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1 IN THE MATTER OF AN ARBITRATION
2 BETWEEN
3 LANCE ARMSTRONG and §
3 TAILWIND SPORTS, INC. §
4 §
4 Claimants, § ARBITRATION BEFORE THE
 § HONORABLE RICHARD
5 VS. § FAULKNER, RICHARD
 § CHERNICK AND TED LYON
6 SCA PROMOTIONS, INC. and §
HAMMAN INSURANCE SERVICES, §
7 Inc. §
 §
8 Respondents.
9
10
11 ARBITRATION
12 TRANSCRIPT OF PROCEEDINGS
13 SEPTEMBER 28, 2005
14 VOLUME 3
15 CONFIDENTIAL
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19
20 On 28th day of September, 2005, at 9:14
21 a.m., the arbitration in the above proceedings came on
22 before Arbitrators Richard Faulkner, Richard Chernick
23 and Ted Lyon, at the offices of JAMS, 8401 North
24 Central Expressway, Suite 610, in the City of Dallas,
25 County of Dallas, State of Texas.

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1 APPEARANCES
2 FOR THE CLAIMANTS:
3 Mr. Tim Herman
3 Mr. Sean Breen
4 HERMAN HOWRY & BREEN
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5
6 FOR THE RESPONDENTS:
7 Mr. Jeffrey M. Tillotson
7 Mr. Cody L. Towns
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10
11 ALSO PRESENT:
11 Ms. Mariela Evora
12 Mr. Chris Compton
12 Mr. John Bandy
13 Mr. Robert Hamman
14 Mr. Jason Barnes
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1 PROCEEDINGS
2 ARBITRATOR FAULKNER: Mr. Longley, I'll
3 remind you you're still under oath from yesterday,
4 and, Mr. Herman, you have finished, correct?
5 MR. BREEN: I did, Mr. Faulkner, yes.
6 ARBITRATOR FAULKNER: Mr. Breen, I'm
7 sorry.
8 MR. BREEN: That's all right.
9 ARBITRATOR FAULKNER: All right. Mr.
10 Tillotson, let's proceed.
11 MR. TILLOTSON: Thank you.
12 JOE K. LONGLEY,
13 having been previously duly sworn, testified further
14 as follows:
15 CROSS EXAMINATION
16 BY MR. TILLOTSON:
17 Q. Good morning, Mr. Longley.
18 A. Good morning, sir.
19 Q. I first want to cover just a couple of
20 background areas to make sure we have some agreement
21 on the structure and analytical framework of the law.
22 First, with respect to section 21.17 and with respect
23 to section -- article I should say, article 21.17 and
24 article 21.21, just by way of background, both of
25 those have been recodified into different sections of

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1 the insurance code; is that right?
 2 A. Yes, sir.
 3 Q. I'm going to -- I think those were effective
 4 in April of '05 so I believe we're still under 21.17
 5 and 21.21. Is that what you're operating under?
 6 A. That's my understanding.
 7 Q. Okay. Let's first look --
 8 A. Although we do cite to the new ones. As I
 9 mentioned to you in my deposition, we're recodifying
 10 our book to include the new sections.
 11 Q. Let's first look at 21.21. And Mariela, if
 12 you'll bring that up for us, I want to -- in article
 13 21.21. Now, with respect to article 21.21, what's
 14 prohibited -- and you either can turn around or I have
 15 a copy of the code here if that would be more helpful
 16 to you.
 17 A. If you've got a copy, that would be good.
 18 Q. Under article 21.21, what's the applicability
 19 and what's prohibited begins with Section 3 there, no
 20 person shall engage in this state in any trade
 21 practice which is defined in this act or determined
 22 pursuant to this act to be an unfair method of
 23 competition, correct?
 24 A. Unfair or deceptive act or method of
 25 competition, that's correct.

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1 Q. Right, and it's not just any unfair or
 2 deceptive act, it's or practice in the business of
 3 insurance; is that right?
 4 A. Correct.
 5 Q. Okay. So it's got to be a person in the
 6 business of insurance?
 7 A. That's correct.
 8 Q. And if we look at the definition of person,
 9 would you agree with me that the definition of person
 10 is someone engaged in the business of insurance, there
 11 in section 1?
 12 A. Correct.
 13 Q. Okay. So to determine whether or not article
 14 21.21 is applicable to SCA in this case, we would have
 15 to ensure that the act that's being alleged to be
 16 unfair and deceptive is in this practice of the
 17 business of insurance and that SCA is a person in the
 18 business of insurance doing that act?
 19 A. Or a person with SCA being in the business of
 20 insurance.
 21 Q. Based upon Garrison it could also be an
 22 employee of SCA?
 23 A. It can be any person, it could be an
 24 individual. As it says here, anyone engaged in the
 25 business of insurance.

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1 Q. Now, article 21.17, if we can contrast that.
 2 MR. TILLOTSON: And do you have 21.17
 3 there, Mariela?
 4 MS. EVORA: Yes.
 5 Q. (BY MR. TILLOTSON) Now, for 21.17 the key
 6 language is in all suits brought upon insurance
 7 contracts or policies hereafter issued or contracted
 8 for in this state. Do you see that?
 9 A. I do.
 10 Q. Okay. So to be applicable under 21.17, we
 11 have -- it's got to be a suit on an insurance
 12 contract; is that right?
 13 A. Correct.
 14 Q. Or policy?
 15 A. Contracts or policies issued or contracted
 16 for in this state, correct.
 17 Q. Okay. Now, it is possible, is it not,
 18 Mr. Longley, for someone to be, under article 21.21,
 19 engaged in the business of insurance but doing
 20 something that -- different that's not an insurance
 21 contract or policy that wouldn't fall under 21.17?
 22 A. Correct.
 23 Q. For example, let's use a simple one if we can
 24 agree on it, an insurance company, Allstate, decides
 25 to sell hot dogs on the street. Although they're in

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1 the business of insurance, that selling of the hot dog
 2 would not fall under 21.17?
 3 A. I believe you're correct.
 4 Q. Let's now relate it to a specific example
 5 here. You know that SCA, because you've looked at
 6 their web site -- by the way, we have had a lot of
 7 hits on our web site. Has that been you guys over
 8 there?
 9 A. Probably so.
 10 Q. You know from our web site that SCA offers a
 11 lot of different businesses or prize indemnifications
 12 or promotions?
 13 A. Correct.
 14 Q. And it is possible -- just theoretically go
 15 with me here -- that some of those particular
 16 activities do not involve an insurance contract?
 17 A. It's possible, I'll agree.
 18 Q. So although SCA could be in the business of
 19 insurance, we need to look at their actual individual
 20 promotions, prizes, products to figure out if it's an
 21 insurance contract to figure out if 21.17 applies?
 22 A. I think that's correct. What you would have
 23 to do is look at the totality of the circumstances.
 24 Q. Okay. Last point -- thank you -- under
 25 article 21.21, although you're in the business of

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1 insurance and you're a person engaged in the business
2 of insurance, you're under 21.21, to determine if
3 there's liability under that particular provision you
4 then need to look at the specified provisions of
5 article 21.21 to see if there's been some violation of
6 some kind that's prohibited, correct?
7 A. That or to the DTPA.
8 Q. Okay, thank you.
9 Now, in determining these two standards,
10 the business of insurance and the insurance contract,
11 it is true, is it not, that what you looked at was
12 article 101.051?
13 A. That's one of them, yes, sir.
14 Q. That's what we went through yesterday; is
15 that right?
16 A. Right, and its predecessor statute which is
17 usually cited in the cases.
18 Q. Okay. That's 1.14-1?
19 A. Correct.
20 Q. Which has now been recodified as 101.051?
21 A. Correct.
22 Q. First 101.051 -- the 101 section is the
23 unauthorized practice of insurance; is that right?
24 A. Yes, sir, I believe that's correct.
25 Q. And what 101.051 is defining is what conduct

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1 someone has to do to be considered doing the business
2 of insurance in Texas to figure out whether or not
3 they're doing unauthorized business, meaning they're
4 not licensed?
5 A. That's part of it, yes. The courts have
6 looked at the statute though just to determine if
7 they're in the business of insurance, authorized or
8 unauthorized, as they did in Garrison.
9 Q. Now, it's true, is it not, that not a single
10 Texas Supreme Court case has ever adopted 101.051 as
11 the definition you would use for article 21.21?
12 A. They've never adopted any definition.
13 Q. Okay.
14 A. For that or any other statute.
15 Q. So you'll at least agree with me that when
16 you say 101.051 is an appropriate place to look to see
17 to start defining the business of insurance, the Texas
18 Supreme Court has not adopted that as the definition?
19 A. Well, they're not defining the business of
20 insurance, they're looking at conduct to see if it
21 falls within the criteria that are listed for the
22 business of insurance.
23 Q. Now, in fact, you are familiar with the Great
24 American case, are you not?
25 A. I am.

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1 Q. Isn't it true that in the Great American case
2 the Texas Supreme Court explicitly rejected using at
3 that time what was 1.14-1, now which is 101, as the
4 definition of the business of insurance under article
5 21.21?
6 ARBITRATOR FAULKNER: Just a minute.
7 ARBITRATOR LYON: Is the Great American
8 case in your --
9 MR. TILLOTSON: Let me clear that up and
10 I'll give you a copy. I think we did.
11 Q. (BY MR. TILLOTSON) You did a list of cases
12 that you relied on in connection with performing your
13 opinion work here; is that right?
14 A. Correct.
15 Q. Okay. I don't think I have an additional --
16 I provided copies yesterday, but we're going to have
17 some more --
18 MS. EVORA: I don't have extras.
19 ARBITRATOR CHERNICK: It was handed out
20 to us with your slides.
21 MR. TILLOTSON: Yes.
22 ARBITRATOR FAULKNER: Here you go.
23 ARBITRATOR LYON: That's the one on the
24 surety deal?
25 MR. BREEN: Yes, that's the surety deal.

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1 ARBITRATOR LYON: Okay, I've got that.
2 Please proceed, I'm sorry.
3 MR. TILLOTSON: That's quite all right.
4 Q. (BY MR. TILLOTSON) You did a list of -- just
5 so we know what the Great American case is, I think
6 you referred to it and I'm going to tease you a little
7 bit, it may have been somewhat derisively as, is that
8 the opinion Justice Owen wrote?
9 A. I did not refer to it that way.
10 Q. I'm teasing you. All right?
11 A. I really didn't know who wrote it.
12 ARBITRATOR CHERNICK: I think that was
13 Mr. Breen.
14 MR. TILLOTSON: I just want to be careful
15 in case tomorrow something big happens in her career.
16 MR. BREEN: I'll take the hit for that.
17 MR. TILLOTSON: Thank you, thank you.
18 Q. (BY MR. TILLOTSON) Now, you did a list of
19 cases for us of cases that you relied on in connection
20 with coming up with your opinions.
21 A. Yes, sir.
22 Q. And I have that list here if you'll bring
23 that up. It was sent to me in an e-mail and I have a
24 copy here for you.
25 A. Thank you.

<p style="text-align: right;">Page 358</p> <p>1 Q. And this is an e-mail from Mr. Breen and 2 you'll see on there you've listed a bunch of cases but 3 the Great American case is not on there; is that 4 right? 5 A. That's correct. 6 Q. Okay. Now, and in Great American, the -- you 7 are familiar with Great American? 8 A. I am familiar with it. 9 Q. And the issue in Great American was whether 10 or not a suretyship fell under article 21.21, fair? 11 A. I believe that's correct. 12 Q. And one of the peculiar things about 13 suretyship is -- 14 MR. TILLOTSON: Mariela, put that back up 15 to 101.051. 16 Q. (BY MR. TILLOTSON) One of the curious things 17 about suretyship is B2 -- this is the same factors 18 you're using under doing the business of insurance. 19 B2, in fact, specifically defines making or proposing 20 to make as guaranteed or assureds or a guaranty or 21 suretyship contract as a vocation. So 101.051 22 specifically defines suretyship as doing the business 23 of insurance in Texas, correct? 24 A. Correct. 25 Q. Yet despite the fact that it's specifically</p>	<p style="text-align: right;">Page 360</p> <p>1 Q. (BY MR. TILLOTSON) Okay. In other words, in 2 1.14 is the factors you're using under 101.051, 3 correct? 4 A. Correct. 5 Q. And what the Supreme Court is saying is that 6 that's great for 1.14-1, but it doesn't govern when we 7 are trying to figure out what the business of 8 insurance is for article 21.21, correct? 9 A. No, I disagree. I think, of course, Garrison 10 came after this case and that's exactly what they did. 11 Q. We will talk about that in a second. 12 MR. TILLOTSON: Mariela, if you'll go 13 down further in the paragraph. 14 ARBITRATOR LYON: Would you repeat that 15 question, because I didn't hear the question, your 16 question to Mr. Longley. 17 MR. TILLOTSON: The Supreme Court was 18 holding or saying that whatever the factors are in 19 1.14-1, now 101.051, that's great, but that's not what 20 tells us what the definition of the business of 21 insurance is for article 21.21. 22 ARBITRATOR LYON: And you disagreed with 23 that? 24 THE WITNESS: I disagreed with that. 25 MR. TILLOTSON: I think he did.</p>
<p style="text-align: right;">Page 359</p> <p>1 defined suretyship in 101.051, the Texas Supreme Court 2 in the Great American case said so what? Article 3 21.21 stands on its own, correct? 4 A. No, it didn't say exactly that. It just said 5 a suretyship was different from insurance in that you 6 could look to the obligor whereas you don't in an 7 indemnification situation. 8 Q. Let me direct your attention. 9 MR. TILLOTSON: Mariela, if you'll bring 10 up the Great American case at page 423 to -- and 11 nowhere for the purpose -- this paragraph there on the 12 front page, just down a little bit. If you'll blow up 13 that whole paragraph for us. The Supreme Court says, 14 you'll agree with me, nowhere in the purpose clause of 15 article 1.14-1 did the legislator indicate that the 16 list of acts contained therein which constitute doing 17 an insurance business was to apply throughout the 18 code. Do you see that? 19 A. What page are you on? 20 Q. Page 423. 21 ARBITRATOR FAULKNER: It's page 10 of the 22 handout. 23 MR. TILLOTSON: I'm sorry, I should have 24 highlighted your provision. 25 A. Yes, sir.</p>	<p style="text-align: right;">Page 361</p> <p>1 THE WITNESS: I said Garrison, which was 2 a later case by the Supreme Court with some of the 3 same people on the Court, used the criteria with 4 regard to determining whether it was under 21.21. 5 Q. (BY MR. TILLOTSON) If you'll look at the top 6 there, which we are going to blow up, continuing on in 7 that paragraph for you, the Supreme Court says, we 8 cannot conclude that the enactment of article 1.14-1 9 altered the scope of the term of business of insurance 10 as it is used in article 21.21. Do you see that? 11 A. I see it. 12 Q. Now, is it your opinion or belief that 13 somehow this holding was modified, altered or changed 14 in the Garrison case, which came three years later? 15 A. Not really. It's just that this holding has 16 been limited to its facts, which is a suretyship 17 situation. When you're looking at the business of 18 insurance for any other purpose other than unique 19 characteristics of a suretyship, then they look to it 20 to determine what's the business of insurance for 21 21.21. 22 Q. Unlike the situation that brings us here 23 today, the one differing factor in the Great American 24 case is that suretyship, the very issue they were 25 considering, is directly found in 101.051, correct?</p>

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1 A. Correct.
 2 Q. Now, you'll agree with me, won't you, that
 3 the Great American case was later affirmed or ratified
 4 or whatever the right word would be by the Supreme
 5 Court of Texas in the Dallas Fire Insurance Company
 6 case?
 7 A. Yes, sir.
 8 Q. And that was in 2004, correct?
 9 A. That was a suretyship case.
 10 Q. And there was still no mention in that case
 11 that 101.051 or 1.14-1 applies to article 21.21,
 12 except in the case of surety, correct?
 13 A. I'll have to see the case. I don't recall.
 14 What portion of the case are you referring to?
 15 MR. HERMAN: Are you talking about Dallas
 16 Fire?
 17 MR. TILLOTSON: Dallas Fire, yes.
 18 A. Yes, let me see that case, please.
 19 MR. TILLOTSON: I'll pass it out to the
 20 panel.
 21 MR. BREEN: You might want to use his
 22 copy, Mr. Longley. This one is printed out in a
 23 format. So if he's going to ask you questions, it
 24 might be easier.
 25 Q. (BY MR. TILLOTSON) All right. If you'll

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1 turn to the second page of the case, I'll direct your
 2 attention to the language the Supreme Court wrote and
 3 this was a per curiam opinion, and at the bottom there
 4 it says, as we have previously noted, the insurance
 5 code is somewhat different and that's the point we
 6 have made earlier, there's not a unified definition,
 7 and again notes that although --
 8 A. But there's no unified definitions with
 9 regard to the business of insurance.
 10 Q. Right, but what the Texas Supreme Court does
 11 note is that even though something is defined as doing
 12 business in 1.14-1, that does not necessarily mean it
 13 must be business of insurance for article 21.21,
 14 correct?
 15 A. No. It says here, thus, quote, the business
 16 of insurance, end quote, has meant different things in
 17 different sections of the code. And then when you
 18 look back to the last page it says in the last
 19 paragraph of the opinion, by limiting the scope of
 20 article 21.21 to the business of insurance, the
 21 legislature intended it to apply to a species of
 22 economic enterprise, not to a particular contract or
 23 on a piecemeal basis.
 24 Q. Right. And so the definition of doing the
 25 business of insurance under 1.14 is nice, but it

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1 doesn't necessarily stand as the definition for
 2 article 21.21?
 3 A. There is no definition. You have to look to
 4 the criteria as they say here, by limiting the scope
 5 of article 21.21 to the business of insurance, the
 6 legislature intended it to apply to a species of
 7 economic enterprise, not to particular contracts on a
 8 piecemeal basis.
 9 Q. Okay. So, for example, when you look at
 10 101.051, provision 3, making or taking an insurance
 11 application in the state of Texas --
 12 A. Right.
 13 Q. -- and you apply that to 21.21, in your mind
 14 you're not using 101.051 as a definition, you're just
 15 using it as a criteria?
 16 A. Absolutely. That's what those courts do.
 17 Q. And sometimes, though, even though -- you'll
 18 agree with me that even though a criteria is mentioned
 19 directly, specifically in 101.051, even though it
 20 might be directly mentioned, the Supreme Court has
 21 said that doesn't matter, we need to look at the
 22 underlying transaction, correct?
 23 A. It said that with regard to suretyship.
 24 That's been the only place it's ever said it. And
 25 that was because of the unique characteristics of the

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1 suretyship.
 2 Q. Let's talk about that. One unique
 3 characteristic of suretyship is that there really
 4 isn't a spreading of the risk; isn't that true?
 5 A. That's one of them.
 6 Q. Another is that you can sue the principal?
 7 A. Yes, sir. I think that's the principal one.
 8 Q. So there's at least two distinguishing
 9 characteristics that although it's defined as the
 10 business of insurance, the Supreme Court says when you
 11 look behind that we don't think this is really the
 12 business of insurance?
 13 A. That's what they said in that particular
 14 instance, and that's been the only instance I've known
 15 of any of the criteria where they've singled something
 16 out.
 17 Q. Now, let's talk for a minute about the
 18 Garrison case, if we could. As I understand it now,
 19 I'm going to stand to be corrected, because I know
 20 it's your case, so I'll be careful, the Garrison case
 21 involved whether or not an individual person could be
 22 involved in doing the business of insurance as opposed
 23 to the corporation; is that right?
 24 A. That's correct.
 25 Q. And in Garrison it was -- I think the actual

<p style="text-align: right;">Page 366</p> <p>1 issue presented to the Court was whether or not the 2 insurance agent or employee could also be under 21.21. 3 A. Correct, it was an employee. 4 Q. Okay. And you'll agree with me in connection 5 with that case that the Court did not look to cite or 6 refer to 1.14-1 as the factors they would look to for 7 purposes of their analysis? 8 A. They looked to those factors, they did not 9 cite the statute by the citation in the case. 10 Q. There was no reference -- when I looked at it 11 last night, there was no reference to 1.14-1 in 12 Garrison at all, is there? 13 A. No, but the characteristics are mentioned. 14 Q. Would it be inaccurate to say the Supreme 15 Court in Garrison adopted or endorsed or supported by 16 referring to 1.14-1 as the factors you would look to 17 for an article 21.21 definition? 18 A. I disagree. They specifically named a factor 19 which is found in 1.01.051. 20 Q. Okay. 21 A. They just didn't say the citation after it as 22 to where they got it. 23 Q. One of the things that they did? 24 A. All of those were before the Court I can 25 assure you.</p>	<p style="text-align: right;">Page 368</p> <p>1 A. A phone call to an employee of TDI in the 2 litigation section, Mr. William Goodman. 3 Q. These are friends of yours? 4 A. Absolutely. 5 Q. And you didn't make any effort to describe to 6 them all of the facts as you now understand them, did 7 you? 8 A. I tried to describe to him all of the facts 9 that were involved in this particular case with regard 10 to the factors in 101.051. We discussed the hole in 11 one insurance situation and its applicability as to 12 whether or not it would be in the business of 13 insurance in Texas and he told me that he felt in both 14 situations they would be interpreted that way. 15 Q. You would agree with me that before the TDI 16 could take any sort of position probably that it would 17 not be Mr. Goodman's decision or call that would be 18 making that decision, correct? 19 A. Just like it wouldn't be Mr. Fisher's in the 20 1988 letter. 21 Q. I understand that, but you'll agree with me, 22 won't you? 23 A. Certainly, but I say if the panel were to 24 request an amicus brief on this issue, I think I know 25 how TDI would come out on it.</p>
<p style="text-align: right;">Page 367</p> <p>1 Q. Also before the Court was the dictionary 2 definition of persons; is that correct? 3 A. That's correct. 4 Q. Was that your citation? 5 A. I don't know if it came from me or from the 6 Court, but we tried to give them every possible avenue 7 they could have to understand the history of article 8 21.21 and its application. 9 Q. Also, one of the things that was important in 10 the Garrison case, as I recall, was the fact that the 11 Texas Department of Insurance had filed an amicus 12 curiae brief; is that correct? 13 A. That's correct. 14 Q. Supporting your position? 15 A. That's correct. 16 Q. And you'll agree with me then the case here 17 in front of us today, the only written information we 18 have from TDI, for whatever it's worth, is the letter 19 that you were examined about yesterday? 20 A. Well, yes. I mean, that's the only thing 21 that's in evidence so far. I think if the panel asks 22 TDI to file an amicus brief in this proceeding, it 23 would come down on the side that this is insurance. 24 Q. That's based upon your phone call with a 25 friend of yours at TDI?</p>	<p style="text-align: right;">Page 369</p> <p>1 Q. Okay. Now, what -- you'll also agree with me 2 in the Garrison case one of the things that the 3 Supreme Court said that a decision making panel is 4 supposed to look to to decide whether or not there's 5 the business of insurance is, quote, assign and 6 determine the meaning given by experts in a particular 7 trade, subject matter or art. 8 A. Correct. 9 Q. And if the TDI comes in, great. If not, look 10 to what the experts and what the subject matter says, 11 fair? 12 A. Fair. 13 Q. Now, although we have been talking about 14 101.051 and whether or not it has meaning or bearing 15 on 21.21, you'll agree with me that there is no case 16 out there whatsoever addressing the issue of whether 17 101.051 has anything to do with determining whether 18 there was an insurance contract under article 21.17? 19 A. I agree. 20 Q. Okay. Now, let's talk about what the 21 standard is. Let's talk about what we know you're not 22 supposed to look at or what in your mind is material. 23 You would agree with me that someone saying it's not 24 insurance doesn't make it not insurance? 25 A. I agree.</p>

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1 Q. And conversely someone standing up,
 2 Ms. Price, Mr. Gorski, Mr. Armstrong himself saying
 3 this is insurance doesn't make it insurance?
 4 A. I agree, except that has different
 5 ramifications, but I do agree with your statement.
 6 Q. Right. It doesn't make it insurance. There
 7 may be some other cause of action out there, for
 8 example?
 9 A. Well, or it may have implications with regard
 10 to misrepresentation or unconscionable action or
 11 fraud, but certainly it does not make it insurance.
 12 Q. For purposes of what we are here today, it
 13 doesn't make it insurance?
 14 A. Yes, sir, I agree.
 15 Q. We saw some article by some freelance writer
 16 from New York, Mr. O'Hare, yesterday talking about
 17 something and whatever he writes, for example, doesn't
 18 make anything insurance; it isn't worth much?
 19 A. I don't know about that. I agree that what
 20 denomination you give to it doesn't necessarily make
 21 it insurance or not make it insurance. You have to
 22 look at the factors that the courts find to be
 23 authoritative to determine that.
 24 Q. Now, let's talk about some specific examples
 25 so we can start dispensing with things. An addendum

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1 to a contract that says, this is an addendum to the
 2 business contract here, by the way, the business
 3 contract is not insurance doesn't make the business
 4 contract not insurance, correct?
 5 A. Correct.
 6 Q. Okay. Now, the specific example here, an
 7 addendum to the contract that was mistakenly, so the
 8 testimony has been, entitled certificate of insurance
 9 doesn't make the underlying transaction insurance,
 10 correct?
 11 A. It doesn't make it insurance. Again, it
 12 would have ramifications with regard to what's being
 13 represented to the public.
 14 Q. Okay. Also, purchasing insurance -- let me
 15 rephrase that, I'm sorry. Purchasing reinsurance --
 16 AIG purchasing reinsurance, if that's, in fact, what
 17 happened, doesn't make or relate to SCA's underlying
 18 contract with Tailwind and make it insurance, correct?
 19 A. Well, I disagree with your premise. I don't
 20 think AIG purchased reinsurance. I think it was SCA
 21 that purchased the reinsurance and AIG came in days
 22 later after the deal had been done.
 23 Q. I understand your opinion regarding the
 24 facts, but assume with me for a second that the
 25 correct way in which the transaction happened was SCA

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1 purchased insurance from AIG and AIG purchased
 2 reinsurance from Swiss Re, assume that for a moment.
 3 A. Assume that's the way it went?
 4 Q. Yes. Those subsequent transactions don't
 5 have any bearing on whether or not the SCA business
 6 contract was insurance?
 7 A. That's correct.
 8 Q. And, in fact, reinsurance itself is
 9 specifically excluded from 101.051 as doing the
 10 business of insurance, correct?
 11 A. Well, it's the flip side of what suretyship
 12 is. Yes, it is excluded, but the Supreme Court -- not
 13 the Supreme Court, but the Court of Appeals in Austin
 14 in Kitley said that it was included when you engage in
 15 the criteria that are listed in 101.051.
 16 Q. Right.
 17 A. So you have the flip side of suretyship with
 18 reinsurance, so, yes, reinsurance you do look to
 19 101.051.
 20 Q. So now we saw two examples of the factors in
 21 101.051; one, suretyship was specifically included,
 22 but the Supreme Court has told us it doesn't count for
 23 21.21, and an example of where something is excluded,
 24 reinsurance under 101.051, but at least one court said
 25 it could well be under 21?

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1 A. It doesn't say it could well be, it said it
 2 was.
 3 Q. Now, also, an individual using words like
 4 coverage doesn't make it insurance, does it?
 5 A. No, although coverage, I think, routinely --
 6 is considered synonymous with coverage -- with
 7 insurance.
 8 Q. Only when you're talking about insurance,
 9 though, right? For example, if I say the Dallas
 10 Cowboys had great coverage on the Monday night
 11 football game, we know what I'm talking about is not
 12 insurance?
 13 A. Right, but if you're talking about -- on the
 14 web site where you're talking about coverage for
 15 claims and, you know, our risk, your reward, I mean,
 16 coverage there has -- in that context assumes
 17 insurance.
 18 Q. Okay. Now, we've talked about what doesn't
 19 count, let's take what does count. You'll agree with
 20 me that really the determination of whether you're in
 21 the business of insurance or whether there's an
 22 insurance contract, you really look at the underlying
 23 transaction of what happened, what was going on?
 24 A. I agree. You look at the specifics of the
 25 situation to see what criteria are there or what

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1 criteria are not there.
2 Q. Let's talk now about those specific criteria.
3 I want to see if we can agree on a definition of the
4 word loss, L-O-S-S. Would you agree with me -- well,
5 let me ask it this way. I noticed in Garrison, in the
6 case that you were successful on, that they used the
7 American Heritage dictionary definition of persons.
8 Do you recall that?
9 A. I do recall that.
10 Q. Turns out I have one. Would you agree with
11 me with respect to the same dictionary that the
12 Supreme Court used in defining persons I've
13 highlighted loss? And you define for us how that is,
14 what that calls loss.
15 A. This is the same one that they use, you say?
16 Q. I think this is the Second College Edition.
17 They might have used the third. I'm not sure. This
18 is the only one I have in my house.
19 A. I'll read what's here. I won't agree that's
20 the same one the Supreme Court used.
21 Q. Okay. Give us the definition from the
22 American Heritage Dictionary.
23 A. What you've highlighted here, it says the act
24 or an instance of losing.
25 Q. And you would accept that, wouldn't you, as a

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1 fair definition for loss?
2 A. I would accept all the definitions here.
3 There are others as well.
4 Q. Okay. You'll agree with me, though, for the
5 definition of loss, the act or instance of losing,
6 that what would not come under this definition is an
7 act or instance of a gain; that would not be a loss?
8 A. Under this definition, that's correct.
9 Q. Okay. And not just an actual gain, but you
10 would agree with me that what would not come under the
11 definition of loss is the act or instance of a
12 possible gain would not be a loss?
13 A. Well, strictly speaking, I suppose, but there
14 are other definitions here that are given that you did
15 not highlight which a loss would -- such as what's
16 happened here with regard to Tailwind would certainly
17 fall under it.
18 Q. Well, give me an example of a loss where you
19 have a possibility of a gain that in your mind is a
20 true loss, an act or instance of losing.
21 A. Well, when you lose \$5 million that you're
22 obligated to pay, that's a loss. That's an adverse
23 event.
24 Q. And if there's the possibility of gain, even
25 though you're paying the \$5 million, that wouldn't

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1 come under our definition of loss, would it, sir?
2 A. It wouldn't come under the one you've
3 highlighted here, but it would certainly come under
4 the one of in the business of insurance.
5 Q. Let's talk about the definition of the word
6 loss. Now, you'll agree with me that if we take that
7 definition of loss, the act of losing, you'll agree
8 with me that in cases that talk about insurance as a
9 transfer of risk, it's not just any transfer of risk,
10 it's transfer of a risk of loss?
11 A. No, I disagree.
12 Q. Okay. Why don't we look at the case that you
13 relied on, I think you specifically pointed out to the
14 panel yesterday, which is the Texas Association of
15 Qualified Drivers. Do you recall that?
16 A. I recall that.
17 MR. TILLOTSON: Mariela, can you bring
18 that up?
19 MR. HERMAN: Do you have a copy of the
20 case for me?
21 MR. TILLOTSON: Yes, I do.
22 MR. BREEN: It's in the spiral there.
23 MR. TILLOTSON: I was going to say, it's
24 in the spiral binder that they provided to you, their
25 memorandum.

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1 MS. EVORA: I have loose copies.
2 ARBITRATOR FAULKNER: I have it.
3 MR. TILLOTSON: I have other copies here
4 as well.
5 ARBITRATOR FAULKNER: Okay.
6 Q. (BY MR. TILLOTSON) Okay. First, this is a
7 1962 Texas Court of Appeals Austin case, correct?
8 A. Yes, sir.
9 Q. All right. At issue in this particular case
10 was auto club activities and whether that constituted
11 insurance; is that right?
12 A. Correct.
13 Q. Which, by the way, are somewhat creatures of
14 statutory regulations; there's all kinds of
15 regulations on auto clubs, what constitutes an auto
16 club and what doesn't, fair?
17 A. There have been statutes in the past, that's
18 correct.
19 Q. Now, in this particular case, I'm going to
20 direct your attention to 581, first I want to -- in
21 the PowerPoint presentation done by Mr. Herman, there
22 was a quote from this case, which I'm going to
23 identify and then put up the full paragraph, and if
24 you'll look at page 581 of the case, the paragraph
25 that begins on the second column of page 2, it starts

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1 off with, there is no statutory general definition of
 2 the word insurance in Texas. Do you see that?
 3 A. I'm not with you yet. Let me see if I can
 4 find it.
 5 Q. All right.
 6 A. On 581?
 7 Q. I'm sorry, sir, if I may?
 8 A. Sure.
 9 Q. I direct your attention to this paragraph
 10 right here and I've blown it up on the board.
 11 A. Right here?
 12 Q. Yes. First, in the PowerPoint presentation
 13 as best I can tell, the PowerPoint starts off with the
 14 word contract by which one party... all right?
 15 A. Okay.
 16 Q. That's what the PowerPoint said. What's been
 17 deleted is it has also been defined as a contract. Do
 18 you see that?
 19 A. Yes, sir.
 20 Q. Okay. Now, let's see what came before the
 21 portion of that sentence that was put in the
 22 PowerPoint. There's no statutory general definition
 23 of the word insurance in Texas, however, insurance has
 24 been defined by the appellate courts as an undertaking
 25 by one party to protect the other party from loss

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1 arising from named risks for consideration upon the
 2 terms and under the conditions recited. Do you see
 3 that?
 4 A. I do.
 5 Q. You'll agree with me that it's not just
 6 protecting the other party from any risk, it's from
 7 loss from a named risk, correct?
 8 A. Correct.
 9 Q. Because there are plenty of risks out there
 10 for which there's the possibility of making money that
 11 would not fall under this definition, for example,
 12 purchasing a stock, correct?
 13 A. I don't know. Perhaps it would be covered.
 14 Q. Well, there's lots of risks for which you
 15 might have a gain or might have a loss, right?
 16 A. True.
 17 Q. But the point of insurance is not to take on
 18 those risks for which there's a gain or a loss but to
 19 take on those risks for which you may suffer a loss,
 20 correct, Mr. Longley?
 21 A. No. It's a loss from a named risk, a
 22 contingency that might occur which would result in you
 23 having a loss.
 24 Q. But you would agree with me if we struck the
 25 word loss from this, this definition could include the

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1 possibility of a risk for which there might be a gain,
 2 right?
 3 A. Certainly. And it could be if you struck the
 4 word loss, you could substitute that from loss or
 5 contingency and the courts have used the word
 6 contingency.
 7 Q. Let's stick with the definition here on which
 8 you used. With loss, if we use our definition of loss
 9 from the American Heritage Dictionary, it would be the
 10 act of instance of losing from a named risk, correct?
 11 A. Yes, if you use the definition that you've
 12 limited that to.
 13 Q. Well, okay. Now, the Court then goes on to
 14 say whether or not a contract is one of insurance is
 15 to be determined by its purpose, effect, contents and
 16 import, not necessarily the terminology. Do you see
 17 that?
 18 A. Yes, sir.
 19 Q. We have talked about that. You'll agree with
 20 me, will you not, that Mr. Gorski testified, which I
 21 think you heard a portion of, that the purpose of his
 22 contract with Mr. Armstrong was to make money?
 23 A. I think I heard something like that.
 24 Q. Okay. Now, one of the other things that you
 25 relied on, aside from the Texas Association of

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1 Qualified Drivers, was an Attorney General opinion
 2 from Mr. Morales. Do you recall that?
 3 A. I do.
 4 MR. TILLOTSON: Do you have copies of
 5 that?
 6 MR. BREEN: It's in the spiral, too,
 7 Jeff.
 8 MR. TILLOTSON: Oh, okay. I have a
 9 version here for you.
 10 ARBITRATOR FAULKNER: What tab number is
 11 that?
 12 MR. BREEN: Are you using the '97, Jeff?
 13 MR. TILLOTSON: Yes, '97.
 14 THE WITNESS: No, this is a
 15 Crawford-Martin opinion here.
 16 MR. TILLOTSON: I'm sorry, I gave you the
 17 wrong one.
 18 MR. BREEN: The '97 opinion, for the
 19 panel, is tab 4.
 20 MR. TILLOTSON: I have additional.
 21 ARBITRATOR FAULKNER: No, thanks.
 22 ARBITRATOR CHERNICK: I'll take one of
 23 those if you've got them.
 24 MR. TILLOTSON: Absolutely.
 25 Q. (BY MR. TILLOTSON) This is a 1997 opinion

<p style="text-align: right;">Page 382</p> <p>1 from Dan Morales, one of the things on your list of 2 materials on which you relied in reaching your 3 opinions; is that correct? 4 A. That is correct. 5 Q. And, again, this is -- this question of 6 automobile club services and whether or not it 7 constitutes -- whether or not you can do certain 8 things under the Automobile Club Act, right? 9 A. Correct. 10 Q. Now, if you'll turn to page 2 of the 11 opinion -- 12 A. I'm with you. 13 Q. -- there at the bottom, the second paragraph 14 from the bottom, it says, you state that the 15 department of insurance, quote, has historically 16 viewed contracts providing for the indemnification or 17 reimbursement against specified loss. 18 ARBITRATOR LYON: Where are we? I'm not 19 using the same one. 20 ARBITRATOR FAULKNER: If you'll pass 21 those over, we will keep on the same page as you are. 22 MR. TILLOTSON: I apologize, I thought we 23 copied theirs, but we must have printed ours out. 24 ARBITRATOR FAULKNER: It's all right. 25 It's just a different pagination. Thank you.</p>	<p style="text-align: right;">Page 384</p> <p>1 there has to be a fortuitous event causing the loss in 2 other cases, haven't you? 3 A. I've seen that particular word used, yes. 4 Q. Okay. Now, I don't mean to approach too 5 much, but if you'll take a look and see here under the 6 American Heritage Dictionary and tell us what that 7 dictionary at least defines fortuitous as. 8 A. What you have highlighted says happening by 9 accident or chance, lucky or fortunate. A fortuitous 10 meaning may have either fortunate or unfortunate 11 consequences, but the word is not synonymous with 12 fortunate and should not be used unless it refers to 13 something that came about by chance or accident. 14 Q. So you'll agree with me that Mr. Gorski 15 testified or you heard testimony in connection with 16 preparing your opinions that Mr. Armstrong and 17 Tailwind collectively winning the Tour de France was 18 anything but an accident or chance, correct? 19 A. I don't have enough knowledge about it to say 20 that or not. I just know that it was an event which 21 was insured and which happened and which -- for which 22 a claim they said the obligation would be paid was not 23 paid. 24 Q. Now, if you'll look at what's page 6 of the 25 opinion.</p>
<p style="text-align: right;">Page 383</p> <p>1 MR. BREEN: Do you have another one, 2 Jeff? 3 MR. TILLOTSON: Yes. 4 Q. (BY MR. TILLOTSON) All right, let me orient 5 everyone. We are looking at the Attorney General 6 opinion. We are looking at page 2. We are looking at 7 the third paragraph on page 2, starting off with the, 8 you state that the department of insurance, quote, has 9 historically viewed contracts providing for the 10 indemnification or reimbursement against specified 11 loss upon the happening of certain fortuitous events 12 as constituting the business of insurance the meaning 13 of 114.1. Do you see that? 14 A. I see that. 15 Q. You would agree with that particular 16 definition, wouldn't you? 17 A. I agree more with the broader one that's 18 found back on page 6 as the definition, I think, is 19 the current one that would be used more frequently by 20 the courts, but, yeah, I don't disagree with that. 21 Q. Right, and this adds -- this has our word 22 loss there, specified loss, upon happening of certain 23 fortuitous events. Do you see that? 24 A. Sure. 25 Q. Okay. And you've seen that language that</p>	<p style="text-align: right;">Page 385</p> <p>1 A. I'm with you. 2 Q. Okay. Now, if you notice my theme here, I'm 3 trying to mix Republicans with Democrats as I go here 4 to try to keep it fair. 5 A. Fair and balanced. 6 Q. I'm just trying to give everyone all their 7 views. You referred to what you -- a definition you 8 were a little more comfortable with, and there's a box 9 quote there. Do you see that? 10 A. I do. 11 Q. And that's referring to the 1971 Attorney 12 General opinion? 13 A. Right, the Crawford-Martin opinion. 14 Q. Crawford-Martin, okay. And there it quotes 15 it and it says an insurance contract arises when for a 16 stipulated consideration, whether called a premium or 17 a fee or something else, one party undertakes to 18 compensate another party for loss on a specified 19 subject by a specified peril or contingency. Do you 20 see that? 21 A. I see that. 22 Q. And again, the word loss, right? 23 A. I see the word loss. 24 Q. And the peril or contingency, right? 25 A. Yes.</p>

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1 Q. And peril or contingency are the kinds of
2 words you've seen in other cases; is that right?
3 A. Sure.
4 Q. And the last time, I promise, will you agree
5 with me that the definition from at least this
6 dictionary, American Heritage, peril is a condition of
7 imminent danger, exposure to the risk of harm or loss?
8 A. Yes, I see that's what you've highlighted
9 there.
10 Q. Okay. Now, you'll agree with me in the
11 language we have seen from those cases and the
12 definitions we have taken from this dictionary that
13 there is something that is intended that can be
14 positive does not fit within our criteria of loss,
15 fortuitous or peril?
16 A. No, I don't agree with that.
17 Q. Can you think of a single insurance product,
18 other than the one that we are here testifying about
19 today, where an insurance company offers to insure an
20 insured knowing and accepting that the insured is
21 going to try and make the act for which there is
22 insurance happen?
23 A. Well, everything that's on this web site just
24 about is something where there's events that people
25 want to happen.

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1 Q. Put aside --
2 A. Almost everything on there. Almost
3 everything in the prize indemnity insurance business
4 involves that.
5 Q. Yes, sir. Let's move from prize indemnity
6 insurance. Let's put aside that. Is there any other
7 insurance product out there that you're aware of,
8 Mr. Longley, in the many years in which you've had
9 your distinguished career in which an insurance
10 company willingly, knowingly insures an insured for an
11 act the insured is trying to do and is the purpose of
12 the contract?
13 A. Only in the prize indemnity insurance area
14 that has developed is the one that comes to mind.
15 Q. The only one you can think of, fair?
16 A. Right.
17 Q. Most examples we can think of render the
18 notion absurd, like you don't insure someone and
19 they're trying to burn down their house; that's
20 excluded, correct?
21 A. True.
22 Q. You can't insure for punitive damages in
23 Texas, can you?
24 A. Well, that was obviously what was done in the
25 qualified driver's case, but where you -- it was an

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1 intentional act, but, yes, you can, in certain
2 circumstances.
3 Q. But the point is that intentional acts are
4 considered not insurable, correct?
5 A. Well, the burning down of your house
6 situation is, but in the qualified driver's instance
7 was where you were breaking the law by speeding and
8 you were provided with a lawyer and insurance in that
9 regard, so that was an illegal act but it was covered.
10 Q. Let's keep on this intentional and
11 unpredictable. One of the cases you cited was Golf
12 Marketing Worldwide and you said there was a
13 Connecticut case or some cases about hole-in-one
14 insurance. Do you recall that?
15 A. I do recall that.
16 Q. I want to bring up --
17 MR. TILLOTSON: Do you have copies of
18 that case?
19 MS. EVORA: Yes.
20 MR. TILLOTSON: They must be in your
21 book.
22 MR. BREEN: It is, it's under tab 13.
23 Q. (BY MR. TILLOTSON) Okay. It's tab 13. I'm
24 just going to refer to a particular portion of which
25 I'm going to blow up here, which I did, a particular

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1 treatise. In the Golf Marketing Worldwide case -- and
2 first, by way of background, I don't know if you
3 remember this or not, but in this particular case an
4 insurance regulator individual had decided that what
5 Golf Marketing was doing with hole-in-one insurance
6 was, in fact, insurance under Connecticut law,
7 correct?
8 A. Correct.
9 Q. And this case was then challenging that
10 before a state court, right?
11 A. I believe that's correct.
12 Q. And so that's the standard that's going on
13 here where the insurance guy got it wrong, true?
14 A. I think that's true.
15 Q. Now, you are aware that in some of the
16 hole-in-one contests that this particular company put
17 on Golf Marketing Worldwide, the insurance
18 commissioner or regulator or whoever it was said
19 that's not insurance. Do you remember that part?
20 A. I think that's true.
21 Q. And in some of them they said they were,
22 right?
23 A. Yes.
24 Q. And do you remember what the distinction was?
25 In the ones they said weren't were ones in which

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1 prizes were donated or there was some charitable
 2 effect to it?
 3 A. I think I recall that.
 4 Q. And the other ones they found were insurance,
 5 fair?
 6 A. Correct.
 7 Q. Now, this treatise here, are you familiar
 8 with casualty insurance by Mr. Hulk and Mr. Hall?
 9 A. I don't believe I am.
 10 Q. Okay. It's relied on by the Court here. It
 11 says an insurable risk must result from perils that
 12 produce loss that is accidental in the basic sense of
 13 the expression. The loss to the insured must be
 14 fortuitous, unexpected and unpredictable in time and
 15 place. Do you agree with that statement?
 16 A. I don't disagree with it. I think that's the
 17 one that's been used through the years.
 18 Q. It goes on to say it's obvious that the
 19 insured member of a group should not deliberately
 20 create loss or exaggerate an actual loss. To him loss
 21 should be a chance event and preferably one he would
 22 rather avoid. Do you see that?
 23 A. I see that.
 24 Q. And you do accept that, don't you?
 25 A. I accept it as one that's been used in the

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1 past. It's not in use in Texas, but it's one that's
 2 been used. I've seen it before.
 3 Q. You will agree with me that if that
 4 definition in this case, in fact, the testimony and
 5 the evidence that you've seen for your opinions is
 6 that the insured, in your mind Tailwind, was trying to
 7 create the loss and it was one that they wanted to try
 8 to make happen and not avoid, you've seen that?
 9 A. No, I disagree with that. I know that they
 10 wanted to try to avoid that loss. They did that, that
 11 was the reason they were buying the insurance,
 12 otherwise they would be paying \$420,000 and getting
 13 nothing, which would be fraud of the highest
 14 magnitude.
 15 Q. But buying insurance isn't the loss you're
 16 insuring yourself from, is it? That's not the loss
 17 this is talking about or the risk, is it?
 18 A. The risk that they took was the indemnity
 19 that they had to Lance Armstrong, that they had agreed
 20 to pay him and they became liable once he fulfilled
 21 the conditions that were indemnified by SCA.
 22 Q. Wouldn't you agree with me that --
 23 A. And if they didn't have the money to pay it,
 24 they were on the hook for it and that's why they were
 25 trying to get the indemnity that was represented would

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1 be paid.
 2 Q. Wouldn't you agree with me that these kinds
 3 of definitions only make sense if the loss exists
 4 before the existence of the insurance?
 5 A. No, I think --
 6 Q. The risk of loss exists before you actually
 7 have the insurance, right?
 8 A. I'm not sure I follow you on that. It has
 9 nothing to do with the business of insurance and what
 10 Texas looks to for the business of insurance. These
 11 definitions taken in a vacuum really mean nothing.
 12 What you have to look at is what Mr. Hamman did and
 13 what SCA did here and do they fit the criteria that
 14 Texas courts look to. Texas courts don't even look to
 15 these, they look to the criteria that are in 101.051.
 16 Q. We are trying to figure out if we have an
 17 insurance contract, right, under 21.17?
 18 A. Okay.
 19 Q. We're not under 101.051, are we? We are
 20 trying to find out if there's insurance, because if
 21 there's no insurance, you'll agree with me, there
 22 can't be an insurance contract, right?
 23 A. Well, there can be an insurance contract,
 24 certainly.
 25 Q. Now, let's talk about --

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1 A. In fact, there were insurance contracts with
 2 regard to this transaction.
 3 Q. All right. Let's talk now about this
 4 loss -- this definition of peril of loss. The TDI
 5 letter, which is Respondent's Exhibit 1, you should
 6 have that.
 7 A. I do.
 8 Q. Now, you think -- it's your opinion that it
 9 would be nuts for any company to rely on a letter
 10 issued in 1988 from Mr. Fisher for purposes of doing
 11 business in 2001, 2002 and I understand that. What I
 12 really want to focus your attention on is the second
 13 paragraph called insurance is designed.
 14 A. Right.
 15 Q. Do you see that?
 16 A. I do.
 17 Q. Insurance is designed to indemnify insureds
 18 against loss of specified perils, and peril by
 19 definition is not the anticipated outcome but rather
 20 an unfortunate and uncontrollable event which may
 21 cause a loss. Awarding prizes is not a peril, it is a
 22 foreseen result of holding a legitimate contest. Do
 23 you see?
 24 A. I do see that.
 25 Q. And you do agree with the statement there

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1 that insurance is designed to indemnify insureds
 2 against loss from specified perils, correct?
 3 A. Insurance is with regard to the business of
 4 insurance, it has nothing to do with that.
 5 Q. If you're not doing something that's designed
 6 to indemnify insureds against loss of specified
 7 perils, it would be pretty tough to be in the business
 8 of insurance, wouldn't it, sir?
 9 A. Not at all.
 10 Q. So taking an application for employment,
 11 let's use some of the examples of 101.051. Isn't it
 12 true in 101.051 that virtually all of the acts you
 13 went over, taking applications, offering a contract,
 14 helping someone are all related directly to, in the
 15 statute, the word insurance?
 16 A. Related to the business of insurance.
 17 Q. Right. So if we look at 101.051, for
 18 example, it's not just taking any application, it's
 19 taking an application for an insurance contract,
 20 right?
 21 A. Or one that can be construed to be an
 22 insurance contract.
 23 Q. Right. So --
 24 A. It doesn't have to have the word insurance on
 25 the application for it to be an insurance application.

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1 Q. Understood. It has to be insurance?
 2 A. Here there was no application taken, anyway.
 3 Q. It has to be insurance, though, right?
 4 A. Or construed to be insurance by the acts of
 5 the people involved in the transaction, and that's
 6 what you look to is the conduct.
 7 Q. Okay. So under 101.051 and looking at the
 8 conduct, you still have to decide if it's insurance,
 9 correct?
 10 A. By that criteria that's listed there.
 11 Q. Okay. And you will agree with me that one
 12 way to determine it is insurance, a definition you
 13 accept is what's listed right here in this letter from
 14 the Texas Department of Insurance, right?
 15 A. No. This letter was not -- first of all, it
 16 wasn't written by an attorney. Second of all, it
 17 talks about illegal contracts and it does not have the
 18 criteria; it doesn't mention what was 1.14-7 at the
 19 time, nor as it's been construed by the courts since
 20 this time.
 21 Q. This is a definition of insurance that's been
 22 around for years and years and years designed to
 23 indemnify against loss and specified perils --
 24 A. I disagree.
 25 Q. Okay.

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1 A. I disagree with the definition that's there,
 2 it's been used by the courts. It's not been used by
 3 the courts, and this gentleman who I understand is no
 4 longer there was simply writing a letter about the
 5 rejection of a particular policy which we don't have
 6 before this panel.
 7 Q. He wasn't really very far off on the word
 8 peril, was he?
 9 A. No. He uses the word peril.
 10 Q. He's pretty close, right?
 11 A. He uses the word loss.
 12 Q. One of the things you said, you mentioned a
 13 few minutes ago, was looking at the web site and I
 14 remember hearing you say yesterday that SCA's slogan
 15 is, our risk, your reward. Do you remember that?
 16 A. Right.
 17 Q. Okay. Let me see if I can identify on the
 18 web site -- you'll agree with me that under an
 19 insurance context you would have -- the insured, we
 20 would have a loss, however we define that, right?
 21 A. Right.
 22 Q. And the insured would then pay that loss,
 23 right?
 24 A. Not necessarily.
 25 Q. Well, it's covered.

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1 A. Yes. If it's covered, they would usually
 2 look to the insurance to pay the loss.
 3 Q. Right. So that's the insured. That's the
 4 insured. Now, the sort of unusual thing about prize
 5 indemnification is that the loss here is created by a
 6 win in the Tour de France by a third party, have I got
 7 that right? Mr. Armstrong wins the Tour de France,
 8 that creates a loss for Tailwind, which is insured,
 9 and the insurer pays it?
 10 A. Yeah, the insured event was the liability
 11 that Tailwind would have to pay Lance Armstrong in the
 12 event he won the 2004 Tour de France.
 13 Q. Win, win -- win, lose, pay, right?
 14 A. Correct.
 15 Q. Take a look, if you will, though, how people
 16 in the business describe it. If you'll bring up what
 17 we have marked as Respondent's Exhibit 16. For ASU
 18 International -- and you heard testimony from Mr.
 19 Hamman who is a competitor, correct?
 20 A. Yes.
 21 Q. If you'll look there at the top, unlike our
 22 little chart that you and I agreed on, they say he
 23 wins, you win, we pay. And that's more accurate in
 24 this business, isn't it; the insured is actually
 25 winning when the third party wins whatever event it

<p style="text-align: right;">Page 398</p> <p>1 is, correct?</p> <p>2 A. No. The insured is losing \$5 million if the</p> <p>3 company that's given the promise to pay does not keep</p> <p>4 its promise.</p> <p>5 Q. Okay. Even if, in fact, ultimately by the</p> <p>6 third party winning, even if the win creates</p> <p>7 additional money and endorsements, publicity,</p> <p>8 whatever, such that the insured actually profits from</p> <p>9 this, in your mind there's still this loss, correct?</p> <p>10 A. Absolutely. Your example is absurd.</p> <p>11 Q. Well, at least I'm getting somewhere. All</p> <p>12 right. Let's move on.</p> <p>13 We have got some principles. I now want</p> <p>14 to cover them -- what some of the treatises say. Let</p> <p>15 me ask you first a question. You said you taught</p> <p>16 insurance at UT, I think, some years back and you're</p> <p>17 going to teach it again. Were you ever --</p> <p>18 A. I taught it in 2001, spring of 2001. I'm</p> <p>19 scheduled to teach again next spring.</p> <p>20 Q. Okay. Were you ever able to find your book</p> <p>21 that you used? Do you remember I asked you about your</p> <p>22 book?</p> <p>23 A. We have a book and chapter 2 is before this</p> <p>24 panel with regard to the business of insurance in</p> <p>25 McCarran-Ferguson and the history of insurance.</p>	<p style="text-align: right;">Page 400</p> <p>1 materials for insurance license continuing education,</p> <p>2 right?</p> <p>3 A. Yes.</p> <p>4 Q. Now, if you'll keep your hand on that page</p> <p>5 and now turn to Respondent's Exhibit 14, you'll at</p> <p>6 least see that, the Dearborn Insurance Fundamentals</p> <p>7 book, correct?</p> <p>8 A. Yes, sir.</p> <p>9 Q. Yesterday you said you've never heard of</p> <p>10 Dearborn and I accept that, but at least someone has</p> <p>11 heard of Dearborn and someone has said Insurance</p> <p>12 Fundamentals is okay for insurance license continuing</p> <p>13 education in Texas, right?</p> <p>14 A. Sure.</p> <p>15 Q. Okay. Now, if you'll look at what we have</p> <p>16 marked as chapter 2, it's called the Concept of Risk</p> <p>17 Management, and I'll use the bottom page, page 9.</p> <p>18 A. I'm with you.</p> <p>19 Q. Okay. You'll see there that you use the</p> <p>20 example of accident versus arson and in italicized</p> <p>21 language there this book says, the event was</p> <p>22 purposeful in nature and no uncertainty exists,</p> <p>23 therefore, there is no risk in insurance terms of loss</p> <p>24 by fire, using the instance where someone is trying to</p> <p>25 burn down their home, right?</p>
<p style="text-align: right;">Page 399</p> <p>1 Q. That's what's on your web site?</p> <p>2 A. Correct.</p> <p>3 Q. Now, you are familiar with that insurance</p> <p>4 agents and members of TDI go through various CLE</p> <p>5 programs?</p> <p>6 A. I am.</p> <p>7 Q. I think maybe you've even taught at one, have</p> <p>8 you not, for insurance agents?</p> <p>9 A. I've probably taught at several of them.</p> <p>10 Q. In fact, I saw in your resume in '94 that</p> <p>11 you gave a speech in front of the Texas Association of</p> <p>12 Insurance Agents. If you'll look at what we have</p> <p>13 marked as Respondent's Exhibit 15. Do you see that?</p> <p>14 A. Yes.</p> <p>15 Q. Okay. And I know you don't have firsthand</p> <p>16 knowledge, but you'll agree with me that this appears</p> <p>17 to be a letter from the Texas Department of Insurance</p> <p>18 in October of 2004 to Dearborn Financial Institute,</p> <p>19 correct?</p> <p>20 A. Correct.</p> <p>21 Q. And it says, the course and title Insurance</p> <p>22 Fundamentals is certified for insurance license</p> <p>23 continuing education. Do you see that?</p> <p>24 A. Yes, sir.</p> <p>25 Q. And you're familiar with certified CLE</p>	<p style="text-align: right;">Page 401</p> <p>1 A. I see that.</p> <p>2 Q. And you accept and agree with that?</p> <p>3 A. I do.</p> <p>4 Q. Okay. If you'll turn the page, there's the</p> <p>5 portion of the book called speculative versus pure</p> <p>6 risk. Do you see that?</p> <p>7 A. I do.</p> <p>8 Q. And you're familiar with those concepts in</p> <p>9 insurance terms, are you not?</p> <p>10 A. I am.</p> <p>11 Q. And a speculative risk as this book says is</p> <p>12 where you have a loss, no loss or the possibility of a</p> <p>13 profit, correct?</p> <p>14 A. That's what it says.</p> <p>15 Q. And a pure risk is only where you're going to</p> <p>16 have a loss or no loss, right?</p> <p>17 A. Right.</p> <p>18 Q. So a speculative risk like they say there was</p> <p>19 my example if you buy stock, you are at risk, but it</p> <p>20 may turn out to be a good risk?</p> <p>21 A. True.</p> <p>22 Q. A pure risk is where you're going to stay the</p> <p>23 same or you're just going to have a loss?</p> <p>24 A. Right.</p> <p>25 Q. Like insuring your home against fire, either</p>

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1 it's going to burn down or it's going to stay the
 2 same?
 3 A. Right.
 4 Q. And you'll agree with me that in this book --
 5 well, let me ask you.
 6 It's true, is it not, that only pure
 7 risks are insurable?
 8 A. No.
 9 Q. So you disagree with that?
 10 A. I do, because you have all kinds of risks
 11 that are insurable.
 12 Q. Okay. And so you would take -- you would say
 13 that if the state is teaching its licensed insurance
 14 agents that speculative risks are not insurable,
 15 that's just wrong?
 16 A. Well, it may not be insurable in the context
 17 of this particular line of insurance, but it certainly
 18 is insurable in the context of prize indemnity
 19 insurance.
 20 Q. You would agree with me that this book is at
 21 least teaching people in Texas that the distinction
 22 between speculative and pure risk is important because
 23 as this book says, only pure risks are insurable,
 24 right?
 25 A. Right. That's what it says, but that's not

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1 what the courts go by with regard to determining
 2 whether something is in the business of insurance
 3 rather than whether it is an insurable risk.
 4 Q. Are you familiar with law of large numbers?
 5 A. Vaguely.
 6 Q. And the law of large numbers means that you
 7 have a lot of people that you can predict that are
 8 similar in some way that you can predict what the
 9 instance of losses would be, right?
 10 A. I think that's correct.
 11 Q. And so the idea behind that concept for
 12 insurance companies is you take insurance from many
 13 different people that you can then predict what the
 14 loss will be so you can then spread that out and
 15 hopefully make a profit through insurance?
 16 A. Sure, it's like in your auto or your
 17 homeowner's line.
 18 Q. You would agree with me that that is a
 19 fundamental concept of insurance is doing the process
 20 that I just described?
 21 A. It's a process. There are other ways of
 22 doing it other than spreading it that way, but
 23 certainly that's one way.
 24 Q. I hear you, but you'll agree with me that
 25 that --

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1 A. That is a way, yes.
 2 Q. If you don't have that, then you have to kind
 3 of wonder if you're actually talking about insurance?
 4 A. No, I disagree with that.
 5 Q. Let's use a simple example, a single bet.
 6 I'm going to make a single bet with Mr. Breen on some
 7 particular event. There's really not that concept of
 8 spreading that risk out over other similar types of
 9 bets, right?
 10 A. Well, unless you have a whole bunch of bets
 11 that were similar, yes, that would be true, but if you
 12 had only that one, that would be obviously a way of
 13 spreading your risk that would not be available to
 14 you, but there are other methods of doing that.
 15 Q. Okay. But the key is that the risk you're
 16 taking or assuming you have to in some way bear some
 17 relationship or be similar, right?
 18 A. No.
 19 Q. Okay. So for you buying a stock and making a
 20 bet on the Super Bowl, both of which, you'll agree
 21 with me, involve risks, right?
 22 A. True.
 23 Q. There is some notion to you in here of risk
 24 spreading in the context in which it's used in the
 25 business of insurance?

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1 A. Well, sure. If you're insuring a risk and
 2 it's a single risk that is not homeowners or auto or
 3 something like that, much like you have the prize
 4 indemnity insurance business, the way you spread your
 5 risk is exactly the way they tried to do it, buy
 6 reinsurance.
 7 Q. Well, let's put aside buying insurance as a
 8 way of spreading your risk, because you would agree
 9 with me that simply buying insurance is not the kind
 10 of risk spreading that the courts talk about and
 11 insurance companies engage in, right?
 12 A. I disagree. They talk about buying
 13 reinsurance as a way of spreading the risk all the
 14 time.
 15 Q. So when Tailwind bought insurance from SCA,
 16 in your mind that was one of the elements of Tailwind
 17 being in the business of insurance, because they're
 18 spreading a risk, right?
 19 A. No, but they're buying insurance and they are
 20 certainly being indemnified for their risk, because
 21 that was the promise that Mr. Hamman made on behalf of
 22 SCA, was that if Mr. Armstrong was named the official
 23 winner of the 2004 Tour de France, that they would pay
 24 \$5 million and that was a way of spreading their risk
 25 to SCA. SCA then went out and bought reinsurance with

<p style="text-align: right;">Page 406</p> <p>1 regard to that risk, and you can't get reinsurance 2 unless you have insurance. 3 Q. Yes, but simply buying insurance is not the 4 concept of risk spreading that the cases talk about 5 that insurance companies engage in; would you agree 6 with that? 7 A. The simple act of buying from one company? 8 Q. Yes, sir. 9 A. I think it is spreading the risk. You're 10 spreading the risk to somebody other than yourself. 11 Q. Let's move on. You'll agree with me in 12 chapter 3 on page 19 that licensed agents in Texas are 13 being taught the following definition of the word loss 14 there under perils and causes of loss, many people 15 would use the term loss, peril and hazard 16 synonymously, however, the meaning of these words as 17 used in insurance are quite different and should be 18 carefully distinguished. 19 As we discussed in the last chapter, 20 insurance, a loss is defined as an unintended, 21 unforeseen reduction or destruction of financial or 22 economic value to an individual, organization or 23 object caused by an accidental event. You don't 24 disagree with that concept, do you? 25 A. No, that is a concept of perils and loss and</p>	<p style="text-align: right;">Page 408</p> <p>1 it's not limited to those and I haven't seen anything 2 in these materials relating to the prize indemnity 3 line of business. 4 Q. It could be because the people at Dearborn 5 don't consider that insurance, right? 6 A. It could be that they don't know about it and 7 don't know that the state of Texas as well as other 8 states consider it to be the business of insurance. 9 Q. One of the reasons you're saying that is 10 because of the phone call. TDI has not made any 11 official pronouncement about prize indemnification -- 12 A. No, but I think if they were invited by this 13 panel to file an amicus brief, they would come down on 14 the side that all of this was in the business of 15 insurance. 16 Q. They've known about prize indemnification 17 insurance since 1998, haven't they, when someone 18 apparently filed something with them, right? 19 A. I don't know if that was prize 20 indemnification insurance or not. It looked like a 21 gambling contract or something, according to what 22 Mr. Fisher said. He said it was illegal and would be 23 going -- it was against public policy. I'm not taking 24 the position that prize indemnity insurance is against 25 public policy. Obviously there's a whole industry</p>
<p style="text-align: right;">Page 407</p> <p>1 contingencies. That's one concept for sure. 2 Q. Okay. Now, if you'll turn to page 23 of this 3 book here, you'll agree with me that this book 4 certified by TDI says requirements of an insurable 5 risk that not all risks or loss exposures are 6 insurable. Do you see that? 7 A. I see that. 8 Q. And to be insurable the risk must meet the 9 following general requirements: Large enough, not 10 excessively catastrophic, unintentional and 11 accidental. Do you see that? 12 A. I see that. 13 Q. You don't disagree with that criteria either, 14 do you? 15 A. No. That is a criteria in the business of 16 insurance. 17 Q. And the last portion there, individually 18 random losses, it says to the insurable losses must be 19 individually random. The risk is not likely to result 20 in repeated catastrophic losses either to the same 21 insured or to a specific number of similar insureds at 22 the same time. You do agree with that, don't you? 23 A. I agree that that is a definition and a 24 criteria that's being used. It's used primarily in 25 personal lines, such as auto, homeowners. Certainly</p>	<p style="text-align: right;">Page 409</p> <p>1 that's grown up around that, but what he was looking 2 at obviously was some sort of illegal contract. 3 Q. But despite this whole industry, you're not 4 aware of TDI taking any specific action, correct? 5 A. Well, I think they're taking action right 6 now. I think if they were to be asked by this as to 7 whether or not these documents that you've seen before 8 this panel constitute the business of insurance in 9 Texas, I don't think there's any doubt they would say 10 that it was. 11 Q. Now, if you'll look -- if you'll turn to the 12 next page about fortuitous or accidental losses, 13 you'll agree with me that, again, the TDI has accepted 14 or at least in some way given some blessing to the 15 definition that the loss must be fortuitous or 16 accidental? I'm looking at page 24 of the book, at 17 the top. 18 A. That's what it says. 19 Q. Meaning to be insurable losses must be 20 accidental and unintentional from the insurer's 21 standpoint. Individuals covered by an insurance 22 contract should not benefit financially from the 23 occurrence of the event insured against. Neither can 24 they intentionally cause a loss to recover from an 25 insurance company. Do you see that?</p>

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1 A. I see that.

2 Q. And you will agree with me if we were to

3 apply that standard, that they should not

4 intentionally cause a loss for recovery from their

5 insurance company, that -- you'll at least agree with

6 me that Tailwind was trying to help Mr. Armstrong win,

7 correct?

8 A. I don't know whether they were or not. All I

9 know is that they insured against an event by which a

10 promise was made that they would be paid for a loss

11 based upon their liability and that was an untrue

12 statement. They weren't paid. And that, in my

13 judgment, constitutes the business of insurance based

14 on my previous testimony. Just like in the qualified

15 driver case, those acts there were intentional acts

16 that were insured against.

17 Q. All right, but --

18 A. That's different than what's used here, but I

19 think generally they're talking about the situation

20 where the house is burned down intentionally.

21 Q. Now, let me ask you about what we have

22 marked as Exhibit 19, which is the P&C License Study

23 Guide. Do you see that?

24 A. I do.

25 Q. And do you know what this is for?

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1 A. No.

2 Q. Okay. So if you're trying to get your

3 license as a property and casualty agent, don't you

4 have to take a test?

5 A. Yes.

6 Q. And so does this look like to you it may be a

7 study guide of some sort for the test?

8 A. It does. It appears to be for property and

9 casualty.

10 Q. All right. And if you'll look at -- we've

11 taken some excerpts here, but if you'll look at

12 chapter 1, the second page of chapter 1, topic B,

13 definitions of key terms. Do you see that?

14 A. Yes.

15 Q. And they define risk here as being defined as

16 the chance of financial loss or the uncertainty of

17 loss. Do you see that?

18 A. Yes.

19 Q. You'll skip, it says there are two risks,

20 pure risk and speculative risk. Do you see that?

21 A. I see that.

22 Q. Pure risk exists only when there's a chance

23 of the loss without a simultaneous chance for gain.

24 Do you see that?

25 A. I see that.

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1 Q. Okay. So it's a pure risk only if there's a

2 loss, even if you might also be experiencing a gain or

3 have the chance of a gain on that risk, correct?

4 A. That's what it says, evidently.

5 Q. And speculative risk is where there's a gain

6 or a loss. Do you see that?

7 A. Yes.

8 Q. And then the part in bold at the bottom is

9 the significance of this definition is that only pure

10 risks are insurable. Do you see that?

11 A. Yes, I see that.

12 Q. Okay. Now, if you'll look down at the bottom

13 under loss, it says insurance terminology loss means a

14 reduction in value of an asset and the financial

15 consequences as a reduction in value of the asset. Do

16 you see that?

17 A. Yes, I do.

18 Q. And then peril -- there's that word that's

19 seen in cases that says the event causing a loss is

20 referred to as peril and they also call it cause of

21 loss. Do you agree with that?

22 A. Yes, they use contingency in the cases as

23 well as event, whatever you want to call it.

24 Q. So you'll agree with me, at least for the

25 guys or women studying to get their license, they're

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1 being taught that only pure risks are insurable,

2 correct?

3 A. That's what they are taught in connection

4 with the P&C license, which, to my knowledge, has

5 never had any questions on it with regard to prize

6 indemnity insurance.

7 Q. All right. Let's turn, if you will, now to

8 the review questions, which is contained at page 1-17.

9 A. Okay.

10 Q. Take a look at question 6.

11 A. Yes.

12 Q. Insurance is a method of treating pure risk,

13 but it's not used to treat speculative risk. Which of

14 the following involves speculative risk? Would you

15 agree with me that gambling would be one of those?

16 A. Probably.

17 Q. All right. And question 7, this one I'm

18 going to leave to you, all of the following are

19 prerequisites for insurable insurance except?

20 MR. BREEN: I'm sorry, I didn't

21 understand. Are you asking him to answer that?

22 MR. TILLOTSON: Yeah.

23 Q. (BY MR. TILLOTSON) Answer it. All of the

24 following are prerequisites -- we are talking about

25 insurable risk here. What kind of risk can insurance

<p style="text-align: right;">Page 414</p> <p>1 cover to figure out this insurance? 2 A. I would say all of them. 3 Q. And would you agree with me that in Texas, at 4 least based upon the authorities we have seen, that to 5 constitute an insurable risk, to be insurance, it has 6 to deal with a pure risk, at least based upon what 7 they're teaching people? 8 A. No, I disagree with you. 9 Q. Are you? 10 A. Certainly the courts do not go by that. What 11 you have here is based on like homeowners and auto 12 with regard to personal lines and huge amounts of 13 insurable risks in those lines. It doesn't deal with 14 the business of insurance at all with regard to the 15 criteria that would be used to determine if prize 16 indemnity transactions were within the business of 17 insurance in the state of Texas. It has nothing to do 18 with that. 19 Q. Are you aware of any Texas case which has 20 endorsed your view that you don't need to see a pure 21 risk? No Texas case has spoken about it that you're 22 aware of, true? 23 A. I don't know what you're talking about in 24 terms of pure risk, but with regard to contingencies, 25 almost all the cases speak of risk and they use it as</p>	<p style="text-align: right;">Page 416</p> <p>1 hitting a hole in one based upon the yardage of the 2 hole? 3 A. Probably. 4 Q. And so if you had a bunch of hole-in-one 5 promotions that you were doing out there all over the 6 country at country clubs, it would be possible to 7 mathematically calculate the various odds of someone 8 hitting a hole in one on any of these particular 9 promotions, right? 10 A. You probably would get some idea, yes. 11 Q. You would agree with me that the hole-in-one 12 promotion as based upon those concepts bears some 13 relationship as to the risk or the chance of someone 14 hitting the hole in one? 15 A. Yes. 16 Q. Okay. You're also aware, are you not -- I 17 bet you're a golfer. 18 A. Well, I wouldn't go that far. 19 Q. A little risk of loss on the course for you? 20 A. I'll just say I've engaged in hole-in-one 21 contests before and haven't won one yet. 22 Q. Keep trying. If you do it about 13,000 23 times, odds are you're going to be okay. 24 And some of the golf tournaments that 25 have this are charitable in nature, right?</p>
<p style="text-align: right;">Page 415</p> <p>1 a contingency, not necessarily a loss or a peril, but 2 with regard to what's in the business of insurance 3 they use the criteria in 101.051. 4 Q. Now, let's turn for a moment to spreading the 5 risk. Again, the Great American case wasn't on your 6 list, but it is true, is it not, that one of the 7 aspects discussed in Great American was the notion 8 that insurance companies spread the risk. Do you 9 remember that? 10 A. Yes. 11 Q. Okay. And, in fact, if you'll -- if you will 12 go back to the Golf Marketing Worldwide case, that was 13 the hole-in-one insurance. While Mariela brings that 14 up, let me ask you about hole-in-one insurance. Are 15 you familiar with the hole-in-one promotion itself? 16 A. Yes. 17 Q. And you know that it's activity, that is 18 hole-in-one promotion is an activity that there's lots 19 of them, right? 20 A. True. 21 Q. You saw that on the web site, right? 22 A. Yes. 23 Q. So you have all of these various hole in 24 ones. Are you aware, are you familiar with that there 25 are mathematical odds about a chance of a person</p>	<p style="text-align: right;">Page 417</p> <p>1 A. True. 2 Q. They're not money-making events, fair? 3 A. True. 4 Q. Now, in the Golf Marketing Worldwide case -- 5 if Mariela has brought it up here, I think the case is 6 attached to the material -- 7 A. What case tab is that? 8 MR. BREEN: It's 13 in your spiral. 9 Q. (BY MR. TILLOTSON) I blew up the handbook on 10 insurance law from Mr. Vance -- he's probably not 11 still around since it was 1930 -- relied on by the 12 Court here that lists these criteria for a contract of 13 insurance, these five elements. Do you see that? 14 A. I do. 15 Q. And I want to focus for a moment on D and E, 16 that such assumption -- and that's the assumption of 17 risk that we have been talking about -- is part of the 18 general scheme to distribute actual lawsuits among a 19 large group of persons bearing similar risks. Do you 20 see that? 21 A. I do. 22 Q. And at least in the hole-in-one context, if 23 I'm right here that there's a bunch of promotions and 24 that you're betting as to whether or not anyone is 25 going to hit a hole in one when you're taking all of</p>

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1 these, there would at least be a general scheme there
 2 to distribute those risks among a group of people that
 3 have like minded probabilities of that loss happening.
 4 A. I agree.
 5 Q. Okay. Now, in some instances for items and
 6 things that are activities out there, in many
 7 instances, whether it's deemed to be insurance by a
 8 state is a creature of regulation, correct?
 9 A. I'm sorry. Say that again.
 10 Q. Yeah. There's lots of things out there that
 11 states have varied on as to whether or not they have
 12 decided it's insurance or not; would you not agree?
 13 A. That's true, because the regulation of the
 14 business of insurance is left to the state so you
 15 could have 50 different approaches.
 16 Q. So, for example, there are things, like I've
 17 seen in Texas an AG opinion, I think we referred to
 18 it, where a dental discount program is deemed not to
 19 be insurance. Do you remember that?
 20 A. No, I don't, but I'll take your word for it.
 21 Q. But some other states have decided that is
 22 insurance?
 23 A. Possibly.
 24 Q. I'll use an example maybe you know about,
 25 auto warranties provided. In Texas those are deemed

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1 to be insurance, are they not, under regulation?
 2 A. True.
 3 Q. And you're aware of other states where they
 4 are not insurance?
 5 A. I think that's true.
 6 Q. Sometimes whether or not a particular thing
 7 winds up being insurance, it's not because of the
 8 necessary underlying nature of what's happened, but
 9 because a particular state has deemed it to be --
 10 A. Right, it's a nuance of the particular state
 11 given the criteria that they use. Some states
 12 probably don't even have a criteria that you have in
 13 the Texas statutes.
 14 Q. But for our case, for what brings us here,
 15 the issue is what was actually happening between the
 16 parties and what actually was going on with respect to
 17 SCA's business for the statutory criteria we are
 18 looking at here.
 19 A. The question is was SCA promotions in the
 20 business of insurance with regard to this particular
 21 transaction.
 22 MR. TILLOTSON: Mr. Longley, thank you
 23 for your time, you're a good sport.
 24 Pass the witness.
 25 ARBITRATOR FAULKNER: Any direct?

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1 MR. BREEN: Do you want to do it now or
 2 can we take just a very short break.
 3 ARBITRATOR FAULKNER: It's 10:30. This
 4 would be a great time to take a break.
 5 (Recess 10:32 to 10:45 a.m.)
 6 REDIRECT EXAMINATION
 7 BY MR. BREEN:
 8 Q. Mr. Longley, I believe the panel clearly
 9 understand the position. I do want to ask you a few
 10 questions on follow-up here.
 11 MR. TILLOTSON: Excuse me, let me get
 12 them all in here so you're not distracted when you get
 13 started.
 14 ARBITRATOR CHERNICK: Do you want this
 15 marked next?
 16 MR. BREEN: Yes, it would be 55, as in I
 17 can't drive 55.
 18 Q. (BY MR. BREEN) Very briefly, Mr. Longley,
 19 I'm showing you what's been marked Exhibit 55 in this
 20 case, which is off of the TDI web site. Do you see
 21 the disclaimer there that says TDI does not suggest or
 22 recommend courses by certifying them?
 23 A. Yes, I do.
 24 ARBITRATOR LYON: Where is that?
 25 MR. BREEN: That's under disclaimer.

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1 Q. (BY MR. BREEN) In fact, based on TDI's own
 2 web site, the fact that it certifies a course or a CLE
 3 course or people go to things that TDI counts toward
 4 or credits isn't some type of enforcement by TDI of
 5 the contents of the manual or document, correct?
 6 A. That's correct. That's just like legal CLE.
 7 Q. In fact, it says basically you take whatever
 8 the course is as you find it, right?
 9 A. Yes, sir.
 10 Q. So in terms of you ever having seen in the
 11 state of Texas any court, et cetera, relying on either
 12 Dearborn, which is essentially something out of
 13 Illinois, or some CLE -- the CLE manual that
 14 Mr. Tillotson was going through with you, have you
 15 ever seen that occur?
 16 A. No, I haven't seen any of the materials that
 17 were given to me today relied upon as authority by a
 18 court of law in the state of Texas, only those
 19 authorities that I have provided to the panel.
 20 Q. I did notice, though, in reading the CLE
 21 course that Mr. Tillotson was looking at that one of
 22 the first things it talks about in the course is that
 23 insurance had its origins in China and that the origin
 24 of insurance was Chinese people taking their crops and
 25 putting them on a couple of different boats,

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1 et cetera, and I'm sure SCA folks know this very well,
2 but then that evolved, did it not, Mr. Longley, over
3 time?
4 A. Yes, sir.
5 Q. And then, in fact, in England at one point in
6 time life insurance was actually not recognized and
7 considered essentially, in my words, to be illegal; is
8 that correct?
9 A. That's correct.
10 Q. So when you take material such as this, which
11 is a square peg, and you try to put it in the round
12 hole of the contingent prize industry, it's no
13 surprise to you that it really doesn't fit as neatly
14 as SCA would like it, correct?
15 A. No. These continuing education materials
16 appear to be broad based with regard to people who are
17 going to be in the personal lines of property and
18 casualty business.
19 Q. And you're aware, are you not, that there are
20 companies, both insurance companies and others, that
21 sell contingent prize insurance coverage in the state
22 of Texas?
23 A. Yes, absolutely.
24 Q. And so I take it then under SCA's
25 interpretation, these companies, be they publicly

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1 declared insurance companies or not, are engaging in
2 illegal and deceptive acts?
3 A. Well, if it's not insurance and they're
4 representing it as insurance and they have no
5 liability under the contract that they are selling and
6 they're taking money and have no risk involved,
7 then -- then there would be ramifications of that.
8 Q. Okay. Well, take -- I think SCA has shown a
9 couple of times that prize indemnity or whatever it's
10 called, which is explicitly called, marketed,
11 et cetera, recognized as insurance in the state of
12 Texas under SCA's theory, that's just not insurance,
13 right?
14 A. It's just called insurance.
15 Q. It can't be insurance in reality even though
16 it has the word insurance on it?
17 A. That would be the logical extension of their
18 position.
19 Q. Do you know why the state of Texas allows
20 that to occur, if that's the case, this open and
21 flagrant fraud in violation of the DTPA?
22 A. They would consider it to be not flagrant
23 fraud in violation of the DTPA to represent it as
24 insurance.
25 Q. Now, in this case there were actual insurance

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1 policies that covered the very things SCA claims can't
2 be the subject of insurance; is that correct?
3 A. That's what -- what the logical conclusion
4 would be to the discussion we just went through.
5 Q. I mean, in theory if you look at the
6 structure here, although we know AIG was a fronting
7 carrier and had no risk, they theoretically have a
8 policy, I suppose. There's a policy there, Swiss Re
9 has a policy. I would assume Prize Indemnity Limited,
10 the offshore holding company -- the offshore reinsurer
11 of SCA would have an insurance policy. Is that just a
12 house of cards then, Mr. Longley, under SCA's theory?
13 A. If they're using the 1988 letter as authority
14 that this is some sort of illegal activity, which
15 would be the logical conclusion of where you would be
16 going with it, then you would be collecting \$420,000
17 with there being no risk, and if you wanted to take a
18 look-see at what happened over a two- or three-year
19 period and see if you would be liable, you could say,
20 oh, king's X, this is an illegal contract. We don't
21 even have to give your 420,000 back.
22 Q. Let me show you what's been marked
23 Exhibit 56 in this case, Mr. Longley, which is, as
24 opposed to a regular dictionary, although of
25 sentimental value, this is from Ballentine's law

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1 dictionary.
2 MR. TILLOTSON: You probably got that
3 from some girl, too.
4 MR. HERMAN: I don't know if
5 Mr. Tillotson dated anybody named Ballentine ...
6 Q. (BY MR. BREEN) You were asked a lot of
7 questions where you were limited to the definition of
8 loss and I assume loss in a net sense. Let me ask you
9 this, what is the contingency in this case?
10 A. The contingency is the liability of Tailwind
11 to Mr. Armstrong.
12 Q. The contingency is not Armstrong winning the
13 Tour de France, correct?
14 A. That's correct.
15 Q. The contingency is actually the debt that
16 Tailwind has, as we sit here now, because SCA hasn't
17 paid?
18 A. That's right.
19 Q. Now, if you applied this definition or the
20 definition that we have looked at before in this
21 context, I assume that your opinion still remains that
22 under the initial focus in 101.051 we're dealing with
23 an insurance contract?
24 A. We are dealing with an insurance contract and
25 moreover, for the purposes of this hearing, as I

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1 understand the issue, whether or not SCA is engaged in
 2 the business of insurance within the state of Texas.
 3 Q. Now, we didn't focus on that at all in the
 4 cross-examination by SCA with you in terms of a whole
 5 other issue in this case, which is, if there is this
 6 coverage for risk takers, whatever the euphemisms SCA
 7 wants to use for them, in their letters that were sent
 8 to Tailwind, if we assumed that those were true, those
 9 letters that they sent and there are these entities
 10 that have policies, that's a whole other independent
 11 way the panel can find that SCA has engaged in the
 12 business of insurance, correct?
 13 A. That's correct.
 14 Q. And what case would it be that we would look
 15 to, Mr. Longley?
 16 A. Well, you would look to -- you would look at
 17 Kitley, you could look to Garrison Contractors, you
 18 could look to -- primarily Garrison Contractors
 19 because it involved the fact that other individuals
 20 could be equally liable for engaging in the same
 21 conduct as the company. And that's sort of a
 22 headwaters case which came after the utility case in
 23 which the Supreme Court used the criteria and
 24 specifically quoted from the statute. Like I say,
 25 they didn't give the citation to the statute, but it

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1 was one of the criteria that they looked to.
 2 Q. Let me ask you this. Assume with me that you
 3 have a contract by which one party for -- for a
 4 consideration assumes a particular risk of the other
 5 party and promises to pay him or someone named by him
 6 a certain or ascertainable sum of money on a specified
 7 contingency and that party, even though they've
 8 promised to pay, not only doesn't pay but asserts
 9 they're not going to pay unless somebody makes them.
 10 What would you call that, Mr. Longley?
 11 A. Well, in that context, I mean, where you're
 12 taking money with no intention of ever paying if the
 13 contingency occurs, I mean, that's pure fraud.
 14 MR. BREEN: I pass the witness.
 15 MR. TILLOTSON: Just a few on recross.
 16 RE-CROSS EXAMINATION
 17 BY MR. TILLOTSON:
 18 Q. Whether the business contract, the
 19 contingency contract from SCA and Tailwind, is
 20 insurance or is not insurance would not fundamentally
 21 change whether or not an obligation is owed under the
 22 contract?
 23 A. True. I agree with you.
 24 Q. So even if it's not insurance, there still is
 25 a contract which may be -- SCA may be required to pay?

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1 A. Absolutely.
 2 Q. Okay.
 3 A. And I've given in my opinions that if for
 4 some reason this was not found to be the business of
 5 insurance, it would certainly be covered under the
 6 Texas Deceptive Trade Practices Act.
 7 Q. I just want to ask you about this definition
 8 from the Ballentine's for loss in contingent events.
 9 The loss is Tailwind having to pay Mr. Armstrong the
 10 \$5 million in your mind, correct?
 11 A. The liability that has now become absolutely
 12 clear.
 13 Q. And the contingent event that triggers the
 14 loss which the loss arises from, is Mr. Armstrong
 15 winning the Tour de France thereby requiring Tailwind
 16 to pay him?
 17 A. 2004 Tour de France.
 18 Q. So the contingent event really doesn't have
 19 to be a positive or negative thing. It's just an
 20 event that triggers a loss.
 21 A. Correct.
 22 Q. Okay. Now, third in the definition that you
 23 just gave, you are aware that there's like a whole
 24 market out there for what's called alternative risk
 25 transfers, where risks are being assumed by parties

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1 that is not considered insurance, aren't you?
 2 A. No.
 3 Q. You're not familiar with weather derivatives,
 4 for example?
 5 A. No.
 6 Q. Stock collars?
 7 A. No.
 8 Q. Derivative transactions in general?
 9 A. No.
 10 Q. Have you ever even heard of alternative risk
 11 transfer market?
 12 A. No, I haven't.
 13 Q. Last, you were asked about some insurance
 14 companies, CHUBB and Lloyd's, operating here in
 15 connection with the same sort of contract SCA entered.
 16 It is true, is it not, that under 101.051 that one of
 17 the things that constitutes doing the business of
 18 insurance in Texas under that particular statute is if
 19 it's business done by -- hold on a second here -- I
 20 think it's Section 6 -- by an insurance company?
 21 MR. HERMAN: 6 is directly or indirectly
 22 acting as an agent for or otherwise representing or
 23 assisting an insurer or person in soliciting,
 24 negotiating, procuring or effectuating insurance or
 25 renewal. Is that what you're referring to?

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1 Q. (BY MR. TILLOTSON) I'm sorry, no. I'm
 2 referring to 101.051, section 10.
 3 A. Okay.
 4 Q. That the business of any -- deciding what the
 5 business of insurance is in Texas, among the other
 6 things you listed, one of them in section 10 is any
 7 other transaction of business in this state by
 8 uninsureds?
 9 A. Yes.
 10 Q. Okay. So CHUBB's and Lloyd's clearly are
 11 insurers, are they not?
 12 A. They are.
 13 Q. So when they come into Texas and they do
 14 something like a prize indemnification policy under
 15 101.051, they are conducting the business of insurance
 16 under this statute, are they not?
 17 A. Correct.
 18 Q. And it doesn't necessarily mean what they're
 19 doing is insurance for someone else who was not an
 20 insured, correct?
 21 A. That's correct.
 22 MR. TILLOTSON: Okay. No further
 23 questions.
 24 MR. BREEN: I have two more if you don't
 25 mind. I'm sorry about that.

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1 ARBITRATOR FAULKNER: Okay.
 2 REDIRECT EXAMINATION
 3 BY MR. BREEN:
 4 Q. The first one, Mr. Longley, is would you
 5 agree with me that one of the fundamental differences
 6 between taking the old school property and casualty
 7 analysis of the intentional creation of a loss and
 8 trying to apply it to a contingent prize market is the
 9 following: In the old school, like the house
 10 insurance that Mr. Tillotson was talking about, you
 11 have an insurance company, okay, that bases the amount
 12 it charges the insured on an actuarial analysis of an
 13 accidental loss, that is somebody not burning down the
 14 house, and they premise that on the fact that that
 15 person is not going to intentionally try to burn down
 16 the house?
 17 A. Correct.
 18 Q. Because there's no chance involved that they
 19 intentionally burn down the house, correct?
 20 A. Correct, the house is burned down.
 21 Q. It's burned down. But in the contingent
 22 prize market the insurance company actually is on the
 23 same page with everybody else in contemplating that --
 24 and, in fact, in SCA's case even helps promote a
 25 winner or a winning person out there; that in fact,

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1 somebody is going to try to win the contest, they base
 2 the rates they charge on the fact that somebody is
 3 going to try to win the contest, and even though they
 4 are trying to win the contest it's not a certainty.
 5 It's not like burning down your house, right?
 6 A. That's correct.
 7 Q. I mean, Lance Armstrong didn't just light a
 8 match and win the Tour de France, did he?
 9 A. No, he didn't.
 10 Q. It certainly wasn't a certain event?
 11 A. It was uncertain in every instance.
 12 Q. That's yet another difference that causes
 13 this application of the old property and casualty pop
 14 quiz or whatever it was we were looking at to this
 15 particular incident, right?
 16 A. Yes, sir.
 17 Q. Finally, does it appear to you from
 18 everything you've heard over the last couple of days
 19 that SCA is working as hard as it can to try to evade
 20 statutes like 21.21 and 101.051?
 21 A. Yes. As a matter of fact, that was one of
 22 the criteria we used there, which is number 9.
 23 MR. BREEN: Thank you.
 24 MR. TILLOTSON: Nothing further.
 25 ARBITRATOR FAULKNER: Anything from the

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1 panel.
 2 ARBITRATOR LYON: You -- I have one. You
 3 said several times if we decided to ask the state
 4 department of insurance for an amicus curiae brief
 5 that they would willingly do it.
 6 THE WITNESS: I don't know if they would
 7 willingly do it, but I think if the parties stipulated
 8 that that would be something appropriate for the panel
 9 to do, the panel certainly could be guided by the
 10 Texas Supreme Court, which was -- they look to the
 11 expertise within the area of enterprise that's under
 12 examination, so you would be well within your bounds
 13 to do that.
 14 ARBITRATOR LYON: I mean, do you think
 15 they would even entertain that in a private lawsuit?
 16 THE WITNESS: I don't know. They did in
 17 Garrison Contractors.
 18 ARBITRATOR LYON: Thank you.
 19 THE WITNESS: Sure.
 20 ARBITRATOR FAULKNER: No further
 21 questions. Thank you very much, sir.
 22 THE WITNESS: Thank you.
 23 MR. TILLOTSON: Do you rest?
 24 MR. BREEN: No, we don't. We have to
 25 take up the issue of this web site, the issue of, you

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1 know, claiming that that wasn't on the web site when
 2 it was.
 3 MR. HERMAN: We can call Jason if you
 4 need us to, but this article was on the web site.
 5 It's been taken off of the web site, so...
 6 MR. BREEN: The article that was in the
 7 slide that we presented at the opening was taken -- we
 8 have a copy of the web site at the time that we copied
 9 it off of the web site. It is no longer on the web
 10 site, but we have a copy from when we did it, so do we
 11 need to call Jason to admit it or what do you want us
 12 to do?
 13 MR. TILLOTSON: What is it you're trying
 14 to admit? I'm not sure I can agree to it.
 15 MR. BREEN: The article itself.
 16 MR. HERMAN: You intimated that that
 17 information really wasn't on the web site.
 18 MR. TILLOTSON: No, no, I'm sorry. Let
 19 me clarify. I think we can simply move past this. My
 20 criticism of your PowerPoint was that you attributed
 21 statements to us that were not necessarily statements
 22 we said but were contained in like headings of an
 23 article written by someone else, okay. I do not
 24 dispute -- you've apparently printed out portions of
 25 our web site that came from our web site or was on our

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1 web site at one point in time.
 2 My criticism of the PowerPoint was that
 3 you attempted to imply, for example, that we said
 4 enter the insured who takes the risk for you, when
 5 that was a heading in the San Diego newspaper article.
 6 I do not dispute at some point that that newspaper
 7 article was on our web site or linked to our web site
 8 in some fashion.
 9 MR. HERMAN: Okay.
 10 MR. TILLOTSON: Okay.
 11 MR. HERMAN: I'm just going to offer --
 12 MR. TILLOTSON: I don't say you made up
 13 these words. I say we didn't speak these words. You
 14 may want to argue that we adopted them somehow, but
 15 that was my point.
 16 MR. HERMAN: Before we rest I've got --
 17 ARBITRATOR FAULKNER: Are you going to
 18 submit whatever your copies are there?
 19 MR. TILLOTSON: This was marked as a
 20 exhibit at one point.
 21 MR. HERMAN: First, we are missing
 22 Exhibits 42 and 43, which are just a printout of key
 23 words from the SCA web site.
 24 ARBITRATOR FAULKNER: Do you have copies
 25 of --

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1 MR. HERMAN: I do, and here are the --
 2 ARBITRATOR CHERNICK: So 42 is the meta
 3 tags.
 4 MR. HERMAN: 42 is the meta tags off the
 5 web site. 43 is a distillation of the insurance
 6 offering on the meta tags, and then 56 is a copy of
 7 the article off the SCA web site.
 8 MS. EVORA: 56 is Ballentine's.
 9 ARBITRATOR FAULKNER: 56 is Ballentine's.
 10 MR. HERMAN: Oh, sorry. Should have been
 11 paying attention. It's going to be 57.
 12 ARBITRATOR FAULKNER: Are you resting?
 13 MR. HERMAN: Yes.
 14 ARBITRATOR FAULKNER: Your witness is
 15 going to be Mr. De Leon?
 16 MR. TILLOTSON: Yes, it is, unless you're
 17 entertaining my motion for a directed verdict
 18 ARBITRATOR FAULKNER: You may make one.
 19 I haven't seen a whole lot of them granted in
 20 arbitration.
 21 MR. TILLOTSON: I guess now both sides
 22 have been provided the PowerPoints. You have ours,
 23 don't you?
 24 We will make copies of what we have got,
 25 which are 20 and 21, for you guys at some point.

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1 ARBITRATOR FAULKNER: Mr. De Leon, would
 2 you raise your right hand.
 3 HECTOR DE LEON,
 4 having been first duly sworn, testified as follows:
 5 ARBITRATOR FAULKNER: Please proceed,
 6 gentlemen.
 7 DIRECT EXAMINATION
 8 BY MR. TILLOTSON:
 9 Q. Hello, Mr. De Leon. We are going to work off
 10 Respondent's exhibits, which is that little binder to
 11 the side of you. First, if you'll state your name for
 12 us.
 13 A. Hector De Leon.
 14 Q. Mr. De Leon, where do you currently work?
 15 A. I work in Austin with the law firm of De Leon
 16 Boggins & Icenogle.
 17 Q. And how long have you been with that firm?
 18 A. Since July 1, 1977.
 19 Q. And what kind of work does that firm do?
 20 A. Primarily a corporate regulatory practice
 21 that is insurance related. I also do some litigation,
 22 appellate work and transaction work.
 23 Q. Now, that's your firm. How about you
 24 personally, what kind of legal work do you perform?
 25 A. I primarily do corporate regulatory work

<p style="text-align: right;">Page 438</p> <p>1 that's insurance related and transaction work that's 2 insurance related. 3 Q. Are you board certified in any subjects? 4 A. Yes, I'm board certified in administrative 5 law. 6 Q. Is there an insurance law board 7 certification? 8 A. No. 9 Q. How big is your firm, how many lawyers? 10 A. Six lawyers. 11 Q. Now, prior to being in the private practice 12 of law at your law firm, did you work for the Texas 13 Department of Insurance? 14 A. I worked for what was then known as the state 15 board of insurance. I worked with the state board of 16 insurance from February 1 of '74 through June 15th of 17 '77. 18 Q. When you started at the state board of 19 insurance, now TDI, what was your job title or 20 responsibilities? 21 A. When I first started, I was staff attorney 22 and EEOC coordinator. 23 Q. And take us through the progression of your 24 positions at the state board of insurance. 25 A. I was in the EEOC role for several months</p>	<p style="text-align: right;">Page 440</p> <p>1 the state board of insurance under the APA. And in 2 '75 the legislature also passed the Health Maintenance 3 Organization Act. I was responsible for developing 4 the rules relative to health maintenance organizations 5 in Texas. In '75 the legislature also passed prepaid 6 legal and I was responsible for developing the rules 7 for prepaid legal. 8 I was also legal counsel for the 9 commissioner of insurance, which meant that I was the 10 commissioner's lawyer and advised him on matters that 11 came before the commissioner. He was in effect the 12 chief operating officer and the staff reported to 13 commissioner. I advised him on various matters 14 related to opinions on everything from surplus lines 15 insurance to independent procured insurance to 16 workers' compensation, those sorts of things. 17 And before I became general counsel, 18 there was no legal section. While I was general 19 counsel I developed a legal section for the state 20 board of insurance and I was head of the legal 21 section, the staff attorneys for the department of 22 insurance. 23 Q. Did you have -- as part of your 24 responsibilities while general counsel at the state 25 board of insurance, did it encompass making</p>
<p style="text-align: right;">Page 439</p> <p>1 developing an affirmative action plan for the state 2 board of insurance in the -- approximately, oh, mid 3 May, June 1 time frame of '74. I was in a special 4 practice task force for agent practices and licensing. 5 I was charged with the responsibilities of 6 investigating allegations of wrongdoing by insurance 7 agents, developing the cases, presenting the cases at 8 administrative hearings and seeking appropriate 9 disciplinary action with respect to the licenses. 10 And then on February 1, approximately 11 February 1 of '75, I was made general counsel of the 12 state board of insurance. 13 Q. How long were you general counsel for the 14 state board of insurance? 15 A. Until I left June 15th of '77. 16 Q. As general counsel, can you just describe for 17 us what your responsibilities were? 18 A. Sure. I was legal counsel to the 19 three-member state board of insurance, which meant 20 that I advised them on matters that came before the 21 board, anything from rate making to rule making, those 22 kinds of things. 23 For instance, in 1975 the legislature 24 passed the Administrative Procedures Act. I was 25 responsible for developing the rules of procedures for</p>	<p style="text-align: right;">Page 441</p> <p>1 determinations as to what constituted insurance or the 2 business of insurance? 3 A. Yes. One of the things that I specifically 4 remember is overseeing the preparation of a memorandum 5 which the state board of insurance adopted as its 6 position on whether a service contract or a warranty 7 issued by, say, automobile dealers or Sear's, people 8 like that, constituted the business of insurance or 9 whether it was outside of the business of insurance, 10 and so, yes, that's one example of it. 11 Q. And based upon your work at the state board, 12 your legal work and other professional expertise that 13 we are going to look at in your resume in a second, do 14 you believe you have expertise in helping offer 15 opinions regarding what constitutes the business of 16 insurance in a particular instance? 17 A. Yes. 18 Q. Now, if you'll look there in front of you, in 19 the binder we have what has been marked as tab 17 and 20 I just want to identify that for the panel. Is that a 21 copy of your resume? 22 A. Yes, it is. 23 Q. You list a number of professional 24 affiliations. Do you -- in addition to professional 25 affiliations and honors or awards, are you currently a</p>

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1 professor of some sort at the University of Texas
 2 School of Law?
 3 A. Yes, I'm an adjunct professor of law. I've
 4 been an adjunct professor of law since 1990. I teach
 5 a course on insurance regulation, that's the title of
 6 the course, a seminar on insurance regulation.
 7 Q. How many years have you taught at UT?
 8 A. Since 1990.
 9 Q. And have you always taught insurance
 10 regulation?
 11 A. Yes, that's always been the course.
 12 Q. As part of that course, do you cover or teach
 13 what is insurance or what constitutes insurance as
 14 part of your course?
 15 A. That's the first part of the course; that's
 16 where I start.
 17 Q. Do you also cover what constitutes or what is
 18 the business of insurance for your course?
 19 A. Yes.
 20 Q. Have you been retained in this case as an
 21 expert witness based upon your expertise?
 22 A. Yes.
 23 Q. What are the terms of your retention?
 24 A. The terms of my retention are that I'm paid
 25 \$360 an hour for review of material, deposition,

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1 et cetera, and \$400 an hour for testimony at
 2 deposition or in arbitration.
 3 Q. And what is it you were retained to do?
 4 First, who retained you? Did I retain you?
 5 A. Yes, sir, you retained me and my assignment
 6 was to review the SCA contract and the transaction
 7 involving the Tailwinds contract and opine as to
 8 whether in my opinion that constituted insurance.
 9 Q. Now, what is it you did first? Tell us the
 10 materials you reviewed, how you went about preparing
 11 to develop your opinions.
 12 A. The materials that I reviewed included four
 13 depositions, the deposition of Mr. Hamman, the
 14 deposition of Mr. Gorski, the deposition of
 15 Mr. Michelitch and let me see the fourth deposition --
 16 oh, the attorney for -- the attorney agent for
 17 Mr. Armstrong.
 18 Q. Ms. Price?
 19 A. No, the attorney agent for Mr. Armstrong,
 20 Mr --
 21 Q. Stapleton?
 22 A. Stapleton, excuse me.
 23 Q. Okay. Did you also have a meeting with
 24 representatives of SCA?
 25 A. I did meet in Dallas with representatives,

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1 with you and a couple of the attorneys from SCA. I
 2 also reviewed the SCA contract that's at issue and
 3 reviewed the exhibits to Mr. Michelitch's deposition
 4 and certain exhibits to the deposition of Mr. Lorenzo.
 5 Q. Okay. Now, I want to just start off broadly
 6 and then we will cover the ground and the basis of
 7 your analysis, but as an overview, can you tell us
 8 what opinions you did reach in connection with this
 9 matter?
 10 A. I reached the opinion that the transaction
 11 between SCA and Tailwind was not insurance and that
 12 the contract that SCA issued to Tailwind was not a
 13 contract of insurance.
 14 Q. And can you detail for us or overview for us
 15 the basis for how you reached that opinion?
 16 A. I reached that opinion based upon the review
 17 of the depositions that I mentioned and a review of
 18 the contract itself, and trying to determine exactly
 19 what is the nature of the underlying transaction. And
 20 based upon my understanding of the underlying
 21 transaction, I came to my opinion that the transaction
 22 was not insurance and the contract was not a contract
 23 of insurance.
 24 Q. What specific reasons did you develop or come
 25 to the conclusion of that allowed you to opine that

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1 this is not insurance, the contract is not insurance?
 2 A. Well, in reviewing the four depositions that
 3 I looked at, it's undisputed that the -- that Lance
 4 Armstrong winning the Tour de France is what Tailwind
 5 wanted, it's what Tailwind sought and it's what
 6 Tailwind intended, and it's undisputed that Tailwind
 7 went out and sought in that capacity people to provide
 8 them X amount of ability to provide bonuses to
 9 Mr. Armstrong to incentivize him to win the Tour de
 10 France, and it was -- and to the extent that Tailwind
 11 was able to find capacity, then they created the
 12 bonus, so they created the event that they wanted to
 13 occur, the bonus event, and they intended the event to
 14 happen, that is to say, the winning of the Tour de
 15 France by Mr. Armstrong.
 16 It was -- the winning of the Tour de
 17 France by Mr. Armstrong is not an adverse event, it's
 18 an intended event, and from an insurance perspective,
 19 if -- you know, the materials that I've looked at over
 20 the years, whether it's insurance where you look at
 21 various materials that talk about insurance, whether
 22 it's continuing education from the department of
 23 insurance or other materials that talk about
 24 principles of insurance, an intended event, an
 25 intended action is not a subject of insurance.

<p style="text-align: right;">Page 446</p> <p>1 Q. Why not? Why can't you insure an intended 2 event? Why just because you're trying to make 3 something happen -- let's assume that you don't know 4 it's actually going to happen, you're just trying to 5 make it happen, why can't that be the subject of 6 insurance or comprise insurance? 7 A. A couple of things. One, it's against public 8 policy to attempt to insure public events. I think 9 that's a matter very well accepted in law in general, 10 number one. Number two, insurance is about pure risk, 11 not speculative risk. There are two types of risk 12 generally to look at. A pure risk is a risk that 13 involves no loss or potential for loss. The 14 speculative risk involves the potential for no loss, 15 the potential for loss and the potential for gain. 16 Entrepreneurs are in the business of speculative risk; 17 they get into business hoping to gain. There's a 18 potential there will be no gain, there's a potential 19 there will be loss, but they're hoping that there will 20 be gain and the intent is that there will be gain. 21 Insurance does not go out and insure 22 speculative types of risks. Insurance is about 23 unintended adverse events, about shifting risk with 24 respect to an unintended adverse event to a third 25 party, generally for consideration.</p>	<p style="text-align: right;">Page 448</p> <p>1 A. It's not a pure risk because Tailwind 2 intended for Mr. Armstrong to win the Tour de France. 3 There were benefits to Tailwind for Mr. Armstrong to 4 win the Tour de France. It is not an adverse risk 5 because if Mr. Armstrong wins the Tour de France, he 6 becomes more marketable. Tailwind is able to get more 7 sponsors, get more money from sponsors, able to 8 generate more income. And on the surface it -- you 9 know, an argument can be made that isn't it adverse 10 that they have to pay \$5 million. Well, on the 11 surface that might be true, except Tailwind created 12 the \$5 million situation by going out and seeking 13 someone to guarantee or underwrite their \$5 million 14 risk and didn't go to Mr. Armstrong and say, we will 15 give you the \$5 million if you win it until they knew 16 that they had somebody out there. They created their 17 adverse event, the \$5 million adverse event, 18 supposedly, but it really is not an adverse event. 19 It's a positive event as to Tailwind, it's a positive 20 event as to Mr. Armstrong. There is not an adverse 21 event to either one of those parties. 22 Q. Does the fact that there's been testimony by 23 Mr. Gorski, I think, in his deposition and in the 24 course of these proceedings that Tailwind actually 25 lost money in connection with its United States Postal</p>
<p style="text-align: right;">Page 447</p> <p>1 Q. Let me ask you as we delve into this, where 2 is it you're drawing this definition from, sir? Is 3 there a case that we can point to that talks about 4 pure risk versus speculative risk? What's your source 5 material for this definition? 6 A. The source material would be everything that 7 we've learned over the years with respect to insurance 8 and principles of insurance whether it's reading 9 Couch, Appleman, the materials that I use in my class, 10 Fundamentals of Insurance with Financial Planning. We 11 use the first chapter of that book, whether it's 12 looking at some of the continuing education materials 13 used by the Texas Department of Insurance. That's 14 where you'll find discussions of what constitutes 15 insurance and what's an insurable risk and what's not 16 an insurable risk. An insurable risk is a pure risk. 17 An insurable risk involves unintended adverse 18 consequences or the shifting of that risk. A risk 19 that isn't insured would be a speculative risk. 20 Q. Now, in this particular case there's been 21 testimony, Mr. De Leon, that Tailwind was obligated to 22 pay Mr. Armstrong a \$5 million bonus which was the 23 subject of the SCA contract. Why isn't your opinion 24 that Tailwind's obligation to pay the bonus to Mr. 25 Armstrong, why is that not a pure risk?</p>	<p style="text-align: right;">Page 449</p> <p>1 cycling team, does that affect, change or impact your 2 opinion regarding this being a pure versus speculative 3 risk? 4 A. I think it reinforces it because it 5 demonstrates what I'm talking about. Speculative risk 6 is about the potential for gain, the potential for 7 loss and the potential for no loss, and what Mr. 8 Gorski is saying is that we went out, we entered into 9 the entrepreneurial venture, we hoped to gain, but we 10 ended up losing money. That demonstrates to me that 11 perhaps a bad business decision was made but it 12 doesn't change the nature of the risk. 13 Q. Mr. Gorski testified that if he had to pay 14 the \$5 million it would bankrupt Tailwind. Did that 15 change or alter your opinion regarding the nature of 16 the risk in any way? 17 A. No. 18 Q. Why not? 19 A. Because, again, it doesn't change the nature 20 of the underlying risk being a speculative risk which 21 Tailwind willingly took on and sought out. It is a 22 little different than what insurance is intended to 23 cover, which is the situation like an automobile 24 insurance. No one gets into an automobile intending 25 to get into an accident, but they buy insurance in the</p>

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1 event that that happens so that they can shift the
2 potential for that loss to a third party.
3 Q. Now, I challenged Mr. Longley, so I'm going
4 to challenge you as well. Are you aware of any
5 insurance product out there today offered by an
6 insurance company where they are insuring someone for
7 an act the insurer intends to happen and is trying to
8 make happen? Is there such an insurance product out
9 there today?

10 A. Well, in the -- in the classic sense there
11 isn't. I'm aware that there is a CHUBB insurance
12 policy in this situation and I'm aware that there was
13 a Lloyd's of London policy. So there are -- clearly
14 there are two examples of insurance companies that
15 have issued policies where there was an intended
16 consequence, but if you look at the business of
17 insurance generally, there is no product that I can
18 think of where insurance companies go out and insure
19 intended risks, where the insured sought out the risk,
20 took on the risk and then goes to an insurance company
21 and says I intend for this event to happen, I created
22 the potential for this event to happen. Now I want
23 you to assume the risk of the event happening for a
24 given premium.

25 Q. The fact that CHUBB and Lloyd's issued

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1 A. Yes, I am.

2 Q. Okay. This particular book, Dearborn, I
3 don't think it's something that you've necessarily
4 reviewed or relied on in connection with your
5 opinions; is that right?

6 A. That's right.

7 Q. Nevertheless, I want to direct your attention
8 to page 10 under Insurance Fundamentals, which is
9 chapter 2, the concept of risk management. There's an
10 inscription there that's speculative versus pure risk.
11 What I want you to do is tell us if you agree with the
12 way in which speculative risks or pure risks are
13 defined here, whether this is a fair representation or
14 definition.

15 A. That is not only a fair representation,
16 that's pretty much the classic representation. I had
17 not seen the definition, but it's pretty much the
18 definition that I recall seeing in everything that
19 I've looked at. In principles of insurance, that's
20 the category you're talking about pure risk and you're
21 talking about speculative risk and pure risk is the
22 subject of insurance, speculative risk it not.

23 Q. Take us to the real world -- that sounded
24 whacky. Take us to your class. Do you actually teach
25 this distinction? I was going to say the real world

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1 insurance policies to Tailwind in connection with the
2 Tour de France, does that change or impact your
3 opinion regarding whether or not SCA's contract was
4 insurance?

5 A. No.

6 Q. Why not?

7 A. Because it doesn't change the underlying
8 nature of the risk, and with respect to CHUBB and
9 Lloyd's, those companies are in the business of
10 insurance and by definition the products that they
11 issue are subject to regulation. That is, they report
12 them as some sort of miscellaneous line, they pay
13 taxes on them, et cetera, but it doesn't change the
14 nature of the underlying risk and it doesn't mean that
15 SCA is in the business of insurance. SCA did not seek
16 a certificate of authority from the Texas Department
17 of Insurance, and SCA is not -- I did not see anything
18 that told me that SCA was holding itself out to be in
19 the business of insurance as an agent.

20 Q. If you'll turn to tab 14 there and -- it's
21 among those exhibits, which is a book from Dearborn
22 Insurance Fundamentals. If you want to hold that
23 place. Tab 15 there's a letter from the Texas
24 Department of Insurance. Are you familiar with
25 certifications for CLE courses by TDI?

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1 is the class.

2 A. My class is the real world.

3 Q. I have a feeling I know what this year's exam
4 is going to be, but take us to your class. We have
5 talked a lot about speculative and pure risk. Is this
6 actually being taught in the course of insurance to
7 students that is what insurance is?

8 A. It is being taught and that's exactly what I
9 teach. I teach it out of Fundamentals of Insurance
10 for Financial Planning, because that's the first
11 chapter, that's what it deals with. And one of the
12 things it specifically deals with is this very
13 distinction, speculative and pure risk, and the first
14 four sessions of my class I spent going through those
15 materials, those case materials, and I'll get to the
16 materials that I have on federalism and insurance
17 regulation as put out by the National Association of
18 Insurance Commissioners. But initially this is
19 exactly the sort of thing that I focus on and I start
20 out talking about what is insurance and I talk about
21 it in terms of sets and subsets, the large set being
22 insurance, what is the business of insurance, a subset
23 within that big set, and what is the business of
24 insurance subject to regulation, a subset the business
25 of insurance.

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1 Q. If I could just do your boxes so I make sure
 2 we have them. There's a big box which is what?
 3 A. That's insurance.
 4 Q. Okay. So within all the things that could be
 5 insurance, what is there?
 6 A. There's a smaller box or a box within it that
 7 is the business of insurance, so I...
 8 Q. So I take it then under this analysis it's
 9 possible for something to be insurance but for a
 10 particular company not to be in the business of
 11 insurance?
 12 A. Correct.
 13 Q. And what's the final smallest box?
 14 A. The box within the business of insurance is
 15 the business of insurance subject to regulation.
 16 Q. Which means somehow it comes under the Texas
 17 Insurance Code or the regulatory authority of the
 18 department of insurance?
 19 A. Correct.
 20 Q. Now, where do you place the SCA/Tailwind
 21 contract here in your three-box analysis?
 22 A. Outside of the large box.
 23 Q. Okay. And that is why?
 24 A. Because it does not involve a pure risk. It
 25 does not involve an adverse event which is unintended,

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1 and for those reasons I do not put it within the box
 2 that is insurance.
 3 Q. Okay. Where would just -- just for
 4 comparison, where would we put CHUBB and Lloyd's?
 5 A. The CHUBB and Lloyd's policies would fall
 6 within the smallest box, the red box.
 7 Q. Why is that, since -- why would you put it in
 8 the smallest box?
 9 A. I would put it in the smallest box not
 10 because of the nature of the risk assumed but because
 11 they are policies issued by companies that are already
 12 regulated by the department of insurance, either as
 13 surplus lines carriers or as admitted companies, and
 14 as a result those policies are subject to regulation,
 15 subject to either the stamping office review and
 16 surplus lines with payment of the premium tax due the
 17 stamping office or regulation through the department
 18 of insurance as an admitted product miscellaneous
 19 lines subject to reporting an annual statement,
 20 subject to payment and premium taxes as a
 21 miscellaneous line.
 22 Q. We've heard testimony from Ms. Price a day or
 23 so ago regarding the particular Tailwind contract and
 24 the payment of surplus lines taxed by Tailwind
 25 regarding CHUBB and Lloyd's. Can you tell us what it

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1 is with respect to surplus lines?
 2 A. Sure. There are companies that are licensed
 3 by the department of insurance admitted to do business
 4 in Texas. If a company is licensed by the Texas
 5 Department of Insurance, it is called an admitted
 6 company and it's subject to the regulation of the
 7 department of insurance financial examination, market
 8 conduct, licensing of its agents due through the
 9 department, et cetera.
 10 Then you have what's known as surplus
 11 lines insurance. Those are companies that are not
 12 admitted to do business in Texas, that is to say
 13 they're not licensed by the department, but they do
 14 appear on what's known as the department's eligibility
 15 list, which means that they have to go through a
 16 certification process, be possessed of at least \$15
 17 million of capital and surplus, excess of reserves to
 18 pay claims and work only through agents that are
 19 licensed as surplus lines agents by the department.
 20 And they do not pay premium taxes. Those insurance
 21 companies do not pay premium taxes directly to the
 22 department of insurance, rather the surplus lines
 23 agents file reports on a semi-annual basis and run
 24 their policies through what's known as the stamping
 25 office.

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1 Every policy issued on a surplus lines
 2 basis requires a stamp of a surplus lines type that it
 3 is a policy issued to a surplus lines company not
 4 licensed to do business in Texas, not part of the
 5 guaranty fund and subject to a 4.85 percent premium
 6 tax. That tax is in addition to the premium that's
 7 paid. The surplus lines agent is responsible for
 8 collecting it, reporting it and paying it to the
 9 comptroller of public accounts
 10 Q. Now --
 11 A. The only products that are eligible to be
 12 placed with a surplus lines company are products which
 13 cannot be written through the admitted marketplace.
 14 So before a surplus lines agent can place a risk with
 15 a surplus lines company, he's got to search the
 16 admitted marketplace or know that the admitted
 17 marketplace has been searched and then say it's
 18 eligible for placement in the surplus lines
 19 marketplace.
 20 Q. Okay. Now, I want to return to your
 21 discussion of speculative risk and pure risk. A
 22 definition you said you had used in your courses was
 23 this concept that we are talking about here,
 24 speculative risk and pure risk, and only pure risk can
 25 be insurable. Was this the concept you employed when

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1 you were actually general counsel for the state board
 2 of insurance?
 3 A. Yes, it's the sort of concept I would have
 4 employed and that's the way we would have looked at
 5 it.
 6 Q. There's been some suggestion here that
 7 perhaps maybe insurance views over on this side of the
 8 table perhaps haven't kept up with the times on things
 9 like prize indemnification and whatnot. Has the
 10 advancement of the business market in any way changed
 11 these definitions that you're employing in terms of
 12 how you look at insurance and what you consider
 13 insurance today?
 14 A. No. While there may be new products that are
 15 introduced, et cetera, the marketplace does evolve,
 16 but the underlying principles don't change; that is to
 17 say, I'm not aware of when I was at the department
 18 that what we considered a speculative risk was a
 19 proper subject of insurance. I'm not aware that we
 20 ever approved a product while I was at the department
 21 for use in Texas involving a speculative risk. The
 22 products that were approved -- and insurance was much
 23 more regulated when I was at the department than it is
 24 today. It is highly regulated. It's still regulated,
 25 but not to the same extent, and the products that were

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1 approved and the products that we used were products
 2 that involved pure risk.
 3 Q. Let me ask you to take a look there in your
 4 binder at what's been marked as Respondent's
 5 Exhibit 1, which is a letter from the state board of
 6 insurance from 1988. Did you see this in connection
 7 with your opinions?
 8 A. I saw it.
 9 Q. I'm going to blow up the second paragraph
 10 there. You can look at it on the screen or in your
 11 binder. Here is a description or definition from
 12 Mr. Fisher about the definition of insurance. And
 13 I'll ask you whether or not you agree with that,
 14 whether that's substantially correct or not?
 15 A. I think that's substantially correct.
 16 Q. Mr. Fisher -- do you know who this guy is, by
 17 the way, the state board of insurance who wrote the
 18 letter, James Fisher?
 19 A. I knew Mr. Fisher. He's no longer within the
 20 department.
 21 Q. He was in the casualty division?
 22 A. Yes, he was in the casualty division.
 23 Q. So would this be -- to employ this definition
 24 in this particular case, would this be a substantially
 25 accurate way to look at insurance and what insurance

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1 is?
 2 A. Yes.
 3 Q. Now, in connection with your review of
 4 Mr. Gorski's deposition in this case and testimony
 5 here, did you notice testimony from Mr. Gorski where
 6 he testified that he thought he was getting insurance
 7 by dealing with his broker? Are you familiar with
 8 that?
 9 A. Yes, I remember him saying that.
 10 Q. Did that factor into your opinion one way or
 11 another regarding whether this is insurance or not,
 12 what Mr. Gorski thought or said?
 13 A. No.
 14 Q. Why not?
 15 A. Because what Mr. Gorski thought he was buying
 16 doesn't change what he bought.
 17 Q. Now, in connection with your opinions, did
 18 you get a chance to review Mr. Longley's deposition?
 19 I know you weren't here for his testimony, but did you
 20 get a chance to review his opinions in his deposition?
 21 A. I reviewed the opinions in his deposition
 22 over the weekend. I didn't review them in formulating
 23 my opinion.
 24 Q. Okay. And do you agree or disagree with the
 25 definitions that he's used with respect to insurance?

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1 A. Well --
 2 Q. I don't want to put you on the spot, but
 3 obviously he's testified a little bit differently
 4 about what constitutes insurance and what the business
 5 of insurance is, and my question to you is, how do you
 6 distinguish your opinions from his in terms of how the
 7 panel should analytically approach this question?
 8 A. I think the difference in the approach is a
 9 review of the underlying transaction as opposed to a
 10 review of what the transaction looks like. And I
 11 think Mr. Longley focused on what it looked like
 12 rather than what the transaction is.
 13 Q. When you say what it is, what specifically
 14 are you looking at to figure out what it is? What's
 15 the key factors to you?
 16 A. To me the key factor is what is the nature of
 17 the risk, what is it that we are talking about? It
 18 is -- what is it that's being -- that's being paid
 19 for? And what's being paid for is potential for a
 20 bonus having to be paid to Mr. Armstrong in the event
 21 he wins the Tour de France, something which Tailwind
 22 wanted to happen, something which Mr. Armstrong wanted
 23 to happen, something which Tailwind aggressively
 24 sought to happen.
 25 Q. Last, I want to focus just specifically on

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1 articles 21.21 and articles 21.17 of the old insurance
2 code. You are familiar with those?
3 A. Yes.
4 Q. Okay. What connection -- help us out here.
5 What connection does Section 101.051, which is the
6 definition of doing the business of insurance in Texas
7 with respect to unauthorized insurance, what
8 connection does that section have with trying to
9 figure out the business of insurance under article
10 21.21?
11 A. Well, the connection would be whether the
12 elements that are set up in the definition fall within
13 what constitutes the business of insurance, because
14 understand, what's defined at 101.051 is not insurance
15 but rather the business of insurance, and there's a
16 difference. And so what -- and 101.051 is the
17 definition of the business of insurance for purposes
18 of the unauthorized insurance statute. It's not for
19 the purposes necessarily of the entire code, because
20 the Supreme Court has told us that with respect to
21 surety in the Dallas Fire case of December of '04 and
22 in the previous case.
23 So that 101.051 gives you a context, a
24 framework, within which to look at what sorts of
25 elements you would try to find in determining whether

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1 somebody is in the business of insurance.
2 Q. With respect to the elements that are listed
3 in 101.051, are they tied to acts involving insurance?
4 A. They are. Frankly, the definition, and this
5 is what I tell my class, the problem with the
6 definition in the 101.051 is it's somewhat circular,
7 because it uses the term that it seeks to define
8 within the definition because it talks about the very
9 first element in the very first item is making a
10 proposal, to make, as an insurer, a contract of
11 insurance.
12 Well, you've got to figure out what's a
13 contract of insurance before you figure out whether or
14 not you fall within that definition, and the insurance
15 code doesn't define insurer. The insurance code
16 doesn't define two terms, one is insurer and the other
17 is insurance. Neither one of them is defined in the
18 Texas Insurance Code. So you're left to have to
19 figure out what's an insurer and what is a contract of
20 insurance.
21 Q. And is that what you sought to do in
22 connection with your opinions here?
23 A. That's correct.
24 Q. All right. And your opinion regarding
25 whether or not the SCA contract with Tailwind -- what

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1 is your opinion with respect to whether or not that's
2 an insurance contract in the process of doing the
3 business of insurance?
4 A. It is not an insurance contract for the
5 reasons I've given today -- this morning and,
6 therefore, it's not the business of insurance.
7 MR. TILLOTSON: Thank you, Mr. De Leon.
8 I appreciate you staying over and coming in today.
9 ARBITRATOR FAULKNER: At this point,
10 gentlemen, we have a request for a short break, so we
11 will take about a five-minute break and go ahead and
12 proceed with cross.
13 (Recess 11:42 to 11:51 a.m.)
14 ARBITRATOR FAULKNER: Are you ready, sir?
15 You're still under oath. Please proceed with
16 cross-examination.
17 CROSS EXAMINATION
18 BY MR. HERMAN:
19 Q. Good morning, Mr. De Leon. How are you?
20 A. Fine, thank you. How are you doing?
21 Q. You've testified regarding your opinions, and
22 may I summarize the basis for your conclusion that
23 this is not an insurance -- or a contract of
24 insurance, that is the SCA contract, because it does
25 not involve an adverse risk in your view?

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1 A. Because it does not involve an adverse risk
2 which is unintended, that's correct.
3 Q. And that is fundamentally the basis for your
4 opinion, is it not?
5 A. That's fundamentally the basis for it, yes,
6 sir.
7 Q. Okay. Now, you had mentioned that while you
8 were at the -- what was then the state board of
9 insurance that, for example, you would develop a --
10 you developed rules and regulations for -- for
11 example, when prepaid legal services came on the scene
12 as an insurance product, correct?
13 A. Correct.
14 Q. And you were at the department when a variety
15 of new products, new insurance products, came on the
16 market, correct?
17 A. Correct.
18 Q. And regulation would adapt itself to take
19 care of new products, new emerging markets, that sort
20 of thing, true?
21 A. True.
22 Q. Now, you talked to Mr. Tillotson a little bit
23 about the Dearborn continuing education for insurance
24 agents. You're familiar with Keeton -- Keeton's
25 treatise on insurance law, Keeton and Widiss, a

<p style="text-align: right;">Page 466</p> <p>1 well-recognized learned treatise on insurance law, 2 wouldn't you agree? 3 A. Yes. 4 Q. And widely accepted, cited by Texas courts, 5 et cetera? 6 A. Yes. 7 Q. I take it that you would agree that the 8 definitions of insurance -- let me just read you this 9 quote and see if you agree with it, okay. You can 10 trust me, Hector, we have known each other a long 11 time. I won't be putting anything -- 12 MR. TILLOTSON: I met you last fall, 13 Buddy. 14 MR. HERMAN: I don't care if you trust 15 me. Oh, I do. I do. I'm teasing. 16 Q. (BY MR. HERMAN) Let me read you this. The 17 definitions of insurance employed to resolve disputes 18 in various contexts may change as human ingenuity 19 produces innovations which in turn may create a need 20 to revise or modify the then existing legal doctrines 21 or definitions. Furthermore, such new concepts may 22 then be applied to older types of transactions as 23 well. In a complex commercial society it is both 24 appropriate and desirable that insurance concepts, 25 including definitions of insurance, remain flexible</p>	<p style="text-align: right;">Page 468</p> <p>1 order to determine the nature of a transaction you 2 would have to view the totality of the transaction, 3 its surrounding circumstances in order to arrive at 4 that conclusion? 5 A. True. 6 Q. And as far as you know, you've reviewed all 7 of the documents necessary to examine the totality of 8 the transaction? 9 A. I've reviewed the documents and the testimony 10 that permitted me, I think, to arrive at my 11 conclusions, yes, sir. It's a very limited 12 conclusion. I was asked for a very limited opinion, a 13 very limited assignment. 14 Q. So that your focus was solely on whether this 15 was an adverse or speculative risk? 16 A. My focus was whether this was insurance or 17 whether the contract was a contract of insurance, that 18 is my focus. Now, once -- once I knew what my focus 19 was, then the question became on what basis do I 20 arrive at my opinion. And in arriving at my opinion, 21 I looked at it from the transport of is this a pure 22 risk, is this a speculative risk. Is this a risk 23 involving an adverse, unintended event or is it 24 something else. 25 Q. Okay. So that if the risk was reinsured, for</p>
<p style="text-align: right;">Page 467</p> <p>1 enough to be adapted to changing, differing 2 circumstances rather than being so rigid that they 3 become shackles to thought, expression or innovation. 4 Do you agree? 5 A. In principle I agree with that, yes. 6 Q. Okay. All right. And do you agree that 7 there has emerged over the relatively recent past an 8 entire insurance industry segment categorized or 9 defined as the contingency insurance market? 10 A. Could you tell me what you mean by that? 11 Q. I'm just asking you if you're aware of that 12 or not aware of it? 13 A. I haven't heard anybody talk about the 14 contingency insurance market. I haven't heard that 15 particular phrase. 16 Q. Okay. That's fair enough. In connection 17 with determining whether a transaction constitutes the 18 business of insurance or is an insurance contract, you 19 are not bound or shackled by the nomenclature used, 20 are you? By that I mean, if it says insurance, it's 21 insurance, if it doesn't say insurance, it's not 22 insurance? 23 A. That's correct, what people call it doesn't 24 determine what it is. 25 Q. And you would agree, I take it then, that in</p>	<p style="text-align: right;">Page 469</p> <p>1 example, and I think you and I agree you can't have 2 reinsurance without insurance, but the issue of 3 whether SCA reinsured its risk didn't play into your 4 opinion one way or the other? 5 A. It did not. 6 Q. Okay. And you have no opinion about that? 7 A. I have no opinion about that. 8 Q. Okay. Would you -- do you have the black 9 notebook there in front of you? 10 A. Yes, I do. 11 Q. If you would -- I wish I could say the same. 12 If you would turn to tab -- it's actually 13 tab -- why don't you go to tab 12, it's easier to 14 read. It's a copy of the contract. 15 A. Okay. 16 Q. If you would look at Exhibit A, the terms and 17 conditions, the very top line states SCA Promotions, 18 Inc., agrees to reimburse sponsor for the full amount 19 of any performance awards schedule hereunder and 20 awarded to the designated cyclist professional 21 pursuant to this agreement. 22 You would agree, would you not, Mr. De 23 Leon, that the only obligation undertaken by SCA 24 Promotions, Inc., was to reimburse the sponsor for the 25 amount of the sponsor's liability to Mr. Armstrong?</p>

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1 A. I believe that's right looking at the whole
2 Exhibit A where it says schedule of reimbursement
3 performance.
4 MR. TILLOTSON: Can you speak up just a
5 little bit? She's having trouble hearing you.
6 THE WITNESS: I'm sorry.
7 A. Looking at the total terms and conditions,
8 that's what it looks like because they do schedule out
9 the reimbursement of performance and awards down there
10 at item 3.
11 Q. (BY MR. HERMAN) All right. And so it's
12 true, is it not, that with respect to what SCA was
13 insuring here or -- let's use the -- so that we have a
14 term about which no one has any argument, what SCA was
15 indemnifying Tailwind against was the contingency that
16 they would become indebted to Mr. Armstrong for the
17 awards?
18 A. Correct.
19 Q. All right. And that indemnification was not
20 to provide any profit to Tailwind in the sense that
21 SCA certainly was not obligated to reimburse Tailwind
22 or for Tailwind to make money off of this insurance
23 policy. In other words, SCA was obligated only to
24 reimburse Tailwind for the precise amount of their
25 economic loss by virtue of their indebtedness to

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1 Armstrong; isn't that true?
2 A. I don't know that there's economic loss. If
3 you'll take that phrase out of it, I can answer your
4 question this way. It's true that what you and I said
5 earlier, that this contract simply obligates SCA to
6 indemnify Tailwind pursuant to this schedule of
7 performance awards, that is true. I don't know that
8 there's necessarily economic loss.
9 Q. Okay. And you don't know that there's
10 economic gain?
11 A. That's the problem. It's a speculative risk
12 in my opinion.
13 Q. But the answer to my question is you don't
14 know one way or another, do you?
15 A. Well, I do know based on my review of the
16 depositions that Tailwind intended economic gain.
17 Q. All right. Now, first of all, let's get this
18 straight. Tailwind was not a participant in the Tour
19 de France, were they? Tailwind could not win the Tour
20 de France; Mr. Armstrong had to win the Tour de
21 France?
22 A. That's an interesting question and I wasn't
23 asked to opine about that, but I'll tell you what my
24 understanding of the way its structure is that
25 Tailwind owned the team of which Mr. Armstrong was a

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1 participant. Mr. Armstrong would be the one that
2 would win Tour de France, but Mr. Armstrong was a part
3 of a team that was participating in the Tour de
4 France. I don't know how all that shakes out because
5 I'm not a bicycling guy.
6 Q. Well, you don't think that Calloway Golf can
7 win the Masters, do you?
8 A. I'm not a golfer either, so I don't know how
9 all that shakes out either.
10 Q. Go back to the first page of this contract.
11 A. Okay.
12 Q. Do you see the type of promotion up there,
13 the cyclist incentive bonus program?
14 A. Oh, yes, uh-huh.
15 Q. All right. And that cyclist incentive bonus
16 program is the subject of this contract; wouldn't you
17 agree?
18 A. I believe that's what it says, uh-huh.
19 Q. All right. Now, my -- when you talk about
20 adverse risk and the -- in the classic sense of the
21 word that has been used quite a bit here this week,
22 you're talking about the public policy which dictates
23 that net economic loss is what should be the subject
24 of insurance, are you not? In other words -- well,
25 first of all, answer that question. Isn't that what

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1 you're talking about, the net economic loss rule is
2 what you're really talking about here?
3 A. What I'm really talking about here is that
4 the proper subject of insurance is an adverse,
5 unintended event that results in an economic loss, but
6 it has to be an adverse, unintended event.
7 Q. Okay. Let me ask you this. The net economic
8 loss rule provides that you cannot -- you cannot
9 realize a gain from the proceeds of an insurance
10 policy; is that -- would you agree with me that
11 there -- that there is such a concept?
12 A. Yes, there is a public policy that insureds
13 should not net gain from insurance proceeds, that's
14 correct.
15 Q. Right. And that -- and really within that
16 concept falls the speculative risk concept, because if
17 there is possibility of a gain from insurance
18 proceeds, that is, a speculative risk where the
19 insured would be benefited as opposed to being put
20 back or being reimbursed, if you will, for his actual
21 loss, that's where the concept of speculative gain
22 arises, isn't it?
23 A. No, that's not where the concept of
24 speculative gain arises. The concept of speculative
25 gain arises with respect to the nature of the risk

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1 where someone enters into a course of conduct designed
 2 to gain, there's a potential for no gain, there's a
 3 potential for loss. But the speculative risk has to
 4 do with the course of conduct designed ultimately to
 5 gain or intended to gain but may not.
 6 Q. That's what I'm talking about. When you say
 7 gain, you're talking about economic benefit, aren't
 8 you?
 9 A. I'm talking about economic benefit, yes.
 10 Q. All right. And that's precisely what we have
 11 just talked about, that there should not be any net
 12 economic benefit to the insured by virtue of having an
 13 insurance policy to cover the event; that's exactly
 14 what you're saying, isn't it?
 15 A. No, that's not what I'm saying. I think you
 16 and I are talking past each other. What I'm saying is
 17 that there's a public policy that says there should
 18 not be double recovery or recovery in excess of 100
 19 percent of your loss because you've got two or three
 20 different insurance policies. That's the reason that
 21 you have in health insurance an exclusion for workers'
 22 comp losses.
 23 Q. Okay. So that's the net economic loss rule;
 24 is that what you're talking about, or are you talking
 25 about the speculative --

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1 A. No, I'm talking about the public policy
 2 against someone recovering more than 100 percent of
 3 their loss.
 4 Q. Okay.
 5 A. And that's the reason that insurance policies
 6 will say they coordinate with each other. There's
 7 coordination of benefits provisions in insurance
 8 policies.
 9 Q. So would you agree with me that -- that the
 10 SCA policy doesn't violate that rule? In other words,
 11 Tailwind is not going to recover any more than what
 12 the loss to them or the expense to them, if you will,
 13 of paying Mr. Armstrong? Is there anything in that
 14 policy that's going to reimburse Tailwind more than \$5
 15 million?
 16 A. That question I can answer. No. This
 17 contract sets out what they will reimburse based upon
 18 certain events. That I can answer.
 19 Q. All right. You would agree with me that the
 20 insured contingency is the contingent event that
 21 Tailwind will become indebted to Armstrong for \$5
 22 million?
 23 A. I will agree with you that the obligation of
 24 SCA is to pay Tailwind in the event Mr. Armstrong wins
 25 pursuant to the terms and conditions of his contract.

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1 That's what I will agree with you.
 2 Q. Wait a second now. What if Armstrong had won
 3 all four races but Tailwind did not have an
 4 independent contract with him which obligated them to
 5 pay him \$5 million?
 6 A. Well, under this contract, SCA is agreeing to
 7 reimburse Tailwind for the full amount of any
 8 performance awards scheduled, so --
 9 Q. Precisely.
 10 A. Okay.
 11 Q. Precisely. So in a pure sense, it's not
 12 whether Armstrong wins the races or not, it's the
 13 consequence of Armstrong winning the races under his
 14 contract with Tailwind, under the liability that
 15 Tailwind has contractually assumed; that's the
 16 contingency here, isn't it?
 17 A. I don't think you and I have disagreed about
 18 that, that's what the contract says.
 19 Q. Exactly. Just so that we understand what we
 20 are talking about here, and I think you and I agreed
 21 that that was the contingency, was Tailwind's
 22 potential obligation to Armstrong for \$5 million?
 23 A. That's what the contract appears to say, yes.
 24 Q. Okay. So Mr. Armstrong wins the four races,
 25 all of a sudden under his -- Tailwind's contract with

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1 him they owe him \$5 million. We both agree about
 2 that?
 3 A. Yes.
 4 Q. Correct?
 5 A. Correct.
 6 Q. Okay. And SCA's obligation is to pay
 7 Tailwind precisely \$5 million?
 8 A. That's what this contract says.
 9 Q. All right. So that Tailwind, as to the
 10 contingency insured, gets precisely -- recovers or is
 11 reimbursed precisely the amount of the liability they
 12 incur?
 13 A. They are -- they're to be reimbursed whatever
 14 it is they pay out under the schedule, that is
 15 correct.
 16 Q. And they're not reimbursed any more than
 17 that?
 18 A. They're reimbursed in accordance with the
 19 schedule.
 20 Q. \$5 million exactly?
 21 A. That's right.
 22 Q. So how is it that you say under Tailwind's
 23 contract -- I'm not talking about collateral benefits
 24 or their subjective desire that Armstrong win, just
 25 like I think you and I have talked about this during

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1 your deposition, I have fire insurance on my house,
2 secretly I want the house to burn down. I hate the
3 neighborhood, I hate my neighbors and I want to get
4 the hell out of there, okay.

5 A. Uh-huh.

6 Q. And the house burns down, I don't burn it
7 down, what role does my subjective desire that the
8 house burn down have to do with whether it's insurance
9 or not?

10 A. Well, let me address your question in the
11 context of what we are talking about in my opinion.
12 When someone --

13 Q. Well, first of all, confirm for me that my
14 subjective desire whether the house burn down has got
15 nothing to do with whether it's insurance or a
16 contract.

17 A. In a situation involving homeowners your
18 subjective desire would not. For this reason, you did
19 not create the situation; you did not intend the
20 adverse event; you did not go out and engage in the
21 course of conduct designed to have your house burn
22 down.

23 Q. Right.

24 A. That's the difference between the homeowner's
25 situation that you're talking about, no matter what

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1 your subjective desire might have been, no matter what
2 you wanted to happen to your house. And the Tailwind
3 situation, Tailwind went out and created the potential
4 for the adverse event. They went out and created the
5 potential for the \$5 million bonus by seeking that
6 capacity for a \$5 million bonus and after having
7 conceived that capacity situation, then they went and
8 contracted for \$5 million and they have Mr. Armstrong
9 on the team which they own, which they want to win the
10 Tour de France because there are positive results that
11 can come from that; that is a speculative risk.
12 Homeowners insurance is a pure risk, it's not a
13 speculative risk no matter what the subjective desires
14 may be.

15 Q. But they're not getting -- all I'm suggesting
16 to you is that -- incidentally, you mentioned
17 capacity. Have you -- do you agree with me that
18 capacity is probably defined as the supply of
19 insurance available to meet demand?

20 A. Capacity is a lot of things. It's not
21 necessarily the supply of insurance. It could be the
22 supply of anything.

23 Q. In the insurance -- in the insurance context,
24 it means exactly what I said, doesn't it, that is, the
25 supply of insurance available to meet demand?

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1 A. In the insurance context that's exactly what
2 it means, that is to say -- and not necessarily supply
3 and demand. Capacity in the insurance context means
4 how much ability do you have to write a given amount
5 of insurance. That's what it means.

6 Q. All right. Well, when -- and I'm going to
7 move on, but the -- when you say speculative risk, you
8 mean, do you not, as it relates to the insurance
9 business that there is a possibility for gain, a
10 possibility for loss, and a possibility to break even?

11 A. That's what a speculative risk is, yes, sir.

12 Q. And what you're saying is that a pure risk
13 there is a possibility of loss --

14 A. Right.

15 Q. -- and a possibility of no loss?

16 A. Correct.

17 Q. Okay. Now, as to the contingent cyclist
18 incentive bonus program that SCA entered into with
19 Mr. Armstrong, okay, that is where if Mr. Armstrong
20 attained certain goals, Tailwind would have to pay
21 him, okay.

22 Now, if Mr. Armstrong didn't win the
23 events, there would be -- there would be no -- there
24 would be no gain for Tailwind; is that what you're
25 saying?

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1 A. If Mr. Armstrong didn't win the event, there
2 would be no gain for Tailwind, because they wouldn't
3 be able to attract additional sponsors and more money
4 from sponsors.

5 Q. But the only two possibilities that existed
6 for Tailwind under their contingent -- or under their
7 incentive agreement with Armstrong was either that he
8 would win or he would not win. If he won, they owed
9 him the money; if he didn't win, they didn't owe him
10 anything, correct?

11 A. If he won under their -- whatever agreement
12 they had with Mr. Armstrong, I don't recall seeing
13 that agreement, I presume they would have been
14 obligated to pay him.

15 Q. But if he didn't win, they wouldn't be
16 obligated to pay him. They had the possibility of --
17 of loss or no loss?

18 A. I don't think that that's correct. I think
19 that that is a -- again, a -- what I would have to
20 characterize as superficially correct but not correct
21 in the total context of the transaction, because
22 Tailwind ultimately wanted Mr. Armstrong to win,
23 because it meant more sponsors, more money and the
24 ability to make a profit from their venture, their
25 venture being the ownership of the cycling team. That

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1 was the speculative risk.
 2 Entering into this transaction was simply
 3 part of the speculative risk that they took on.
 4 Q. So you're saying, even though it was the
 5 contractual obligation existing between Tailwind and
 6 Armstrong that SCA was insuring, that -- that the
 7 insurance company -- or in order to be insurance, you
 8 would have to look beyond the contractual implications
 9 at a whole series of potential collateral or chain
 10 reaction events to determine if it was a speculative
 11 risk?
 12 A. No, that's not what I'm saying at all. I
 13 think you're misconstruing what I'm saying. What I'm
 14 saying is that you have to look at the nature of the
 15 risk being -- being transferred. The nature of the
 16 risk is a speculative risk and it is an intended risk.
 17 It is a risk that does not have adverse consequences
 18 ultimately to Tailwind. Paying the \$5 million on the
 19 surface is an adverse event to Tailwind. Ultimately
 20 it's a positive event for Tailwind because
 21 ultimately -- first of all, they intend for Mr.
 22 Armstrong to win, they set up the circumstances for
 23 him to win because they set up a team for him to train
 24 in so he would win the race, and they wanted him to
 25 win because they wanted to attract more sponsors and

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1 more money. I'm not talking about looking at anything
 2 other than what is the nature of the transaction that
 3 we are talking about and what is the nature of the
 4 risk being assumed; is this a pure risk or is this a
 5 speculative risk? This is a speculative risk.
 6 Q. Well, look at Claimant's Exhibit 1 --
 7 A. Okay.
 8 Q. -- which is the contractor liability that's
 9 insured by SCA.
 10 A. All right.
 11 Q. And if you'll look at -- and incidentally,
 12 I'm -- we are dumbfounded you haven't been provided a
 13 copy of this, since this is the subject of coverage,
 14 but if you would look at the addendum.
 15 A. Okay.
 16 Q. Please agree with me that the -- that in
 17 the --
 18 A. Let me interrupt you. I think I did look at
 19 this -- this exhibit.
 20 Q. Well, do you have anything that would
 21 indicate or evidence that anything other than the
 22 contractual obligations in this agreement are the
 23 subject of the SCA insurance agreement or contract or
 24 business contract?
 25 A. No, I'm not saying that there's anything

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1 other than what's in this.
 2 Q. You agree that this is it right here?
 3 A. I agree that this is what leads to, what was
 4 it, Exhibit --
 5 Q. 12.
 6 A. 12.
 7 Q. Right.
 8 A. Exhibit 17, excuse me, 17.
 9 Q. Now, if you look at the addendum here, can
 10 you determine or point out to me any gain -- any
 11 potential gain to Tailwind from the obligations that
 12 they've incurred or contracted for in that addendum?
 13 A. The gain to Tailwind comes not from the
 14 addendum, per se. The gain to Tailwind comes from
 15 what is intended by this agreement in the first place,
 16 and the testimony of Mr. Gorski, the testimony of
 17 Mr. Stapleton, the testimony of Mr. Michelitch and all
 18 of them testified that they intended for Mr. Armstrong
 19 to win. They didn't enter into this agreement
 20 intending that Mr. Armstrong not win the Tour de
 21 France. They entered into this agreement intending
 22 that he win it and that they be obligated to pay him,
 23 and then they sought out ways to be able to fulfill
 24 their obligation. It is a speculative risk. This is
 25 part of the entrepreneurial venture that I'm talking

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1 about
 2 Q. Okay. So the fact that there were only two
 3 possibilities under this contract, either they would
 4 pay him or they wouldn't pay him, has -- has --
 5 doesn't qualify it as a risk in your opinion?
 6 A. This -- this contract is not the only part of
 7 the analysis. This contract has two potential
 8 consequences, you're right, either they pay him or
 9 they don't. But then you look at what is the purpose
 10 of this contract and what is intended by the parties.
 11 Clearly from the testimony that I looked at for
 12 Mr. Stapleton and Mr. Gorski they didn't enter into
 13 the contract with Mr. Armstrong for the purposes of
 14 having him lose the Tour de France. They wanted him
 15 to win. They intended that certainly. Sure. That's
 16 what I mean. That's the whole point. That's why it
 17 is a speculative risk, not a pure risk.
 18 Q. Okay. Now, you haven't -- you did mention
 19 and I think that Mr. Tillotson talked to Mr. Longley
 20 about this, and you relied upon the Dallas Fire case,
 21 that's the only case that you cited to me during your
 22 deposition as playing into your opinion here.
 23 A. That's the only case that -- that's the most
 24 recent case that speaks to what 21.21 applies to, and
 25 when you say I relied on it, I just -- I'm aware of it

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1 and I'm aware of what it says with respect to
2 article 21.21.
3 Q. Okay. And Dallas Fire was essentially an
4 affirmation by the Supreme Court of their opinion in
5 North Austin Mud?
6 A. Correct.
7 Q. Now, first of all, there is no act or
8 practice that's identified in Section 101.051 or
9 article 101.051 that the Supreme Court has excluded
10 from the application of article 21.21 other than the
11 surety business?
12 A. That's correct. They have excluded from the
13 application 101.051 suretyship, guarantyship, that
14 type of contract.
15 Q. And you're aware of why or the reasoning of
16 the Court in those opinions?
17 A. Yes, sir, I'm aware of it.
18 Q. First of all, the surety bond is on a state
19 regulated paper, that is to say the contents of the
20 obligation are required to conform with a state
21 regulated surety bond form. Okay?
22 A. If it's written to an admitted company that
23 is correct.
24 Q. All right. Conversely an insurance contract
25 is generally prepared by the insurer?

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1 A. That is correct, the insurance contract is
2 written to an admitted company and are always prepared
3 by the insurer.
4 Q. An insurance company has the sole control
5 over the claims process, determining whether a claim
6 should be paid or not?
7 A. The insurance company determines whether or
8 not a claim should be paid under the contract of
9 insurance, correct.
10 Q. Exactly right. And that's one of the
11 reasons -- that is one of the reasons for 21.21 is so
12 that an insurer cannot take advantage or reap economic
13 gain by delaying or denying claims that should
14 rightfully be paid; isn't that a fair statement?
15 A. That's one of the provisions of section 4 of
16 21.21.
17 Q. Now, conversely, a surety can force his
18 principal to file suit to contest liability for the
19 underlying claim, correct?
20 A. Correct.
21 Q. And an insurer cannot force the insured to do
22 that, correct?
23 A. They're not supposed to, that's correct.
24 Q. All right. The most important difference as
25 we move along through the numerous differences, a

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1 surety involves three parties, not two?
2 A. Correct.
3 Q. The surety's obligation is not to the
4 principal, the person who contracts with the surety
5 and buys the bond, the surety's obligation is to the
6 obligee, correct, to a third party?
7 A. That's correct.
8 Q. It's not indemnification in the true sense
9 because the surety can sue the principal for whatever
10 the surety is out by standing good for his
11 obligations, correct?
12 A. That is correct.
13 Q. Another difference is that rather than pay
14 the obligee, the surety has all the defenses that the
15 principal has against the claim, correct?
16 A. Correct.
17 Q. And that's not present in the insurance
18 business where you have only the insured and the
19 insurer which indemnifies the insured against a
20 specific contingency, correct?
21 A. Which insures -- which insures -- with
22 respect to whatever the covered event is, that is
23 correct.
24 Q. Okay. And those are just a few of the
25 reasons why 21.21 doesn't apply to the surety business

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1 is because there is so much difference between a
2 surety principal relationship from a true
3 insurer/insured relationship; isn't that a fair
4 statement?
5 A. Fair statement.
6 Q. All of the cases -- all of the basic
7 principles which underlie the -- this idea of
8 speculative risk, economic gain, et cetera, it is to
9 implement the public policy that there shouldn't be an
10 opportunity for net gain to an insured from the
11 receipt of insurance proceeds which exceed the loss
12 actually suffered; isn't that -- that's a fair
13 statement of -- of Hornbook Insurance Law, isn't it?
14 A. That's an incomplete statement. That may be
15 part of it. The other part of it is that it is
16 against public policy to assume a risk where somebody
17 intends the consequence, intends the conduct and seeks
18 out to engage in the conduct.
19 Q. And you take the fact that Tailwind provided
20 trainers, et cetera, as -- as them accomplishing or
21 winning the Tour de France, is that where -- that is
22 to say, the fact that they intended the event to
23 happen is immaterial, the fact that they went and
24 provided support for Mr. Armstrong, that's what --
25 that's what makes the distinction between Tailwind and

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1 me wanting my house to burn down?
 2 A. The distinction is that Tailwind at inception
 3 wanted the event to occur when they purchased this
 4 contract, and then they engaged in the course of
 5 conduct for the event -- the triggering event to
 6 happen with respect to the contract. In the
 7 homeowner's situation, no matter what you may want to
 8 happen to your home, you did not -- you do not intend
 9 for the conduct to occur, because if you tell the
 10 insurance company you intend for your house to burn
 11 down, you're not going to do anything for it to
 12 happen, but you intend for it to happen, they're not
 13 going to issue you a homeowner's policy. That's not
 14 going to happen. And if you engage in a course of
 15 conduct for the event to occur, that is your house
 16 burning down, it's called arson and that's clearly
 17 excluded under a homeowner's policy
 18 Q. Okay. Now, would you turn to Respondent's
 19 Exhibit 1, which is this 1988 letter from the state
 20 board of insurance?
 21 A. Okay.
 22 Q. Do you take the position, Mr. De Leon, that
 23 the SCA insurance or the SCA contract at issue in this
 24 case is void because it violates public policy?
 25 A. I think it's void because it isn't the

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1 business of insurance.
 2 Q. So it's unenforceable?
 3 A. It's not enforceable as an insurance
 4 contract. I'm not saying it's unenforceable. It may
 5 be for other reasons. I wasn't asked to opine about
 6 that. I was simply asked to opine whether it
 7 constituted insurance or the business of insurance.
 8 I'm not here to give an opinion as to whether it's
 9 enforceable or unenforceable. That's something for
 10 some other people to decide, not me. And it's not
 11 something about which I was asked to opine.
 12 Q. But you have opined about Respondent's
 13 Exhibit 1. Look at the last sentence of the first
 14 paragraph.
 15 A. That's right, but I haven't opined as to
 16 whether or not the contract is enforceable or
 17 unenforceable, and you and I specifically had that
 18 discussion in my deposition and I specifically told
 19 you that I had no opinion about that because I was not
 20 asked to provide a coverage opinion and I wasn't
 21 providing a coverage opinion.
 22 Q. Well, here's my question, though. I want to
 23 be fair about the question.
 24 A. Okay.
 25 Q. You have stated that because it's a

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1 speculative risk with a possibility for gain, that
 2 it's not an insurance contract?
 3 A. That is correct.
 4 Q. Okay. And so in connection with your
 5 testimony, Mr. Tillotson provided you this letter
 6 which you apparently embrace as accurately defining
 7 what an insurance contract is or should be, and I'm
 8 asking you that if it involves a speculative risk --
 9 apparently Mr. Fisher believed that it was void
 10 because it violated public policy. Now, my question
 11 is, to you, whether you embrace that part of
 12 Mr. Fisher's opinion?
 13 A. Well, first of all, I don't think that's what
 14 Mr. Fisher is saying. He never said it's void because
 15 it's a speculative risk. He said it's void for other
 16 reasons and I let the paragraph speak for itself --
 17 Q. Sure.
 18 A. -- number one. Number two, I'm not here to
 19 opine as to whether or not the contract is void.
 20 That's not what I was asked to do and I'm not going to
 21 offer an opinion on that.
 22 Q. Okay. And that's because you have no opinion
 23 on that topic?
 24 A. I do not have an opinion on that topic. I
 25 wasn't asked to look at it for that purpose and I'm

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1 not offering any opinion on whether it's void or not
 2 void.
 3 Q. You've had an opportunity to review the two
 4 insurance policies that are at issue in this case that
 5 cover half of the risk for -- for 2004 that Tailwind
 6 assumed. And I take it the fact that CHUBB and
 7 Lloyd's issued insurance policies and refer to the --
 8 to the \$5 million in the aggregate as insurance
 9 proceeds or insurance payments, that played no part in
 10 your opinion as to whether this is insurance?
 11 A. That is correct.
 12 Q. And as a matter of fact, you don't think
 13 that -- you don't think that the CHUBB insurance
 14 policy or the Lloyd's insurance policy is insurance in
 15 a classic sense?
 16 A. That is correct.
 17 Q. You think they're only insurance or insurance
 18 policies because an insurance company issued them?
 19 A. That is correct.
 20 Q. And so what you're saying is that though it's
 21 not really insurance, it is insurance simply because
 22 the parties to the contract are insurance companies?
 23 A. More precisely, I'm saying that for
 24 regulatory purposes they're treated as insurance
 25 contracts because they're issued by insurance

<p style="text-align: right;">Page 494</p> <p>1 companies. 2 Q. Have you had an opportunity to review the 3 testimony of Mr. Overton that was -- as was given here 4 in this -- in this hearing? 5 A. No. 6 Q. Did you review his deposition testimony? 7 A. No. 8 Q. Did you review the relationship between SCA 9 and what has been referred to as its captive 10 reinsurance company headquartered in Bermuda? 11 A. I was aware, I think, of some deposition 12 testimony, but I didn't review that relationship, no. 13 Q. All right. Let me ask you this: While you 14 haven't addressed the spreading the risk, it has been 15 raised by SCA in this case. Would you agree that if 16 an insured does not sell enough policies to pool a 17 sufficient number of insureds, the insurer may still 18 attain the requisite risk distribution by arranging 19 with another insurer to reinsure part or all of the 20 risk undertaken? 21 A. Ask the question again. 22 Q. This I'm quoting out of Keeton here. 23 A. Sure. 24 Q. If an insurer does not sell enough policies 25 to pool a sufficient number of insureds, that is,</p>	<p style="text-align: right;">Page 496</p> <p>1 this is independently procured insurance or if this is 2 a reinsurance agreement and, therefore, I can't answer 3 your question. 4 Q. But I've asked you to assume with me, and 5 given those assumptions -- 6 A. Well, this -- 7 Q. -- this is reinsurance, isn't it? 8 A. Give me your assumptions again. 9 Q. That SCA has a \$5 million risk to Tailwind. 10 A. Okay. 11 Q. And they want to reinsure that risk. 12 A. Uh-huh. 13 Q. Okay. And so they go to their captive 14 reinsurance company -- 15 A. Uh-huh. 16 Q. -- in Bermuda and get an insurance agreement 17 covering their liability for \$5 million, which would 18 accrue if Tailwind becomes obligated to pay Armstrong. 19 A. Uh-huh. 20 Q. That would be classic reinsurance, wouldn't 21 it? 22 A. I can't answer your question, even given your 23 assumptions, because I really don't know what this 24 agreement is. I don't know if it's a -- like I said 25 to you before, as I listened to your assumptions, even</p>
<p style="text-align: right;">Page 495</p> <p>1 homogeneous risks, the insurer may still attain the 2 requisite risk distribution by arranging with another 3 insurer to reinsure part or all of the risk 4 undertaken. 5 A. I agree with that. 6 Q. Okay. Look at exhibit or tab 24. 7 A. Of? 8 Q. The black binder you've got there. 9 A. Okay. 10 Q. Do you see that? 11 A. Yes, sir. 12 Q. That first page is an agreement -- an 13 insurance agreement between Prize Indemnity Limited. 14 A. Uh-huh. 15 Q. Assume with me that's the PIL that's been 16 described as SCA's captive reinsurance company. And 17 assume with me that Prize Indemnity issued this 18 agreement for \$5 million in order to reinsure the 19 liability of SCA under its agreement with 20 Mr. Armstrong -- with Tailwind, I'm sorry. 21 A. I'll assume that with you. 22 Q. All right. That would, in a classic sense, 23 be reinsurance, wouldn't it? 24 A. It depends on what this agreement is. I 25 don't know what the agreement is. I don't know if</p>	<p style="text-align: right;">Page 497</p> <p>1 given your assumptions I can't answer the question, 2 because I don't know whether this agreement is 3 intended to be independently procured insurance or 4 some other type of insurance agreement, or whether 5 this is intended to be a reinsurance agreement or 6 reinsurance treatise, therefore, I can't answer your 7 question. This says insurance agreement. It doesn't 8 say reinsurance agreement. So I can't answer your 9 question. 10 Q. Okay. Let me ask you this, you know who 11 Swiss Re is? 12 A. Yes, sir. 13 Q. Swiss Re is a reinsurance company? 14 A. Largest reinsurer in the world. 15 Q. Okay. And Swiss Re insures insurers? 16 A. Correct. 17 Q. Okay. And if -- I guess you would agree that 18 the substance of the transaction is what matters. In 19 other words, if you look at 101.051, if you do 20 insurance business that is, in substance, equivalent 21 to any of the conduct described, then it satisfies, 22 for whatever purpose 101.051 is used for, it satisfies 23 having done those acts, whether you call them that or 24 not. 25 A. What you call them doesn't matter. It's what</p>

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1 you do.

2 Q. Okay. So that if in substance it's
3 reinsurance, even though you don't call it that,
4 that's what it would be, or if in substance you've
5 issued a policy of insurance, even though you don't
6 call it that, you would still be satisfying the
7 criteria of 101.051?

8 A. If -- if the transaction that you're talking
9 about -- you've asked me two different questions. If
10 the transaction that you're talking about as respect
11 to insurance, no matter what you're calling it, if it
12 involves the proposing to make a contract with respect
13 to a pure risk and the transfer of that risk for
14 consideration, then I would agree with you that that
15 constitutes insurance.

16 With respect to the other question that
17 you've asked, whether or not something constitutes
18 insurance or reinsurance gets to the question of what
19 is the transaction that is involved, that is to say,
20 if -- if the transaction between SCA and Tailwind is
21 insurance, then this agreement with PIL could be
22 characterized as reinsurance, no matter what its
23 title. If the contract between SCA and Tailwind is
24 not insurance and this contract is titled insurance,
25 then this contract is an insurance agreement between

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1 SCA and PIL whereby whatever risk SCA has has been
2 assumed because there is no potential for upside for
3 SCA. SCA has the potential for either not having to
4 pay the \$5 million or having to pay it.

5 Q. Precisely.

6 A. They have no potential for gain with respect
7 to whatever happens with regard to the Tour de France
8 whereas Tailwind does. That's the difference. That's
9 precisely what I'm saying.

10 Q. All right. Have you reviewed the contents of
11 the agreement under tab 2 of the Claimant's exhibits?

12 A. The Claimant's exhibits?

13 MR. BREEN: Yes, sir, that's the right
14 one.

15 A. I've looked at the letter.

16 Q. (BY MR. HERMAN) Well, that's -- that's not a
17 letter. That's an agreement, isn't it?

18 A. Well, it outlines certain things and -- it's
19 in the form of a letter and it's agreed to, so it's a
20 letter agreement. You can call it what you want.

21 MR. TILLOTSON: There's an opinion on the
22 fly.

23 MR. HERMAN: There's a win-win deal.

24 A. All right, there you go.

25 Q. (BY MR. HERMAN) And I think at your

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1 deposition we talked about what in your view was a --
2 constituted a reinsurance treatise. Do you recall
3 that?

4 A. We talked about reinsurance. You'll have to
5 remind me what we talked about.

6 Q. I believe you identified a reinsurance treaty
7 as a contract between an insurance company and another
8 insurance company whereby the insurance company who
9 has a contract with the insured lays off part of their
10 risk to another insurance company. It's a risk
11 management technique.

12 A. Correct, that's what I said.

13 Q. Now, look at paragraph -- just for example in
14 the continuous contracts.

15 A. Uh-huh.

16 Q. It says for the standard continuous program
17 Swiss Re participates at 27 and a half percent and AIG
18 at 27 percent of the risk and SCA allocates the other
19 52 and a half percent of the risk?

20 A. Uh-huh.

21 Q. It's true by virtue of that language that SCA
22 is laying off part of their risk to Swiss Re and to
23 AIG, true?

24 A. Well, what is true is that -- and I think I
25 told you this. I don't know exactly what this letter

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1 outlines when you and I talked about it. My
2 understanding is that AIG is the insurer and this
3 simply outlines the terms and conditions of the
4 relationship between Swiss Re and AIG, the insurance
5 company.

6 Now, this may -- this may be an agreement
7 that SCA set out in terms of how they're allocating
8 the risk that's been passed along to AIG. I don't
9 know that because I wasn't provided enough
10 documentation or information to determine that. I got
11 this letter agreement last Thursday, I believe, or
12 Wednesday before my deposition on Friday, so I don't
13 have enough information to go beyond what I've just
14 told you and what I've told you in my deposition.

15 Q. I'm not asking you that. I'm just asking you
16 pursuant to the unambiguous terms of that sentence,
17 there's an agreement between Swiss Re, AIG and SCA
18 about how the risk is going to be allocated.

19 A. Well, let me read the first sentence of this
20 letter. This letter outlines my proposal for the
21 third year of our documented programs with Swiss Re
22 and AIG, so it talks about Swiss Re and AIG and that's
23 the reason that I can't very well tell you that by
24 this letter SCA is acting as an insurer and Swiss Re
25 is acting as a reinsurer directly with SCA; that's the

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1 problem I have with the question you're asking.
2 Q. I didn't ask you that question, though. All
3 I asked you was whether or not under your definition
4 of a reinsurance treaty, whether or not this is an
5 agreement whereby the risk is -- risks assumed by SCA
6 are passed on, whether they flow through AIG or
7 whether they don't flow through AIG, isn't this an
8 agreement for Swiss Re to take 27 and a half percent
9 and AIG to take 20 percent of those particular risks?
10 A. This agreement says what it says and I'll let
11 it speak for itself, and that's it. The words say
12 what they say.
13 ARBITRATOR CHERNICK: Mr. Herman, do you
14 have an estimate?
15 MR. HERMAN: Yeah, I've got about ten
16 more minutes. Can you hang on?
17 ARBITRATOR CHERNICK: Yes.
18 Q. (BY MR. HERMAN) You represent -- I believe
19 on your web site it says that you represent Gulf
20 Insurance Group?
21 A. I don't personally. The firm may. I don't
22 know. I don't work with them.
23 Q. Well, let me back up a little bit here.
24 Would you put the slide up, Jason?
25 Whether you agree with the Attorney

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1 General or the Austin Court of Appeals, you would
2 agree with me, would you not, that the SCA contract at
3 issue in this proceeding was one by which SCA assumed
4 Tailwind's risk or contingency that they would become
5 obligated to Mr. Armstrong and that Tailwind paid SCA
6 a fee or a premium or consideration and that the
7 amount for which SCA undertook or indemnified Tailwind
8 was a specific and ascertainable sum? The short
9 answer is doesn't the SCA contract fit the first
10 definition up there?
11 A. As you and I talked about, that's a
12 definition and it fits that sentence of that partial
13 definition. The rest of the paragraph has other words
14 in it, but yeah, it fits that sentence.
15 Q. It fits that sentence?
16 A. It fits that sentence.
17 Q. Okay. Now, does the SCA contract fit the
18 quote from the Attorney General's opinion?
19 A. It fits that sentence, also.
20 Q. And you agree that the Attorney General
21 doesn't -- the Attorney General says peril or
22 contingency?
23 A. Yes, he uses that conjunc -- the disjunctive,
24 excuse me, a peril or contingency.
25 Q. Disjunctive. And you and I have agreed that

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1 the risk of Tailwind here was a contingency?
2 A. Yes, there was a contingency involved with
3 respect to the contract that they had.
4 THE REPORTER: I'm sorry. I didn't hear
5 you.
6 A. It is correct that the contract they had with
7 Lance Armstrong was a contingency. It was an event
8 that had to happen before they obligated themselves to
9 pay Lance Armstrong \$5 million.
10 Q. (BY MR. HERMAN) So that if, in fact, the SCA
11 contract is a contract of insurance, without going
12 through them all, SCA would have engaged in every --
13 virtually every act identified in 101.051, which you
14 and I went through during your deposition?
15 A. We went through that and I specifically
16 identified the ones that if we limit it to that
17 definition what they would have done.
18 Q. And you don't have a Texas case which
19 identifies an insurance contract arising or defines
20 insurance as excluding a contingency like we have
21 talked about here today?
22 A. I don't think that case has come to the
23 Court's attention that communicates a first
24 impression.
25 Q. You don't have any judicial authority which

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1 would contradict the definitions which are set out on
2 this board here?
3 A. Well, first of all, as I said to you during
4 my deposition, the first sentence that you quote there
5 from a case is a partial definition and, no, I don't,
6 because there are no cases that have addressed the
7 question of speculative versus pure risk.
8 Q. Actually, the sentence that you're saying is
9 a partial sentence is a quote from a prior Court of
10 Appeals case, is it not?
11 A. It's a quote from a prior Court of Appeals
12 case and the rest of the paragraph has verbiage as to
13 what constitutes insurance.
14 Q. Well, to be fair about it, the other
15 definition comes from another Court of Appeals case
16 which defined insurance as an undertaking by one party
17 to protect the other party from loss arising from
18 named risks --
19 A. Uh-huh.
20 Q. -- for the consideration and upon the terms
21 and under the conditions recited. Whether or not a
22 contract is one of insurance is to be determined by
23 its purpose, effect, contents and import and not
24 necessarily by the terminology used and even though it
25 contains declarations to the contrary?

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1 A. Absolutely.
 2 Q. Okay.
 3 A. Correct.
 4 Q. And so it doesn't say -- well, are you saying
 5 that the SCA contract does not satisfy that first
 6 definition?
 7 A. I'm saying it doesn't because we don't have
 8 the potential for loss. What we have is the potential
 9 for speculative risk and gain. As to Tailwind, as I
 10 said to you before, Tailwind by paying the \$5 million
 11 may have lost initially, but ultimately it gained
 12 access to more sponsors and more money.
 13 Q. Now, let me ask you this, does 101.051 define
 14 acts that constitute the business of insurance?
 15 A. It defines for purposes of the unauthorized
 16 insurance statute what constitutes the business of
 17 insurance in Texas, yes.
 18 Q. Well, does it define what constitutes the
 19 business of insurance in Texas or not?
 20 A. It defines for purposes of the unauthorized
 21 insurance statute what constitutes the business of
 22 insurance, because that's what it's about. It's in
 23 subchapter A of 101, subchapter B of 101.
 24 Q. Are you saying if you're an authorized
 25 insurer and you do any of this that you're not engaged

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1 in the business of insurance?
 2 A. What I'm saying is that that sets out a
 3 definition so that the department of insurance can
 4 identify conduct it could seek sanctions against if
 5 someone is engaged in that conduct without a license
 6 or permit. That's what it's about.
 7 Q. All right. Can you point to any case,
 8 Attorney General opinion or otherwise that relies upon
 9 the Dearborn review course for insurance agents?
 10 A. Not off the top of my head I can't.
 11 Q. Okay. Can you name any case where an amicus
 12 brief or intervention from the TDI was given deference
 13 in determining what constitutes insurance or the
 14 business of insurance?
 15 A. Not off the top of my head.
 16 Q. Have you read Garrison Contractors?
 17 A. I've read Garrison Contractors, but I haven't
 18 memorized it, and maybe the TDI filed an amicus brief.
 19 Q. You would agree that article 21.21 regulates
 20 conduct and provides private remedies for the conduct
 21 of persons engaged in the business of insurance,
 22 whether they be individuals, corporations, insurance
 23 companies or any other entity?
 24 A. That's correct. That's what it says. It
 25 defines persons pretty broadly.

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1 Q. Pardon me?
 2 A. It defines persons pretty broadly.
 3 MR. HERMAN: I'll pass the witness.
 4 ARBITRATOR FAULKNER: Do you need to take
 5 a break?
 6 ARBITRATOR CHERNICK: No, I need to end.
 7 MR. TILLOTSON: I have one minute if you
 8 would bring up the slide. I need to ask a
 9 clarification question.
 10 REDIRECT EXAMINATION
 11 BY MR. TILLOTSON:
 12 Q. Mr. De Leon, I just want to focus on this
 13 particular excerpt. We've gone over this paragraph in
 14 the Texas Association of Qualified Drivers and it
 15 says, assumes particular risks. If we were to assume
 16 that risk could be positive or negative, a good thing
 17 or a bad thing, would the SCA contract then fit within
 18 that definition?
 19 A. If the risk is a positive or a bad thing?
 20 Q. A positive or a negative.
 21 A. Yes.
 22 Q. If we were to take that risk and define the
 23 word risk in the sentence the way it's defined in the
 24 prior sentence of that same paragraph as a loss from a
 25 particular risk, is that the pure risk that you're

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1 speaking about that's not present in this case?
 2 A. That's right. That's exactly what I'm
 3 saying.
 4 MR. TILLOTSON: No further questions.
 5 MR. HERMAN: Let me just ask one more.
 6 RECROSS EXAMINATION
 7 BY MR. HERMAN:
 8 Q. Aside from what you've been asked to opine
 9 about, whether the actual contract, the SCA contract
 10 with Tailwind, is an insurance contract, there are
 11 numerous other ways that -- in connection with other
 12 insurance contracts or helping or facilitating other
 13 insurers that SCA could be engaged in the business of
 14 insurance, correct?
 15 A. I don't know that. I would have to know what
 16 you're talking about. I can't answer your question.
 17 Q. Well, what I'm saying is, it's possible -- in
 18 other words, SCA could have collected premiums and
 19 adjusted claims for Swiss Re or AIG, they could have
 20 facilitated executed contracts on behalf of insurance
 21 companies in the state of Texas, any of those things
 22 could also place them in the business of insurance?
 23 A. Whatever the words say, they say, and if they
 24 did the conduct that's described there, then they
 25 would be considered in the business of insurance.

<p style="text-align: right;">Page 510</p> <p>1 MR. HERMAN: Okay, thank you. 2 ARBITRATOR FAULKNER: Any other 3 questions? 4 MR. TILLOTSON: Nothing further. 5 ARBITRATOR FAULKNER: All right, 6 gentlemen, that concludes this part of it. Now, we 7 have discussed earlier the possibility -- you know, 8 the submission. 9 MR. TILLOTSON: You're excused, I think. 10 MR. HERMAN: Yes, he's excused. 11 ARBITRATOR CHERNICK: I've given my proxy 12 to Mr. Faulkner and he's going to tell you what you 13 need to do now. 14 ARBITRATOR FAULKNER: Time frames, 15 gentlemen. We'd like briefs on this. We also, as we 16 alluded to earlier in the week, we would like you to 17 provide us with a copy of any cited cases so we don't 18 have to go chasing them down. 19 MR. TILLOTSON: Outside of the ones that 20 are already here? 21 ARBITRATOR FAULKNER: Yes, outside of the 22 ones that are already here, but we won't complain if 23 you put them neatly in a binder that we can easily 24 find them. 25 MR. TILLOTSON: No problem.</p>	<p style="text-align: right;">Page 512</p> <p>1 any cites so we'll have already started, obviously, so 2 three days or so after I get the transcript or two 3 days after I get the transcript. 4 ARBITRATOR FAULKNER: Assuming you get 5 the transcript by Monday, could you all have your 6 submission by Friday of next week? 7 MR. TILLOTSON: Oh, yes. 8 ARBITRATOR FAULKNER: Which I think is, 9 what, the 7th or the 8th? 10 MR. TILLOTSON: Oh, yeah, that's fine. 11 ARBITRATOR FAULKNER: If the 7th works 12 for them, how long do you all need to be able to 13 reply? 14 MR. HERMAN: A week. 15 ARBITRATOR FAULKNER: So the 14th for you 16 all. Why don't you have your submission to us on the 17 7th, say like by 5:00, and I will tell you candidly, I 18 will be in an airplane between here and Idaho so I 19 won't see yours until the following Monday and you all 20 can have yours by the end of the business day on 21 Friday, the 14th. 22 MR. HERMAN: Yes. 23 ARBITRATOR FAULKNER: That works, 24 gentlemen. 25 MR. TILLOTSON: Since there will probably</p>
<p style="text-align: right;">Page 511</p> <p>1 ARBITRATOR FAULKNER: When do you think 2 you could have your submission and do y'all want to do 3 them simultaneously or -- 4 ARBITRATOR LYON: Rick suggested 5 yesterday that they file a response to what they 6 filed -- 7 ARBITRATOR FAULKNER: That's right. You 8 all filed something. I forgot about that. What kind 9 of time frame do you all envision needing? 10 MR. TILLOTSON: I'd like to include 11 citations to the transcript. 12 ARBITRATOR FAULKNER: I was going to ask, 13 do you have any idea when we might be able to 14 anticipate this transcript being available? 15 THE REPORTER: General turnaround time is 16 two weeks, but if you -- 17 MR. TILLOTSON: If we pay for it, can we 18 get it on Monday? 19 THE REPORTER: Yes. 20 MR. TILLOTSON: Let's assume we get it on 21 Monday or Tuesday. 22 ARBITRATOR FAULKNER: I know where I will 23 be trying a case in Boise, Idaho on the 6th. 24 MR. TILLOTSON: Just a few days after 25 that. We'll have one written and then we'll insert</p>	<p style="text-align: right;">Page 513</p> <p>1 be an appendix with the authorities, I take it it 2 should be physically hand-delivered rather than 3 electronically sent. I don't want you to have to 4 print it all. 5 ARBITRATOR FAULKNER: It would be easier 6 if you hand-delivered it. 7 MR. TILLOTSON: Then the last question 8 with respect to other matters that are ongoing as we 9 get ready for the December hearing, we have some 10 subpoenas for witnesses that we have held off on while 11 we finished this part of it. Is the panel in a 12 position to, if we present these subpoenas, say, by 13 tomorrow, to begin issuing those subpoenas so we can 14 get going? 15 ARBITRATOR FAULKNER: If you can get them 16 to us today or tomorrow, yes. 17 MR. TILLOTSON: Last question. Is the 18 process that we only need a single -- the chairman to 19 sign off on them or do we need all three or can we 20 agree so that only one, the chairman, can sign them so 21 we don't have to physically get them to everyone? 22 ARBITRATOR FAULKNER: We intended that I 23 will be the one signing them, unless somebody attempts 24 to quash a subpoena. In that event then all three of 25 us will look at it, but otherwise I'll be able to sign</p>

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1 them to facilitate getting them out. And, in fact, do
 2 you anticipate anybody you're going to have an
 3 absolute need for by Friday of next week, because I
 4 can give you an address in Boise.
 5 MR. TILLOTSON: No. I mean, I'm going to
 6 deliver subpoenas to you tomorrow, because we have
 7 been working with lawyers in terms of availability of
 8 these people and they've given us specific dates and
 9 demanded that we subpoena them. So we are ready to go
 10 on this process. And out of marshalling evidence here
 11 we started that process last time with the panel
 12 members and then put it off a little bit to finish
 13 this. So we need to get going on that.
 14 ARBITRATOR FAULKNER: Now, do you know
 15 who they are attempting to subpoena?
 16 MR. HERMAN: I don't know, but we would
 17 urge that before we start traveling to Europe and so
 18 forth that we see where we light on this first issue,
 19 because it would -- it will likely have some impact
 20 on -- on what issues remain in the case, so before we
 21 are obligated to travel to Europe or whatever to
 22 depose someone that they think they want to depose --
 23 ARBITRATOR FAULKNER: How many people --
 24 MR. TILLOTSON: This is not Europe. The
 25 ones that we are talking about are in the continental

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1 United States.
 2 ARBITRATOR LYON: How many witnesses are
 3 there?
 4 MR. TILLOTSON: The subpoenas we are
 5 going to deliver initially tomorrow would be for four
 6 individuals, husbands and wives.
 7 ARBITRATOR LYON: Are they the same ones
 8 that you --
 9 MR. TILLOTSON: Yes, the same ones that
 10 we served last time and put in front of the panel.
 11 MR. BREEN: Are you going to propose
 12 dates on this? I mean, he hasn't even proposed the
 13 dates to us. I don't even know if we're available.
 14 MR. TILLOTSON: I will at the end of the
 15 day, as well as one document subpoena for production
 16 of the document that doesn't require a witness to
 17 appear and simply produce the documents.
 18 ARBITRATOR FAULKNER: Is that the USPS?
 19 MR. BREEN: No, we handled that already.
 20 MR. TILLOTSON: We handled that
 21 previously. This is to someone different.
 22 MR. BREEN: I don't think there's going
 23 to be an issue on that.
 24 ARBITRATOR FAULKNER: That one I'll sign
 25 as soon as you get it to me since there won't be an

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1 issue. The two husbands and wives, can you identify
 2 who these people are so they can --
 3 MR. TILLOTSON: They will be the Lamons,
 4 Greg and Kathy Lamons, and Betsy and Frank Andrews,
 5 which are the ones we previously identified.
 6 MR. HERMAN: We're going to -- the
 7 subject matter of those depositions could be mooted by
 8 the resolution of this issue, because the -- the
 9 misrepresentation defense, which if there's anything
 10 left of it after Mr. Hamman's testimony, is largely --
 11 you know, they're not entitled to it after 90 days,
 12 and so I presume that's what the -- that's what the
 13 subject matter of these depositions is about.
 14 MR. BREEN: Well, it has to be. They
 15 didn't have any involvement in the Tailwind contract
 16 or anything else.
 17 MR. TILLOTSON: This was a subject of a
 18 whole hearing and a ruling.
 19 ARBITRATOR FAULKNER: We are aware of
 20 what our previous rulings are. Get us the subpoenas.
 21 If they file a motion to quash, we will attempt to
 22 address it very expeditiously and then we will deal
 23 with that as soon as we see it and see what, if any,
 24 objections you guys have. Do coordinate the dates,
 25 please, so we don't have that going back and forth,

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1 and you'll have worked cooperatively.
 2 MR. TILLOTSON: Yes. The only problem
 3 here is that these individuals, for example, Greg
 4 Lamons and the Andrews' attorney have said these are
 5 the dates that we are willing to appear on. They gave
 6 us very strict time frames. Part of that is because
 7 at their request we had sort of pushed off that
 8 discovery this very limited time frame, so I'm going
 9 to ask for an extreme amount of flexibility from them.
 10 ARBITRATOR LYON: Is Lamons up there in
 11 Big Sky, Montana?
 12 MR. TILLOTSON: Minnesota.
 13 ARBITRATOR LYON: He's got a house in Big
 14 Sky.
 15 MR. TILLOTSON: Are you offering to
 16 attend those?
 17 ARBITRATOR LYON: My house isn't far from
 18 there.
 19 ARBITRATOR FAULKNER: If you get those to
 20 us by tomorrow, we will deal with that and if you have
 21 an objection, go ahead and file whatever motion. As
 22 far as I understand my calendar, I'm here until -- I
 23 think I get on a plane on Tuesday so I will be here
 24 and have all the contact information for all of us. I
 25 don't know what Rich's calendar is --

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1 MR. TILLOTSON: It could be handled by
2 phone.
3 ARBITRATOR FAULKNER: If there is a need
4 to try to quash anything, we can handle it by phone.
5 How quickly are those deposition dates? How far out
6 are we talking about?
7 MR. TILLOTSON: Two -- I want to say
8 three weeks.
9 ARBITRATOR FAULKNER: Y'all, depending
10 upon how quickly we get the briefing from you all, we
11 are going to be talking very expeditiously on this
12 issue of the business of insurance, so you may not
13 have, you know, to worry about that concern, because
14 we are going to try to turn this around quickly. We
15 really do want to keep the December trial dates, so we
16 are going to push as hard as we can, consistent with
17 y'all presenting your cases in the way you need to.
18 Anything else we need to address?
19 MR. TILLOTSON: That's it for now.
20 ARBITRATOR FAULKNER: Thank you very
21 much.
22 (Proceedings concluded at 1:06 p.m.)
23
24
25

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1 STATE OF TEXAS)
2 COUNTY OF DALLAS)
3
4 I, Nancy P. Blankenship, Certified Shorthand
5 Reporter, in and for the State of Texas, certify that
6 the foregoing proceedings were reported
7 stenographically by me at the time and place
8 indicated.
9 Given under my hand on this the 3rd day of
10 October, 2005.
11
12
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