[15] interest to put the case behind us at that point for that
[16] amount of money.

[17] *Q Anything else other than the cases you've already*
[18] *mentioned in the toxic tort area for which you have or have*
[19] *had management responsibility?*

[20] *A I have, from time to time, responsibility for*
[21] *just cases that come up that involve substantial exposure*
[22] *or potential exposure. One case, which we took to trial in*

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[1] Oklahoma City in 1990, involved claims of exposure to the
[2] active chemical in mothballs, paradichlorobenzene, by
[3] about

[3] 120 workers in the main post office in Oklahoma City.

That

[4] case was tried to a defense verdict in 1990.

[5] I've also been responsible for a case that was
[6] brought by a purported class of people who were allegedly
[7] injured by a release of potassium oxychloride from the
[8] Monsanto Krummrich plant in East St. Louis. That case
[9] was

[9] finally just voluntarily discontinued by the plaintiffs
[10] rather than take it to trial. Monsanto paid no
[11] settlement. I'm sure there were other cases, but I just
[12] can't recall them at the moment.

[13] *Q Have you identified the substantial ones?*

[14] *A I think there was one other benzene case, the*
[15] *other Monsanto employee case alleging benzene exposure*
[16] *at*
[16] *the Chocolate Bayou plant, styled The Cummings versus*
[17] *Monsanto. That one, in which Mr. O'Quinn, again, was*
[18] *the*
[18] *plaintiff's counsel, was settled, I guess, about two years*
[19] *ago for \$1.2 million.*

[20] *Q What role did you have in the settlement of that*
[21] *case?*

[22] *A I was the company's primary negotiator for that*

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[1] settlement.

[2] *Q Did you conduct an analysis of the settlement*
[3] *demand?*

[4] *A Yes. I don't recall writing anything, but I had*
[5] *extensive discussions with Mr. Berendt and Mr.*

Duesenberg

[6] *on the nature of the claims, the type of evidence that*
[7] *would be offered, the expert opinions that would be*
[8] *offered, the strengths and weaknesses of the plaintiff's*
[9] *legal position. It was a very substantial statute of*
[10] *limitations issue that we believed we would prevail upon,*
[11] *but the trial denied our motion to dismiss for summary*
[12] *judgment on the statute of limitations, and although we*
[13] *believed we would have prevailed on that issue on appeal,*
[14] *Texas courts are not the happiest place to be sometimes.*
[15] *We determined that it was in the company's best interest*
[16] *to*

[16] *settle that case.*

[17] *Q Any other cases, setting apart for the moment the*
[18] *Brio cases in which you've had an active responsibility?*
[19] *And this is in the area of toxic tort cases.*

[20] *A Right. I understand. That's all I can recall at*
[21] *the moment.*

[22] *Q When did you learn that you would be an expert*

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[1] *witness in this case - let me withdraw the question.*

[2] *When were you first asked to be an expert witness*
[3] *in this case?*

[4] *A I don't recall exactly. It was sometime after my*
[5] *first round of depositions, which was, as I recall,*
[6] *February of this year, that I was first asked. I think*
[7] *that's when it was. I don't have a clear recollection.*

[8] *Q So it was in February or perhaps March?*

[9] *A It was later than that, Mr. Leimkuhler. It might*
[10] *have been April, but somewhere in that time period.*

[11] *Q Who initially asked you to be an expert witness?*

[12] *A I believe David Snively first raised it with me.*

[13] *Q Was it raised by correspondence, by telephone*
[14] *call, face-to-face meeting?*

[15] *A It was a face-to-face meeting.*

[16] *Q Can you tell me everything that transpired at*
[17] *that meeting.*

[18] *A Not without violating the attorney-client*
[19] *privilege.*

[20] *Q Well, I'd like to know - let's start first by*
[21] *having me ask you, what did Mr. Snively talk to you about*
[22] *with regard to your testifying as an expert witness?*

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[1] *A He asked me if I would.*

[2] *Q And what did you say?*

[3] *A I don't recall exactly what I said.*

[4] *Q What was the substance of your response?*

[5] *A That if he and Mr. Berendt believed that they*
[6] *wanted me to perform that function, that I would.*

[7] *Q Did Mr. Snively discuss the areas of testimony*
[8] *that he wanted you to handle as an expert?*

[9] *MR. TRACEY: Let me interject here. I think we*
[10] *have to be mindful here of the fact that Mr. Bistline is a*
[11] *Monsanto employee while also appearing for a deposition*
[12] *as*

[12] *an expert witness at Monsanto. I guess the parsing that*
[13] *has to be done is the inquiry into his preparation as an*
[14] *expert and what he did in that respect versus conversations*
[15] *that may be outside the scope of that inquiry.*

[16] *MR. LEIMKUHLER: I think any privilege is waived*
[17] *as to matters that could reasonably bear on the content of*
[18] *his testimony as an expert. So I intend to delve into*
[19] *this.*

[20] *MR. TRACEY: I'm not going to instruct him not to*
[21] *answer on questions going to what Mr. Bistline did to*
[22] *prepare himself for his expert testimony - not any other*

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[1] *testimony, but his expert testimony - but I will instruct*
[2] *on areas that go beyond that and caution the witness to be*
[3] *mindful of that distinction in giving his answers.*

[4] *MR. LEIMKUHLER: I don't agree with your cut. I*
[5] *think you're carving out too narrow of an area which is*
[6] *permissible for inquiry in examining an expert witness. I*
[7] *think the best way to proceed is for me to ask the*
[8] *questions and we'll see where we run into trouble.*

[9] *MR. TRACEY: I have no objection to your asking*
[10] *questions, but I was simply carving out what we believe is*
[11] *the distinction here, and I think this is a case where we*
[12] *have a Monsanto employee who is also appearing as an*
[13] *expert*

[13] *witness. I think there's an attorney-client consideration*
[14] *present there that might not be present were Mr. Bistline*
[15] *not a Monsanto employee.*

[16] *MR. LEIMKUHLER: There's also a waiver issue*
[17] *that's present that would not be there if Mr. Bistline were*
[18] *not an expert, but Mr. Bistline is an expert.*

[19] *MR. TRACEY: You're alleging - you can allege*
[20] *what you want.*

[21] *MR. LEIMKUHLER: Let me modify that somewhat.*

(22) He's being held out as an expert, and on that basis, we're

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(1) entitled to probe matters discussed which bear on the
(2) opinions that he's going to testify to.

(3) MR. TRACEY: You and I can obviously spend a lot
(4) of time debating this. I think I made the distinction that
(5) I would draw clear, and I guess to a certain extent here,
(6) since it was the witness who was involved in these
(7) conversations and the efforts at preparation, perhaps he is
(8) the one that will have to apply his judgment as well to
(9) areas that he feels are outside the scope of the inquiry.

(10) But I'm not trying to prevent your proceeding with your
(11) questioning.

(12) MR. LEIMKUHLER: Just his answering. Let's read
(13) back what was pending before that extended colloquy, if
(14) you please.

(15) (The reporter read the record as requested.)

(16) THE WITNESS: Mr. Snively's comment to me was
(17) that he wished me to testify about the expenses in handling
(18) the Acosta cases as well as the settlement of the Acosta
(19) case.

(20) BY MR. LEIMKUHLER:

(21) Q Tell me as best as you can recall what

(22) Mr. Snively said to you concerning those areas of

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(1) testimony.

(2) A It was just that, Mr. Leimkuhler. He asked if I
(3) would be willing to testify as an expert in those areas.

(4) Q And you told him in substance that you would?

(5) A Yes.

(6) Q What other discussions transpired concerning your
(7) anticipated role as an expert between you and Mr. Snively?

(8) A At that time, none.

(9) Q Did you have any further discussions or
(10) correspondence with Mr. Snively concerning the issue of
(11) Monsanto's costs at the Brio sites in defending private
(12) actions at the Brio site?

(13) A Not with Mr. Snively, no.

(14) Q With whom else did you have discussions of that
(15) nature?

(16) A I've had discussions with many people about the
(17) costs incurred in defending and settling these cases.

(18) Q Are you referring to discussions that took place
(19) before or after your initial conversation with Mr. Snively?

(20) A Both.

(21) Q Let's leave it at discussions that took place

(22) after your meeting with Mr. Snively. With whom else have

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(1) you discussed the issue of legal costs or settlements with
(2) regard to the Brio private actions?

(3) MR. TRACEY: Let me just interject, and I'm not
(4) trying to put a lot of colloquy on the record but to the
(5) extent that that information was being collected in
(6) preparation for your deposition is the limitation that I
(7) would put on that as opposed to whatever otherwise
(8) privileged communications may have been made.

(9) MR. LEIMKUHLER: Peter, I'm not going to accept
(10) that qualification, and the witness should understand in
(11) answering the question that I stand by my question as it's
(12) put. And if he intends to limit his answer to meet with
(13) your qualification, he's obliged to let me know that
(14) there's information that's not being provided that's
(15) responsive to the question that I put.

(16) THE WITNESS: I understand that, Mr. Leimkuhler.
(17) There are conversations that I had that do fall within the

(18) restriction that was just articulated, and I will follow

(19) the instruction of Mr. Tracey on that.

(20) MR. KRAMER: Given that response, perhaps

(21) Mr. Tracey misspoke, but he limited the response to

(22) discussions that were had in preparation for this

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(1) deposition. I don't think that was the intent of the
(2) question nor do I think that would be a proper limitation.

(3) Certainly, it would also cover any discussions he
(4) had in preparation for his anticipated expert testimony.
(5) whether or not it was in preparation for this deposition.

(6) MR. TRACEY: And I think that your comment there
(7) is correct actually, and that's probably a fair reading of
(8) what I meant. In preparation for his deposition as an
(9) expert witness.

(10) MR. LEIMKUHLER: I still think that limitation is
(11) unduly harsh because if there is any information that
(12) Mr. Bistline has obtained which bears in any respect on his
(13) testimony whether, his sole objective was preparing for his
(14) testimony or not, it's something which is fair ground for
(15) examination. Let me repeat the question.

(16) MR. TRACEY: What is your question?

(17) BY MR. LEIMKUHLER:

(18) Q My question is as follows: Mr. Bistline, since

(19) your initial discussion with Mr. Snively, have you had any

(20) discussions with anyone concerning the issue of costs

(21) incurred by Monsanto in connection with its defense or

(22) settlement of any private actions at the Brio sites? And

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(1) if you have had such discussions, please identify with
(2) whom.

(3) A Yes, I have had discussions, and the individuals
(4) with whom I've had those discussions have been either
(5) Mr. Snively, counsel for Monsanto in the underlying

cases,
(6) in the Brio cases or counsel for Monsanto in this case, and
(7) I may have had - I can't recall exactly when - but I may
(8) have had a discussion with Mr. Krehma in passing.

(9) Q Can you identify counsel for Monsanto in the Brio
(10) cases, the underlying cases with whom you've had
(11) discussions?

(12) A Yes.

(13) Q Is Ms. Cohen one of them?

(14) A Phyllis Cohen.

(15) Q Mr. Hall?

(16) A Mr. Hall.

(17) Q Anyone else?

(18) A Joe Shoebottom.

(19) Q Mr. Ellis?

(20) A Mr. Ellis, yes. He was one. Mr. Jones and

(21) Mr. Goldenthau, Larry Goldenthau.

(22) Q Are those all lawyers?

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(1) A Those are all lawyers. And Tracy Gist, G-i-s-t,
(2) who is a paralegal at Woodard, Hall & Primm.

(3) Q Are the other lawyers that you mentioned lawyers
(4) at Woodard, Hall?

(5) A Yes.

(6) Q Anyone else other than those individuals within
(7) the category of counsel for Monsanto in the underlying
(8) cases?

(9) A Not that I recall.

(10) Q Who have you discussed cost matters with who you
(11) identified as counsel for Monsanto in the insurance
(12) litigation?

(13) A David Curtin, Peter Tracey.

[14] MR. TRACEY: When you say "cost matters," you
 [15] mean matters – cost matters relating to the Brio actions?
 [16] MR. LEIMKUHLER: That's right.
 [17] THE WITNESS: That's what I understood the
 [18] question to be.
 [19] BY MR. LEIMKUHLER:
 [20] *Q Are there other cost matters other than those as*
 [21] *to which you've had discussions since Mr. Snively first*
 [22] *asked you to become an expert witness?*

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[1] A Just in general, cost matters. I mean, my wife
 [2] and I talked about the cost of a new car that we recently
 [3] purchased because my 18-year-old did lethal damage to
 the
 [4] old one.

[5] *Q You caught me. Boy, what an overbroad question.*
 [6] *Other cost matters relating to the dispute*
 [7] *between Monsanto and its insurers.*

[8] A I have had other discussions, yes.
 [9] *Q With whom?*

[10] MR. TRACEY: I think that's outside the scope of
 [11] this deposition. I mean, he's not – he's being offered
 [12] here on the issues that are outlined in his statement. If
 [13] you're going into other cost issues, that's not his area of
 [14] expertise, and I'm going to instruct him not to answer.
 [15] He's here to answer as to costs within the scope of this
 [16] deposition. I think it clearly takes on attorney-client
 [17] privilege when you step beyond that.

[18] MR. LEIMKUHLER: First of all, I haven't asked of
 [19] the substance of any conversations yet, and I'm not saying
 [20] that that would be impermissible, but right now I'm simply
 [21] asking him to identify conversations that he's had. Is
 [22] this an instruction not to answer?

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[1] MR. TRACEY: The witness is a lawyer for
 [2] Monsanto, and to the extent that he is also representing
 [3] his client, Monsanto Company, I don't think that it's
 [4] appropriate for him to have to go beyond the scope of what
 [5] is laid out in the Rule 26 statement. So I will instruct
 [6] him not to answer as to discussions he may have had or may
 [7] not have had as to costs that are not referenced in the
 [8] Rule 26 statement.

[9] BY MR. LEIMKUHLER:
 [10] *Q Can you answer the pending question,*
 [11] *Mr. Bistline?*

[12] A I'm going to follow my counsel's instructions.
 [13] *Q Can you provide me the names of any individuals*
 [14] *with whom you've had discussions about costs at issue in*
 [15] *the Monsanto action, apart from as they relate to the Brio*
 [16] *private actions?*

[17] MR. TRACEY: I'm going to instruct him not to
 [18] answer on that. First of all, it's attorney-client, and
 [19] second, it's outside the scope of this deposition.

[20] THE WITNESS: I'm going to follow my counsel's
 [21] instruction.

[22] MR. LEIMKUHLER: Let's go off the record for a

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[1] second.
 [2] (Discussion off the record.)
 [3] MR. LEIMKUHLER: We have to break because
 several

[4] people have flights to catch or trains to catch.
 [5] Due to some scheduling confusion, Mr. Bistline
 [6] will not be available tomorrow, but Mr. Tracey has agreed
 [7] to get back to me promptly with any available dates that
 [8] Mr. Bistline has in the future. I would note that we are

[9] ending earlier than I anticipated today after starting
 [10] later than we had originally expected and so the
 [11] continuation may last longer than an additional day for
 [12] that reason.

[13] MR. TRACEY: Well, given Defendants' cooperation
 [14] in scheduling in this instance, we will accommodate the
 [15] schedule.

[16] MR. LEIMKUHLER: We're ending in the middle of
 a
 [17] tussle over privileged issues, and I think all parties are
 [18] simply going to reserve their rights as to their positions.
 [19] and we'll try to sort that out either between now and the
 [20] next session or at the next session. So the fact that
 [21] we're dropping the fight for the moment should not be seen
 [22] as acquiescence on the part of Defendants and the
 positions

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[1] that have been set forth by Monsanto.

[2] MR. TRACEY: I have no concluding remarks.
 [3] However, Monsanto does request that this deposition
 [4] transcript and the exhibits there to be designated
 [5] protected material in accordance with the Monsanto
 [6] protective order and any other applicable orders, including
 [7] the May 25th order. That's all I have.

[8] Thank you, Mr. Bistline.

[9] MR. LEIMKUHLER: Thank you.
 [10] (Whereupon, at 4:25 p.m., the deposition was
 [11] adjourned, to reconvene at a mutually agreed-upon date.)

[13] -----
 [14] THOMAS M. BISTLINE

**Look-See
Concordance Report**

UNIQUE WORDS: 2,236
TOTAL OCCURRENCES:
9,558
NOISE WORDS: 385
TOTAL WORDS IN FILE:
27,294

SINGLE FILE
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CASE SENSITIVE

NOISE WORD LIST(S):
NOISE.NOI

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TRANSCRIPT OF PROCEEDINGS

IN THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

----- -x		
MONSANTO COMPANY,	:	
	:	
	:	
Plaintiff,	:	Civil Action Number
	:	
v.	:	88C-JA-118-1-CV
	:	
AETNA CASUALTY & SURETY COMPANY,	:	NON-ARBITRATION
et al.,	:	CASE
	:	
Defendants.	:	
	:	
----- -x		

EXHIBITS TO THE
DEPOSITION OF THOMAS M. BISTLINE

PROTECTED MATERIAL: MONSANTO
INSURANCE COVERAGE LITIGATION

Washington, D. C.

Tuesday, August 10, 1993

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OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

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MONSANTO COMPANY,	:
	:
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Plaintiff,	:
	:
v.	:
	:
AETNA CASUALTY & SURETY COMPANY,	:
et al.,	:
	:
Defendants.	:
	:
----- -x	

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RULE 26 STATEMENT FOR THOMAS M. BISTLINE, ESQ.

Background and Experience

Mr. Bistline testified extensively at his depositions as to his educational background and employment history.

Subject Matter of Testimony

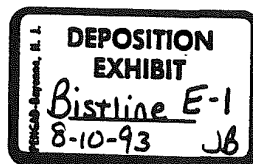
Mr. Bistline is expected to testify as to the necessity for and reasonableness of the sums expended by Monsanto in litigating and, in some instances, settling the various third-party actions arising in connection with the Brio site. Mr. Bistline's testimony will concern the period from April 1990 to date.

Summary of Bases and Grounds for Testimony

Mr. Bistline is expected to testify that the sums expended by Monsanto in connection with the Brio third-party actions were reasonable and necessary. These sums, which, for the most part, are set forth in Exhibits 1(C)-(E) of Mr. Bistline's 30(b)(6) deposition (expenses incurred through 1992), include, but are not limited to, attorney's fees, expert/consultant fees, and other necessary and reasonable litigation expenses.

Mr. Bistline is expected to testify that the settlement amounts incurred by Monsanto in connection with certain Brio third-party actions, i.e., Acosta, Aguilar, and Hardage, were reasonable.

In addition to his knowledge, experience, and training, Mr. Bistline's opinions are based on the following:



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1. his familiarity with market rates for legal services needed for litigation of similar sophistication and complexity;
2. his familiarity with the number of hours reasonably expended for tasks associated with the type of litigation in issue;
3. his familiarity with the level of attorney performance customary and necessary in the type of litigation in issue;
4. his familiarity with the types and amounts of expert fees and expenses customarily incurred in the type of litigation in issue; and
5. his familiarity with the operative facts and assumptions employed in arriving at the various settlement amounts that were paid by Monsanto.

In addition, Mr. Bistline may rely on the transcripts of depositions taken in this action, and the exhibits thereto. Mr. Bistline may also rely on documents that were produced and pleadings which were filed in this case. Mr. Bistline also may rely on information provided by other persons who have knowledge of the litigation costs and settlement amounts at issue.

Mr. Bistline reserves the right to offer further opinions in rebuttal or in response to defendants' experts or other evidence.

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