

BATF. City Council Court

TRANSCRIPTS

Shofu
VS
HACK

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND
RICHARD SHOFER,
Plaintiff,
v. Case No. 88102069/CL79993
STUART HACK, et al.,
Defendants.

OFFICIAL TRANSCRIPT OF PROCEEDINGS
Baltimore, Maryland
June 26, 1997

BEFORE:
HONORABLE JUDGE ALBERT J. MATRICCIANI, JR.
APPEARANCES:

For the Plaintiff:
DOUGLAS TAYLOR, ESQUIRE
For Defendants:
JANET TRUHE, ESQUIRE
DEBORAH WHELIHAN, ESQUIRE
JOHN MAY, ESQUIRE

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CIRCUIT COURT FOR BALTIMORE CITY

PROCEEDINGS
[1] (These proceedings commenced at 9:53 a.m.)
[3] THE COURT: For the record, this is the matter of
[4] Shofer v. Hack, et al., Case Number 88102069/CL79993. I
[5] would like to ask Counsel to identify themselves for the
[6] record, please.
[7] MR. TAYLOR: Your Honor, Douglas Taylor, appearing
[8] on behalf of the Plaintiff.
[9] THE COURT: Good morning, Mr. Taylor.
[10] MR. TAYLOR: Good morning.
[11] MS. TRUHE: Janet Truhe, appearing on behalf of
[12] Defendants, Stuart Hack and the Stuart Hack Company.
[13] THE COURT: Good morning.
[14] MS. TRUHE: Good morning.
[15] MS. WHELIHAN: Your Honor, Deborah M. Whelihan,
[16] appearing on behalf of Greybush Newman Company. Beside me
[17] is my partner, John May, whom I would like to introduce to
[18] you, who is also now Co-Counsel with us.
[19] THE COURT: Good morning.
[20] MR. MAY: Good morning.
[21] THE COURT: Is it May, M-a-y?
[22] MR. MAY: May.
[23] MS. WHELIHAN: M-a-y.
[24] THE COURT: Nice meeting you. Mr. Taylor, are we
[25] ready to proceed?

[1] MR. TAYLOR: I believe we are, Your Honor.
 [2] THE COURT: Okay. You can call your first
 [3] witness.
 [4] MR. TAYLOR: Your Honor, I was going to, if the
 [5] Court would allow me, just to make a brief opening
 [6] statement.
 [7] THE COURT: You may. As you know, I am quite
 [8] familiar with the facts, so I do not need a detailed one.
 [9] But if you would like, certainly.

[10] OPENING STATEMENT OF THE PLAINTIFF

[11] MR. TAYLOR: Your Honor, just by way of
 [12] background, the Plaintiff is Richard Shofer who is the
 [13] President and sole stockholder of Catalina Enterprises, a
 [14] Maryland corporation which was incorporated in 1965.
 [15] Catalina Enterprises, Inc. does business under the name of
 [16] Crown Motors which is engaged in the selling and financing
 [17] of used cars right here in Baltimore City. In the late
 [18] 1960's, early 1970's, Catalina Enterprises, Inc. established
 [19] a pension plan.
 [20] Actually, at the time the contact was made with
 [21] the Defendants, there was a profit-sharing pension plan
 [22] already in existence. The pension plan was called the
 [23] Catalina Enterprises, Inc. Pension Trust; and the Plaintiff,
 [24] Richard Shofer, was and is the sole trustee of the pension
 [25] trust. In the early 1970's, the Defendant, Stuart Hack, and

[1] the Plaintiff got together as a result of a referral to the
 [2] Plaintiff, and the Defendants offered to review and amend
 [3] the pension trust to ensure that the plan complied with the
 [4] then-current law and would achieve the objectives for which
 [5] it was designed.
 [6] The Defendants and the Plaintiff agreed that the
 [7] Defendants would in fact perform the necessary work to amend
 [8] and modify the existing plan. This was not a new plan that
 [9] the Defendants had created. After the modifications and
 [10] amendments were made, that they would proceed to administer
 [11] that plan for the Plaintiff and his company. The Plaintiff
 [12] expects that the evidence will establish that among the
 [13] services provided by the Defendants to the Plaintiff and his
 [14] company were, in addition to regular administration and
 [15] maintenance of the plan, actuarial services, tax law
 [16] information, legal advice and assistance as it related to
 [17] the administration of the plan.
 [18] That at the time the parties got together, the
 [19] Defendant, Stuart Hack, was an officer and employee of the
 [20] Stuart Hack Company, and had full authority to bind the
 [21] company to act for it in matters relating to pension
 [22] modification and administration. The parties actually
 [23] entered into a business arrangement in the early 1970's, and
 [24] that business arrangement continued into the late 1980's.
 [25] The Plaintiff expects that the evidence will show that a

[1] knowledge of tax and pension law is a necessary prerequisite
 [2] and requirement for the competent discharge of the work and
 [3] services which the Defendants offered to perform for the
 [4] Plaintiff and his company.
 [5] We believe that the evidence will establish that
 [6] the Defendant, Stuart Hack, was and is a licensed attorney;
 [7] that he and his company were in fact performing legal
 [8] services for the Plaintiff during the course of the time
 [9] that they were providing services with respect to the
 [10] administration of the pension trust; and that Mr. Hack
 [11] should be held to the standard of care of any attorney
 [12] providing the same or similar services for a person or
 [13] entity in the Plaintiff's situation in this case.
 [14] The evidence, we believe, will show that during
 [15] the time that the parties maintained this contractual
 [16] relationship, the Defendant, Hack Company, maintained its
 [17] own legal department and provided legal advice and legal
 [18] services for its clients. The evidence, we believe, will
 [19] establish that there was a course of conduct and a pattern
 [20] of business whereby the Defendants did perform the services
 [21] which they offered to perform, and that the Defendants dealt
 [22] directly with Plaintiff concerning all matters relating to
 [23] the proper administration of the pension trust.
 [24] We believe that the evidence will establish that
 [25] this course of conduct and pattern of business contacts

[1] included advising the Plaintiff on matters with respect to
 [2] the pension generally, and his own account, particularly in
 [3] answering inquiries which the Plaintiff may have had
 [4] concerning the pension generally. That as a part of this
 [5] pattern of conduct which had been in existence for a number
 [6] of years, the Plaintiff sought the Defendant's advice
 [7] concerning the practicality and advisability of borrowing
 [8] money from the pension trust in order to further his
 [9] interests and the business interests of the parent company,
 [10] Catalina Enterprises, Inc.
 [11] The evidence specifically will establish that
 [12] between August 1, 1984, and August 9, 1984, Plaintiff called
 [13] the Defendant, Stuart Hack, on the telephone and asked him
 [14] whether or not it would be advisable for him to borrow money
 [15] from the pension trust in order to raise money for a variety
 [16] of purposes, including business purposes. The Defendants
 [17] verbally approved over the telephone or, expressed their
 [18] opinion over the telephone that it would in fact be
 [19] advisable for the Plaintiff to make such a loan. The
 [20] Plaintiff requested that that advice be placed in writing,
 [21] and that resulted in a letter of August 9, 1984, which the
 [22] Plaintiff will offer into the record in this case.
 [23] Plaintiff will offer proof that the advice
 [24] contained in the letter of August 9, 1984, is blatantly
 [25] incorrect. I am not going to go through the particular

[1] items, but simply advise the Court that we are prepared to
[2] offer evidence that the information contained in that letter
[3] is erroneous. That acting on that advice, the Plaintiff did
[4] undertake to borrow money from the pension account over the
[5] years 1984, 1985, and 1986; and that as it later turned out,
[6] acting on this erroneous advice, created additional taxes,
[7] penalties, and interest for the Plaintiff in this particular
[8] case.

[9] The Plaintiff expects that he will be able to
[10] prove that the Defendants owed him a legal duty in this case
[11] to advise him properly and correctly with regard to the
[12] applicable law as to the proposed use of any pension funds
[13] for loans of any type, and particularly, the loans that he
[14] was seeking to take in 1984. Notwithstanding this duty, the
[15] Defendants failed to inform the Plaintiff of the adverse tax
[16] consequences and other problems associated with borrowing
[17] money in accordance with the advice contained in the letter
[18] of August 9, 1984.

[19] The evidence will show that at the time that the
[20] loans were made, that the Plaintiff had absolutely no idea
[21] that by taking these loans, he would subject himself to
[22] additional federal income taxes, state income taxes,
[23] interest and penalties thereon, or that there would be other
[24] difficulties that he would encounter with regard to his
[25] business as a direct result of making these loans. The

[1] evidence will also show that after bringing these matters to
[2] the Defendants' attention, they continued to offer him
[3] erroneous tax advice with respect to the course of action
[4] that he might take to correct these problems. And that the
[5] Plaintiff elected to follow the advice of his accountants in
[6] this matter, filing amended returns which resulted in the
[7] additional tax and other liabilities being assessed against
[8] him.

[9] Your Honor, there are actually eight categories of
[10] damages which we will offer evidence on. Those eight
[11] categories include the federal and state income taxes, the
[12] penalties of the interest on each category. There will be a
[13] showing also with respect to fees that were necessary for
[14] professionals to correct the problems created by these taxes
[15] and interest on monies that Plaintiff had to borrow in order
[16] to pay for these services. Prior to the close of
[17] Plaintiff's case, Your Honor, Plaintiff would make a proffer
[18] with regard to additional damages which have been already
[19] excluded from this case, not only by this Court's memorandum
[20] and order in November of 1996, but by prior orders in
[21] connection with this case. Thank you.

[22] **THE COURT:** Okay, Ms. Truhe, do you wish to make
[23] any opening statement?

[24] **MS. TRUHE:** Yes, Your Honor. Thank you.

OPENING STATEMENT OF DEFENDANTS HACK

[1] **MS. TRUHE:** As the Court knows, I represent
[2] Defendants, Stuart Hack and the Stuart Hack Company. In
[3] 1988 the Plaintiff, Richard Shofer, filed suit against these
[4] Defendants for negligence and breach of contract arising out
[5] of their failure to advise Mr. Hack about tax consequences
[6] which might occur if he borrowed money from his pension
[7] plan. The primary liability issue to be tried in this case
[8] is whether Mr. Hack and his company even owed any duty to
[9] the Plaintiff which proximately caused him any foreseeable
[10] damages.

[11] Now as this Court noted in its memorandum,
[12] opinion, and order of November 7, under the rulings now in
[13] effect the Plaintiff is limited to recovery of federal and
[14] state income taxes, penalties, and interest as well as
[15] professional fees incurred as a result of Defendants'
[16] negligence, if proven. All other alleged damages, including
[17] those that are pension-related, are out of this case. Now
[18] the Plaintiff's attorney has given you one version of
[19] events, but Defendants believe the evidence will show
[20] something very, very different.

[21] I would like to summarize very briefly what that
[22] evidence will show. From a factual standpoint, the
[23] background of what happened in this case is basically not in
[24] dispute and is fairly straightforward, although I believe

[1] the Plaintiff's attorney, in his opening statement, has
[2] oversimplified much of it. The Catalina Enterprises pension
[3] plan was established for employees of the Plaintiff's
[4] business, Catalina Enterprises trading as Crown Motors.
[5] That is a used car dealership owned and operated by the
[6] Plaintiff, Richard Shofer. He is President of Crown Motors,
[7] and he is trustee of the pension. He is also a participant
[8] in the pension.

[9] Now in the mid-1970's, the Stuart Hack Company was
[10] hired, not by Mr. Shofer but by Catalina Enterprises, to
[11] perform certain administrative services for the pension. It
[12] is undisputed in this case that the Plaintiff was never a
[13] client of Mr. Hacks or the Hack Company, or that Mr. Hack
[14] was performing any services as an attorney. He has never,
[15] in his entire professional career, held himself out as an
[16] attorney to anyone. He has never engaged in the practice of
[17] law. He has been strictly a pension consultant and
[18] administrator.

[19] Now when Mr. Shofer was referred to Mr. Hack's
[20] company by his accountants at Greybush Newman, he already
[21] had a pension plan. So the first task which Catalina
[22] therefore asked the Hack Company to perform was a redrafting
[23] of the pension to bring it into compliance with ERISA, which
[24] was new at that time. After that, the Hack Company's
[25] administrative services consisted of determining employee

[1] eligibility, calculating participant benefits, the issuance
[2] of annual participant reports, and preparation of the 5500
[3] forms which were annual reports filed with the IRS and the
[4] Department of Labor setting forth the pensions assets and
[5] liabilities as well as any transactions, including loans,
[6] affecting the pension for that particular year, and that is
[7] all.

[8] When Catalina Enterprises first retained the Hack
[9] Company to perform these services, the evidence will show
[10] that Mr. Shofer personally had very little contact with Mr.
[11] Hack. In fact, the evidence will show that Mr. Shofer did
[12] not speak with Mr. Shofer more than about once a year, and
[13] sometimes not even that. So this ongoing and continuous
[14] relationship which Mr. Taylor alluded to in opening
[15] statement, will not be borne out by the evidence. The
[16] frequency of their contact, however, changed in 1982, two
[17] years before the events at issue in this case.

[18] At that time, Mr. Shofer wanted to get his pension
[19] involved in financing the company's receivables. In the
[20] process of doing that, Mr. Shofer communicated with Mr. Hack
[21] and his accounts at Greybush Newman about the legality of
[22] this plan as well as the tax consequences. All of this was
[23] initiated by Mr. Shofer. Even after the pension started to
[24] finance the company's receivables, the evidence will show
[25] that Mr. Shofer periodically checked in on his own

[1] initiative with Mr. Hack and with his accountants at
[2] Greybush to find out about the legality of continuing to use
[3] the company's pension to finance the car dealership's
[4] receivables. But otherwise, Mr. Shofer had very little
[5] contact with Mr. Hack.

[6] The evidence in this case will show that in the
[7] summer of 1984, Mr. Shofer needed money and he needed a lot
[8] of it. This was because the Maryland National Bank at that
[9] time had just conducted its annual review of Crown Motors'
[10] balance sheet to see what kind of financing it would give
[11] Crown in the coming year. But at that time, Crown owed a
[12] lot of money to the bank for several reasons. First of all,
[13] the pension had been financing the company's receivables,
[14] and Crown had lent a lot of money to Mr. Shofer so that he
[15] could pay back a debt to the bank arising out of a bad stock
[16] deal.

[17] So in August of 1984, Mr. Shofer saw that one way
[18] Crown could make some progress on its debt to the bank was
[19] for him to pay at least some of his debt to Crown. At that
[20] time, he owed Crown a little over a quarter of a million
[21] dollars, which was the amount Crown had lent him so that he
[22] could pay the bank back for the bad stock deal. So Mr.
[23] Shofer told Glen Wilson, his loan officer at the bank, that
[24] he was planning to borrow about \$250,000 from his pension to
[25] repay Crown so it could pay its debt to the bank and the

[1] bank could extend Crown an additional line of credit.
[2] He told Mr. Wilson all of this in advance of ever
[3] contacting Mr. Shofer. You will hear testimony from Mr.
[4] Shofer; his pension attorney, Nicholas Giampietro, his
[5] current pension attorney; and from his personal assistant at
[6] the time, Pam Summers, that he was under very heavy pressure
[7] from the bank to improve Crown's balance sheet and that his
[8] back was basically to the wall. So when things came to a
[9] head in the summer of 1984, the evidence will show that Mr.
[10] Shofer called Stuart Hack on August 3rd and asked whether,
[11] very simply, he could borrow from the pension, and if so,
[12] how much. But those were not the only two questions he ran
[13] by Mr. Hack during that very quick conversation.

[14] He also asked whether he could put his pension up
[15] as collateral for a loan. As the Court will see, Mr. Shofer
[16] was running several different possibilities by Mr. Hack
[17] which would yield him some immediate cash. What is
[18] interesting about this August 3rd conversation is that Mr.
[19] Shofer will admit to you that he remembers absolutely
[20] nothing about it other than the fact that it took place. He
[21] will admit that it lasted no more than a few minutes, and
[22] that at no time during the conversation did he tell Mr. Hack
[23] that he was definitely going to borrow from the pension if
[24] Mr. Hack said it was all right.

[25] Nor did he tell Mr. Hack how much he was intending

[1] to borrow, why he needed to borrow, or that he was even
[2] thinking of borrowing more than once. He also never asked
[3] Mr. Hack how to take money from a pension in the event he
[4] decided to do so. It is the Defendants' position in this
[5] case that all of this was deliberate on the part of Mr.
[6] Shofer, and we believe the evidence will show that Mr.
[7] Shofer intentionally avoided giving Mr. Hack any other
[8] details.

[9] The evidence will further show that after the two
[10] of them spoke on August 3rd, that Mr. Hack ran these
[11] questions by Barry Berman, who at the time was an attorney
[12] at Weinberg and Green. Mr. Berman confirmed that Mr. Hack
[13] was correct that Mr. Shofer could borrow up to 100 percent
[14] from his voluntary account in the pension. The evidence
[15] will show that there was a second telephone conversation
[16] between Mr. Hack and Mr. Shofer, again initiated by Mr.
[17] Shofer, on August 7th.

[18] At that time, Mr. Shofer simply asked Mr. Hack for
[19] a letter stating that he could borrow up to 100 percent from
[20] his voluntary account and that his voluntary account could
[21] be put up as collateral for a loan from a bank. So there
[22] was more than simply this borrowing from a pension; nothing
[23] about the practicality or advisability of borrowing. Mr.
[24] Shofer will also admit to you that he remembers absolutely
[25] nothing about this second conversation either. He will also

[1] admit that at no time during either conversation did he ever
 [2] ask Mr. Hack about tax consequences or for any tax advice.
 [3] Yet, it is Mr. Shofer's contention in this case
 [4] that somehow Mr. Hack had a duty to do that, and should have
 [5] known that Mr. Shofer was planning take in excess of
 [6] \$126,600, which is the amount over which he would have to
 [7] borrow in order for there to even be a tax consequence. Now
 [8] in accordance with Mr. Shofer's request, Mr. Hack prepared a
 [9] letter dated August 9, 1984, in which he set forth exactly
 [10] the information which Mr. Shofer had requested; no more, no
 [11] less.
 [12] But before Mr. Hack's letter was even received by
 [13] Mr. Shofer, Mr. Shofer took his first loan from the pension
 [14] on August 9th. The evidence in this case will show that Mr.
 [15] Shofer was obviously a man in a hurry to do what he told the
 [16] bank he was going to do. Now, I have prepared a chart
 [17] summarizing each of the loans which Mr. Shofer took from his
 [18] pension over the course of the next three years.
 [19] I will not go into each loan, but suffice it to
 [20] say that in each case, Mr. Shofer told only his wife and the
 [21] loan officer at the bank. He did not tell Mr. Hack, and he
 [22] did not tell anyone at Greymbush Newman, other than to bring
 [23] them tax information each year about his borrowing from the
 [24] pension in terms of interest deductions. He simply cut
 [25] himself a check from the pension and prepared a demand note.

[1] He determined his own rate of interest, and the loans were
 [2] not secured.
 [3] He proceeded to borrow from the pension from
 [4] August of 1984 until September of 1986. It is undisputed in
 [5] this case that at no time during any of that borrowing was
 [6] Mr. Hack ever informed or consulted. The evidence in this
 [7] case will show, however, the accounting firm of Greymbush
 [8] Newman was performing a number of accounting services for
 [9] the Plaintiff, his business, and the pension. The
 [10] accountant in charge of Mr. Shofer's file was Kenneth
 [11] Larash, whom you will hear testify at trial.
 [12] Mr. Larash will testify to each year he prepared
 [13] the Plaintiff's personal and corporate tax returns as well
 [14] as the pension's 990-T, which is a very important form. It
 [15] is filed with the IRS whenever a pension receives taxable
 [16] income. Greymbush also acted as the Plaintiff's personal tax
 [17] advisor. Mr. Shofer dealt with more than just one
 [18] accountant at Greymbush Newman whenever he sought tax advice.
 [19] Mr. Larash also performed work on the pension's general
 [20] ledger each year, so he was familiar with all these
 [21] transactions when they were going on.
 [22] The evidence in this case is undisputed that Mr.
 [23] Larash learned on June 17, 1985, when he was doing work on
 [24] the pension's general ledger that Mr. Shofer had borrowed
 [25] \$200,000 from his pension in 1984. But when Greymbush

[1] subsequently prepared Mr. Shofer's 1984 federal and state
 [2] income tax returns, they failed to show a portion of those
 [3] loans as taxable income. The error on the 1984 return was
 [4] not discovered until the fall of 1986 when another
 [5] accountant at Greymbush, Alan Marvel, happened to be
 [6] reviewing Mr. Shofer's file for another purpose and
 [7] discovered the problem.
 [8] At that point, the problem is brought to Mr.
 [9] Shofer's attention, and eventually it was decided that an
 [10] amended return for 1984 should be filed. This was also
 [11] around the time when Greymbush was in the process of
 [12] preparing Mr. Shofer's original 1985 return. Although they
 [13] knew there was a tax issue by that point, they still failed
 [14] to report all of the income which was taxable to Mr. Shofer
 [15] on that return, thereby necessitating the filing of an
 [16] amended return for 1985 as well.
 [17] Now we will have expert testimony in this case
 [18] because it involves alleged malpractice not only on the part
 [19] of Mr. Hack but on the part of the accountants at Greymbush
 [20] Newman as well. We will be presenting testimony from
 [21] Baltimore accountant Richard Intner who, in short, will
 [22] testify that Greymbush Newman's preparation of the 1984 and
 [23] 1985 tax returns was negligent. Very simply, when one holds
 [24] himself out as a tax preparer, one has to know what is
 [25] taxable to an individual as income and what is not, or at

[1] least be able to spot the issue and determine the correct
 [2] answer. Greymbush Newman, however, did none of that.
 [3] Mr. Intner will also testify that Greymbush was
 [4] negligent after the problem was discovered in failing to
 [5] advise Mr. Shofer that one of the options he had was not to
 [6] do anything, was to simply not amend the 1984 return. We
 [7] will be submitting a brief memorandum of law to the Court on
 [8] that issue because it is not only Mr. Intner's opinion, it
 [9] is one that has been the subject of many court decisions as
 [10] well.
 [11] Now getting back to the issue of Mr. Hack's
 [12] liability, it is undisputed, as I advised the Court, that
 [13] the Plaintiff will freely admit that he did not consult with
 [14] Mr. Hack at any time he was borrowing these monies from the
 [15] pension. Mr. Hack found out when everyone else did. One of
 [16] the reasons that occurred was because Mr. Shofer was late in
 [17] sending in the annual data to Mr. Hack and his company. Mr.
 [18] Hack needed that data to prepare the 5500-C form for 1984,
 [19] which becomes a critical document in this case.
 [20] The evidence will show that the information
 [21] concerning the plan for 1984 was not provided to Mr. Hack's
 [22] company until late 1986. We believe this was deliberate.
 [23] It will also show that the 5500-C form which was filed for
 [24] 1984 by Mr. Shofer and signed by him under the penalties of
 [25] perjury indicated no loans - zero loans - to any

[1] participant during 1984, something which Mr. Shofer had to
[2] know was false. We believe the evidence will show that Mr.
[3] Shofer kept his borrowings from the pension in 1984, 1985,
[4] and 1986 a secret from everyone so that he could use his
[5] pension as a personal piggybank.

[6] Now Mr. Shofer wants this Court to hold Mr. Hack
[7] responsible for the additional taxes, penalties, and
[8] interest which Mr. Shofer had to pay on the monies he was
[9] borrowing from the pension during this time period. We will
[10] also be presenting testimony from Edward Burrows, who is
[11] past-President of the American Society of Pension Actuaries
[12] and is considered one of the most knowledgeable and
[13] experienced consultants in the pension business. Throughout
[14] most of his career, he performed the kinds of pension
[15] consulting and administrative services which Mr. Hack
[16] performed.

[17] In short, Mr. Burrows will testify that Mr. Hack
[18] was under no obligation as a matter of professional
[19] standards to volunteer gratuitous personal tax advice to Mr.
[20] Shofer, especially given the nature of the inquiry, the
[21] nature of their relationship. Mr. Shofer was not even a
[22] client of Mr. Hack's. He was not asked for this type of
[23] advice, nor was Mr. Hack given any details which would
[24] otherwise put him on notice that Mr. Shofer was intending to
[25] borrow the kind of money that he did.

[1] Mr. Burrows will also testify that it would have
[2] been inappropriate in fact for Mr. Hack to have advised Mr.
[3] Shofer about personal tax implications under these
[4] circumstances. That is more properly the domain of either
[5] Mr. Shofer's attorneys or accountants. Now the Plaintiff
[6] will also be calling one or more experts on the issue of Mr.
[7] Hack's liability. There is a lot I can say about these
[8] experts. But the evidence will show that Edward Kabala, who
[9] will be the primary witness as to liability against Mr.
[10] Hack, who is also a pension attorney from Pennsylvania, and
[11] Nicholas Giampietro, who is the Plaintiff's current pension
[12] attorney, thought Mr. Hack did not commit any negligence
[13] when he failed to include a discussion of possible tax
[14] consequences in his August 9th letter. They put those
[15] thoughts in writing, and we will introduce those as exhibits
[16] at trial.

[17] At least that is what their opinions were when the
[18] facts of this case were first described to them by Mr.
[19] Shofer's attorney, although these opinions have shifted
[20] somewhat. With reference to Mr. Kabala in particular, who
[21] will be the Plaintiff's primary expert witness against Mr.
[22] Hack on the issue of liability, he has also admitted under
[23] oath in the past that he would never give someone who is not
[24] a client of his firm tax advice, although he will come into
[25] court and presumably testify otherwise.

[1] There is also a lot I could say about the evidence
[2] which Mr. Taylor alluded to in opening statement. But very
[3] briefly with respect to taxes, penalties, and interest, the
[4] evidence will show that Mr. Hack was not involved in the
[5] preparation of the tax returns at issue in any way. With
[6] respect to interest, there is law and as a factual matter,
[7] Mr. Shofer had the use of the money which he borrowed from
[8] the pension and the use of the monies which he should have
[9] otherwise paid in taxes. So we believe the evidence will
[10] show Mr. Hack cannot be held responsible for that either for
[11] that type of damage.

[12] With respect to the taxes themselves, there is
[13] simply a timing difference between paying taxes now versus
[14] later. Mr. Shofer would have had to pay taxes on the monies
[15] he borrowed from his pension eventually at retirement. In
[16] addition, with respect to the fees he will be claiming for
[17] professional services, Defendants intend to offer evidence
[18] that this was not a damage sustained by the Plaintiff
[19] himself. There are also other evidentiary problems
[20] associated with that item of damage which will become
[21] apparent during the Plaintiff's own testimony.

[22] In short, Your Honor, the evidence in this case
[23] will show that the Plaintiff was going to borrow money from
[24] his pension regardless of any tax consequences because his
[25] company was in huge financial debt by 1984 and the bank was

[1] putting pressure on Mr. Shofer to make progress on the line
[2] of credit for the business. He had no other source to
[3] borrow money from other than his pension, and he will admit
[4] that to you. Even assuming Mr. Hack was negligent for
[5] somehow failing to advise the Plaintiff about tax
[6] consequences which might or might not occur, such
[7] negligence, we believe the evidence will show, did not
[8] proximately cause any of the Plaintiff's increased tax
[9] liabilities or other damages.

[10] The evidence in this case will also show that the
[11] Plaintiff, Mr. Shofer, was sophisticated in tax matters and
[12] understood the principle of sheltering income in a pension.
[13] He either knew or should have known that he would incur some
[14] tax debt when he withdrew money from his pension during the
[15] years in question. In fact, his own experts have expressed
[16] that same view, which you will hear during the trial of this
[17] case. The evidence will also show the Plaintiff assumed the
[18] risk of his increased tax liability, and further, assumed
[19] the risk of his damages and was contributorily negligent
[20] when he, as a trustee and fiduciary to the pension, used his
[21] pension as a personal bank for three years without
[22] communicating with Mr. Hack or discussing these transactions
[23] with any other professional.

[24] The evidence will also show that the spending
[25] spree which the Plaintiff began in August of 1984 was

[1] something which could not have been foreseeable to Mr. Hack
[2] given the nature of his two quick - very quick - telephone
[3] conversations with Mr. Shofer on August 3 and 7. Lastly,
[4] the evidence will also show that the Plaintiff has failed
[5] utterly to mitigate his damages in this case by applying
[6] other available sources of income to his tax debt. For all
[7] of these reasons, the Defendants will ask the Court to
[8] return a verdict in their favor, or in the alternative, find
[9] that any negligence on their part was superseded by the
[10] negligence of the accountants at Greybush, whose failure to
[11] properly prepare the income tax returns at issue was
[12] something which Mr. Hack could not have foreseen either.
[13] Thank you.

[14] **THE COURT:** Ms. Whelihan?

[15] **MS. WHELIHAN:** May it please the Court, Your
[16] Honor.

[17] **OPENING STATEMENT OF DEFENDANT, GREYBUSH NEWMAN**

[18] **MS. WHELIHAN:** I do not want to belabor this any
[19] longer, but in June of 1985 when Greybush was preparing Mr.
[20] Shofer's 1984 return, Greybush was not asked to research the
[21] tax consequences of the pension loans. There was no 1099
[22] issued. Mr. Larash, who was gathering the information for
[23] the preparation of Mr. Shofer's 1984 return, was given the
[24] impression from his conversations with Mr. Shofer, that the
[25] loans were not taxable and should not go on the 1984 return.

[1] The evidence will show that Mr. Shofer thought he knew it
[2] all, and unfortunately, did not. Now he is trying to blame
[3] the professionals that assisted him with his pension and
[4] with his accounting matters.

[5] I think the evidence will also show quite
[6] conclusively that Greybush not only should not be a party in
[7] this case because they did not in fact do anything wrong.
[8] But they in fact helped Mr. Shofer by promptly identifying
[9] the loans as taxable income in 1986 which allowed the
[10] Plaintiff to pay less taxes, interest, and penalties if the
[11] problem had gone unidentified and undiscovered by Greybush.

[12] As to Ms. Truhe's statements about the 990-T, as Ms. Truhe
[13] indicated, the evidence will show that it is true Greybush
[14] prepared the 990-T forms; however, they only show income to
[15] the plan. They do not show income to the participants.

[16] The evidence will also show that there was nothing
[17] wrong with the 1985 returns when they were prepared in 1987
[18] because at the time the 1985 returns were prepared, Mr.
[19] Shofer had not made the decision to amend. He did not make
[20] that decision, and the amended returns were not filed until
[21] some nine months later. At the time the 1984 returns were
[22] prepared, they were prepared properly. The voluntary
[23] contributions that Mr. Shofer had taken from his pension
[24] plan were deducted from the loans made and taken by Mr.
[25] Shofer in 1985. The taxable income that was proper in 1985,

[1] \$3,400, was shown on the 1985 return.
[2] I think the evidence will also be overwhelming
[3] that Mr. Shofer should have filed amended tax returns, as he
[4] finally did, and that Mr. Shofer would have filed amended
[5] tax returns based upon a wide variety of professional
[6] advice, including advice from Mr. Giampietro and Mr. Hack.
[7] So for all of those reasons, I think that you will come to
[8] the conclusion that Mr. Shofer should not be able to recover
[9] against Mr. Hack, and Mr. Hack should not be able to recover
[10] against Greybush.

[11] **THE COURT:** The third-party claim is for
[12] contribution only, is that correct?

[13] **MS. WHELIHAN:** Correct.

[14] **MS. TRUHE:** Yes, Your Honor.

[15] **THE COURT:** Mr. Taylor, are you ready to call your
[16] first witness?

[17] **MR. TAYLOR:** Yes, Your Honor. Mr. Shofer -

[18] **THE COURT:** You may proceed.

[19] **RICHARD SHOFER,**

[20] a witness produced on call of the Plaintiff, having first
[21] been duly sworn, was examined and testified as follows:

[22] **THE CLERK:** State your name and address for the
[23] record, please.

[24] **THE WITNESS:** Richard Shofer, 216 St. Dunston's
[25] Road -

[1] **THE CLERK:** Thank you.

[2] **THE WITNESS:** - Baltimore.

[3] **DIRECT EXAMINATION**

[4] **BY MR. TAYLOR:**

[5] **Q:** What is your business or occupation, Mr. Shofer?

[6] **A:** I'm in the auto sales and finance business.

[7] **Q:** Is your business incorporated?

[8] **A:** Yes.

[9] **Q:** What is the name of your corporation?

[10] **A:** Catalina Enterprises, Inc., trading as Crown
[11] Motors.

[12] **Q:** When was your corporation established?

[13] **A:** 1965.

[14] **Q:** Is it incorporated in the State of Maryland?

[15] **A:** Yes.

[16] **Q:** What is the principal business activity of
[17] Catalina Enterprises, Inc.?

[18] **A:** We sell and finance automobiles.

[19] **Q:** Where is your business located?

[20] **A:** 5006 Liberty Heights Avenue.

[21] **Q:** Did your business of selling and financing cars
[22] begin at about the same time that the corporation was
[23] established, or were you doing business before the
[24] corporation was setup?

[25] **A:** I was in the same type of business under another

[1] corporate name prior to the establishment of Catalina.
[2] **Q:** Did there come a time when Catalina Enterprises,
[3] Inc. established a pension or retirement plan?
[4] **A:** Yes.
[5] **Q:** Could you state when that occurred?
[6] **A:** I, to the best of my recollection, the profit-
[7] sharing plan was established in 1969; and I believe the
[8] pension, 1970.
[9] **Q:** Do you recall who prepared the plans for you?
[10] **A:** I can't recall the name offhand of the gentleman.
[11] **Q:** Did there come a time when you received a
[12] recommendation to consult with Stuart Hack?
[13] **A:** Yes.
[14] **Q:** When did that occur?
[15] **A:** To the best of my recollection, some time, I
[16] believe, in the year '72, but around that time. I could be
[17] off by a year.
[18] **Q:** For what purpose was the recommendation made that
[19] you should consult with Mr. Hack?
[20] **A:** Well, the pension plan at that time it looked like
[21] it was going to become a more important entity than it first
[22] seemed like it was when it was established. And I wanted to
[23] make sure that it was in conformity, and I was looking for
[24] the best, most experienced, type of pension people I could
[25] get so that the job would be done right.

[1] **Q:** Was there any particular reason why you consulted
[2] with Mr. Hack or his company at that time?
[3] **A:** Well, what I heard about it was that it was one of
[4] the largest in the city next to the Hergett Company. And I
[5] had had an experience with Hergett once before in the
[6] insurance range of Hergett's business that was not to my
[7] liking. So I decided that if I wanted a big company, Hack
[8] was the biggest around other than Hergett.
[9] **Q:** Did anyone make the referral to you for the Hack
[10] Company?
[11] **A:** I believe a referral was made by Greybush Newman,
[12] Harvey Newman.
[13] **Q:** Do you recall with whom you met at that initial
[14] meeting when you met the Stuart Hack Company?
[15] **A:** No, I don't recall.
[16] **Q:** Did you and the Stuart Hack Company enter into any
[17] agreements at that time after you had your initial meeting
[18] with them?
[19] **A:** Yes.
[20] **Q:** What was it that the Hack Company was going to
[21] undertake to do for you?
[22] **A:** They were going to take over the administration of
[23] my profit-sharing and pension plans.
[24] **MR. TAYLOR:** This is listed as 41 on our list of
[25] documents.

[1] (Plaintiff's Exhibit No. 1, Omansky
[2] 8/21/75 letter to Shofer, was marked for
[3] identification.)
[4] **BY MR. TAYLOR:**
[5] **Q:** Mr. Shofer, let me show you what has been marked
[6] as Plaintiff's Exhibit 1 for identification. Let me ask you
[7] if you recognize that document?
[8] **A:** It's something that must've crossed my eyes in
[9] '75, the date on the document.
[10] **Q:** The document is a letter, is it not, from Louis
[11] Omansky?
[12] **A:** Yes.
[13] **Q:** Do you know who Louis Omansky is?
[14] **A:** He was an employee of the Stuart Hack Company at
[15] the time, and I believe he was an attorney.
[16] **Q:** Do you recall whether or not the Stuart Hack
[17] Company was doing anything for you at the time Mr. Omansky
[18] wrote that letter?
[19] **A:** They were administering my pension and profit-
[20] sharing plan.
[21] **Q:** Was anything going on other than just the
[22] administration of the plan at the time, if you recall?
[23] **A:** Well, according to this letter, there was a
[24] pension reform act, so there apparently had to be a revision
[25] of my plan document.

[1] **Q:** All right.
[2] **MR. TAYLOR:** Do you all have a copy of this?
[3] **MS. TRUHE:** Yes.
[4] **MR. TAYLOR:** Your Honor, I would like to offer
[5] into the record Plaintiff's Exhibit Number 1.
[6] **MS. TRUHE:** No objection.
[7] **MS. WHELIHAN:** No objection, Your Honor.
[8] **THE COURT:** It is admitted.
[9] (Plaintiff's Exhibit No. 1, Omansky
[10] 8/21/75 letter to Shofer, previously
[11] marked for identification, was received
[12] in evidence.)
[13] **BY MR. TAYLOR:**
[14] **Q:** Mr. Shofer, let me show you - well, let me get
[15] this marked.
[16] **MR. TAYLOR:** That should be marked as Plaintiff's
[17] Exhibit 2. This is Number - I think I said 41 on the first
[18] one. This is 41. Thank you.
[19] (Plaintiff's Exhibit No. 2, 10/18/76
[20] Pension Plan and Trust Agreement, was
[21] marked for identification.)
[22] **BY MR. TAYLOR:**
[23] **Q:** Mr. Shofer, let me show you what has been marked
[24] as Plaintiff's Exhibit Number 2 for identification. Can you
[25] identify that document?

[1] **A:** It says on the title "Pension Plan and Trust
 [2] Agreement," dated October 18th, 1976.
 [3] **Q:** Who prepared those documents, if you know?
 [4] **A:** It obviously must've been the Stuart Hack Company.
 [5] **Q:** Well, were they the ones that you were dealing
 [6] with at that time to -
 [7] **A:** Yes. They were the only ones, and that's why I
 [8] say that.
 [9] **Q:** Are there amendments to that plan in that exhibit?
 [10] **A:** Yes, I see a first amendment here on page - I see
 [11] an amendment. Yes, there's an amendment, first amendment.
 [12] There's a second amendment. So there's more than one
 [13] amendment.
 [14] **Q:** All right.
 [15] **MR. TAYLOR:** Your Honor, I would like to offer
 [16] Plaintiff's Number 2 into the record.
 [17] **MS. TRUHE:** No objection.
 [18] **MS. WHELIHAN:** No objection, Your Honor.
 [19] **THE COURT:** Admitted.
 [20] (Plaintiff's Exhibit No. 2, 10/18/76
 [21] Pension Plan and Trust Agreement,
 [22] previously marked for identification,
 [23] was received in evidence.)
 [24] **BY MR. TAYLOR:**
 [25] **Q:** Mr. Shofer, you have testified that you had

[1] initial contact with the Stuart Hack Company in about 1972
 [2] and your plan, apparently, had been amended or modified in
 [3] 1976. Could you describe for the Court what your
 [4] relationship was or how you conducted business with the
 [5] Stuart Hack Company during that particular time frame, the
 [6] 1970's?
 [7] **A:** Yes. Once a year, a representative of the Stuart
 [8] Hack Company would come into my office and spend one day.
 [9] And at that time, the representative was Pam Beauchamps, and
 [10] she worked for the Stuart Hack Company. She'd come in and
 [11] gather the data that she would use to prepare whatever
 [12] documents they had to prepare. That was one of the general
 [13] relationships. Possibly from time to time, and I really
 [14] can't recall, but there may've been from time to time
 [15] questions that I would have that I would call during the
 [16] year and talk to either Pam or ask for someone else if I
 [17] thought it was something that I should ask for someone else,
 [18] and that might've been Stuart Hack.
 [19] **Q:** How often did you say Ms. Beauchamps would come
 [20] into your office?
 [21] **A:** My recollection is it was once a year for the
 [22] purpose of getting the data, one day a year.
 [23] **Q:** Would you typically have more contact with the
 [24] Stuart Hack Company than once a year in your ordinary
 [25] business activities?

[1] **THE COURT:** We are talking about the 1970's -
 [2] **MR. TAYLOR:** 1970's, yes.
 [3] **THE COURT:** - period?
 [4] **THE WITNESS:** I believe so.
 [5] (Plaintiff's Exhibit No. 3, Omansky
 [6] 10/6/76 letter to Shofer, was marked for
 [7] identification.)
 [8] **BY MR. TAYLOR:**
 [9] **Q:** Mr. Shofer, let me have you look at what has been
 [10] marked as Plaintiff's Exhibit 3.
 [11] **MR. TAYLOR:** This is number 50 on our list.
 [12] **MS. TRUHE:** Okay.
 [13] **THE WITNESS:** It's a letter dated October 6th of
 [14] '76 from Lou Omansky.
 [15] **BY MR. TAYLOR:**
 [16] **Q:** Were you contemplating borrowing any money that
 [17] involved the pension back in 1976?
 [18] **A:** According to the first paragraph of this letter,
 [19] yes. I was planning to borrow some money to finance the
 [20] addition of a roof for one of the pension buildings. And
 [21] possibly a second mortgage in the amount of a total of
 [22] \$100,000 is being considered, with part of the proceeds to
 [23] be used to replace the roof; the remainder being invested in
 [24] investments with a greater liquidity than the investments
 [25] now owned by the plan.

[1] **Q:** Do you recall whether or not the loan transaction
 [2] took place as described in Plaintiff's Exhibit 3?
 [3] **A:** Actually, I don't recall. And I'm not sure it did
 [4] take place because I can't recall having a second mortgage
 [5] for \$100,000. I may've, but I can't recall.
 [6] **MR. TAYLOR:** Your Honor, I would like to offer
 [7] Plaintiff's Number 3 into the record.
 [8] **MS. TRUHE:** No objection.
 [9] **THE COURT:** Admitted.
 [10] **MS. WHELIHAN:** No objection.
 [11] (Plaintiff's Exhibit No. 3, Omansky
 [12] 10/6/76 letter to Shofer, previously
 [13] marked for identification, was received
 [14] in evidence.)
 [15] (Plaintiff's Exhibit No. 4, Omansky
 [16] 2/12/81 letter to Shofer, was marked for
 [17] identification.)
 [18] **BY MR. TAYLOR:**
 [19] **Q:** Mr. Shofer, let me show you what has been marked
 [20] as Plaintiff's 4 for identification.
 [21] **MR. TAYLOR:** It is number 6 on our list.
 [22] **THE WITNESS:** It's a letter dated February 12th,
 [23] 1981. The subject matter is sale of notes to plans. It's
 [24] signed, again, by Louis Omansky, and it speaks of a
 [25] Department of Labor Temporary Class Exemption that would

[1] allow certain classes of businesses to finance motor vehicle
[2] receivables with their pension plans.

[3] **BY MR. TAYLOR:**

[4] **Q:** Do you recall whether or not this letter was
[5] written in response to any inquiry you might have made, or
[6] was this sent to you in the ordinary course of business with
[7] regard to your ongoing relationship with the Defendants?

[8] **A:** I can't recall what led to the issuance of this
[9] letter.

[10] **Q:** All right.

[11] **MR. TAYLOR:** I would like to offer Plaintiff's 4
[12] into the record.

[13] **MS. TRUHE:** No objection, Your Honor.

[14] **MS. WHELIHAN:** No objection, Your Honor.

[15] **THE COURT:** Admitted.

[16] (Plaintiff's Exhibit No. 4, Omansky
[17] 2/12/81 letter to Shofer, previously
[18] marked for identification, was received
[19] in evidence.)

[20] **BY MR. TAYLOR:**

[21] **Q:** Mr. Shofer, did there come a time in August of
[22] 1984 when you were interested in determining the
[23] advisability or practicality of borrowing money from your
[24] pension account?

[25] **A:** Yes.

[1] **Q:** What prompted your interest in such an
[2] arrangement?

[3] **A:** It occurred to me that it could be a method of
[4] lowering my personal debt to my company. And I wanted to do
[5] that if it were practical to do so. And it would also have
[6] provided my company with working capital to finance cars
[7] itself instead of selling the paper to the pension.

[8] **Q:** Well, just to set the background a little bit in
[9] terms of your situation and your company's situation in
[10] 1984, you have testified that there was a debt that you owed
[11] to your company.

[12] **A:** Yes.

[13] **Q:** When you say your company, are you talking about
[14] Catalina Enterprises, Inc.?

[15] **A:** Yes, the parent company.

[16] **Q:** Do you recall in 1984 what that debt was?

[17] **A:** It was several hundred thousand dollars. I really
[18] do not recall, but it was many hundred thousand.

[19] **Q:** Do you recall what caused you to be in debt to
[20] your company at that time, or did you -

[21] **A:** Well, there was a number of circumstances that
[22] probably led to the total accumulation of debt. But
[23] primarily, what started the debt off was in the late '70's,
[24] I had a personal loan with Maryland National for more than
[25] \$300,000 secured by stock, the stock Intel. And Intel

[1] dropped from 37 to 1. It was delisted, which made my loan
[2] to Maryland National at that time, or the money that I owed
[3] Maryland National personally was unsecured to Maryland
[4] National now because the stock was worthless. And this was
[5] in the late '70's when interest rates actually hit double
[6] digits.

[7] Maryland National was looking at this personal
[8] loan that I owed them and that it was unsecured. And they
[9] suggested strongly to me that what they wanted, and
[10] actually, I had no choice in the matter, was that they would
[11] lend money to my parent company, and my parent company would
[12] reloan that money to me, and I would pay off my personal
[13] debt due Maryland National with that. The effect of that
[14] was that my company, Crown Motors, would then owe Maryland
[15] National that considerable amount of money at whatever
[16] interest rates prevailed.

[17] And they went as high actually as 20-some percent.
[18] I think at one time I was paying over prime, and I was
[19] paying as high as, I think it even hit 26 percent at one
[20] period; I'm not sure. But what I had to do was that money
[21] that my parent company now owed to Maryland National, I owed
[22] to my parent company and I had to pay them interest on it.
[23] So it started building my debt up to my parent company, the
[24] principal and accumulating interest. Now my parent company
[25] was in debt to Maryland National for a great deal of money,

[1] and Maryland National, while they instrumented it being that
[2] way, they started tightening up and saying well, we don't
[3] like this situation; your parent company owes us too much
[4] money.

[5] **Q:** This would have been in August of 1984 that that
[6] was the situation, is that correct?

[7] **A:** No, by August of '84, the situation had changed
[8] considerably.

[9] **Q:** That scenario you just described -

[10] **A:** That -

[11] **Q:** - that occurred when?

[12] **A:** Yeah, that that scenario was '79, '80, that
[13] time - time period.

[14] **Q:** So by 1984, the debt that you had owed Maryland
[15] National with regard to the Intel stock had been repaid to
[16] the Maryland National Bank. Is that correct?

[17] **A:** Personal, yes. But it was shifted that my company
[18] still owed Maryland National money.

[19] **Q:** And you owed your company money?

[20] **A:** And I owed my company money, but the money that I
[21] owed my company now had risen to a greater amount because of
[22] all the compounding interest.

[23] **Q:** How long had you had a relationship with Maryland
[24] National Bank; that is, how long had Maryland National been
[25] a lender for you or your business?

[1] A: That started around 1970. It might've been, I
[2] think, 1970 or '71 at the latest.
[3] Q: So by 1984, then you had had a business
[4] relationship with Maryland National for some period of time?
[5] A: Probably close to 14 years. I must add this, that
[6] in the years following 1980, which was about the low point,
[7] every year progress had been made toward strengthening my
[8] balance sheets and satisfying Maryland National that we had
[9] turned a corner and were doing better.
[10] Q: In 1984 did you owe Maryland National more or less
[11] than you owed in 1979 to Maryland National, if you can
[12] recall?
[13] A: I probably owed them a little bit more, and my
[14] balance sheet was a lot stronger, so they probably felt that
[15] they were better secured. They were more comfortable doing
[16] business with me in 1984 than they were in 1980.
[17] Q: What, if anything, caused you to be interested in
[18] looking to your pension plan or your pension account as a
[19] source of financing or as a loan source? Was there anything
[20] particularly?
[21] A: I want, well actually, I really wanted to undo the
[22] relationship between or, I wanted to clean up the
[23] intertwining of the relationship with loans between myself
[24] and my company and the pension also. But the way to do it,
[25] I thought as a strategy, would be to have more profit

[1] available to my parent company outside of the pension. What
[2] was happening between 1982 and 1984, in 1982 the pension
[3] started doing financing for the parent company. And it
[4] achieved incredible growth because it was getting a large
[5] finance charge with no expenses and no losses.
[6] And in that first two years, the parent company,
[7] or the pension made a half a million dollars financing
[8] receivables for the parent company. And it was fine for me
[9] because it was a shelter, and I was getting the bigger
[10] portion of it and the other employees were doing well too,
[11] so everybody loved it. But the problem with it was that it
[12] left nothing for the parent company. They were absorbing
[13] all of the losses for every piece of paper that went bad,
[14] and they got no participation in the finance charges and
[15] they had to do all the collecting.
[16] So it was an equitable arrangement in that it was
[17] lopsided because the pension was getting a larger share than
[18] was customary even though it was going into a shelter. So
[19] it had its good and bad parts, but it began to be like the
[20] tail wagging the dog: the pension's getting stronger, the
[21] parent company's getting weaker. And I determined that I
[22] could achieve a couple of objectives. I - I must say
[23] because I've heard that it's been characterized by some that
[24] I had no other choices, and I did have other choices. But
[25] it's been characterized I had no choice but to borrow money

[1] from my pension and I would've done it anyway.
[2] The fact is that in 1984 when I sought the advice
[3] of Stuart Hack, my thinking at that time was that if I could
[4] borrow money from my pension, I could achieve the single
[5] purpose of repaying some of my debt to Crown Motors. I
[6] could also achieve getting Crown Motors more liquidity to do
[7] some of its own financing so that it wouldn't have to sell
[8] everything to the pension, and therefore, could build its
[9] profits up. And if it built its profits up, then I would
[10] achieve the income from those profits because I'm the owner
[11] of the company to be able to pay my pension loan.
[12] If I didn't do that, the flip side of it was that
[13] the pension would continue to finance receivables for Crown.
[14] However, in any case, there was going to be an adjustment of
[15] finance charge to 12 percent, which there actually was.
[16] Instead of the pension receiving 25 or 26 percent for the
[17] financing that it had achieved in '82 and '84, in the new
[18] arrangement it was going to receive 12 percent. And the
[19] pension was going to receive 12 percent whether it was
[20] financing receivables for the company or whether it was my
[21] loan to the company or from the pension.
[22] So the pension was going to get on that \$200,000,
[23] or those loans that I made from the pension, it was going to
[24] get the same interest rate anyway. It would make no
[25] difference to the pension. It was going to get 12 percent,

[1] which was a nice rate because we're now in the mid-'80's
[2] when interest rates were at an extreme low. So they were
[3] going to get a very handsome interest rate either on
[4] financing receivables or from my personal loan and it was 12
[5] percent.
[6] It would make no difference to the pension whether
[7] it was receivables or it was the same money to the pension.
[8] However, it would've made a difference and it would've made
[9] no difference to Crown either because Crown was going to pay
[10] 12 percent to the pension for its share of the receivables
[11] it financed. Or, that it was going to cost Crown 12 percent
[12] in any case or cost me 12 percent if I borrowed, well, let's
[13] see, no, Crown would've received 12 percent if my loan
[14] stayed higher to Crown. So it lost 12 percent there, but it
[15] gained that 12 percent back by not having to sell those
[16] receivables of the pension. So it was a wash for Crown; it
[17] was a wash for the pension, but it allowed Crown to retain
[18] more receivables.
[19] Q: Did there come a time in August of 1984 when you
[20] had contact with Stuart Hack?
[21] A: Yes.
[22] Q: Could you describe how that contact began?
[23] A: Well, after I'd thought of that arrangement and
[24] what the effects of it would be as I just described them, I
[25] called Stuart to find out if I could do it, if I could

[1] borrow from my pension. And -
 [2] **Q:** Do you recall -
 [3] **A:** I wanted to -
 [4] **Q:** Do you recall what you asked Mr. Hack during that
 [5] telephone call?
 [6] **A:** I can't recall what I asked him, but I wanted to
 [7] be sure that it was permissible to do so. I might add that
 [8] I never imagined that there would be tax consequences. So
 [9] even though I can't recall the conversation, I'm almost
 [10] certain that I must not have brought up the issue of was
 [11] there any tax consequences because I had never had an
 [12] experience in my life where borrowing money, where it's
 [13] resulted in a taxable event. It's always a loan when you
 [14] borrow.
 [15] (Plaintiff's Exhibit No. 5, Hack 8/9/84
 [16] letter to Shofer, was marked for
 [17] identification.)

BY MR. TAYLOR:

[18] **Q:** Let me show you, Mr. Shofer, what has been marked
 [19] as Plaintiff's 5 for identification - that is number 1 -
 [20] and ask you if you can identify that document.
 [21] **A:** It's a letter from the Stuart Hack Company, and
 [22] Stuart Hack to me. It says personal and confidential to
 [23] Richard Shofer on August 9th, 1984, personal and
 [24] confidential.
 [25]

[1] **Q:** Do you know why that letter was written?
 [2] **A:** Signed Stuart - yes. "You questioned whether
 [3] assets of your money purchase pension plan" -
 [4] **Q:** Well, you do not need to -
 [5] **A:** Okay.
 [6] **Q:** The letter will speak for itself. I am just
 [7] wondering did you have anything to do with that letter being
 [8] written?
 [9] **A:** Yes.
 [10] **Q:** Could you tell us what involvement you had with
 [11] that?
 [12] **A:** Well, and again, I can't recall what I might've
 [13] said to Stuart Hack or what he might've said to me. I mean,
 [14] this is 13 years ago. But I believe that I would not have
 [15] wanted to go to my bank and propose, I must've asked Stuart
 [16] first where I could do it -
 [17] **MS. WHELIHAN:** Objection, Your Honor.
 [18] **THE WITNESS:** - and after he said that I could do
 [19] it -
 [20] **BY MR. TAYLOR:**
 [21] **Q:** Wait a minute, Mr. Shofer, there is an objection.
 [22] **THE COURT:** Are you objecting to a question?
 [23] **MS. WHELIHAN:** No, I am objecting to his answer
 [24] which is not only non-responsive to the question, but it is
 [25] clearly conjecture and contradictory to his earlier

[1] testimony. He is now saying without any foundation, well, I
 [2] do not remember what I asked, but what I really said was -
 [3] **MR. TAYLOR:** Your Honor, let me withdraw that and
 [4] I will ask another question.
 [5] **THE COURT:** Okay, let's start over again.
 [6] **BY MR. TAYLOR:**
 [7] **Q:** Mr. Shofer, after you had talked with Mr. Hack on
 [8] the telephone, was there any reason for your own purposes
 [9] that you would have desired to have that information in
 [10] writing?
 [11] **A:** Yes.
 [12] **Q:** What was the purpose to have it in writing?
 [13] **A:** Because if I went to Maryland National with a
 [14] proposal and a package, I wanted to back it up with
 [15] documentation that it was a valid request and that I had
 [16] gone to the horse's mouth for the information.
 [17] **Q:** All right.
 [18] **MR. TAYLOR:** Your Honor, I would like to offer
 [19] Plaintiff's 5 into the record.
 [20] **MS. TRUHE:** No objection, Your Honor.
 [21] **MS. WHELIHAN:** No objection, Your Honor.
 [22] **THE COURT:** It is admitted.
 [23] (Plaintiff's Exhibit No. 5, Hack 8/9/84
 [24] letter to Shofer, previously marked for
 [25] identification, was received in evidence.)

[1] **BY MR. TAYLOR:**
 [2] **Q:** Mr. Shofer, do you recall whether or not you
 [3] utilized Plaintiff's Exhibit 5 in connection with any
 [4] communications that you might have had with Maryland
 [5] National or any other financial institution?
 [6] **A:** I believe that a photocopy of that letter was
 [7] probably included in my proposal to the bank that they lend
 [8] the pension money on a mortgage that would be loaned to me
 [9] that I would use to pay off debt to Crown Motors.
 [10] **Q:** You had the ongoing relationship with Maryland
 [11] National at the time Plaintiff's Exhibit 5 was written to
 [12] you. Is that correct?
 [13] **A:** Yes.
 [14] (Plaintiff's Exhibit No. 6, promissory
 [15] notes, was marked for identification.)
 [16] **BY MR. TAYLOR:**
 [17] **Q:** Mr. Shofer, let me show you what has been marked
 [18] as Plaintiff's 6, that is 13. Can you tell us what
 [19] Plaintiff's Exhibit 6 is, Mr. Shofer?
 [20] **A:** It's a series of promissory notes made out to the
 [21] pension trust, they're demand notes made out to the trust by
 [22] me and signed by me for various amounts over various periods
 [23] of time, all at the uniform rate of 12 percent interest.
 [24] **Q:** Was in fact money borrowed in connection with
 [25] these notes? Did you in fact receive monies that are

[1] reflected on the notes?
[2] **A:** Yes.
[3] **MR. TAYLOR:** Your Honor, I would like to offer
[4] Plaintiff's 6 into the record.
[5] **MS. TRUHE:** No objection, Your Honor.
[6] **THE COURT:** It is admitted.
[7] (Plaintiff's Exhibit No. 6, promissory
[8] notes, previously marked for
[9] identification, was received in
[10] evidence.)

BY MR. TAYLOR:

[11] **Q:** Now, Mr. Shofer, did there come a time when you
[12] learned that there were tax consequences associated with
[13] these loans?
[14] **A:** Yes.

[15] (Plaintiff's Exhibit No. 7, Larash
[16] 2/20/87 letter to Shofer, was marked for
[17] identification.)
[18]

BY MR. TAYLOR:

[19] **Q:** How did that information come to your knowledge?
[20] **A:** It was brought to my attention. The first words I
[21] heard were from the mouth of Ken Larash, my accountant. And
[22] shortly after that, or just within moments, the conversation
[23] was joined by Alan Marvel, an associate of Ken Larash's.
[24] **Q:** When did that information come to you? When did
[25]

[1] you have that contact with Mr. Larash?
[2] **A:** To the best of my recollection, it was late
[3] November or some time in early December of 1986.
[4] **Q:** Now at the time that information was transmitted
[5] to you by Mr. Larash, had you in fact taken all the loans
[6] that are shown on Plaintiff's Exhibit 6?
[7] **A:** Yes.
[8] **Q:** At the time that you were making those loans, did
[9] you have any knowledge or any suspicion that those loans
[10] would result in taxable events?
[11] **A:** No.
[12] **Q:** Let me show you what has been marked as
[13] Plaintiff's Exhibit 7 for identification, and that is
[14] number 2.
[15] **A:** It's a letter dated February 20th, '87, from Ken
[16] Larash to me. And it discusses the issue of additional
[17] income from those loans and a suggestion from them that
[18] amended income tax returns should be filed for the years '84
[19] and '85.
[20] **Q:** All right, based on your prior testimony, this
[21] letter then was not a surprise to you because the same
[22] information had been verbally communicated to you. Is that
[23] correct?
[24] **A:** Yes.
[25] **Q:** What was Mr. Larash doing for you or your company

[1] or both of you in 1986 and 1987?
[2] **A:** He handled all matters that a CPA would normally
[3] handle for me relating to my pension, my parent company, and
[4] myself personally.
[5] **Q:** You mentioned another person: Alan Marvel. What
[6] was Alan Marvel's relationship with Ken Larash?
[7] **A:** My understanding from Ken Larash that he was a new
[8] member of the firm who had particular experience with
[9] pension matters, and that he had noticed something when he
[10] was reviewing my account that was of concern to him.
[11] **Q:** That would have been at or about the time you had
[12] the oral communication with Mr. Larash, is that correct?
[13] **A:** In that time frame.
[14] **MR. TAYLOR:** Your Honor, I would like to offer
[15] Plaintiff's Number 7 into the record.
[16] **MS. TRUHE:** No objection, Your Honor.
[17] **THE COURT:** It is admitted.
[18] (Plaintiff's Exhibit No. 7, Larash
[19] 2/20/87 letter to Shofer, previously
[20] marked for identification, was received
[21] in evidence.)
[22] **MS. WHELIHAN:** I am sorry, I had no objection,
[23] either.
[24] **THE COURT:** I assumed that since I did not hear
[25] from you.

[1] **MS. WHELIHAN:** All right.
[2] **BY MR. TAYLOR:**
[3] **Q:** Mr. Shofer, after you received the letter which
[4] has been introduced as Plaintiff's Number 7, did you have
[5] any contact with Mr. Hack?
[6] **A:** Yes.
[7] (Plaintiff's Exhibit No. 8, Shofer
[8] 3/12/87 letter to Hack, was marked for
[9] identification.)
[10] **BY MR. TAYLOR:**
[11] **Q:** What form did that communication with Mr. Hack
[12] take?
[13] **A:** I wrote him a letter in March.
[14] **Q:** Let me show you what has been marked as
[15] Plaintiff's Exhibit 8 for identification, that is number 3
[16] on my list. Mr. Shofer, do you recognize what has been
[17] marked as Plaintiff's Exhibit 3 for identification?
[18] **THE COURT:** You mean 8?
[19] **BY MR. TAYLOR:**
[20] **Q:** I am sorry, you are right 8.
[21] **A:** Yes. It's a letter dated March 12th, 1987, from
[22] me, marked personal and confidential to Stuart Hack: "Dear
[23] Stuart" -
[24] **Q:** Well, you do not need -
[25] **A:** - and it's on Catalina Enterprises -

[1] Q: All right.
 [2] A: - stationary.
 [3] Q: All right.
 [4] A: A three-page letter signed by me.
 [5] Q: All right.
 [6] MR. TAYLOR: Your Honor, I would like to offer
 [7] Plaintiff's 8 into the record.
 [8] MS. TRUHE: Your Honor, if I may have a moment to
 [9] examine this document.
 [10] THE COURT: All right.
 [11] MS. TRUHE: Your Honor, I do object to the
 [12] admission of this exhibit which is a letter from Mr. Shofer
 [13] to Mr. Hack dated March 12, 1987. There are references in
 [14] it to certain matters which are inadmissible in evidence in
 [15] any tort case in Maryland. So while I have no objection to
 [16] certain portions of this letter coming in, I think it needs
 [17] to be redacted.
 [18] THE COURT: Well, do you want to try to work that
 [19] out at a break with Mr. Taylor, and then I will admit it as
 [20] redacted?
 [21] MR. TAYLOR: All right, I would be happy to do
 [22] that at the break. My position is this was a letter that
 [23] was written in the ordinary course of business, and I do not
 [24] think that any portion of it should be redacted. But I
 [25] would like to -

[1] THE COURT: Well, I have not seen it. May I see
 [2] it? I do not know what is in it?
 [3] MR. TAYLOR: Well, that is why she does not to -
 [4] MS. TRUHE: Your Honor, there is a reference to
 [5] insurance.
 [6] MS. WHELIHAN: Although he could probably
 [7] disregard that.
 [8] THE COURT: Yes, I really can. I do not know that
 [9] we need to go that (inaudible). I understand the collateral
 [10] source doctrine, and I am not going to violate it.
 [11] MR. TAYLOR: It is not a jury trial.
 [12] THE COURT: With that understanding, I will accept
 [13] it.
 [14] MS. TRUHE: Thank you, Your Honor.
 [15] THE COURT: It is admitted.
 [16] (Plaintiff's Exhibit No. 8, Shofer
 [17] 3/12/87 letter to Hack, previously
 [18] marked for identification, was received
 [19] in evidence.)
 [20] MR. TAYLOR: Thank you.
 [21] THE COURT: I was not sure that was what you were
 [22] referring to.
 [23] BY MR. TAYLOR:
 [24] Q: Mr. Shofer, after you had written your letter to
 [25] Mr. Hack, which has been introduced as Plaintiff's Exhibit

[1] Number 8, did you have further contact with Mr. Hack?
 [2] A: Yes.
 [3] (Plaintiff's Exhibit No. 9, Hack 4/8/87
 [4] letter to Shofer, was marked for
 [5] identification.)
 [6] BY MR. TAYLOR:
 [7] Q: Let me show you what has been marked as
 [8] Plaintiff's 9 for identification, that is number 4, and ask
 [9] you if you recognize that document.
 [10] A: Yes.
 [11] Q: Did you in fact receive that document?
 [12] A: Yes.
 [13] Q: Thank you.
 [14] MR. TAYLOR: Your Honor, I would like to offer
 [15] into the record Plaintiff's Number 9.
 [16] THE COURT: What was the date on Number 9?
 [17] MS. WHELIHAN: Wait a minute, we are just pulling
 [18] it.
 [19] MR. TAYLOR: April 8, 1987.
 [20] THE COURT: It is from the Defendant -
 [21] MR. TAYLOR: Yes, Your Honor -
 [22] THE COURT: - to the Plaintiff?
 [23] MR. TAYLOR: - to the Plaintiff.
 [24] MS. TRUHE: No objection, Your Honor.
 [25] MS. WHELIHAN: No objection, Your Honor.

[1] THE COURT: It is admitted.
 [2] (Plaintiff's Exhibit No. 9, Hack 4/8/87
 [3] letter to Shofer, previously marked for
 [4] identification, was received in
 [5] evidence.)
 [6] THE WITNESS: Right, he's writing me a letter
 [7] leading me to believe that there's a solution, that we
 [8] shouldn't have too much to worry about.
 [9] BY MR. TAYLOR:
 [10] Q: Well, Mr. Shofer, after you received that letter,
 [11] what actually happened next? What was the next event that
 [12] occurred?
 [13] A: Well, to the best of my recollection, I believe
 [14] that the next thing that happened was a meeting at the
 [15] offices of Greybush Newman, a meeting that included myself,
 [16] Alan Marvel, ken Larash, and Stuart Hack.
 [17] Q: When did that meeting take place, approximately?
 [18] A: My recollection is that it was in May that year.
 [19] Q: That would have been May of -
 [20] A: May of -
 [21] Q: - 1987?
 [22] A: Yes.
 [23] Q: Where did the meeting occur?
 [24] A: At the Falls Road offices of Greybush Newman.
 [25] Q: Can you describe what happened at the meeting?

[1] **A:** Yes.

[2] **Q:** Would you describe what happened at the meeting?

[3] **A:** Yes. I can remember that meeting pretty well:

[4] Ken Larash sitting to my right, Alan Marvel sitting almost

[5] across from him to his right, Stuart Hack sitting to my

[6] left, and me with my back to the window. And they, the

[7] accountants asked Stuart what he proposed and what he had

[8] come up with to substantiate that there would not be tax

[9] consequences. And Stuart answered my accountants by

[10] referring to some obscure code reference. I don't know; I'm

[11] just using those words 'cause there might be more

[12] appropriate words, but I wouldn't know what they are.

[13] So he referred to that, and there was short

[14] conversation between the accountants and Stuart Hack. And

[15] Alan Marvel said that won't fly. I can almost remember

[16] those exact words: that won't fly. Then I looked at Stuart

[17] Hack and said well, Stuart, what should I do? And he said

[18] do nothing. I said what do you mean do nothing? Don't file

[19] amended returns. In substance, that was most of the

[20] meeting. There was a discussion afterward about the

[21] appropriateness of filing amended returns that went on

[22] between my accountants and Stuart. And I think the meeting

[23] ended with Stuart saying that he was going to get to Barry

[24] Berman and then get back to us.

[25] **Q:** Now prior to the meeting in May of 1987, had your

[1] accountants given you advice with respect to how to treat

[2] these loans on your income tax returns?

[3] **A:** They said that amended returns had to be filed.

[4] **Q:** Was that their position at the time the meeting in

[5] May of 1987 occurred?

[6] **A:** Yes.

[7] **Q:** Was this opinion expressed to Mr. Hack at the

[8] meeting?

[9] **A:** I'm sure it was.

[10] **Q:** Do you recall whether or not Mr. Hack commented at

[11] all on the appropriateness of filing amended returns?

[12] **A:** There was a discussion about it. He was taking

[13] the position that I shouldn't file and to give it thought.

[14] But I can't recall the exact words or how long it went, how

[15] long that discussion lasted. I don't, it isn't something

[16] that lasted a half-hour or more on that one subject. It was

[17] a matter of minutes, I think.

[18] **Q:** Did you have any further conversations with Mr.

[19] Hack about the issue of amended returns after the May of

[20] 1987 meeting?

[21] **A:** I don't recall any specific communication. It

[22] seems to me like there was perhaps at least one

[23] communication where it was definite that I was going to file

[24] amended returns, but that's in my mind that there was at

[25] least one more communication. I can't specifically recall

[1] when it was.

[2] (Plaintiff's Exhibit Nos. 10, Shofer

[3] 1984 tax return, and 11, Shofer amended

[4] 1984 tax return, were marked for

[5] identification.)

[6] **BY MR. TAYLOR:**

[7] **Q:** At the time you attended that meeting in May of

[8] 1987, had you made up your own mind in terms of what you

[9] were going to do with regard to the amended returns?

[10] **A:** I never had any doubt that I was going to file

[11] amended returns.

[12] **Q:** Mr. Shofer, let me show you what has been marked

[13] as Plaintiff's 10 for identification this is 7 on our list,

[14] and ask you if you can identify that document.

[15] **A:** 1984 personal income tax return signed on April 9,

[16] 1985, so it has to be my original return.

[17] **Q:** All right, and who prepared that return for you?

[18] **A:** Ken Larash. I can't make out this signature. I

[19] think it's Ken Larash's.

[20] **Q:** All right. Was Mr. Larash working on your

[21] accounts at that time?

[22] **A:** Yes.

[23] **Q:** Let me show you what has been marked as

[24] Plaintiff's Exhibit Number 11 and ask you to identify that

[25] document.

[1] **A:** It's an amended 1984 income tax return dated

[2] December 9th of '87, and I can make out that signature as

[3] Ken Larash's.

[4] (Plaintiff's Exhibit Nos. 12, Shofer

[5] 1985 tax return, and 13, Shofer amended

[6] 1985 tax return, were marked for

[7] identification.)

[8] **BY MR. TAYLOR:**

[9] **Q:** All right. Let me ask you to look at what has

[10] been marked as Plaintiff's Exhibit 12 for identification.

[11] **A:** It's 1985 income tax return. I'm looking now for

[12] the date that it was signed, February 1987 by Ken Larash.

[13] **Q:** All right, and I would like to have you look at

[14] Plaintiff's Exhibit 13 for identification.

[15] **A:** Amended tax return for 1985 signed December 9th,

[16] 1987, by Ken Larash.

[17] (Plaintiff's Exhibit Nos. 14, Shofer

[18] 1986 tax return, and 15, Shofer 1987 tax

[19] return, were marked for identification.)

[20] **BY MR. TAYLOR:**

[21] **Q:** If you would look at what has been marked

[22] Plaintiff's Exhibit 14 for identification.

[23] **A:** 1986 personal income tax return signed

[24] December 31st, 1987, by Ken Larash.

[25] **Q:** And what has been marked as Plaintiff's Exhibit 15

[1] for identification.

[2] **A:** 1987 personal income tax return signed

[3] October 11th, 1988.

[4] **MR. TAYLOR:** Your Honor, I would like to move into

[5] the record Plaintiff's Exhibits 10 through 15.

[6] **MS. TRUHE:** No objection, Your Honor.

[7] **MS. WHELIHAN:** No objection, Your Honor.

[8] **THE COURT:** They are admitted.

[9] (Plaintiff's Exhibit Nos. 10, Shofer

[10] 1984 tax return; 11, Shofer amended 1984

[11] tax return; 12, Shofer 1985 tax return;

[12] 13, Shofer amended 1985 tax return; 14,

[13] Shofer 1986 tax return; and 15, Shofer

[14] 1987 tax return, previously marked for

[15] identification, were received in

[16] evidence.)

[17] **THE COURT:** All right, Mr. Taylor, I am going to

[18] take a very short recess at this point, okay.

[19] **MR. TAYLOR:** Yes.

[20] **THE COURT:** Mr. Shofer, while you are on the stand

[21] under oath, you may not discuss your testimony with anyone,

[22] do you understand?

[23] **THE WITNESS:** Yes.

[24] **THE COURT:** We are going to take a brief recess.

[25] We will be right back.

[1] (Brief recess.)

[2] **THE COURT:** Good morning, everyone; please be

[3] seated.

[4] **MR. TAYLOR:** Thank you, Your Honor.

[5] **THE COURT:** You may resume.

[6] (Plaintiff's Exhibit No. 16, 1984

[7] amended pension plan, was marked for

[8] identification.)

[9] **BY MR. TAYLOR:**

[10] **Q:** Mr. Shofer, all during this time period that we

[11] have been discussing beginning with the telephone call and

[12] the letter of August of 1984 up through the meeting that you

[13] just described involving yourself, your accountants, and Mr.

[14] Hack, the Defendants were still performing services for you

[15] and your company during that time period, were they not?

[16] **A:** Well, there was a period of roughly six months

[17] between my first learning of the possible tax consequences

[18] and that meeting having first learned of them some time in

[19] late November or around then, and the meeting was in May,

[20] six months later. And during that period of time, I was

[21] still utilizing their services but I don't think we had

[22] engaged in any big projects because it was sort of an

[23] unsettled period.

[24] **Q:** Well, let me show you what has been marked as

[25] Plaintiff's Exhibit Number 16 for identification, this would

[1] be 19 on my list.

[2] **A:** Yes. This is a 1984 amending restatement, so it's

[3] a restatement of the plan. The date on it's 1984.

[4] **Q:** Who prepared that amending statement, or

[5] restatement?

[6] **A:** That would've been prepared by the Stuart Hack

[7] Company. And I see that it's signed March of 1985, so he

[8] was still doing the work for me at that time.

[9] **MR. TAYLOR:** I would like to offer Plaintiff's

[10] Number 16 into the record.

[11] **MS. TRUHE:** No objection, Your Honor.

[12] **MS. WHELIHAN:** No objection, Your Honor.

[13] **THE COURT:** Admitted.

[14] (Plaintiff's Exhibit No. 16, 1984

[15] amended pension plan, previously marked

[16] for identification, was received in

[17] evidence.)

[18] (Plaintiff's Exhibit No. 17,

[19] Vanderdresche 11/26/85 letter to Shofer,

[20] was marked for identification.)

[21] **BY MR. TAYLOR:**

[22] **Q:** Mr. Shofer, let me have you look at Plaintiff's

[23] Number 17 for identification, this is number 22 on the list.

[24] I wanted to ask you if you could identify that document.

[25] **A:** It's a letter signed November 26, dated

[1] November 26, '84, signed by Alan Vander, an employee of

[2] Stuart Hack's. And it's a fee arrangement agreement

[3] outlining the type of work that they do on an annual basis.

[4] And they characterize that as "regular annual administration

[5] work and special work." And they characterize special work

[6] "including procedures which we are unable to predict or

[7] quantify in advance."

[8] **Q:** Well, Plaintiff's 17 is a fee agreement, is it

[9] not?

[10] **A:** Yes.

[11] **Q:** Did you or your company receive a similar letter

[12] every year that they -

[13] **A:** I would assume every year. I cannot specifically

[14] recall every year.

[15] **Q:** All right.

[16] **MR. TAYLOR:** I would like to offer Plaintiff's 17

[17] into the record.

[18] **MS. TRUHE:** No objection, Your Honor.

[19] **THE COURT:** It is admitted.

[20] (Plaintiff's Exhibit No. 17,

[21] Vanderdresche 11/2/85 letter to Shofer,

[22] previously marked for identification,

[23] was received in evidence.)

[24] (Plaintiff's Exhibit No. 18, Hack

[25] invoices to Shofer, was marked for

[1] identification.)

[2]

BY MR. TAYLOR:

[3] **Q:** Mr. Shofer, were you or your company billed for
[4] the advice which Mr. Hack gave you orally and in writing on
[5] August of 1984?

[6] **A:** Yes.

[7] **Q:** Let me show you what has been marked as
[8] Plaintiff's Exhibit 20 for identification, that is also 20.

[9] **A:** It's two invoices. The first invoice dated
[10] 9/245/84 addressed to Pam Summers and Catalina Enterprises
[11] from the Stuart Hack Company. The total amount of the
[12] invoice is for \$540. And as I see here, \$360 of that is for
[13] discussion with clients and types of plan loans; "bill for
[14] research to follow." The second part of this document is
[15] dated December 4th of '84, and it's a bill for \$40 for
[16] research on loans from voluntary account.

[17] **MR. TAYLOR:** Your Honor, I would like to offer
[18] Plaintiff's 18 into evidence.

[19] **MS. TRUHE:** No objection, Your Honor.

[20] **THE COURT:** It is admitted.

[21] **MR. TAYLOR:** Did I say 20, I am sorry.

[22] **THE COURT:** Is it 18 or 20?

[23] **MR. TAYLOR:** It is 18, I am sorry, Your Honor. We
[24] are working with two different lists, Your Honor. I am
[25] sorry about that.

[1] **MS. WHELIHAN:** No objection, Your Honor.

[2] **THE COURT:** It is admitted.

[3] (Plaintiff's Exhibit No. 18, Hack
[4] invoices to Shofer, previously marked
[5] for identification, was received in
[6] evidence.)

[7] (Plaintiff's Exhibit No. 19, Gordon
[8] 3/11/85 letter to Shofer, was marked for
[9] identification.)

BY MR. TAYLOR:

[11] **Q:** Mr. Shofer, let me show you what has been marked
[12] as Plaintiff's Number 19, which would appear as number 23 on
[13] my list, and ask you if you can identify that document.

[14] **A:** It's a letter to Richard Shofer, personal and
[15] confidential, from the Stuart Hack Company, signed by
[16] Charlene B. Gordon, Esquire. It's a letter from an attorney
[17] there discussing confusion over amendments.

[18] **Q:** Well, do you recall whether or not this letter
[19] would have been sent to you in response to an inquiry, or
[20] was this a part of the normal service that the Stuart Hack
[21] Company provided to you?

[22] **A:** It would've been part of the normal service that
[23] they provided. It doesn't look like it's a letter that was
[24] made up especially for Catalina. In fact, the way some of
[25] the typing is, it almost looks like it's a form letter.

[1] **Q:** All right, thank you.

[2] **MR. TAYLOR:** Your Honor, I would like to offer
[3] Plaintiff's 19 into the record.

[4] **MS. TRUHE:** No objection, Your Honor.

[5] **MS. WHELIHAN:** No objection, Your Honor.

[6] **THE COURT:** It is admitted.

[7] (Plaintiff's Exhibit No. 19, Gordon

[8] 3/11/85 letter to Shofer, previously
[9] marked for identification, was received
[10] in evidence.)

[11] (Plaintiff's Exhibit No. 20, Hack 3/7/86
[12] letter to clients, was marked for
[13] identification.)

BY MR. TAYLOR:

[15] **Q:** Mr. Shofer, let me show you what has been marked
[16] as Plaintiff's 20 for identification, I believe this is 29.

[17] **A:** This says 20. This is -

[18] **Q:** I am working from another list.

[19] **A:** Okay. Well, anyway, this is a letter dated

[20] March 7th, 1986, and it's from Stuart: "Dear Client" -

[21] **Q:** Well, you do not need to read the letter.

[22] **A:** Okay. It's -

[23] **Q:** Was this a letter sent to you personally, or was
[24] this just a part of the ordinary service, or what was done
[25] in the ordinary course of business?

[1] **A:** Ordinary service. It's a form letter, and it says
[2] "Dear Client."

[3] **Q:** All right.

[4] **MR. TAYLOR:** Your Honor, I would like to offer
[5] Plaintiff's 20 into the record.

[6] **MS. TRUHE:** No objection, Your Honor.

[7] **MS. WHELIHAN:** No objection, Your Honor.

[8] **THE COURT:** It is admitted.

[9] (Plaintiff's Exhibit No. 20, Hack 3/7/86

[10] letter to Shofer, previously marked for

[11] identification, was received in

[12] evidence.)

BY MR. TAYLOR:

[14] **Q:** Mr. Shofer, what occurred after you had filed your
[15] amended tax returns?

[16] **A:** Well, the amended tax returns were filed in
[17] December of '87. And between that period and March of '88,
[18] I spent four months attempting to get Stuart Hack to sit
[19] with his representatives and discuss this issue with me to
[20] help me work out of this situation before it deteriorated
[21] and got worse

[22] (Plaintiff's Exhibit No. 21,

[23] Vanderdresche 11/24/86 letter to Shofer;

[24] 22, Hack 10/13/87 letter to clients; and

[25] 23, Hack 12/87 letter to clients, were

[1] marked for identification.)

[2] **BY MR. TAYLOR:**

[3] **Q:** All right, Mr. Shofer, before I hand you --

[4] **A:** -- actually pleaded with him --

[5] **Q:** All right. Before I --

[6] **A:** -- for four months.

[7] **Q:** Before I get into that, I had a couple of other
[8] documents I did not want you to identify, and then I want to
[9] move to that topic. Let me show you what has been marked as
[10] Plaintiff's Number 21.

[11] **A:** It's a letter from the Stuart Hack Company dated
[12] November 24th, 1986, to Richard Shofer, personal and
[13] confidential, reference fee agreement. It's another fee
[14] agreement letter.

[15] **Q:** That would have been in 1986, is that correct?

[16] **A:** Yes.

[17] **Q:** All right.

[18] **MR. TAYLOR:** Your Honor, I would like to offer
[19] Plaintiff's Exhibit 21.

[20] **MS. TRUHE:** No objection, Your Honor.

[21] **MS. WHELIHAN:** No objection, Your Honor.

[22] **THE COURT:** Admitted.

[23] (Plaintiff's Exhibit No. 21,
[24] Vanderdresche 11/24/86 letter to
[25] clients, previously marked for

[1] identification, was received in
[2] evidence.)

[3] **BY MR. TAYLOR:**

[4] **Q:** Let me ask you to look at Plaintiff's 22, that is
[5] 28, and ask you if you can identify that document.

[6] **A:** It's a letter dated October 13th, 1987, from the
[7] Stuart Hack Company Consultants and Actuaries. I see Stuart
[8] lists himself here as a J.D., in fact. And it says "To our
[9] clients, plan document changes required by the Tax Reform
[10] Act of 1986." Signed by Stuart personally. Well, it says
[11] to clients, but it's signed cordially, Stuart.

[12] **Q:** All right.

[13] **MR. TAYLOR:** I would like to offer 22 into the
[14] record.

[15] **MS. TRUHE:** No objection, Your Honor.

[16] **MS. WHELIHAN:** No objection, Your Honor.

[17] **THE COURT:** It is admitted.

[18] (Plaintiff's Exhibit No. 22, Hack
[19] 10/13/87 letter to clients, previously
[20] marked for identification, was received
[21] in evidence.)

[22] **BY MR. TAYLOR:**

[23] **Q:** If you will look at Plaintiff's 23, Mr. Shofer.

[24] **A:** A pension alert from Stuart Hack, J.D., again,
[25] signed by Stuart Hack, Marian Dubbs, Alan Vanderdresche, and

[1] Donna Welch. And they're asking, it's a letter to general
[2] client to other clients. And it says here received
[3] 12/20/87. I have apparently, in my own handwriting, I
[4] received this letter in December of '87, and --

[5] **MS. WHELIHAN:** Excuse me, Your Honor. Could I
[6] know what exhibit number that is from our --

[7] **MR. TAYLOR:** I am sorry.

[8] **THE COURT:** 23 -- do you mean from your old list?

[9] **MS. WHELIHAN:** From our old list? Doug, what
[10] number is that?

[11] **MR. TAYLOR:** Yes, I am sorry. That is --

[12] **THE WITNESS:** And it's --

[13] **MR. TAYLOR:** I believe that is 43.

[14] **THE WITNESS:** -- a letter advising us --

[15] **MS. WHELIHAN:** Is it 43 or is it 29? It looks
[16] like it is --

[17] **MS. TRUHE:** It is 20.

[18] **MS. WHELIHAN:** -- the same thing as 29.

[19] **MR. TAYLOR:** Yes, I am sorry, it is 29. I beg
[20] your pardon.

[21] **MS. WHELIHAN:** All right.

[22] **MR. TAYLOR:** I beg your pardon.

[23] **THE WITNESS:** It's a pension --

[24] **MS. WHELIHAN:** It is the same as Exhibit 20.

[25] **THE WITNESS:** -- alert letter.

[1] **MS. WHELIHAN:** It is the same as Exhibit 20. It
[2] is Exhibit 20.

[3] **MR. TAYLOR:** Well, I do not think it is the same.

[4] **MS. WHELIHAN:** Well, it has handwriting on it. Is
[5] that the difference?

[6] **MR. TAYLOR:** Well, I think it is a different date,
[7] is it not? I do not think it has been admitted.

[8] **MR. MAY:** You gave us the wrong number for
[9] Number 20.

[10] **MR. TAYLOR:** Did I?

[11] **MR. MAY:** You said it is 29. It was actually 26.

[12] **THE COURT:** You are coming very close to confusing
[13] me.

[14] **MR. TAYLOR:** Let me see that. Yes, the problem
[15] with that is --

[16] **MS. WHELIHAN:** All right, I think I have got it:
[17] 23 is really 29 --

[18] **MR. TAYLOR:** Yes.

[19] **MS. WHELIHAN:** -- and 20 was 26.

[20] **MR. TAYLOR:** So -- yes.

[21] **MS. WHELIHAN:** So do not be confused.

[22] **MR. TAYLOR:** I do not think this (inaudible).

[23] **THE COURT:** I just am recording the --

[24] **MS. WHELIHAN:** Real numbers, right.

[25] **THE COURT:** -- exhibit numbers that we are using

[1] at trial. I understand the others were pretrial -
 [2] **MS. WHELIHAN:** Right.
 [3] **THE COURT:** - schedules.
 [4] **MR. TAYLOR:** That is correct. This has not been
 [5] admitted, I do not believe, Your Honor. I would like to
 [6] offer 23 into the record.
 [7] **THE COURT:** Is there any objection?
 [8] **MS. TRUHE:** No objection.
 [9] **THE COURT:** It is admitted.
 [10] (Plaintiff's Exhibit No. 23, Hack 12/87
 [11] letter to clients, previously marked for
 [12] identification, was received in
 [13] evidence.)
 [14] **BY MR. TAYLOR:**
 [15] **Q:** Mr. Shofer, as a result of the additional work
 [16] related to preparation of your amended tax returns, did you
 [17] incur any fees with your accounts, Greybush Newman?
 [18] **A:** Yes.
 [19] (Plaintiff's Exhibit No. 24, Larash
 [20] letters to Shofer, was marked for
 [21] identification.)
 [22] **BY MR. TAYLOR:**
 [23] **Q:** Let me show you what has been marked as
 [24] Plaintiff's Exhibit 24.
 [25] **A:** It's a letter marked July, dated July 9th, 1987,

[1] from Greybush Newman, signed by Ken Larash, referring to
 [2] their analysis of billing on work done related to the
 [3] pension loan problem, and it's between November '86 and
 [4] June '87 amounting to \$2,273.60.
 [5] **MS. WHELIHAN:** Excuse me, Your Honor, may I ask
 [6] Mr. Taylor a question? Is that Exhibit 36 -
 [7] **MR. TAYLOR:** Let me -
 [8] **MS. WHELIHAN:** - from our list?
 [9] **MR. TAYLOR:** The Court's indulgence for just a
 [10] moment, Your Honor.
 [11] **THE COURT:** Okay.
 [12] (Discussion off the record.)
 [13] **BY MR. TAYLOR:**
 [14] **Q:** Mr. Shofer, just to clarify the record, if you
 [15] would look through Plaintiff's Exhibit Number 24, there are
 [16] three documents that are included in that exhibit, are there
 [17] not?
 [18] **A:** Yes, three separate communications from Greybush
 [19] Newman. The first one was dated July 9th, '87, and refers
 [20] to a bill for \$2,273. The second one is dated January 21st
 [21] of '88, and covers the time from July 1st, '87, to
 [22] December 31st, '87, and it's an additional \$2,229 for work
 [23] done on the pension loan problem. The third document is
 [24] dated February 6th, 1989, covering a period from January
 [25] 1st, '88, to December 31st, '88, and it's a bill for \$2,462

[1] covering work done on the pension loan problem for that
 [2] period of time: January 1st to December 31st, '88.
 [3] **Q:** All right.
 [4] **MR. TAYLOR:** Your Honor, I would like to offer
 [5] Plaintiff's 24 into the record.
 [6] **MS. TRUHE:** No objection.
 [7] **MS. WHELIHAN:** No objection, Your Honor.
 [8] **THE COURT:** It is admitted.
 [9] (Plaintiff's Exhibit No. 24, Larash
 [10] letters to Shofer, previously marked for
 [11] identification, was received in
 [12] evidence.)
 [13] (Plaintiff's Exhibit No. 25, Larash
 [14] 12/4/87 letter to Shofer, was marked for
 [15] identification.)
 [16] **MR. TAYLOR:** The Court's indulgence for one
 [17] moment.
 [18] **BY MR. TAYLOR:**
 [19] **Q:** Mr. Shofer, let me show you what has been marked
 [20] as Plaintiff's Exhibit 25 for identification. Can you
 [21] identify that document?
 [22] **A:** It's from Greybush Newman and Company. It's dated
 [23] December 4th, 1987. And it's a letter signed by Ken Larash,
 [24] a summary of calculations regarding Federal and Maryland
 [25] income tax due for 1984 and 1985 as a result of having to

[1] file amended returns over the loan issue. It also addresses
 [2] other issues regarding that same general issue.
 [3] **Q:** All right.
 [4] **MR. TAYLOR:** Your Honor, I am not going to offer
 [5] this at this time. I wanted to have some explanation as to
 [6] what this was, but I would like to reserve this until
 [7] another witness testifies. Your Honor, I had several other
 [8] documents that I would like to just gather together. I
 [9] wonder if the Court might allow me about a 10-minute recess
 [10] to do that. I am about finished with Mr. Shofer. I just
 [11] need to -
 [12] **THE COURT:** Sure. Is there some narrative that we
 [13] could do and then let you do that over the lunch and finish,
 [14] or would that break it up for you?
 [15] **MR. TAYLOR:** Well, that is fine. I know Ms. Truhe
 [16] is going to take some extended time with Mr. Shofer.
 [17] **THE COURT:** Either way. If you want the time, I
 [18] will break for 10 minutes.
 [19] **MR. TAYLOR:** Ten minutes might allow me to sort of
 [20] wrap this up -
 [21] **THE COURT:** That is fine.
 [22] **MR. TAYLOR:** - if I could.
 [23] **THE COURT:** Be back in 10 minutes.
 [24] (Brief recess.)
 [25] (Plaintiff's Exhibit No. 26,

[1] newsletters, was marked for
[2] identification.)
[3] **THE COURT:** Good morning, everyone. Please be
[4] seated. Are we ready to go, Mr. Taylor?
[5] **MR. TAYLOR:** Yes, Your Honor, thank you very much
[6] for the break. I was trying to see what was remaining here.
[7] **THE COURT:** I thought that you were just
[8] renumbering everything.
[9] **MR. TAYLOR:** The truth of the matter is it has
[10] been renumbered maybe twice -
[11] **THE COURT:** Okay.
[12] **MR. TAYLOR:** - and every time it is renumbered,
[13] it is a little more difficult to follow. But I have several
[14] other exhibits I would like to have identified. I am going
[15] to start with Plaintiff's Exhibit 26. I am trying to see if
[16] we have this listed. I know it is on this list. This is
[17] number 41.

[18] **BY MR. TAYLOR:**

[19] **Q:** Mr. Shofer, do you recognize what has been marked
[20] as Exhibit 26?
[21] **A:** I can see that these are a group of newsletters
[22] covering a period of time from well, this one says
[23] September-October 1980, but there are several of them here.
[24] And I see one that goes up through 1988. So they cover a
[25] broad range of time, and they're titled Fringe Benefit

[1] Newsletter. They're all say Fringe Benefit Newsletters, and
[2] cover a variety of subject matter having to do, I guess,
[3] with the pensions without having read them all.

[4] **Q:** Thank you.
[5] **MR. TAYLOR:** Your Honor, I would like to offer
[6] Plaintiff's Exhibit 26 into the record.

[7] **MS. TRUHE:** No objection, Your Honor.

[8] **MS. WHELIHAN:** No objection, Your Honor.

[9] **THE COURT:** Admitted.

[10] (Plaintiff's Exhibit No. 26,
[11] newsletters, previously marked for
[12] identification, was received in
[13] evidence.)

[14] (Plaintiff's Exhibit No. 27, Giampietro
[15] 4/30/87 letter to Shofer, was marked for
[16] identification.)

[17] **BY MR. TAYLOR:**

[18] **Q:** Mr. Shofer, who is Nicholas Giampietro?

[19] **A:** He is an attorney whose field of specialty is
[20] pension law, and he also has his own company that does
[21] pension administration for clients.

[22] **Q:** Did you consult with Mr. Giampietro in connection
[23] with this matter?

[24] **A:** Yes.

[25] **Q:** When was that?

[1] **A:** The first contact, I believe, was in '86, but very
[2] late in '86, on a recommendation from Alan Marvel that I
[3] contact him.

[4] **Q:** Why did you contact him? Why did you consult with
[5] him?

[6] **A:** Well, when Alan Marvel gave me the news that it
[7] was a taxable event, or he and Ken Larash did, I couldn't
[8] quite believe it, having had such a different understanding
[9] from Stuart. And I really at that time was almost afraid to
[10] believe it. I wanted to believe Stuart. And I thought that
[11] I needed another opinion. I was hoping that Alan Marvel and
[12] Ken Larash were wrong.

[13] **Q:** Did you in fact consult with Mr. Giampietro?

[14] **A:** Yes.

[15] **Q:** Let me show you what has been marked as
[16] Plaintiff's Number 27 for identification, this is number 10.

[17] **A:** Well, this is a letter marked April 30th of '87,
[18] from Giampietro and signed by Nicholas Giampietro, and it's
[19] addressed to me. And it said "You have asked us to render
[20] an" -

[21] **Q:** Well -

[22] **A:** - "opinion."

[23] **Q:** What is the subject matter of the letter?

[24] **A:** The subject matter is an opinion relating to the
[25] loan issue. You have to excuse me a minute. Okay, the

[1] subject matter of this, and we're almost in May now, it's
[2] dated April 30th. The subject matter goes into how much of
[3] my loan would be taxable and what portion might not be
[4] taxable because it falls into a classification that isn't
[5] subject to tax. So that's the substance of this letter.

[6] **Q:** All right.

[7] **MR. TAYLOR:** Your Honor, I would like to offer
[8] into the record Plaintiff's Exhibit 27. I would, in
[9] addition to the offer, make a proffer that Mr. Giampietro
[10] would have testified, and I do intend to ask him questions
[11] about the letter. But it seems to me it may be appropriate
[12] to -

[13] **THE COURT:** Is there any objection to the letter?

[14] **MS. TRUHE:** No, Your Honor.

[15] **THE COURT:** Okay, it is admitted.

[16] (Plaintiff's Exhibit No. 27, Giampietro
[17] 4/30/87 letter to Shofer, previously
[18] marked for identification, was received
[19] in evidence.)

[20] **BY MR. TAYLOR:**

[21] **Q:** Mr. Shofer, when the amended tax returns were
[22] prepared and filed, were there additional taxes due over
[23] what had been shown on your earlier, original returns?

[24] **A:** Yes.

[25] **Q:** Were you able to pay those additional taxes?

[1] **A:** No.

[2] **Q:** When you were unable to pay those taxes, did the

[3] Internal Revenue Service take any action?

[4] **A:** Eventually; not immediately.

[5] **Q:** Were you still engaged in a business relationship

[6] with Maryland National Bank?

[7] **A:** Yes.

[8] (Plaintiff's Exhibit Nos. 28, Krause

[9] 10/11/88 letter to Shofer, and 29,

[10] Krause 6/14/89 letter to Shofer, were

[11] marked for identification.)

[12] **BY MR. TAYLOR:**

[13] **Q:** Let me show you what has been marked as

[14] Plaintiff's Exhibit 28.

[15] **A:** It's a letter dated October 11th, 1988, from

[16] Maryland National to me, signed by Tim Krause.

[17] **Q:** 59.

[18] **A:** It was one of my loan officers at the bank at that

[19] time. And the letter is in essence a turndown letter where

[20] I had requested \$100,000 although the letter doesn't specify

[21] it, the \$100,000 was to pay income tax liabilities.

[22] **Q:** That was the purpose of the loan you were seeking?

[23] **A:** Yes.

[24] **Q:** Did you have existing loans with Maryland National

[25] Bank at that time?

[1] **A:** Yes.

[2] **MS. TRUHE:** Objection, Your Honor. Could we get

[3] clarification? When Mr. Shofer testifies that he has loans

[4] with Maryland National Bank at that time, can we find out

[5] whether that is him personally, or is he referring to the

[6] business?

[7] **BY MR. TAYLOR:**

[8] **Q:** The kinds of loans that you had with Maryland

[9] National, were they commercial, that is, business loans, or

[10] were they personal loans to you, or were they both? What

[11] was your -

[12] **A:** Well, I'm - I'm going to look at this time

[13] period, 1988. At that time, to the best of my recollection,

[14] the majority of my debt, which was in the \$1 million or \$1.1

[15] million range, was from my pension to the bank or my

[16] corporation to the bank. It was principally in those two

[17] forms in October of '88. However, I personally guaranteed

[18] much of the debt, if not all of the debt.

[19] **Q:** Well, do you recall specifically whether this

[20] \$100,000 loan application was made in your own name, or was

[21] that on behalf of the business?

[22] **A:** That was to me alone.

[23] **Q:** That was a personal loan?

[24] **A:** Well, I'm looking at the heading, and it's to

[25] Richard Shofer, but it's also got Catalina Enterprises in

[1] the caption, you know, so. The purpose of the loan was to

[2] pay those taxes. And however it's headed here, that's what

[3] the purpose was for, and it was turned down or denied.

[4] **Q:** All right.

[5] **MR. TAYLOR:** Your Honor, I would like to offer

[6] Plaintiff's 28.

[7] **MS. TRUHE:** Well, Your Honor, I have a problem

[8] with it from an evidentiary standpoint. Mr. Shofer has just

[9] admitted that he does not know whether this was a loan which

[10] his business was applying for, or one which he was

[11] personally applying for. The only party in this case is Mr.

[12] Shofer.

[13] **THE COURT:** May I see the exhibit?

[14] **MS. WHELIHAN:** In addition, Your Honor, I do not

[15] see how this witness can possibly lay a foundation for not

[16] only what the loan was for, but what the reasons were for

[17] why the turndown was, which is, I anticipate, the next

[18] series of questions from Mr. Taylor. I do not think there

[19] is a proper foundation for this (inaudible) established by

[20] this witness.

[21] **THE COURT:** How does it get in? It is hearsay.

[22] **MR. TAYLOR:** Well, how about the business

[23] exception, business document exception? It is a letter that

[24] is written, really, in the regular course of business. I

[25] think Mr. Shofer has already testified that he has had a

[1] long-standing, ongoing relationship with the bank, and that

[2] as a matter of fact, the genesis of this particular problem

[3] with pension loans began with his efforts to find a way of

[4] repaying his Maryland National Bank. It seems to me that

[5] the course of business dealings would set up a basis for

[6] this document to come in.

[7] **THE COURT:** Let me reserve for a moment. Go ahead

[8] and finish what you are doing. Let me see if we are going

[9] to get to these questions that are anticipated.

[10] **MS. WHELIHAN:** All right.

[11] **MS. TRUHE:** Okay.

[12] **BY MR. TAYLOR:**

[13] **Q:** Let me show you another document, Mr. Shofer,

[14] which has been marked as Plaintiff's Exhibit 29, that is

[15] number 55. First of all, can you identify the letter from

[16] the standpoint of to whom it is addressed, the date of it,

[17] and who signed it?

[18] **A:** It's a letter dated June 14th, 1989. It's signed

[19] by Tim Krause, and -

[20] **Q:** Who is Tim Krause?

[21] **A:** Tim Krause is a loan officer at Maryland National.

[22] **Q:** Do you know Tim Krause?

[23] **A:** Yes.

[24] **Q:** How long prior to 1989 did you know Tim Krause?

[25] **A:** I think he was my loan officer, or one of my loan

[1] officers. He and Dan Hernandez were my two loan officers,
[2] Dan being his supervisor. I think the period of time that
[3] they were my loan officers would've been from about '87 or 8
[4] to this period of time. It seems to me like it covered a
[5] period of two or three years that they were my loan
[6] officers.

[7] **Q:** The letter which has been marked as Plaintiff's
[8] Exhibit 28, written a year earlier, which you have testified
[9] was a letter turning down a \$100,000 loan application -

[10] **A:** I have a clarification comment on that, if you
[11] wish me to say it.

[12] **Q:** Well, let me just ask you this. Apparently, that
[13] turndown letter in 1988 did not end your business
[14] relationship or your personal relationship with Maryland
[15] National Bank, is that correct?

[16] **A:** Correct.

[17] **Q:** What was the status, or how was the status,
[18] between you and Maryland National Bank different in 1989
[19] than in 1988? What had happened in that one-year time
[20] period?

[21] **A:** Well, I have to go back to that '88 letter to
[22] clarify it because I've heard discussion about the
[23] unclarity of that letter, and I can add to the clarity,
[24] if the Court's interested.

[25] **Q:** Well, what further explanation do you want to give

[1] with respect to the 1988 letter?

[2] **A:** When we filed amended returns in late '87, it
[3] resulted in a collection procedure starting in the calendar
[4] year '88. And the collection procedure got more and more
[5] heated where they wanted that letter, where they wanted that
[6] money, and they were sending notices that they were going to
[7] start attaching or filing liens. By that period in '88
[8] around the time that letter was written, the IRS was
[9] contacting me personally and wanted money, and I wanted a
[10] payment plan. And they said that one of the procedures
[11] before they could have a payment plan -

[12] **MS. WHELIHAN:** Your Honor -

[13] **THE WITNESS:** - was they needed an analysis -

[14] **MS. WHELIHAN:** Could I object, please?

[15] **THE WITNESS:** - of my personal -

[16] **BY MR. TAYLOR:**

[17] **Q:** Wait a minute, there is an objection.

[18] **MS. WHELIHAN:** Mr. Shofer is now testifying to
[19] hearsay conversations he has had with the IRS that have
[20] never been substantiated by any documents supplied to us
[21] during any discovery period during the pendency of this
[22] case. In addition, his answer well exceeds the scope of the
[23] question that -

[24] **THE COURT:** Why do we not do this? Let us go back
[25] and let us ask specific questions of the witness.

BY MR. TAYLOR:

[1] **Q:** All right. Well, Mr. Shofer, you have already
[2] testified that you still had an ongoing relationship with
[3] Maryland National Bank -

[4] **A:** Yes.

[5] **Q:** - correct? The 1989 letter, Exhibit 29 which
[6] you have in your hand -

[7] **A:** Yes.

[8] **Q:** - can you recount the circumstances as to why
[9] that letter was written or the nature of the business that
[10] was under consideration at that time?

[11] **A:** Yes.

[12] **MS. TRUHE:** Objection, Your Honor.

[13] **MS. WHELIHAN:** Objection; leading, Your Honor. In
[14] addition, not clearly related to what we are trying.

[15] **THE COURT:** Do you want to try again?

[16] **BY MR. TAYLOR:**

[17] **Q:** What, if anything, were you doing with Maryland
[18] National Bank in 1989?

[19] **MS. WHELIHAN:** Objection; irrelevant to taxes,
[20] interest, penalties, professional fees, and the issues in
[21] the case that we are trying.

[22] **THE COURT:** I will overrule it. You may answer.

[23] **THE WITNESS:** In the springtime of 1989, Maryland
[24] National desired to assist me in expanding my line of
[25]

[1] credit. They were going to give me another half a million
[2] dollars to expand my business operations. When I say me:
[3] my company. And we started into producing the materials,
[4] that they had a menu of materials they wanted because they
[5] were now going a half a million dollars higher in their line
[6] of credit with me than they ever did before.

[7] And they requested all my financial information as
[8] part of the package and that certain things be put in place.
[9] I said to them well, this is going to take a few months to
[10] put together and it's springtime; I really need money for my
[11] business. So they said okay, you can go and overdraw on
[12] your account and we'll honor those overdrafts so that you
[13] can have money to buy cars and finance those cars while
[14] we're doing this loan negotiation.

[15] **BY MR. TAYLOR:**

[16] **Q:** How much were you applying for? What was the
[17] amount of the loan?

[18] **A:** I was applying for another half a million dollars.
[19] That was the extension that was going to be given to me. So
[20] I would've gone from about \$1.1 million to \$1.6 million. In
[21] total entities between the pension and Crown and of myself
[22] personally was involved, that was the total to the Dick
[23] Shofer group.

[24] **Q:** Had any changes occurred in your personal or
[25] business financial situation in 1989 as compared to 1988

[1] when you were turned down for a \$100,000 loan?
[2] **MS. TRUHE:** Objection, Your Honor. I think this,
[3] again, is getting into damages not in this case. Subsumed
[4] within that question is an alternative, a multiple choice:
[5] you or your business. The business is not a party in this
[6] case. If it sustained any damage, then Mr. Shofer cannot
[7] recover it.

[8] **THE COURT:** Well, let us again break the question
[9] down.

[10] **MS. TRUHE:** Okay.

[11] **BY MR. TAYLOR:**

[12] **Q:** Let us approach it from you personally, Mr.
[13] Shofer. You have a letter in 1988 from the same bank
[14] turning you down for a \$100,000. In 1989, you had testified
[15] that you had a loan application pending for one-half a
[16] million dollars.

[17] **A:** Correct.

[18] **Q:** What was the difference in your financial
[19] situation in 1989 as compared to 1988?

[20] **A:** The bank's review of my whole experience with them
[21] and the operation was that they wanted me to, they were
[22] happy to see me expand and happy to aid me in that endeavor.
[23] So we were in that loan preparation stage, and they were so
[24] sure that they were going to lend me the money, they said
[25] you can go overdraft while we're preparing the documents and

[1] finalizing it. And they allowed me to overdraft up to, I
[2] think I have documentation showing over \$150,000 over a
[3] period of about three months from March to June.

[4] **Q:** In 1989 what, if anything, had the Internal
[5] Revenue Service done with respect to collecting the
[6] additional taxes generated by the filing of your amended
[7] 1984 and 1985 tax returns?

[8] **A:** At this point in 1989, although I was being
[9] audited by the IRS, that's a separate issue, we were in an
[10] agreement that I would be paying \$500 a month on the
[11] hundred-and-some-thousand dollar tax bill. That agreement
[12] was entered into with the IRS in the fall of '88 after I
[13] got turned down for my cash request with Maryland National.
[14] That was the letter of '88. I got turned down. The IRS
[15] says okay, you can't get the money; we'll take \$500 a month
[16] until the Hack matter is settled.

[17] **Q:** Did you in fact get your half-million-dollar loan
[18] from Maryland National Bank?

[19] **A:** No.

[20] **Q:** Did you continue your business relationship with
[21] Maryland National Bank after the 1989 letter was written?

[22] **A:** Well, our business relationship continued, but
[23] they wanted out of it. It - it continued by necessity
[24] because they couldn't get out of it 'cause I couldn't pay
[25] them off.

[1] **Q:** Since 1989, have you personally borrowed any money
[2] from Maryland National Bank?

[3] **A:** No.

[4] **Q:** Since 1989 -

[5] **A:** Excuse me, with their credit card division.
[6] That's it.

[7] **Q:** Since 1989, has your business, Catalina
[8] Enterprises, Inc., borrowed any money from Maryland National
[9] Bank?

[10] **A:** No.

[11] **MS. TRUHE:** Objection.

[12] **THE COURT:** Overruled.

[13] **THE WITNESS:** No.

[14] **MR. TAYLOR:** All right. Your Honor, I would like
[15] to offer Plaintiff's 29 into the record.

[16] **THE COURT:** I am going to admit 28 and 29. I
[17] understand the objection of Counsel with respect to nature
[18] of damages, and I think I clearly understand what damages
[19] are allowable in this case. So I will permit them.

[20] (Plaintiff's Exhibit Nos. 28, Krause
[21] 10/11/88 letter to Shofer, and 29,
[22] Krause 6/14/89 letter to Shofer,
[23] previously marked for identification,
[24] were received in evidence.)

[25] (Plaintiff's Exhibit No. 30, chart of

[1] fees and billings, was marked for
[2] identification.)

[3] **THE COURT:** Are you almost done, Mr. Taylor?

[4] **MR. TAYLOR:** Your Honor, I really had just one
[5] exhibit I wanted to question Mr. Shofer about.

[6] **THE COURT:** I am not rushing you, but if you are
[7] going to be a while, we will just take it up again later.

[8] **MR. TAYLOR:** Well, I would be happy to break and
[9] then just come back to this. That would be fine, Your
[10] Honor.

[11] **THE COURT:** Okay well, why do we not take the
[12] lunch recess then? We will come back at 2:00 o'clock and
[13] take up where we were.

[14] **MR. TAYLOR:** May we leave our materials here, Your
[15] Honor?

[16] **THE COURT:** You may. The courtroom will be
[17] locked.

[18] **MR. TAYLOR:** Thank you.

[19] **MS. WHELIHAN:** Now, we have a few more things that
[20] we need to bring back from our various vehicles, which we
[21] can do right at the 2:00 o'clock.

[22] **THE COURT:** Deb, when will you be back in the
[23] courtroom?

[24] **THE CLERK:** Whatever time you want me here.

[25] **THE COURT:** How much time -

[1] (At 12:32 p.m. a luncheon recess was taken.)
 [2] **THE COURT:** Okay, Mr. Shofer, will you resume the
 [3] stand, please?
 [4] (The witness resumed the stand.)
 [5] **MR. TAYLOR:** Thank you, Your Honor.
 [6] **BY MR. TAYLOR:**
 [7] **Q:** Mr. Shofer, just before we broke, I had asked to
 [8] have this document marked as Plaintiff's Exhibit 30 for
 [9] identification purposes. I wanted you to look at the
 [10] exhibit and identify it for the record, if you would,
 [11] please.
 [12] **A:** Yes.
 [13] **Q:** What is the exhibit?
 [14] **A:** The exhibit is a chart and an explanation for a
 [15] summary of various expenses incurred in the undoing of the
 [16] Stuart Hack, or the discussions around the accounting for
 [17] the Stuart Hack loans, accounting work done by Greybush
 [18] Newman, talks with the Labor Department and IRS done by
 [19] Nicholas Giampietro, a small amount of input from Thomas
 [20] Bornhorst. Various matters relating to the Stuart Hack
 [21] loans directly as opposed to just, and in some cases, it's
 [22] estimated amounts 'cause it's very difficult to extract and
 [23] separate a portion of a bill or a portion of an hour that
 [24] was spent discussing six different matters when Stuart Hack
 [25] was one of the matters and other matters were discussed.

[1] **Q:** Who prepared Exhibit 30?
 [2] **A:** Essentially, I did with the assistance of Theodore
 [3] Rosenberg and Carl Auck.
 [4] **Q:** From what sources did you draw the information
 [5] that appears in Exhibit 30?
 [6] **A:** In some cases, there are specific invoices
 [7] relating to the subject matter in the Stuart Hack loans. So
 [8] there's some instances where there's specific data. In some
 [9] cases, I had to make assumptions based on the fact that the
 [10] Stuart Hack matters were mixed up with other matters. And
 [11] in those cases, I took what I thought would be reasonably
 [12] conservative percentages. For instance, just as an example,
 [13] I show Carl Auck. Carl Auck is an internal accountant that
 [14] works for our company, and as well as having other clients.
 [15] And I show for him that the percentage of Carl
 [16] Auck, 10 percent. In other words, I show for him an expense
 [17] of 10 percent of what we pay Carl Auck generally of his
 [18] general annual income was related to the Stuart Hack loan
 [19] matters in various forms. Sometimes, it's gathering data
 [20] for people. Sometimes, it's doing calculations. Sometimes,
 [21] it's talking with the Labor Department. But I pegged it at
 [22] 10 percent, which means that 90 percent of what he did for
 [23] me had nothing to do with Stuart Hack. And I thought 10
 [24] percent was as conservative as I could be.
 [25] **MS. TRUHE:** Your Honor, before we go much further

[1] with this, the problem I have with this document is it is
 [2] self-styled: "professional and other expenses related to
 [3] determining and correcting Hack-caused prohibited
 [4] transactions and tax liabilities for periods from November
 [5] 1986 through June 1997." On its face, these professional
 [6] fees related, at least in part, to prohibited transactions
 [7] which are excluded as a damage from the case. So these
 [8] related to that should also be excluded as well. And there
 [9] is nothing that I can see on this exhibit which
 [10] differentiates the prohibited transactions from the tax
 [11] liabilities.
 [12] **THE COURT:** Well, I will allow the witness to
 [13] testify about this. I am going to allow you to cross-
 [14] examine him about that. We will see where we are at that
 [15] point.
 [16] **MR. TAYLOR:** Yes, Your Honor, I think just to
 [17] expedite this, and I know everyone wants to expedite it, I
 [18] think the document, as a tool of expedition, is useful. My
 [19] proposal was to ask Mr. Shofer to comment with respect to
 [20] specific work done by individuals who are listed on the
 [21] chart as it relates to the particular problem which is the
 [22] subject of this lawsuit. There are, in some cases, billing
 [23] and invoices which would correspond to that work, and
 [24] several of the individuals who have performed services will
 [25] testify during the course of the trial. It is the

[1] Plaintiff's intention to offer those invoices at the time
 [2] the professionals -
 [3] **THE COURT:** I mean, if there is specific
 [4] information that you can only get from Mr. Shofer that you
 [5] want to have presented in your case, you certainly can do
 [6] that. I think what is going to be helpful to the Court at
 [7] the end of this trial is going to be the closing arguments
 [8] and my ability to go over testimony in evidence with Counsel
 [9] at that time so that we can clarify and focus on issues.
 [10] **MR. TAYLOR:** Well perhaps, with that in mind, Your
 [11] Honor, I would like to just question Mr. Shofer with respect
 [12] to the individuals that are listed here. We may not offer
 [13] this exhibit at this time, but maybe tie it in with other
 [14] individuals who will testify.
 [15] **THE COURT:** Fine. It is your case, you can.
 [16] **MR. TAYLOR:** Thank you.
 [17] **BY MR. TAYLOR:**
 [18] **Q:** Mr. Shofer, with respect to the summary on
 [19] Exhibit 30, which is the first page with the chart on it,
 [20] you have already identified Mr. Auck and indicated the work
 [21] that he has done for you internally. You have an entry
 [22] "Blom Younquist," which is the second entry. Could you
 [23] identify who they are and what they did for you in
 [24] connection with this matter?
 [25] **A:** Yes. There's only one entry on Blom Younquist,

[1] and it's \$2,000. And that entry is there because in 1989
[2] they did one job for me and I ballparked it at \$2,000. It's
[3] obviously a rounded number. In the springtime of 1989, or
[4] in May of 1989, suddenly Greybush Newman stopped doing work
[5] for Crown Motors and said that they needed an agreement -

[6] **MS. WHELIHAN:** Objection, Your Honor. I mean,
[7] this has nothing to do with Mr. -

[8] **THE WITNESS:** This has something important to -

[9] **THE COURT:** Wait a minute. Wait a minute.

[10] **MR. TAYLOR:** Wait a minute, there is an objection.

[11] **MS. WHELIHAN:** Well, Mr. Shofer, I would like to
[12] talk to the Judge first. This has nothing to do with Mr.
[13] Shofer's case against Mr. Hack. If we are going to actually
[14] shorten up the trial, I do not think we need to go into what
[15] Mr. Shofer's unpled, unclaimed (inaudible).

[16] **THE COURT:** I am aware that Blom Younquist
[17] represented the Plaintiff in the appeal. Is there something
[18] additional that you want to bring to the Court's attention?

[19] **MR. TAYLOR:** Well, I would simply proffer that in
[20] order to complete the accounting work which Mr. Shofer had
[21] requested Greybush Newman to do and this accounting work was
[22] related directly to the problems associated with the loans
[23] because it occurred at a time when they were working on tax
[24] returns and other matters, that the loans had an impact on.
[25] I think what Mr. Shofer's testimony would be is that he

[1] incurred a \$2,000 fee in connection with having an agreement
[2] prepared that would enable Greybush Newman, his accountants,
[3] to proceed with that work. At least, it would be our
[4] position that this is an expense that is directly related
[5] to -

[6] **THE COURT:** How do you intend to recover that from
[7] Stuart Hack? What responsibility does the Defendant have if
[8] Greybush Newman refused to perform work?

[9] **MR. TAYLOR:** Well, the agreement was occasioned by
[10] Greybush Newman refusing to proceed with the work they were
[11] doing because Stuart Hack sued them.

[12] **MS. WHELIHAN:** Which clearly makes the fee claimed
[13] related to Mr. Shofer's counsel fees in connection with this
[14] case, which is not recoverable.

[15] **THE COURT:** It seems a very attenuated to me, Mr.
[16] Taylor. I would focus more on other matters.

[17] **MR. TAYLOR:** All right.

[18] **BY MR. TAYLOR:**

[19] **Q:** Mr. Shofer, you have an entry with regard to
[20] Thomas Bornhorst. Can you identify him and the work that he
[21] did for you?

[22] **A:** Yes. He was the attorney of record in this case
[23] for more than two years. And in 1994, he did a particular
[24] kind of work, as opposed to all of the other work and
[25] litigation that he did to me, he was a very important part.

[1] He went to the IRS, about to come down on me rather hard at
[2] that time, a proceeding in some steps towards collection.
[3] And he went to Washington and had a meeting with the Labor
[4] Department. And as a result of the meeting with the Labor
[5] Department, received information from them that would help
[6] him intercede with the IRS and have them halt what they were
[7] doing. And that was all in connection with the Stuart Hack
[8] loans.

[9] **Q:** This was in connection, then, with the IRS
[10] collection efforts?

[11] **A:** Well, not only the collection efforts, but the
[12] resolution of the ongoing cases that they had with me that
[13] was active. And there subsequently were meetings that Mr.
[14] Bornhorst attended along with Nick Giampietro, myself, and
[15] others from the IRS and Labor Department. So Mr. Bornhorst
[16] was instrumental in changing the direction that they were
[17] heading in at that time that could've been disastrous to me.
[18] And he was instrumental in changing the direction into a
[19] direction that finally succeeded in bringing about a
[20] resolution of this issue.

[21] And what I did, I mean, I paid Mr. Bornhorst
[22] probably \$50,000 over those two years. And I only segmented
[23] \$2,000, and personally, too, with my checks, and I only
[24] segmented \$2,000 of that, a very small amount and said this
[25] is related to the time that he went to Washington and turned

[1] around the direction of the Labor Department and the IRS
[2] related to the Stuart Hack incident. It had nothing to do
[3] with the other \$48,000 or the litigation.

[4] **Q:** You also listed Nicholas Giampietro on your chart.
[5] You have previously identified Mr. Giampietro as a pension
[6] attorney. What did Mr. Giampietro do for you in the years
[7] that you have reflected on your chart?

[8] **A:** Well, these numbers that come from Mr. Giampietro,
[9] a lot of it comes from Mr. Giampietro himself. Mr.
[10] Giampietro took his hourly billings over the years. And for
[11] purposes of defining what portion of that was related to the
[12] Stuart Hack loan issues, he segregated it. He was
[13] instrumental in most of the meetings. I mean, he was there
[14] before Tom Bornhorst, and -

[15] **Q:** Did those numbers -

[16] **THE COURT:** Excuse me, Mr. Taylor. I am sorry, I
[17] apologize for interrupting, but I have to take a quick call
[18] from another judge. I will only be a few minutes, I
[19] believe, and I will be right back.

[20] (Brief recess.)

[21] **THE COURT:** I am sorry.

[22] **MR. TAYLOR:** Thank you, Your Honor.

[23] **BY MR. TAYLOR:**

[24] **Q:** Mr. Shofer, in order to maybe expedite this
[25] somewhat, let me just ask you with regard to Mr. Giampietro,

[1] your testimony is that the numbers came from invoices or
[2] statements that Mr. Giampietro issued to you?
[3] **A:** Well, he himself went through those statements and
[4] checked off those items that were related to the Stuart Hack
[5] loan issue. And I took the sum total of those items that he
[6] had checked off and just divided it into, I think, five
[7] equal yearly periods - one, two, three, four, five; maybe
[8] six equal yearly periods. I didn't take each yearly period
[9] and show it separately. But there are, for each of these
[10] numbers and for the whole amount of these numbers, there is
[11] a number of detailed charts from Mr. Giampietro's own
[12] records that he himself went through to pick out the items
[13] that were related to the Stuart Hack loan issue and that
[14] would be recoverable in this. And he is an attorney, so he
[15] himself could differentiate between, better than I could, on
[16] what was appropriate and what wasn't appropriate. But -
[17] **Q:** You -
[18] **A:** The numbers later dropped as the issue whittled
[19] down in '93. And it got intense again in '94 because that
[20] was the settlement year and he spent much more time on it.
[21] And then it dropped much more substantially since then.
[22] **Q:** You have listed expenses that you have incurred
[23] with Greybush Newman, your accountants. Do those expenses
[24] reflect the accounting work that you have already testified
[25] to?

[1] **A:** With Greybush Newman, the numbers were produced by
[2] them. I'm using numbers that they produced and handed me in
[3] charts on for most or all of it.
[4] **Q:** All right.
[5] **A:** In other words, they themselves made charts.
[6] **Q:** You have an entry on your chart of \$1,435 to
[7] Stuart Hack. What does that represent?
[8] **A:** Well, it represents three items: the research
[9] that he did is the first item, the \$40. I think it
[10] obviously should be given back to me. The \$300-and-some for
[11] the discussions that he had on the loans and the erroneous
[12] letter that he allegedly wrote.
[13] **Q:** You also -
[14] **A:** And the major part of it, the other additional, I
[15] think it's \$1,100 or whatever it is, is followup work that
[16] he did in late '86 when he was doing research and writing a
[17] report to Greybush Newman that he charged me for when they
[18] themselves, Greybush Newman and he, were discussing the loan
[19] problem. And I think that was work done by, for the most
[20] part, Judith Reed. And that turned out to be erroneous.
[21] **Q:** You also have an entry there for Edward Kabala, who
[22] is listed as an expert witness in this case. Did Mr. Kabala
[23] perform services for you that were not related to his
[24] testimony?
[25] **A:** Well, Mr. Kabala's total bills to me were in

[1] excess of \$20,000. And these small amounts, Mr. Kabala,
[2] this is Edward Kabala, 20 percent of Mr. Kabala's total
[3] billing for that period of time. "This is a conservative
[4] estimated amount for the portion of his services related to
[5] providing information to Blom Younquist on the legal and tax
[6] aspects of undoing the prohibited transaction and excludes
[7] the far greater portion of costs related to Mr. Kabala's use
[8] by Blom Younquist as an expert witness."
[9] In other words, Mr. Kabala provided them with
[10] certain technical information that was used in containment
[11] of the exposure that I had to the IRS and Labor Department
[12] over the Stuart Hack matter. So they provided Blom
[13] Younquist with technical assistance in containing the
[14] severity of the situation.
[15] **Q:** You also listed an entry there to Alan Schwaite
[16] for two years, 1991 and 1992. What did Mr. Schwaite do for
[17] you?
[18] **A:** In 1991 and '2, part of the assessment directly
[19] stemming from the Stuart Hack loan issue was that there was
[20] an additional category of interest not paid timely that was
[21] to be converted by the IRS as additional income during the
[22] audit years. And we protested the validity of their
[23] calculations, and it became a contested issue, and Mr.
[24] Schwaite was representing me in that contested issue. The
[25] reason the amounts are so low is because somehow that's all

[1] the billing he did.
[2] But somehow, that issue got put into an appellate
[3] or some kind of a level where I don't even know if it was
[4] ever handled or whether it was assessed to me. There were
[5] so many things going on at the time that I don't ever know
[6] whether the IRS just assessed it to me or what. I don't
[7] know what happened.
[8] **Q:** You also have an entry there for miscellaneous
[9] expenses. What is that?
[10] **A:** Well, I've taken five categories of expenses and
[11] taken \$100 a year for each. And most of this came out of my
[12] own pocket. There's no, of course, records on it. I took
[13] \$100 a year for copying costs; \$100 a year for heavy
[14] postage; \$100 a year for parking fees my golly, we've got
[15] \$30 in parking fees today in one appearance, and we'll have,
[16] but this is \$100 a year, I took total; \$100 a year telephone
[17] expense; and \$100 transportation, including gasoline. So I
[18] am taking \$500 a year as a miscellaneous expense per year
[19] without having, there's no way I can, that's a ballpark, and
[20] it's a reasonable ballpark of extraordinary amount of
[21] expenses that there's no other way to do it than ballpark
[22] what's reasonable. And I think it's rather conservative.
[23] **Q:** All right, thank you.
[24] **MR. TAYLOR:** Your Honor, I am not going to offer
[25] Plaintiff's 30 at this time, but I would like to reserve

[1] that.

[2] **THE COURT:** Okay.

[3] (Plaintiff's Exhibit No. 31,

[4] documentation, was marked for

[5] identification.)

[6] **MR. TAYLOR:** This is 75.

[7] **BY MR. TAYLOR:**

[8] **Q:** Mr. Shofer, would you look at what has been

[9] identified as Plaintiff's Exhibit 31?

[10] **A:** Yes.

[11] **Q:** Could you identify that for the record? What is
[12] it?

[13] **A:** It's documentation that I put together myself
[14] because I understand what's been going on. I've been the
[15] participant for 10 years. This is a document that is a
[16] history of my attempts to mitigate my exposure for the tax
[17] liens by trying to get money to pay off the tax liens; the
[18] efforts that I've made to do it, the history of the
[19] failures, rather than successes; and documentation
[20] supporting those failures, with names and specific times,
[21] where I've tried to get money to pay the tax liens and to
[22] contain the damages. It also has to do with my present and
[23] the costs of money. In other words, the last time that I
[24] got money from my bank other than a credit card company was
[25] in 1989 before Maryland National turned me down. After

[1] Maryland National turned me down, and all periods of time
[2] after that, and until just a few months ago, the only money
[3] I was able to get was credit card money at credit card
[4] rates. I tried there's a list here of perhaps as many as 40
[5] different banks and lending institutions of all kinds:
[6] professional, commercial lending institutions, high-rate
[7] institutions. And it illustrates my continued efforts to
[8] mitigate this problem and try and resolve it, and documents
[9] the failure that I had. There is in here also excerpts from
[10] a deposition of Dan Hernandez, the Maryland National loan
[11] officer, who himself, in his words, relates what happened in
[12] that 1989 meeting, or that incident.

[13] **Q:** All right.

[14] **MR. TAYLOR:** Your Honor, I would offer
[15] Plaintiff's 31 into the record.

[16] **MS. WHELIHAN:** Objection, Your Honor. First of
[17] all, it was not given to us until after the discovery
[18] deadline, number one. And even if that were not the problem
[19] with it, it is a compilation of Mr. Shofer's self-serving
[20] characterizations of his various claims and damages. It has
[21] inadmissible portions of charts. It has, for example, a
[22] chart of loans that, apparently, Mr. Shofer applied for that
[23] he could not get. But we have never been given any
[24] discovery about that, and it does not make any difference
[25] because it is not in this case anyway. Then, of course,

[1] there is the excerpt from Mr. Hernandez' deposition,
[2] somebody who is not even going to be a witness in this case.

[3] So for all of those reasons, I do not think it comes in.

[4] **THE COURT:** Do you have any argument that will

[5] salvage this exhibit?

[6] **MR. TAYLOR:** Well, I recognize that there are some
[7] documents contained in it that are technically inadmissible,
[8] Your Honor. I think the document, taken as a whole, is
[9] simply offered for the purposes of showing what efforts Mr.
[10] Shofer made to try to find sources of credit, which will be
[11] an issue, I think, in this case. If the Court sustains the
[12] objection on the arguments that have been made, many of
[13] those documents, I think, can be offered in other forms as
[14] the case proceeds. I think Mr. Shofer certainly has the
[15] right to rebut any argument or evidence that may be offered
[16] to show that he did not mitigate his damages or as to his
[17] efforts to find credit, which is essentially what this
[18] document does.

[19] **THE COURT:** I am going to sustain the objection.
[20] But I agree with you that he is entitled to try to establish
[21] his mitigation efforts.

[22] **MR. TAYLOR:** Thank you, Your Honor. I have no
[23] other questions.

[24] **THE COURT:** Cross-examination?

[25] **MS. TRUHE:** Yes, Your Honor. To assist the Court

[1] in following along with my cross-examination, I would like
[2] to hand up those exhibits that I will be referring to,
[3] copies of them.

[4] **THE COURT:** Okay.

[5] **CROSS-EXAMINATION**
[6] **BY MS. TRUHE:**

[7] **Q:** Mr. Shofer, have you attended any college?

[8] **A:** Yes.

[9] **Q:** How much?

[10] **A:** (No audible response.)

[11] **Q:** How much?

[12] **A:** How much what?

[13] **Q:** College? How long did you attend college?

[14] **A:** Oh, how much, how long?

[15] **Q:** Yes.

[16] **A:** Just short of two years.

[17] **Q:** After you left college, you went into the auto
[18] business and started your own company in the mid-1950's, is
[19] that not correct?

[20] **A:** No.

[21] **Q:** What is not correct?

[22] **A:** That after I went to college, I started the auto
[23] business.

[24] **Q:** What did you do in between?

[25] **A:** Well, I started the auto business before I quit

[1] college.

[2] **Q:** I see, but you have been in the auto business

[3] since the mid-1950's?

[4] **A:** A little before the mid-1950's.

[5] **Q:** All right. Now you testified earlier that you

[6] first met Mr. Hack in the early 1970's. That was at the

[7] recommendation of your accountants at Greybush Newman,

[8] correct?

[9] **A:** Yes.

[10] **Q:** Now throughout the time period at issue in this

[11] case, is it not true that you personally were a client of

[12] the Baltimore accounting firm of Greybush Newman?

[13] **A:** Yes.

[14] **Q:** And that the accountants there prepared your

[15] personal as well as your corporate income tax returns?

[16] **A:** Yes.

[17] **Q:** They also prepared year-end financial statements

[18] for Crown Motors?

[19] **A:** Yes.

[20] **Q:** They also reviewed and did work on the Catalina

[21] Enterprises pension ledger each year?

[22] **A:** Yes.

[23] **Q:** They also prepared the 990-T, which is a form

[24] filed with the IRS whenever a pension receives taxable

[25] income?

[1] **A:** Yes.

[2] **Q:** They acted as your personal tax advisor, did they

[3] not?

[4] **A:** Yes.

[5] **Q:** In fact, you were aware that Greybush Newman had a

[6] separate tax department headed up by Phil Matz, correct?

[7] **A:** Yes.

[8] **Q:** Focusing on the year at issue, 1984 in particular,

[9] it was your practice to consult with Mr. Matz whenever you

[10] had a personal tax question, is that not correct?

[11] **A:** Yes.

[12] **Q:** In fact, although you typically asked tax

[13] questions of the accountant assigned -

[14] **A:** Excuse me, I'd like to qualify that. It'd depend

[15] on the nature of the tax question I had. I didn't need Mr.

[16] Matz for every tax question. If something was so unique and

[17] major that sometimes I would go to Ken Larash and he would

[18] send me to Mr. Matz.

[19] **Q:** Then sometimes, you would ask for Mr. Matz on your

[20] own, is that not correct -

[21] **A:** I don't -

[22] **Q:** - when you thought it was a major question?

[23] **A:** - know. There were probably a couple of times,

[24] two or three, during my relationship with him that I asked

[25] for him.

[1] **Q:** All right, and that was because you had great

[2] faith in Phil Matz when it came to tax matters, did you not?

[3] **A:** Yes.

[4] **Q:** But you never consulted with Phil Matz or anyone

[5] else at Greybush in August of 1984 with regard to your idea

[6] of borrowing money from your pension, did you?

[7] **A:** No.

[8] **Q:** You had personally retained the accounting firm of

[9] Greybush Newman to, as I quote from your deposition, "keep

[10] me straight with the government." Is that not correct?

[11] **A:** It's one of the reasons.

[12] **Q:** In fact, your trust in Greybush Newman was so

[13] great that each year after Ken Larash came to your office to

[14] collect all the information he needed to prepare your

[15] personal as well as corporate tax returns, you usually did

[16] not even review the return before signing and mailing it

[17] out, did you?

[18] **A:** That's an accurate statement.

[19] **Q:** Now, when Catalina Enterprises retained Mr. Hack's

[20] firm in the early 1970's, the business already had a pension

[21] plan, correct?

[22] **A:** Yes.

[23] **Q:** Catalina Enterprises, trading as Crown Motors, is

[24] a used car dealership owned and operated by you, correct?

[25] **A:** Yes.

[1] **Q:** You are the president of Crown Motors?

[2] **A:** Yes.

[3] **Q:** Now, directing your attention to Defendant's

[4] Exhibit Number 1, this is a fee agreement for Catalina

[5] Enterprises, Inc. pension plan dated December 22, 1983. Do

[6] you see that?

[7] **A:** Yes.

[8] **Q:** Who is the fee agreement for?

[9] **MR. TAYLOR:** I would object, Your Honor. I think

[10] the document speaks for itself.

[11] **THE COURT:** Well, is there some difference between

[12] having him give some detail on cross than on direct? I will

[13] overrule.

[14] **THE WITNESS:** Who was it for?

[15] **BY MS. TRUHE:**

[16] **Q:** Yes, who is it between? It is obviously between

[17] the Stuart Hack Company and whom?

[18] **A:** Well, it's addressed to Ms. Pam Summers, Catalina

[19] Enterprises.

[20] **Q:** What does it regarding?

[21] **A:** Fee arrangement for Catalina Enterprises, Inc.

[22] pension plan.

[23] **Q:** So the fee agreement is for Catalina Enterprises

[24] pension plan, correct?

[25] **A:** Correct.

[1] Q: Thank you.
 [2] MR. TAYLOR: Your Honor, I would move Defendant's
 [3] Exhibit Number 1 into evidence.
 [4] THE COURT: It is admitted.
 [5] (Defendant's Exhibit No. 1, Catalina fee
 [6] agreement with Hack, previously marked
 [7] for identification, was received in
 [8] evidence.)
 [9] BY MS. TRUHE:
 [10] Q: Mr. Shofer, is it not true that the client for
 [11] whom Mr. Hack's company was performing the pension services
 [12] was in fact Catalina Enterprises, and that you personally
 [13] were never a client of Mr. Hack's firm?
 [14] A: No.
 [15] Q: Do you have any evidence that you personally were
 [16] a client of Mr. Hack's firm?
 [17] A: Yes.
 [18] Q: What evidence is that?
 [19] A: I have case law, I'm sure.
 [20] Q: Anything else?
 [21] MR. TAYLOR: Well, Your Honor, let me belatedly
 [22] object to the question. I think it really calls for a legal
 [23] conclusion. I do not know whether the witness would
 [24] understand what the term evidence means, which is a term of
 [25] art.

[1] THE COURT: I would agree, although there are very
 [2] litigants before me with his level of experience in these
 [3] matters. Did you understand the question, Mr. Shofer?
 [4] THE WITNESS: Yes, I did. Much of the
 [5] correspondence that Mr. Hack sends to me, he sends to Dick
 [6] Shofer, personal and confidential, and signs it Stuart. Mr.
 [7] Hack has always led me to believe in his relationship with
 [8] me that he was working for me, and that he would set up any
 [9] plans that I needed to be constructed the way I wanted them
 [10] to be to provide me with the kind of result that I wanted.
 [11] He was not concerned, he never met my mechanics or my lot
 [12] men. He wasn't concerned with whether they got 3 percent of
 [13] their pay or 15 percent of their pay put into a pension.
 [14] He was concerned with what Dick Shofer wanted and
 [15] what Dick Shofer wanted to put into the plan and how much
 [16] Dick Shofer wanted to give them and keep for himself. This
 [17] was the service that he sold me. What he said was what I
 [18] can do for you is maximize what you want to shelter, and
 [19] then you can give to your people what you have to; we've got
 [20] laws set up, and I'm going to do it for you the way you want
 [21] me to do it for you. Of course, we're always going to bill
 [22] your plan because it's deductible that way.
 [23] We're going to set up your shelter, and it's going
 [24] to be deductible 'cause we're going to bill your company or
 [25] your plan, but you're the guy that we're interested in

[1] sheltering and everything that we do will be exactly the way
 [2] we can maximize it for you if that's what you wish. And
 [3] that was my understanding in my relationship with Mr. Hack
 [4] as to what he was doing.
 [5] BY MS. TRUHE:
 [6] Q: Even though the fee agreement runs to Catalina -
 [7] A: Of course, 'cause it's deductible that way.
 [8] Q: Oh, and referring to Defendant's Exhibit Number 2,
 [9] the invoices were also addressed to Catalina, correct?
 [10] A: I think that's business. I think that's the way
 [11] things get deductible, and it's generally done that way in
 [12] this country.
 [13] Q: Do you recognize Defendant's Exhibit Number 2?
 [14] A: Yes.
 [15] Q: It is an invoice from Stuart Hack's company to Pam
 [16] Summers at Catalina Enterprises, correct?
 [17] A: I probably never saw it before, yes.
 [18] Q: The bill is for, as it states on the bill,
 [19] Catalina Enterprises profit-sharing, special work. Correct?
 [20] A: Correct.
 [21] MS. TRUHE: Your Honor, I would move for the
 [22] admission into evidence of Defendant's Exhibit Number 2.
 [23] MS. WHELIHAN: No objection.
 [24] THE COURT: It is admitted.
 [25] (Defendant's Exhibit No. 2, Hack

[1] invoices to Catalina, previously marked
 [2] for identification, was received in
 [3] evidence.)
 [4] BY MS. TRUHE:
 [5] Q: Now, when Catalina Enterprises first retained Mr.
 [6] Hack's firm to perform certain pension services, you
 [7] personally had very little contact with Mr. Hack, is that
 [8] not correct?
 [9] A: Correct.
 [10] Q: In fact, you personally did not speak with Mr.
 [11] Hack more than about once a year, and sometimes not even
 [12] that. Is that not correct?
 [13] A: That's possibly correct; I can't recall.
 [14] Q: Well, that is what you told me in your deposition
 [15] in 1990.
 [16] A: Okay, then it may be correct.
 [17] Q: All right. But in 1982, your contact with Mr.
 [18] Hack increased because that is when you wanted to get the
 [19] pension involved in financing the company's receivables. So
 [20] you communicated with Mr. Hack about the legality of doing
 [21] that about 8 to 10 times, as you told me in your deposition?
 [22] A: Probably correct.
 [23] Q: All right. Even after this plan went into effect
 [24] in 1982, you periodically checked in with Mr. Hack, or at
 [25] least someone in his firm, to find out about the legality of

[1] continuing to use your pension to finance the company's
 [2] receivables?
 [3] **A:** For a very special reason.
 [4] **Q:** All right. But otherwise, your personal contact
 [5] with Mr. Hack was no more than about once a year. Is that
 [6] not correct?
 [7] **A:** Otherwise.
 [8] **Q:** In fact, during your entire relationship with Mr.
 [9] Hack, from the early 1970's until 1987, you had been to Mr.
 [10] Hack's office only about two to three times, correct?
 [11] **A:** Probably correct.
 [12] **Q:** Now, let's go back to review briefly the various
 [13] administrative services which Mr. Hack's firm performed each
 [14] year for Catalina Enterprises. These included determining
 [15] which employees were eligible to participate in the pension?
 [16] **A:** Repeat that again.
 [17] **Q:** Did part of the services which Mr. Hack's firm was
 [18] performing for Catalina include determining which employees
 [19] were eligible to participate in the pension that was set up?
 [20] **A:** Yes.
 [21] **Q:** Did Mr. Hack's firm also calculate the amount of
 [22] participant benefits?
 [23] **A:** Yes.
 [24] **Q:** Did Mr. Hack also issue annual participant
 [25] reports?

[1] **A:** Yes.
 [2] **Q:** Did he also prepare the 5500-C forms to be filed
 [3] with the IRS and the Department of Labor each year?
 [4] **A:** Yes.
 [5] **Q:** Now who was the trustee of the Catalina
 [6] Enterprises, Inc. pension plan?
 [7] **A:** I was.
 [8] **Q:** You were the sole trustee, correct?
 [9] **A:** For most of the period.
 [10] **Q:** As trustee, you would agree that under federal
 [11] law, you were considered a fiduciary with respect to the
 [12] pension, correct?
 [13] **MR. TAYLOR:** Well, I would object. I mean, I do
 [14] not know if the witness knows that or not. I mean, that -
 [15] **THE COURT:** Well, I think you have to ask the
 [16] witness whether he understands those terms.
 [17] **MS. TRUHE:** All right.
 [18] **BY MS. TRUHE:**
 [19] **Q:** Mr. Shofer, do you understand what is meant by the
 [20] term fiduciary?
 [21] **A:** For the most part.
 [22] **Q:** What is your understanding?
 [23] **A:** Well, my understanding is according to ERISA, and
 [24] probably generally beyond that: someone who has a
 [25] responsibility, a special degree of care and responsibility

[1] because they're handling someone else's assets or welfare.
 [2] **Q:** That would be you in this case with respect to the
 [3] Catalina Enterprises pension plan, correct?
 [4] **A:** Yes.
 [5] **Q:** Now, directing your attention to what has been
 [6] marked as Defendant's Exhibit Number 3, this is a letter
 [7] dated February 24, 1982, from, I believe, you to Mary
 [8] Grompert at Maryland National Bank, correct?
 [9] **A:** Yes.
 [10] **Q:** Can you tell us briefly what the gist of that
 [11] letter is all about?
 [12] **A:** You have to give me a moment to read this -
 [13] **Q:** Sure, take your time.
 [14] **A:** - or several moments.
 [15] (Pause.)
 [16] **THE WITNESS:** Well, the gist of the letter is
 [17] that, I got down to a paragraph, I'm looking for money and a
 [18] continued or expanded relationship with Maryland National.
 [19] And I say here that "since the inception of Catalina
 [20] Enterprises, Inc. pension trust and until this point, the
 [21] two entities, the pension trust and Crown Motors, have had
 [22] no transactions between themselves other than the annual
 [23] contribution made to the trust. It has long been the
 [24] assumption of the trust that there should be no money
 [25] traveling back and forth between these related parties.

[1] "However, it came to the attention of Crown Motors
 [2] last year that the government had made certain temporary
 [3] exceptions to this party-in-interest rule. More
 [4] specifically, the government has decided that for a trial
 [5] period and under certain very stringent arms-length rules a
 [6] pension trust would be allowed to finance the receivables of
 [7] a parent company's customers. However, even despite this
 [8] ruling, Crown Motors chose not to do such a thing because we
 [9] did not want to create any gray areas. Aside from that
 [10] reason, another reason was that the pension trust was
 [11] desiring to rent a vacant building and wanted to conserve
 [12] any cash available for broker commissions or improvements to
 [13] the building that might be necessary to tailor a deal for
 [14] any prospective tenant.
 [15] "Catalina still has reservations about party-in-
 [16] interest transactions. However, it now appears that if the
 [17] pension trust does not do something to support Crown Motors,
 [18] Crown Motors may become a very poor parent to the pension
 [19] trust. After all, the purpose of the pension trust is to
 [20] provide security for the employees of Crown Motors. But the
 [21] most insecure thing that can happen to the employees of
 [22] Crown Motors is to have Crown Motors deteriorate from a lack
 [23] of adequate working capital, but" -
 [24] **BY MS. TRUHE:**
 [25] **Q:** So would it be fair to say, Mr. Shofer, I do not

[1] mean to interrupt you, that this letter outlines your
 [2] proposal to the Maryland National Bank in 1982 to get the
 [3] pension involved in financing the company's receivables?
 [4] **A:** Yes.
 [5] **Q:** All right. Would you turn to page 3? I see the
 [6] headings on there: Tax Consequences to the Trust, and Tax
 [7] Consequences to Crown. Did you write those headings?
 [8] **A:** Yes, I wrote the whole letter.
 [9] **Q:** All right, and could you explain to us what the
 [10] tax consequences to the trust were and what the tax
 [11] consequences to Crown were as set forth in that letter?
 [12] **A:** "The trust understands that it would be subject to
 [13] income tax at corporate rates on net finance income derived
 [14] from the financing of accounts receivable of Crown. This is
 [15] one of the areas that the trust has sought to avoid, but it
 [16] becomes necessary at this time."
 [17] **Q:** And how about tax consequences to Crown? Do you
 [18] also set forth there the various tax consequences that will
 [19] result to Crown -
 [20] **A:** Yes.
 [21] **Q:** - as a result of this transaction?
 [22] **A:** Well, let's see what it says here. "There would,
 [23] however, become a period of time when Crown Motors must
 [24] again start financing some of its own receivables." This
 [25] letter is written in 1982, and in 1984 that's probably going

[1] along with why I wanted to start financing more in 1984.
 [2] "Crown Motors now", and to read the letter -
 [3] **Q:** No, I do not necessarily need you to read the
 [4] letter in its entirety at that (inaudible).
 [5] **A:** Well, let me look and see what the tax
 [6] consequences are, if there are any, here.
 [7] **Q:** That is fine. Tell us as best you can what you
 [8] meant to convey to Mr. Blumberg on that subject.
 [9] **A:** I'm trying to pick out the tax part of it. It
 [10] says: "Consequently, it is vital that Crown Motors maintain
 [11] an adequate level of accounts receivable itself so that
 [12] taxable earned income from the reduction of deferred income
 [13] does not become a major problem for the company." Okay,
 [14] then what was happening is that Crown Motors had built up a
 [15] great amount of deferred income, which means as long as it
 [16] finances accounts receivable, it does not have to pay taxes
 [17] on profits not yet collected.
 [18] But if it starts selling all of its paper to the
 [19] pension, then technically it doesn't have that deferred
 [20] income anymore. And when it becomes undeferred, it becomes
 [21] taxable as though it had collected the profits even though
 [22] there is still the exposure that the people might never pay.
 [23] So in this letter, I wanted the bank to realize that even
 [24] though the pension was getting involved in financing
 [25] accounts receivable, that there had to be a balance created

[1] so that Crown didn't get into a position where it had lost
 [2] so much deferred income that it created a big tax problem
 [3] for itself. That's -
 [4] **Q:** Mr. Shofer, did you feel like you had a pretty
 [5] good understanding of those issues when you wrote -
 [6] **A:** Absolutely.
 [7] **Q:** - that to Mr. Blumberg?
 [8] **A:** Absolutely.
 [9] **Q:** Now in August of 1984, you got the idea of
 [10] borrowing some money from your pension, correct?
 [11] **A:** Correct.
 [12] **Q:** At that time, you discussed this idea with your
 [13] company's loan officer at the Maryland National Bank, Glen
 [14] Wilson, correct?
 [15] **A:** I think after I talked to Stuart Hack first.
 [16] **Q:** Well, during this time period the bank had just
 [17] conducted its annual review of Crown's balance sheet to see
 [18] what kind of financing it would extend to Crown in the
 [19] coming year. Is that not correct?
 [20] **A:** That's what they normally do.
 [21] **Q:** All right, and the bank wanted to see some
 [22] improvement on that balance sheet, correct?
 [23] **A:** They were happy with the balance sheet for this
 [24] reason: they were already happy, and they were already
 [25] positive about continuing the relationship with me. And the

[1] reason was that when I showed the Maryland National my
 [2] balance sheets, I always said that there's three entities:
 [3] there's Richard Shofer, the pension, and Crown Motors. And
 [4] you really have to look at all three entities together to
 [5] see whether it's really an overall profitable business
 [6] because if you pull it apart and start looking at the
 [7] individual parts, one part might look like it's losing
 [8] money and another part might look like it's making too much
 [9] money. For instance, as I explained earlier today, the
 [10] pension made a half a million dollars in two years; on the
 [11] other side of it, Crown wasn't making anything, or losing
 [12] money, and that would've looked lopsided. But when you put
 [13] them together, you'd see that it's a profitable enterprise.
 [14] **Q:** Mr. Shofer, let's go to your deposition testimony
 [15] in 1990.
 [16] **MS. TRUHE:** Counsel, I am referring to Volume 1,
 [17] page 79.
 [18] **THE WITNESS:** What are we going to?
 [19] **MS. WHELIHAN:** Page 79 of your deposition
 [20] transcript dated February 2, 1990.
 [21] **BY MS. TRUHE:**
 [22] **Q:** I am reading from line 12. This is your answer.
 [23] "It was evident that in the couple of years that the pension
 [24] was doing financing for Crown, that Crown really hadn't made
 [25] any headway in its balance sheet. And this was because the

[1] whole finance charge was going to the pension. So the bank
[2] was concerned in wanting to see an improvement in Crown's
[3] balance sheet, and there were discussions with Glen Wilson
[4] about that issue." Do you recall that testimony?
[5] **A:** Okay, I follow it; it's right.
[6] **Q:** One of the reasons Crown was not doing so well
[7] was, in addition to the fact that the pension was now
[8] financing the company's receivables, Crown had also lent you
[9] some money to pay back Maryland National Bank on this stock
[10] deal you referred to earlier, correct?
[11] **A:** Right.
[12] **Q:** So now, the debt was on Crown's books instead of
[13] you personally, correct?
[14] **A:** Well, there was an offsetting debt that I owed
[15] Crown, but essentially Crown was in a more illiquid
[16] position.
[17] **Q:** Exactly, and the amount you owed Crown was, I
[18] believe, \$270,000?
[19] **A:** I thought it was more than that.
[20] **Q:** Well, with reference to the stock deal, in
[21] particular?
[22] **A:** The stock deal?
[23] **Q:** Yes.
[24] **A:** Yes, that might've been how much I borrowed from,
[25] that's how much Crown may've initially borrowed, but by now

[1] it had compounded quite a bit because of added interest.
[2] **Q:** Exactly, but the bank wanted Crown to pay back
[3] that debt so that it could make some progress on the balance
[4] sheet and owe less, correct?
[5] **A:** Well, they, yes.
[6] **Q:** One of the ways that you thought Crown could do
[7] that was if you paid that debt that you owed to Crown,
[8] correct?
[9] **A:** I thought, well, no, that's not correct because I
[10] had two choices. I didn't have to borrow the money from the
[11] pension at all. All I had to do was what I actually did do,
[12] and that's change the effective rate to 12 percent from 25
[13] percent. The pension was getting 25 percent interest on all
[14] the financing it was doing with no exposure. Crown absorbed
[15] all of the losses and exposure and collection expense.
[16] All I had to do was modify the agreement to allow
[17] the pension to get 12 percent, which would've still been
[18] handsome. And it would've been more equitable for Crown
[19] because they would've had a buffer and a reserve on finance
[20] charges because they were doing the collection and taking
[21] care of the risk. All I had to do was make that arrangement
[22] rather than borrow money from the pension, and I could've
[23] had the same effect. I didn't have to borrow money from the
[24] pension at all. The exact, same effect could've been
[25] achieved by just changing the rate to 12 percent and not

[1] borrowing a nickel from the pension.
[2] **Q:** But did you not tell Mr. Wilson, the loan officer
[3] at the bank, that you were planning to borrow about \$250,000
[4] from your pension to repay Crown so it could pay its debt to
[5] the bank?
[6] **A:** No.
[7] **MS. TRUHE:** Well, Counsel, I am referring now to
[8] Volume 1 of Mr. Shofer's deposition testimony.
[9] **THE WITNESS:** Well, I'll tell you where you're
[10] off. You said repay its debt to the bank.
[11] **BY MS. TRUHE:**
[12] **Q:** Excuse me, Mr. Shofer -
[13] **A:** There wasn't repaying a debt to the bank. It was
[14] using it for receivable financing.
[15] **Q:** But do you deny telling Mr. Wilson, your loan
[16] officer at the bank, that you were going to borrow \$250,000
[17] from the pension to give to Crown Motors?
[18] **A:** No, I don't -
[19] **Q:** You -
[20] **A:** - deny that.
[21] **Q:** - do not deny that. But you never told Mr. Hack
[22] that you were planning to borrow a quarter of a million
[23] dollars from your pension, did you?
[24] **A:** I may not have.
[25] **Q:** Well, you did not, did you?

[1] **A:** I don't know that I did or didn't because I can't
[2] recall my exact conversations at that time. But I'll assume
[3] that if he says I didn't, I didn't.
[4] **Q:** You only got specific with Mr. Wilson, the loan
[5] officer, because, as you told me at your deposition, "I
[6] can't imagine that there was any part of any major financial
[7] transaction that I wouldn't have made him", referring to Mr.
[8] Wilson, "privity to or aware of," correct?
[9] **MR. TAYLOR:** Well, let me object, Your Honor. I
[10] think if Counsel is going to read portions of an answer that
[11] a witness has given at a deposition, it is only appropriate
[12] to read the question and the answer. I do not know whether
[13] this is in context or not.
[14] **THE COURT:** Do you have a transcript in front of
[15] you as well?
[16] **MR. TAYLOR:** Well, I actually do not have a copy
[17] of this with me today. But I think, even for the record,
[18] Your Honor, so that we understand what the question is that
[19] the witness is responding, I think the whole question should
[20] be read.
[21] **THE COURT:** That is fine.
[22] **MS. TRUHE:** Well, the problem I have with that,
[23] Your Honor, is, first of all, the question I am asking Mr.
[24] Shofer now is not the same question I asked him at his
[25] deposition. The question I am asking now is the reason he

[1] told one person instead of a -

[2] **THE COURT:** Let me ask this: does Ms. Whelihan

[3] have a copy of the transcript in front of her?

[4] **MS. TRUHE:** Yes.

[5] **MS. WHELIHAN:** Yes, I do.

[6] **THE COURT:** Would it be possible to allow Mr.

[7] Taylor to use yours during this portion of the trial, and

[8] then maybe we can avoid the difficulty because you will have

[9] it in front of you.

[10] **MR. TAYLOR:** I have those depositions; I just did

[11] not have them with me.

[12] **MS. WHELIHAN:** Right.

[13] **THE COURT:** I understand.

[14] **MS. WHELIHAN:** You can have mine.

[15] **THE COURT:** If you do not mind, and then maybe you

[16] can look over Ms. Truhe's shoulder.

[17] **MS. WHELIHAN:** Your Honor, I have more than one.

[18] **THE COURT:** Oh, okay. That way, if she fails to

[19] read the whole answer, you will bring it to my attention,

[20] Mr. Taylor.

[21] **MR. TAYLOR:** Yes, Your Honor, I will.

[22] **THE COURT:** Okay.

[23] **MR. TAYLOR:** Thank you.

[24] **THE WITNESS:** Go ahead, Ms. Truhe. Would you ask

[25] me that question again?

[1] **BY MS. TRUHE:**

[2] **Q:** Well, let me ask you the question before that,

[3] which is that you never told Mr. Hack, or at least you

[4] cannot say you told Mr. Hack, that you were going to borrow

[5] a quarter of a million dollars from the pension, correct,

[6] like you did tell Mr. Wilson?

[7] **A:** I can't say for sure that I ever told him that.

[8] **Q:** But you did tell Mr. Wilson, did you not?

[9] **A:** Oh, he's my -

[10] **MR. TAYLOR:** Well, Your Honor -

[11] **THE WITNESS:** - my loan officer.

[12] **MR. TAYLOR:** I object. I think that it is

[13] irrelevant as to what Mr. Shofer may have told Mr. Wilson in

[14] relation to whether he told Mr. Hack anything. I do not

[15] understand the relationship that Counsel attempts to draw

[16] between the two situations.

[17] **MS. WHELIHAN:** That is what makes it -

[18] **THE COURT:** Well, I will overrule. I mean, it may

[19] be going somewhere relevant.

[20] **THE WITNESS:** I'm sure that I communicated

[21] everything I intended to do with Mr. Wilson.

[22] **BY MS. TRUHE:**

[23] **Q:** All right, but you never discussed this idea with

[24] anyone at Greybush, either, did you?

[25] **A:** Greybush, no, not to my recollection.

[1] **Q:** All right. Is it not true, Mr. Shofer, that in

[2] August of 1984, when all of this was going on, you had

[3] turned to your pension for money because you personally had

[4] no other available source from which to get a loan?

[5] **A:** No, that's not necessarily true.

[6] **MS. TRUHE:** Counsel, referring to Volume 1, pages

[7] 92 to 93, beginning at the bottom of page 92, line 21.

[8] **BY MS. TRUHE:**

[9] **Q:** Question - Mr. Shofer, I am reading from your

[10] deposition testimony - "Did you consider taking a loan from

[11] any other source?" Answer: "No." Question: "Why not?"

[12] **Answer:** "I didn't have any other available source."

[13] **A:** Okay.

[14] **Q:** Does that refresh your recollection?

[15] **A:** It didn't refresh my recollection, but it -

[16] **Q:** Well, let me ask you this.

[17] **A:** - have answered it.

[18] **Q:** Do you recall being put under oath when you gave

[19] your deposition testimony in 1990?

[20] **A:** No, I don't recall being put under oath, but I'm'

[21] sure I was.

[22] **Q:** All right. The answer you have just given here in

[23] court today is that you had other sources, correct? You

[24] personally?

[25] **A:** No, my answer was that what you said to me wasn't

[1] necessarily so. That was my answer. I didn't say that I

[2] had no other source.

[3] **Q:** But that is not what you told me in 1990, correct?

[4] **A:** In 1990, my recollect - what I told you was my

[5] recollection in 1990 and that or, my feeling in 1990, and

[6] that was that I had no other sources. And that maybe I

[7] didn't have any other sources, and that may be true. But

[8] when I answered you, what you asked me is you didn't have

[9] any other sources, right? And I said that isn't necessarily

[10] so because I can't recall that it was necessarily so.

[11] **Q:** Well, is your recollection about these events

[12] fresher today or was it fresher in 1990?

[13] **A:** Well, I guess in 1990 it had to be a little

[14] fresher than it would be in 1997.

[15] **Q:** In 1990, you testified that you did not have any

[16] other available source, you personally, from which to borrow

[17] money other than your pension, correct?

[18] **A:** If I testified to that, it may be correct.

[19] **Q:** All right. Let us go to the time of your first

[20] telephone contact with Mr. Hack on the issue of borrowing

[21] from your pension. According to Mr. Hack's timesheet, you

[22] first contacted him on August 3, 1984, correct?

[23] **A:** If that's what the timesheet says, it may be

[24] correct.

[25] **Q:** Is it not true, Mr. Shofer, that you can remember

[1] nothing about your first conversation with Mr. Hack on this
 [2] issue of borrowing money from your pension?
 [3] **A:** That is true.
 [4] **Q:** Is it not also true that you do not even know how
 [5] long your conversation with Mr. Hack lasted?
 [6] **A:** That is true.
 [7] **Q:** When I asked you in 1990 for your best
 [8] approximation of how long this conversation might have
 [9] lasted, you said 5, maybe 10, minutes, but certainly not
 [10] more than 20 because, as you put it then, you "can't
 [11] remember having that much of a conversation with Stuart
 [12] ever." Is that not correct?
 [13] **A:** That is correct.
 [14] **Q:** Did you make any notes of your conversation with
 [15] Mr. Hack about borrowing money from your pension?
 [16] **A:** No.
 [17] **Q:** Did you tell Mr. Hack how much you were intending
 [18] to borrow from the pension just as you told Mr. Wilson?
 [19] **A:** I can't say whether I did or not because, as I
 [20] told you, I can't remember anything about the conversation.
 [21] **Q:** Did you ever tell Mr. Hack why you were looking to
 [22] borrow money from your pension during this time period?
 [23] **A:** I can't remember if I did 'cause I don't know what
 [24] I said.
 [25] **Q:** Did you ever Mr. Hack that you might even take

[1] more than one loan from the pension?
 [2] **A:** I don't know.
 [3] **Q:** Did you ever ask Mr. Hack how to take money from a
 [4] pension?
 [5] **A:** I can't remember if I asked him or not.
 [6] **Q:** Well, according to Mr. Hack's notes, this idea of
 [7] borrowing money from the pension was not the only one you
 [8] bounced off of him during that conversation. You also asked
 [9] whether you could put your pension up as collateral for a
 [10] loan, is that correct?
 [11] **A:** If he says it is, it may be; I don't know.
 [12] **Q:** According to Mr. Hack's timesheets, you had a
 [13] second conversation with him on August 7, 1984. Do you
 [14] remember anything about the second telephone conversation?
 [15] **A:** No.
 [16] **Q:** Did you take any notes?
 [17] **A:** No.
 [18] **Q:** Well, Mr. Hack did. According to his notes, you
 [19] called him up and asked him to write you a letter stating
 [20] that you can borrow up to 100 percent of your voluntary
 [21] account with the pension. Do you recall doing that?
 [22] **A:** I don't recall, but it sounds reasonable.
 [23] **Q:** Then, before you even got that letter from Mr.
 [24] Hack, you took your first loan from the pension on August 9,
 [25] 1984, in the amount of \$60,000, correct?

[1] **A:** I believe I did take a loan in that amount at that
 [2] time.
 [3] **Q:** Before you even received Mr. Hack's letter,
 [4] correct?
 [5] **A:** Yes, that probably would've been based on the
 [6] information I'd gotten on the telephone.
 [7] **Q:** The purpose of that first loan was to repay part
 [8] of the debt you owed to Crown Motors, correct -
 [9] **A:** Yes.
 [10] **Q:** - just like we discussed a few minutes ago, so
 [11] that Crown could then pay part of the money it owed to
 [12] Maryland National Bank?
 [13] **A:** No. I don't know what Crown did with that because
 [14] I'd have to look and follow that money. Crown may've paid
 [15] general bills, might've bought inventory with it. I don't
 [16] know. I don't know that it paid Maryland National Bank the
 [17] money bank. I don't know it paid Maryland National debt.
 [18] It may've just bought accounts receivable or bought
 [19] inventory.
 [20] **Q:** Then why tell Mr. Wilson that you were going to
 [21] borrow a quarter of a million dollars from your pension so
 [22] that you can pay part of the debt you owed Crown Motors?
 [23] **A:** I'm not sure that -
 [24] **Q:** This is (inaudible).
 [25] **A:** I'm not sure that I said that.

[1] **Q:** Well, in 1990 when I took your deposition, you
 [2] testified otherwise.
 [3] **A:** I'd like to see it.
 [4] **Q:** For example, at the top of page 87, line 2:
 [5] **Question:** "But you think you probably mentioned the amount
 [6] to Mr. Wilson?" Answer: "Probably, yes; I can't imagine
 [7] that there was any part of any major financial transaction I
 [8] would have had that I wouldn't have made him privy to or
 [9] aware of." Do you recall that testimony?
 [10] **A:** I don't recall the testimony, but why don't you
 [11] repeat what you just said, and I'll -
 [12] **Q:** When I asked you at your deposition in 1990 if you
 [13] mentioned the amount to Mr. Wilson, you said probably, yes.
 [14] **A:** Probably yes what? I still don't understand what
 [15] you're say -
 [16] **Q:** Probably yes that you mentioned the amount you
 [17] were planning to borrow from your pension? You told Mr.
 [18] Wilson.
 [19] **A:** Well, I would have to because if I'm going to
 [20] borrow it from Mr. Wilson, I got to tell him how much it is.
 [21] **Q:** Well, you are going to borrow this money from your
 [22] pension.
 [23] **A:** Oh, okay -
 [24] **MR. TAYLOR:** Well, let me object, Your Honor. It
 [25] seemed to me that we started this discussion with the idea

[1] that the money was going to be used to repay Crown or
 [2] Maryland National Bank. There was a specific purpose for
 [3] the loan. I do not see that purpose stated in the
 [4] deposition. It seems to me that the portions of the
 [5] deposition that Counsel is reading do not relate to the
 [6] question and the answer that the witness gave.
 [7] **MS. TRUHE:** Your Honor, I think I can clear this
 [8] up.
 [9] **THE COURT:** Okay, we are going around the bend.
 [10] **MS. TRUHE:** All right.
 [11] **BY MS. TRUHE:**
 [12] **Q:** Mr. Shofer, referring to your deposition beginning
 [13] on page 86. I will back up a few more questions. Line 19:
 [14] "Did you tell Mr. Hack you were planning to borrow
 [15] approximately \$250,000?" Answer: "I don't recall any
 [16] specific amount that was mentioned or not." Question: "But
 [17] you think you probably mentioned the amount to Mr. Wilson?"
 [18] **Answer:** "Probably, yes; I can't imagine that there was any
 [19] part of any major financial transaction I would have had
 [20] that I wouldn't have made him privy to or aware of." Do you
 [21] recall that testimony?
 [22] **A:** No, I don't recall the testimony, but I probably
 [23] did say it if the deposition says I say it.
 [24] **Q:** And you do recall discussing this idea of
 [25] borrowing money from your pension with Mr. Wilson, correct?

[1] **A:** Correct.
 [2] **Q:** Now with respect to this first loan that you took
 [3] from the pension, how did you take the money out?
 [4] **A:** You mean what actually happened?
 [5] **Q:** Yes.
 [6] **A:** I'm going to think back to what I think happened.
 [7] I think that the pension had a certificate of deposit or
 [8] some type of low-interest instrument, and that all we had to
 [9] do was cash that instrument and the funds were there. It
 [10] didn't require going to Maryland National. It didn't
 [11] require a loan or anything. I think that the pension just
 [12] had the money tied up.
 [13] **Q:** Is it not true, Mr. Shofer, that you just -
 [14] **A:** And I -
 [15] **Q:** - wrote yourself a check from the pension -
 [16] **A:** Well -
 [17] **Q:** - for \$60,000?
 [18] **A:** I would've after the pension had liquidated that
 [19] instrument to have the cash to do it, sure.
 [20] **Q:** But you just wrote yourself a check, correct?
 [21] **A:** Just wrote myself a check? Yes, just wrote myself
 [22] a check.
 [23] **Q:** All right, and no one assisted you, did they?
 [24] **A:** Huh?
 [25] **Q:** No one assisted you?

[1] **A:** No, I can write a check myself.
 [2] **Q:** And you just assumed you knew how to properly take
 [3] money from a pension, correct?
 [4] **A:** Yes.
 [5] **Q:** The only other document you prepared in connection
 [6] with this first loan of \$60,000 was a note payable on
 [7] demand, correct?
 [8] **A:** The first \$60,000?
 [9] **Q:** Yes.
 [10] **A:** I can't recall.
 [11] **Q:** Well, directing your attention to Defendant's
 [12] Exhibit 4, which I believe is a duplicate of another exhibit
 [13] that was offered by the Plaintiff, these are all of the
 [14] notes which you wrote to the pension in connection with the
 [15] monies you borrowed for that 3-year period, correct?
 [16] **A:** Not correct because I don't see a note here for
 [17] the \$60,000.
 [18] **Q:** Right. Do you know what happened to that note?
 [19] **A:** It might've been destroyed if it was paid off. I
 [20] don't know.
 [21] **Q:** Do you know whether the note itself was similar to
 [22] the notes that appear on that exhibit?
 [23] **A:** If it was a note, it probably would've been
 [24] similar. It most certainly probably would've.
 [25] **Q:** All right.

[1] **MS. TRUHE:** Your Honor, I am going to be referring
 [2] to Defendant's Exhibit Number 4. But in view of the fact
 [3] that it is already admitted as a Plaintiff's exhibit, I will
 [4] not submit the same thing.
 [5] **THE COURT:** That is appreciated.
 [6] **MS. TRUHE:** Okay.
 [7] **BY MS. TRUHE:**
 [8] **Q:** Now who was going to demand payment of the note?
 [9] I notice that the first note, for example, is payable on
 [10] demand.
 [11] **A:** Who was going to demand payment?
 [12] **Q:** Yes.
 [13] **A:** You mean was the pension trust going to demand
 [14] payment from me? Who would be making that demand?
 [15] **Q:** Yes.
 [16] **A:** Well, I guess if I was trustee, I would have to
 [17] make the demand.
 [18] **Q:** Who calculated the rate of interest? I notice you
 [19] have a rate of interest on these notes.
 [20] **A:** Who calculated the -
 [21] **Q:** Yes.
 [22] **A:** - rate of interest? What do you mean who
 [23] calculated -
 [24] **MR. TAYLOR:** Let me object. I think it is not a
 [25] proper term to say calculated; maybe, who set the rate of

[1] interest.

[2] **MS. TRUHE:** That is fine.

[3] **THE COURT:** Who set the -

[4] **BY MS. TRUHE:**

[5] **Q:** Who set the rate of interest?

[6] **A:** Who set the rate of interest? I set the rate of
[7] interest high enough that it could not be questioned that I
[8] was doing anything inappropriate.

[9] **Q:** Were you concerned about doing anything
[10] inappropriate?

[11] **A:** Absolutely.

[12] **Q:** Were any of these notes secured?

[13] **A:** Yes.

[14] **Q:** How?

[15] **A:** Every note was secured in the sense that it was
[16] taken against the value, the 100, I already had 100 percent
[17] value in my volunteer account, and the plan was secured by
[18] the fact that I was borrowing against the value of my
[19] volunteer account, which I owned 100 percent, so they
[20] couldn't get hurt 'cause if I never paid them back, it
[21] would've come out of my volunteer account.

[22] **Q:** Did you ever tell anyone about the first loan you
[23] took?

[24] **A:** Did I ever tell anyone about the first loan that
[25] I took? I'm sure I did.

[1] **Q:** Who?

[2] **A:** Well, I would've had to tell probably, number one,
[3] my wife.

[4] **Q:** Anyone else?

[5] **A:** I can't recall who I might've specifically told,
[6] but there may've been others.

[7] **Q:** Did you tell Mr. Hack?

[8] **A:** I doubt that I told Mr. Hack.

[9] **Q:** Let's go to the second loan, for which we do have
[10] a note. According to this note, you took a second loan less
[11] than two weeks after the first one. This time you borrowed
[12] \$150,000, is that correct? This is the very top - I am
[13] sorry.

[14] **A:** Yes. Yes, that's correct. Okay, that's correct.

[15] **Q:** The purpose of that loan was, again, to repay
[16] money you owed to Crown, correct?

[17] **A:** Well, I don't I have to follow the trail of that.
[18] I can't say what I did with the first \$150,000. I might've
[19] paid back my first \$60,000 loan to the pension out of part
[20] of that \$150,000 and paid the other \$90,000 to Catalina, my
[21] company. I don't know. I know that I paid back the first
[22] \$60,000 loan -

[23] **Q:** And what did you do with the rest?

[24] **A:** - from the proceeds of a subsequent loan, and I
[25] imagine it was this first \$150,000 loan. What -

[1] **Q:** What did you do with the rest? What was the
[2] purpose of borrowing the rest of that money?

[3] **A:** I probably reduced my debt to Crown Motors with
[4] the rest of that money.

[5] **Q:** The only two people you told about this loan were
[6] your wife and Glen Wilson, the loan officer at the bank,
[7] correct?

[8] **A:** I don't know that that's correct. They were
[9] probably at least two of the people that knew about it. I
[10] don't know who else might've known. There may've been other
[11] people at my office just like doing bookkeeping or something
[12] that might've known. But it's quite likely that those that
[13] did know, if there were others besides my wife and Mr.
[14] Wilson, they probably would've been limited to people that
[15] were close in my office just because they were doing
[16] bookkeeping or something.

[17] **Q:** Well, Mr. Shofer, referring to your deposition
[18] testimony, page 124, Volume 1, line 3: Question: "Did you
[19] tell anyone that you were going to borrow more money?"

[20] **Answer:** "I don't recall, but I assume that two other people
[21] that were aware of everything that was happening was
[22] Sarah, or Sally, the bookkeeper, and my wife; you know, one
[23] and the same person, and the gentleman at Maryland National
[24] Bank."

[25] **A:** Okay.

[1] **Q:** Do you recall that? Again, with reference to this
[2] \$150,000, you just cut yourself a check and prepared a note
[3] payable on demand, correct?

[4] **A:** Correct.

[5] **Q:** You never consulted with anyone as to how to take
[6] money from your pension, correct?

[7] **A:** On those occasions, I didn't think it was
[8] necessary.

[9] **Q:** The reason you made the note payable on demand was
[10] because you wanted some flexibility because you did not know
[11] where you were going to be financially at any given point?

[12] **A:** No, I don't think that was a reason. I think on
[13] demand was a conventional terminology that I assumed was
[14] appropriate.

[15] **MS. TRUHE:** Referring, Counsel, to Mr. Shofer's
[16] deposition testimony, Volume 1, page 127, line 10.

[17] **BY MS. TRUHE:**

[18] **Q:** "Now the note says due on demand. Who decided the
[19] terms of that note?" Answer: "I did." Question: "Why did
[20] you decide it would be on demand?" Answer: "Well, I'm the
[21] trustee, and I didn't think that I was going to demand it
[22] before I had to pay it back." Do you remember that
[23] testimony?

[24] **A:** Okay, I don't remember it, but I'm sure I said it.

[25] **Q:** Further down on the page, line 20: Question:

[1] "But you wanted it to be flexible?" Answer: "I think it
 [2] required some flexibility because I wasn't in a position of
 [3] at any time knowing where I would be in six months or a year
 [4] financially," correct?
 [5] **A:** That's what I said.
 [6] **Q:** Let's go to the third loan, which was just a few
 [7] weeks later, on September 5, 1984, when you borrowed another
 [8] \$50,000 from your pension, correct?
 [9] **A:** Correct.
 [10] **Q:** The purpose of that loan was, again, to repay your
 [11] debt to Crown Motors?
 [12] **A:** To repay it probably went, for the most part, or
 [13] all of it, to Crown Motors. I can't say that it all went to
 [14] it. I might've needed \$5,000 or \$10,000 for something else;
 [15] I don't know.
 [16] **MS. TRUHE:** Counsel, referring to Mr. Shofer's
 [17] deposition testimony, Volume 1, page 132 -
 [18] **THE WITNESS:** See, I -
 [19] **MS. TRUHE:** - line 16.
 [20] **BY MS. TRUHE:**
 [21] **Q:** Question: "And what was the purpose of that
 [22] loan?" Answer: "Similar to the previous loan: to reduce
 [23] debt to Crown Motors and give it, at the same time, money to
 [24] buy and finance cars."
 [25] **A:** Okay. Incidentally, you'll notice to buy and

[1] finance cars; not to pay back Maryland National.
 [2] **Q:** When was the fourth time you borrowed from your
 [3] pension?
 [4] **A:** According to this, \$35,000, February 21st, '95.
 [5] **Q:** That was the following year, correct?
 [6] **A:** Yes, I said '95 -
 [7] **Q:** All right.
 [8] **A:** - '85, excuse me.
 [9] **Q:** Right, and you borrowed \$35,000, correct?
 [10] **A:** Yes.
 [11] **Q:** The purpose of borrowing this money, though, was
 [12] for downpayments on two homes you wanted in the Virgin
 [13] Islands on St. Thomas, correct?
 [14] **A:** Partially correct.
 [15] **MS. TRUHE:** Counsel, Volume 1, Mr. Shofer's
 [16] deposition testimony, at page 135, beginning line 13, I am
 [17] sorry, line 12.
 [18] **BY MS. TRUHE:**
 [19] **Q:** "When was the fourth time?" Answer: "I see a
 [20] date here February 21st, '85." Question: "Why did you
 [21] borrow money on that date?" Answer: "For personal use
 [22] other than to repay my company. I was interested in two
 [23] properties in the Virgin Islands, investment properties."
 [24] Do you recall that testimony?
 [25] **A:** I don't recall the testimony, but it sounds like I

[1] said that. But you notice I said investment properties; you
 [2] said homes.
 [3] **Q:** Well, what were these two properties?
 [4] **A:** Investment properties.
 [5] **Q:** Did they have homes on them?
 [6] **A:** They were resort properties built to be utilized
 [7] for short-term rental at high resort rates. That was the
 [8] main purpose of them. Some people used them as condominiums
 [9] for longer-term rates. There's probably a few people on the
 [10] island that lived in them. But a great number of them were
 [11] consigned to the hotel management plan to be utilized for
 [12] short-term rentals on a profit-sharing basis.
 [13] **Q:** But one could live on either of those properties,
 [14] correct?
 [15] **A:** Oh, they were certainly livable.
 [16] **Q:** All right. Is it not true that you had no other
 [17] source of money to buy these properties besides your
 [18] pension?
 [19] **A:** Well, another source could've been Crown Motors,
 [20] but it would've taken money from working capital that I
 [21] needed for cars. So the most convenient source was the
 [22] pension.
 [23] **MS. TRUHE:** Counsel, Volume 1 of Mr. Shofer's
 [24] deposition testimony, at page 139, beginning at line 4.
 [25] **BY MS. TRUHE:**

[1] **Q:** "Could you have gotten the money to buy these
 [2] properties from any other sources besides your pension
 [3] plan?" Answer: "No." Question: "Why not?" Answer: "I
 [4] didn't have any other source with that much equity." Do you
 [5] recall that testimony?
 [6] **A:** I don't recall it, no, but it sounds accurate,
 [7] then. If I said that seven years ago, it's accurate.
 [8] **Q:** Now after you bought these two investment
 [9] properties, you had to pay a mortgage on both, correct?
 [10] **A:** Absolutely.
 [11] **Q:** By the way, you never told Mr. Hack that you were
 [12] borrowing this money, either, did you?
 [13] **A:** I can't recall that I did.
 [14] **Q:** You borrowed the money in the same way as you had
 [15] before: you cut a check and prepared a demand note,
 [16] correct?
 [17] **A:** Correct.
 [18] **Q:** Let's go the fifth time you borrowed money, which
 [19] was just four days later, on February 25, 1985, when you
 [20] borrowed \$3,000 from your pension. Do you recall that?
 [21] **A:** No, I don't recall it.
 [22] **Q:** Do you deny that?
 [23] **A:** No, I don't deny it. I just don't recall it. You
 [24] keep using the word recall. I can't remember specifically,
 [25] you know, but I did. I'm sure I did. It's here that I did.

[1] Q: Well, what did you do with that money?
 [2] A: I can't recall.
 [3] Q: Did you spend it on the Virgin Islands property?
 [4] A: It may've been used for the Virgin Islands
 [5] property, I don't know.
 [6] MS. TRUHE: Counsel, Mr. Shofer's deposition
 [7] testimony, Volume 1, page 142, line 19.
 [8] BY MS. TRUHE:
 [9] Q: Question: "Why did you borrow money on that
 [10] date?" Answer: "I don't know specifically, but it may've
 [11] been in connection with the purchase of those properties;
 [12] probably was." Do you recall that testimony?
 [13] A: No, I don't recall that testimony.
 [14] Q: Does that refresh -
 [15] A: It probably was -
 [16] Q: - your recollection?
 [17] A: It was my probable testimony, and it's the same
 [18] answer I just gave you.
 [19] Q: Did you take this money the same way you did
 [20] before: namely, cut a check for yourself from the pension
 [21] and prepare a demand note?
 [22] A: I can't recall, but I probably did. I can't think
 [23] of any other way to do it.
 [24] Q: Well, do you see the demand note for the \$3,000
 [25] you took -

[1] A: Yes.
 [2] Q: - on February 25?
 [3] A: Yes.
 [4] Q: All right. Did you tell anyone about taking this
 [5] money from your pension?
 [6] A: I can't recall.
 [7] Q: Did you have any concern at all, Mr. Shofer, that
 [8] what was lawful in 1984 when you telephoned Mr. Hack might
 [9] not be lawful in 1985 in terms of borrowing from the
 [10] pension?
 [11] A: Did I have any concern about that?
 [12] Q: Right.
 [13] A: I can't recall whether I had a concern about that.
 [14] Q: Let's go to the sixth time you withdrew money from
 [15] your pension which was on July 30, 1985. You borrowed
 [16] \$12,000, correct?
 [17] A: July 30th, \$12,000. Yes, I see that.
 [18] Q: All right, and the purpose of that was to purchase
 [19] new furniture for one of the Virgin Islands properties,
 [20] correct?
 [21] A: If that's what I said in my previous deposition,
 [22] that must've been what I borrowed it for. I can't recall
 [23] having said it, but I probably had a better memory about
 [24] what happened in 1985 -
 [25] Q: Back in 1990 when I took your deposition?

[1] A: - 19 - six years ago than I would -
 [2] Q: Okay, and for the record, Mr. Shofer -
 [3] A: - 12 years ago.
 [4] Q: - Volume 1 of your deposition testimony -
 [5] A: Okay, then I know I did need to refurbish one of
 [6] the rental properties so that it could be put into the
 [7] rental plan. And that is why I might've spent that money.
 [8] Q: Well, not just might. On -
 [9] A: Okay, then I did.
 [10] Q: Back in 1990, when I took your deposition,
 [11] page 145 -
 [12] A: One of the -
 [13] Q: - beginning at line -
 [14] A: One of the rental properties -
 [15] Q: - 3. Excuse me, Mr. Shofer, if I may finish,
 [16] beginning at line 3. Question: "And how much money did you
 [17] take at that time?" Answer: "\$12,000." Question: "Why
 [18] that amount?" Answer: "I think that's what I needed to
 [19] complete personally the purchase of new furniture for one of
 [20] the investment properties on the Virgin Islands that needed
 [21] to be refurbished."
 [22] A: Okay, that sounds very good: investment
 [23] properties.
 [24] Q: Do you agree with that testimony?
 [25] A: Yes.

[1] Q: Now could you have gotten the money to do this, to
 [2] purchase this furniture, from anywhere but the pension?
 [3] A: I'm sure I couldn't have.
 [4] Q: And again, did you just take the money by cutting
 [5] a check and preparing a demand note?
 [6] A: I'm sure I did.
 [7] Q: Did you tell Mr. Hack about any of this money
 [8] which you were taking from your pension to spend on the
 [9] Virgin Islands property?
 [10] A: I can't recall, but I'm sure I must not've.
 [11] Q: By the way, Mr. Shofer, you knew that the growth
 [12] on any monies which you contributed to your pension was not
 [13] subject to income taxes, correct, as long as it -
 [14] A: Correct.
 [15] Q: - remained in the pension?
 [16] A: Correct.
 [17] Q: Let's go to the seventh time you borrowed from
 [18] your pension, which was on August 13, 1985, when you took
 [19] \$25,000. This was money you spent on refurbishing your
 [20] other property in the Virgin Islands, correct?
 [21] A: If that's my testimony, that's correct.
 [22] Q: Did you just cut a check and prepare a demand note
 [23] like you did before?
 [24] A: I'm sure I must've.
 [25] Q: Did you consult with or tell anyone about this

[1] seventh loan?
 [2] **A:** I'm sure my wife knew about it. I don't know who
 [3] else might've known.
 [4] **Q:** Do you recall telling Mr. Hack?
 [5] **A:** No, I don't recall telling Mr. Hack.
 [6] **Q:** Let's go to the eighth time, which was about a
 [7] week later, on August 21, 1985, when you took \$5,000 from
 [8] your pension. Again, you took that money to do some
 [9] additional refurbishing of your Virgin Islands property,
 [10] correct?
 [11] **A:** Correct. If -
 [12] **Q:** And you took -
 [13] **A:** If that's my testimony.
 [14] **Q:** That is your testimony. You took the money from
 [15] your pension because, as you told me at your deposition, you
 [16] did not have any other source and it would have been a
 [17] strain to just take it out of the business, correct?
 [18] **A:** If that's my testimony, that's correct. It sounds
 [19] reasonable.
 [20] **Q:** Well, again, for the record, Volume 1, page 156,
 [21] beginning at line 4. Question: "Could you have gotten this
 [22] money from any other source other than your pension?"
 [23] **Answer:** "No." Question: "Why not?" **Answer:** "Well, it
 [24] was available in the pension and would've been a strain to
 [25] Crown Motors." Do you recall that testimony?

[1] **A:** No, I don't recall that testimony, but I don't
 [2] deny that I said that, and I don't deny that it's perfectly
 [3] true.
 [4] **Q:** Now before I go to the ninth and final time you
 [5] took money from your pension, which was in the following
 [6] year, in 1986, I would like to ask you a few questions about
 [7] the 5500-C that was filed for the year 1984. Now the 5500-C
 [8] is a form you file each year or, I should say, the pension
 [9] files each year with the IRS and the Department of Labor
 [10] that show the pension's assets and liabilities -
 [11] **A:** Correct.
 [12] **Q:** - as well as transactions affecting the plan?
 [13] **A:** When you say it shows the pension's assets and
 [14] liabilities, I don't know if it does or not. And it may,
 [15] but I'm not completely familiar with that form. And often I
 [16] sign it without reading it, and I don't even know now
 [17] everything that's in that form.
 [18] **MS. TRUHE:** Your Honor, could we take a brief
 [19] break -
 [20] **THE COURT:** Yes.
 [21] **MS. TRUHE:** - right now to organize these
 [22] exhibits and go into the next -
 [23] **THE COURT:** Yes, we can take a brief recess. I
 [24] just noticed on your chart that the August 13 loan, if I am
 [25] reading it correctly says \$12,000. But on this note, it

[1] says \$25,000. Is that -
 [2] **MS. TRUHE:** Which one do we have?
 [3] **THE COURT:** This is the August 13, 1985. It was
 [4] \$25,000.
 [5] **MS. TRUHE:** \$25,000.
 [6] **THE COURT:** I think you have \$12,000, unless my
 [7] bifocals are confusing me.
 [8] **MS. TRUHE:** It may be.
 [9] **THE COURT:** Okay. But in any event, we will take
 [10] a brief recess -
 [11] **MS. TRUHE:** Okay.
 [12] **THE COURT:** - and I will be back.
 [13] (Brief recess.)
 [14] **THE COURT:** Okay.
 [15] **MS. TRUHE:** Thank you, Your Honor.
 [16] **BY MS. TRUHE:**
 [17] **Q:** Mr. Shofer, is it not true that each year, Mr.
 [18] Hack's company would prepare the 5500-C after you or, I
 [19] should say, your company provided them with the pertinent
 [20] information for that year?
 [21] **A:** Yes.
 [22] **Q:** All right. Directing your attention to what has
 [23] been marked as Defendant's Exhibit Number 5. This is a
 [24] letter from Alan Vanderdresche, who is an account executive
 [25] at the Stuart Hack Company, to you, correct?

[1] **A:** Correct.
 [2] **Q:** All right. Would you please read the first
 [3] paragraph of that letter out loud?
 [4] **A:** The first paragraph of the letter?
 [5] **Q:** Yes.
 [6] **A:** Can I read the date first?
 [7] **Q:** Sure.
 [8] **A:** November 23rd, 1984, and it's addressed to me.
 [9] And it said: "The annual valuation of your plan is due as
 [10] of 12/31/84. Before work can begin, we shall need certain
 [11] information from you for the plan year beginning 1/1/84 and
 [12] ending 12/31/84."
 [13] **Q:** Do you recall receiving these types of inquiries
 [14] from Mr. Hack's company each year?
 [15] **A:** I know that I did receive the inquiries every
 [16] year.
 [17] **Q:** All right. Now I note that this letter is
 [18] addressed to you, and it is marked personal and
 [19] confidential. Do you recall receiving the one for 1984?
 [20] **A:** No, I don't recall receiving the one from 1984.
 [21] **Q:** Do you have any reason to believe you did not
 [22] receive it?
 [23] **A:** No.
 [24] **Q:** Did you consider requests for data like that,
 [25] Deposition Exhibit Number 6, I am sorry, Defendant's Exhibit

[1] Number 6, relevant or important?
[2] **A:** Did I consider the request important?
[3] **Q:** Yes.
[4] **A:** No.
[5] **Q:** Now I note that stamped on this letter are the
[6] words, in the upper right-hand corner, "Second Request," and
[7] the date is February 12, 1985. Do you recall being asked
[8] for the asset and loan data again in February of 1985?
[9] **A:** No, I don't recall. But excuse me a second here.
[10] This says second request and refers to '84 as the date.
[11] **Q:** Exactly. Had you provided Mr. Hack the 1984 data
[12] by February of 1985?
[13] **A:** Did I reply, did I give him the 1984 data by
[14] February of 1985?
[15] **Q:** Yes.
[16] **A:** In other words, two months after '84 ended?
[17] **Q:** Right.
[18] **A:** I doubt it.
[19] **Q:** All right. Directing your attention -
[20] **MS. TRUHE:** I am sorry. Your Honor, may I move
[21] into evidence Defendant's Exhibit Number 5? Well, I am out
[22] of order because it is duplicative.
[23] **THE COURT:** I am sorry, it is 5 you are asking,
[24] right?
[25] **MS. TRUHE:** It is 5, yes.

[1] from Stuart Hack Company. And I may never even have seen
[2] this. I might've or I might not've seen it.
[3] **Q:** Well, let's go to Defendant's Exhibit Number 7.
[4] **MS. TRUHE:** By the way, Your Honor, I would like
[5] to move into evidence Defendant's Exhibit Number 6.
[6] **THE COURT:** I am confused. What date is on the
[7] letter of your Exhibit 6?
[8] **MS. TRUHE:** It is also November 23, 1984, but it
[9] has this time the words "Final Request" stamped in the upper
[10] right-hand corner -
[11] **THE COURT:** Okay.
[12] **MS. TRUHE:** - as opposed to the previous one that
[13] had Second Request.
[14] **THE COURT:** I saw that, but I thought that you
[15] were referring to another date. Okay, thank you.
[16] **MS. TRUHE:** All right.
[17] **THE COURT:** It is admitted.
[18] (Defendant's Exhibit No. 6,
[19] Vanderdresche 11/23/84 Final Request to
[20] Shofer, previously marked for
[21] identification, was received in
[22] evidence.)
[23] **BY MS. TRUHE:**
[24] **Q:** Now let's go to Defendant's Exhibit Number 7,
[25] Mr. Shofer. This is a letter dated September 26, 1985. It

[1] **THE COURT:** Yes, admitted.
[2] **MS. TRUHE:** Thank you.
[3] (Defendant's Exhibit No. 5,
[4] Vanderdresche 11/23/84 Second Request to
[5] Shofer, previously marked for
[6] identification, was received in
[7] evidence.)
[8] **BY MS. TRUHE:**
[9] **Q:** Mr. Shofer, directing your attention to
[10] Defendant's Exhibit Number 6. This is another copy of this
[11] November 23, 1984, letter. Stamped in the upper right-hand
[12] corner are the words "Final Request," and the date is May 7,
[13] 1985. Do you see that?
[14] **A:** I see this handwritten 1985.
[15] **Q:** Well, do you know whether you had provided -
[16] **A:** I -
[17] **Q:** - Mr. Hack's company with the asset data for 1984
[18] by May of 1985?
[19] **A:** I know from my recent looking at the files, that I
[20] had not provided Mr. Hack with the 1984 data by May of 1985.
[21] **Q:** Right, you were being asked repeatedly for this
[22] data during 1985. Is that not correct?
[23] **A:** Well, I wasn't being asked repeatedly. This
[24] letter is addressed to me, but generally speaking, I think
[25] that Pam Summers opened up most of the correspondence from

[1] is addressed to you, personal and confidential, from Alan
[2] Vanderdresche. Do you see that?
[3] **A:** Yes, I do.
[4] **Q:** And the first -
[5] **A:** Excuse me, let me keep reading it.
[6] (Pause.)
[7] **THE WITNESS:** All right, I've read this.
[8] **BY MS. TRUHE:**
[9] **Q:** Okay. The first paragraph states, and I quote:
[10] "You", referring to you, Mr. Shofer, "asked that I check to
[11] see if we are waiting for any data to finish up the 1984
[12] work. Our records show we are still waiting for the asset
[13] data and the contribution statement. The 5500 form is due
[14] at the IRS at 10/15/85, so it's important we receive this
[15] data very soon." Do you recall that by September of 1985,
[16] you still had not supplied the Hack Company with the asset
[17] data, which would have revealed the loans you took from the
[18] pension in 1984?
[19] **A:** No, I don't recall that I hadn't supplied them the
[20] data, and I'm not sure whether they had the data in their
[21] hands by September, by the date of that letter. But I am
[22] sure that they had that data in their hands within a few
[23] weeks of that letter.
[24] **Q:** Well, Mr. Shofer, let me ask you this. We will
[25] get to that. Mr. Vanderdresche writes in the first part of

[1] this letter that you had asked him if the Hack Company was
 [2] still waiting for the 1984 data. Do you recall doing that?
 [3] **A:** No, I don't recall, but I'm sure I must've asked
 [4] him -
 [5] **Q:** All right.
 [6] **A:** - because I probably didn't know that he hadn't
 [7] received it.
 [8] **Q:** So you do not dispute the content of what is set
 [9] forth in the first part of -
 [10] **A:** Not at all.
 [11] **Q:** - Defendant's Exhibit Number 7?
 [12] **A:** Not at all.
 [13] **Q:** All right.
 [14] **MS. TRUHE:** Your Honor, I would move for admission
 [15] into evidence of Defendant's Exhibit Number 7.
 [16] **MR. TAYLOR:** Your Honor, I am not -
 [17] **THE WITNESS:** You must remember that Pam was
 [18] supplying him with that data.
 [19] **MR. TAYLOR:** Mr. Shofer -
 [20] **MS. TRUHE:** Excuse me, Mr. Shofer.
 [21] **MR. TAYLOR:** Excuse me, Mr. Shofer, there is no
 [22] question pending. Your Honor, I am not going to object to
 [23] this document, but I do want the record reflect that
 [24] apparently the subject matter of this letter is the Catalina
 [25] Enterprises, Inc. profit-sharing plan, whereas the other

[1] letters make reference to the pension plan. It seems the
 [2] subject matter of this letter, in addition to requesting the
 [3] asset data which was covered in the other two exhibits,
 [4] contains information with regard to apparently terminating
 [5] the profit-sharing plan. I simply do not want the Court to
 [6] become confused about the two plans and look upon this
 [7] letter as dealing with some issue that is not in this case.
 [8] So with that caveat, I have no objections.
 [9] **THE COURT:** It is admitted.
 [10] (Defendant's Exhibit No. 7,
 [11] Vanderdresche 9/26/85 letter to Shofer,
 [12] previously marked for identification,
 [13] was received in evidence.)
 [14] **BY MS. TRUHE:**
 [15] **Q:** Mr. Shofer, you would agree that if you had given
 [16] the Hack Company the asset data for your pension for 1984,
 [17] it would have revealed the \$200,000 that you had withdrawn,
 [18] correct?
 [19] **A:** I agree that if I did give them the data, it would
 [20] reveal the loans. And I did give them the data, and it did
 [21] reveal the loans.
 [22] **Q:** We will get to that. I am showing you what has
 [23] been marked as Defendant's Exhibit Number 8. This is a
 [24] memo, a handwritten memo, from Janelle Hardy at the Stuart
 [25] Hack Company, to you. Do you recall receiving that memo?

[1] **A:** I certainly do not recall receiving it -
 [2] **Q:** Now according to -
 [3] **A:** - but I'd like to read it.
 [4] **Q:** Sure.
 [5] (Pause.)
 [6] **THE WITNESS:** Customarily -
 [7] **BY MS. TRUHE:**
 [8] **Q:** Mr. Shofer, there is no question pending.
 [9] **A:** Okay, I was going to just volunteer so that you
 [10] would be clear that customarily -
 [11] **Q:** Well again -
 [12] **A:** - most -
 [13] **Q:** Mr. Shofer -
 [14] **A:** - most letters like that -
 [15] **Q:** If you want to do that -
 [16] **MR. TAYLOR:** Mr. Shofer, there is no question
 [17] pending.
 [18] **BY MS. TRUHE:**
 [19] **Q:** - you can do that when your attorney questions
 [20] you.
 [21] **A:** Okay.
 [22] **Q:** I would like to direct your attention to the first
 [23] part of Ms. Hardy's memo when she states: "Enclosed are the
 [24] 1984 government forms due 10/15/85 for the Catalina
 [25] Enterprises, Inc. pension plan. As we have never received

[1] asset data or a completed contribution statement for the
 [2] plan year ending 12/31/84, we were unable to complete
 [3] questions," and she set forth what questions those are.
 [4] Then she directs you to fill in the questions and "send us a
 [5] copy of the completed form for" the Hack Company's records.
 [6] Do you recall being instructed to do that?
 [7] **A:** No.
 [8] **MS. TRUHE:** Your Honor, I would move into evidence
 [9] Defendant's Exhibit Number 8.
 [10] **THE COURT:** It is admitted.
 [11] (Defendant's Exhibit No. 8, Hardy
 [12] 10/11/85 memo to Shofer, previously
 [13] marked for identification, was received
 [14] in evidence.)
 [15] **BY MS. TRUHE:**
 [16] **Q:** Do you deny being requested to do that?
 [17] **A:** No.
 [18] **Q:** Now directing your attention to the 5500-C. It
 [19] was in fact filed for plan year 1984. This is Defendant's
 [20] Exhibit Number 9. Do you recognize this form?
 [21] **A:** Yes.
 [22] **Q:** Is that your signature at the bottom?
 [23] **A:** Yes.
 [24] **Q:** I would like to ask you about some of the
 [25] handwriting which appears on this form.

[1] **A:** Certainly.

[2] **Q:** May I have this? Thank you. Whose handwriting

[3] appears on page 2, question 13, to be purchased?

[4] **A:** That's mine. What is it, the question to be

[5] purchased, Fidelity Bond to be purchased, okay.

[6] **Q:** Now when you received this document from Janelle

[7] Hardy at the Stuart Hack Company, did you review it in its

[8] entirety for accuracy as it had been completed, at least in

[9] part, by the Hack Company?

[10] **A:** I doubt it. I can't recall, but I doubt it.

[11] **Q:** Is it not true, Mr. -

[12] **A:** It wasn't my custom to review things for accuracy.

[13] **Q:** It was not -

[14] **A:** It wasn't my custom to review everyone else's work

[15] for accuracy.

[16] **Q:** All right. Is it not true, Mr. Shofer, as

[17] indicated right above your signature on the first page, that

[18] you were signing this document under the penalties of

[19] perjury and various other penalties?

[20] **A:** Yes.

[21] **Q:** Is it not also true that you are affirming, as

[22] indicated right above your signature, that you have examined

[23] this return including accompanying schedules and statements,

[24] and to the best of your knowledge and belief, it is true,

[25] correct, and complete?

[1] **A:** Yes, and I'm sure I signed it without, I signed it

[2] where there was a check mark indicating sign here. But it

[3] doesn't read and sign. It's just a check mark like sign

[4] here and return.

[5] **Q:** Turn to page 4, question 17, please, at the top.

[6] **A:** Excuse me, but those check marks are like when

[7] people say here's something; here's a check mark, sign it.

[8] Page 14?

[9] **Q:** Yes. No, I am sorry, page 4, question 17, at the

[10] top. Do you see that question?

[11] **A:** Yes.

[12] **Q:** The first question reads: "What percentage of

[13] plan assets are a loan to a party-in-interest?" Do you see

[14] that?

[15] **A:** I see it.

[16] **Q:** Do you see where it says zero?

[17] **A:** I see it.

[18] **Q:** Did you review that section for accuracy?

[19] **A:** No.

[20] **Q:** Do you recall, Mr. Shofer, at your deposition you

[21] told me that you were relying on Pam Summers to make sure

[22] everything on that form was accurate and that all you did

[23] was sign it?

[24] **A:** I don't recall, but that sounds like it sure

[25] would've been me.

[1] **Q:** Well, when I asked Ms. Summers about that

[2] testimony, she said that you never told her to review the

[3] 1984 5500-C for accuracy or any other 5500-C, for that

[4] matter.

[5] **MR. TAYLOR:** Well, let me object to the form of

[6] the question. That statement is not in evidence, Your

[7] Honor, and I have no way of reviewing whether that statement

[8] is accurate or not.

[9] **THE COURT:** Well, I am not really concerned about

[10] the statement. Is there a question that goes with it?

[11] **MS. TRUHE:** Yes.

[12] **BY MS. TRUHE:**

[13] **Q:** Assuming that is her testimony, would you disagree

[14] that she had never reviewed a 5500-C, including the one you

[15] are holding?

[16] **A:** I can't agree or disagree. I don't know whether

[17] she ever reviewed one. And I don't know that I ever

[18] instructed her to not review them or to review them. I

[19] can't recall that.

[20] **Q:** Well, you would agree, would you not, Mr. Shofer,

[21] that the 5500-C was an important document?

[22] **A:** Yes, I agree it's an important document.

[23] **Q:** That it is filed with the government?

[24] **A:** Yes.

[25] **Q:** That is signed by you under the penalties of

[1] perjury?

[2] **A:** Yes.

[3] **Q:** And that the answer to question 17a was not

[4] correct?

[5] **A:** I can see that, and I would like to comment that

[6] it just shows how much confidence I had in the Stuart Hack

[7] Company.

[8] **MS. TRUHE:** Your Honor, I would move for admission

[9] into evidence Defendant's Exhibit Number 9.

[10] **THE COURT:** It is admitted.

[11] (Defendant's Exhibit No. 9, 1984 5500-C,

[12] previously marked for identification,

[13] was received in evidence.)

[14] **BY MS. TRUHE:**

[15] **Q:** Mr. Shofer, directing your attention to what has

[16] been marked as Defendant's Exhibit Number 10. This is a

[17] letter from Katherine Goldsmith of the Hack Company, dated

[18] November 7, 1986, to you. Do you see that?

[19] **A:** Yes.

[20] **Q:** She writes in the first part of that letter:

[21] "Attached are copies of the 1984 and 1985 asset sheets that

[22] we received from Pamela Summers." Do you see that?

[23] **A:** Yes.

[24] **Q:** Do you see further down where she states: "I

[25] apologize for the quality of the copy, but the copies we

[1] were sent were barely decipherable?"

[2] **A:** Yes, I see that.

[3] **Q:** Now in that letter, she is asking you to clarify

[4] certain questions she has with respect to the asset sheets

[5] attached thereto, correct?

[6] **A:** Right.

[7] **Q:** All right, let's look at the asset sheets,

[8] specifically, the last one. At the very top, and it is

[9] difficult to read, do you see the highlighted portion

[10] 12/31/84?

[11] **A:** Yes.

[12] **Q:** Further down, it shows \$200,000?

[13] **A:** Yes.

[14] **Q:** The category, I believe, is Notes to Participants?

[15] **A:** Yes.

[16] **Q:** All right. Mr. Shofer, is it not true that the

[17] 1984 asset data was not supplied to Mr. Hack's office until

[18] shortly before Ms. Goldsmith wrote you that letter asking

[19] for further clarification?

[20] **A:** Well, I would have to probably imagine that it was

[21] provided some time from September or October to November.

[22] I don't know what day, or what month.

[23] **Q:** All right.

[24] **MR. TAYLOR:** Your Honor, I would move for

[25] admission into evidence Defendant's Exhibit Number 10.

[1] **THE COURT:** It is admitted.

[2] (Defendant's Exhibit No. 10, Goldsmith

[3] 11/7/86 letter to Shofer, previously

[4] marked for identification, was received

[5] in evidence.)

[6] **MR. TAYLOR:** Your Honor, the only comment I would

[7] like to just make, if I might for the record, is we are

[8] talking about quality of copy. I think if this income and

[9] expense statement, which is the last item in the exhibit, is

[10] going to become significant with regard to the degree or the

[11] extent of the quality of the copy, we probably would want to

[12] see if we could locate the original document in this case.

[13] I mean, we are certainly working with copies, but I do not

[14] want the record to be barren with respect to the quality of

[15] copy issue that might be reflected by a copy of a copy.

[16] **THE COURT:** I understand, but we are talking over

[17] 10 years ago. Is it likely to search the -

[18] **MR. TAYLOR:** Well, I simply do not want the record

[19] to remain silent on that issue. Obviously, I would like to

[20] do a little more investigation on this. Of course, it would

[21] be the Stuart Hack Company that would have received the

[22] original of this. They are offering a copy here. I do not

[23] know whether the quality -

[24] **THE COURT:** Well, if you take Ms. Goldsmith at her

[25] word, that piece of paper was not very legible, either.

[1] **MR. TAYLOR:** I understand that, but how legible

[2] may be a matter of subjective degree. As I said, a copy of

[3] a copy, a copy of a poor copy, may be worse than the

[4] original.

[5] **MS. WHELIHAN:** Although I am not sure that Mr.

[6] Taylor's objection is really appropriate given that I think

[7] the whole concept behind this exhibit is to show that Mr.

[8] Shofer did not supply the asset data, by his own testimony,

[9] until September of 1986. So I do not know that the original

[10] of the enclosure for the November 1986 letter -

[11] **THE COURT:** I understand, but if Mr. Taylor can

[12] locate a better copy, I will let him substitute.

[13] **MR. TAYLOR:** Yes, well, I would like to have that

[14] matter open.

[15] **THE COURT:** Sure.

[16] **MR. TAYLOR:** I mean, I would be happy to stipulate

[17] that the -

[18] **THE COURT:** I do not think anybody is going to

[19] object if you could find something that is more readable.

[20] **MR. TAYLOR:** Well, I would like to just reserve my

[21] comments on that point.

[22] **THE COURT:** Okay.

[23] **BY MS. TRUHE:**

[24] **Q:** Mr. Shofer, let's go to the ninth, and what would

[25] turn out to be the last time you took money from your

[1] pension, which was on September 30, 1986, at which time you

[2] took out \$35,000, correct?

[3] **A:** Correct.

[4] **Q:** All right, now this was over two years after Mr.

[5] Hack had written you a letter stating that you could borrow

[6] from your pension, correct?

[7] **A:** Correct.

[8] **Q:** This time, the reason you took money out of your

[9] pension was to put a downpayment on a condominium at Harbor

[10] Port?

[11] **A:** Correct.

[12] **Q:** Did you take this money out the same way you did

[13] before; namely, cut yourself a check and prepare a demand

[14] note?

[15] **A:** Correct.

[16] **Q:** Did you tell Stuart Hack you were taking this

[17] money for that purpose?

[18] **A:** No.

[19] **Q:** So, Mr. Shofer, would you not agree that from

[20] August 9, 1984, when you first withdrew money from you

[21] pension until September 30, 1986, when you took your ninth

[22] loan from the pension, that you never advised Mr. Hack that

[23] you were taking this money?

[24] **A:** No, I wouldn't agree with that because we sent him

[25] data in 1985 advising him that there was this \$200,000

[1] participant loan. He had the data in 1985, not November of
[2] 1986. You're off by a year.

[3] **Q:** Mr. Shofer, I thought you testified a few moments
[4] ago with reference to the earlier exhibit that the 1984 data
[5] was furnished to Katherine Goldsmith, or at least that is
[6] who was sending it back to you for further clarification in
[7] late 1986?

[8] **A:** Well, I see that she's sending it back for
[9] clarification in '86, but that doesn't mean she didn't have
[10] it in '85.

[11] **Q:** But your testimony -

[12] **A:** Now that I'm looking at the '8 -

[13] **Q:** - a few moments ago was that (inaudible).

[14] **A:** I know, but I got my year mixed up (inaudible).

[15] **MR. TAYLOR:** May I object? May I object -

[16] **THE WITNESS:** I have document -

[17] **MR. TAYLOR:** - Your Honor? My client, I think,
[18] ought to have an opportunity to finish his answer before
[19] Counsel asks another question.

[20] **MS. TRUHE:** Fine.

[21] **THE WITNESS:** I have documentation showing for a
[22] fact that Mr. Hack had my 1984 data in the fall of 1985. I
[23] have it on materials from his office and in his handwriting,
[24] employees of his handwriting.

[25] **BY MS. TRUHE:**

[1] **Q:** So now you are disputing your earlier testimony
[2] that you think you supplied the 1984 data (inaudible).

[3] **A:** Well, when I looked at this date -

[4] **Q:** Excuse me, Mr. Shofer, if I may finish my
[5] question. So you are recanting your earlier testimony that
[6] you think you furnished the 1984 asset data in late 1986,
[7] around October?

[8] **MR. TAYLOR:** Well, I would object -

[9] **THE WITNESS:** Yes, I am recanting.

[10] **MR. TAYLOR:** I object. I do not think that is
[11] what his testimony was.

[12] **THE WITNESS:** Well, I am recanting it if I said
[13] that because Hack had the data in '85. He had the '84 data
[14] in '85, and I have documentation to show that.

[15] **BY MS. TRUHE:**

[16] **Q:** Mr. Shofer, is it not also true that until the
[17] late fall, early winter of 1986 when your accountants
[18] advised you that a portion of the monies which you had taken
[19] from your pension were taxable, that you never consulted
[20] with or had any discussion with anyone at Greybush about the
[21] fact that you were withdrawing money from your pension?

[22] **A:** Would you repeat that, please?

[23] **Q:** Is it not also true that until the late fall or
[24] early winter of 1986 when your accountants first brought the
[25] problem of the taxability of some of this money which you

[1] had borrowed from your pension to your attention, that you
[2] had never had any discussion with anyone at Greybush about
[3] all of this money that you were borrowing?

[4] **A:** No, that's not true.

[5] **MS. TRUHE:** Counsel, Volume 1 of Mr. Shofer's
[6] deposition testimony, page 182, beginning at line 6.

[7] **BY MS. TRUHE:**

[8] **Q:** Question: "When did you first have any discussion
[9] with anyone at Greybush about the tax treatment of your
[10] loans from the pension plan?" Answer -

[11] **A:** That's not the question you asked me just now.

[12] **Q:** Excuse me, Mr. Shofer, may I finish? This will
[13] become clear. Answer: "The tax treatment of my loans from
[14] the pension plan?" Question: "Yes." Answer: "You mean
[15] you are referring to the fact that there was a tax
[16] consequence of my having taken loans from the pension plan?"

[17] **Question:** "Yes." "Their first communication to me from
[18] them regarding that issue, my recollection was that it was
[19] late in November of '86. It was late in November or early
[20] December, sometime late in the winter of 1986." Do you
[21] recall that testimony?

[22] **A:** No. Again, I don't recall the testimony. But if
[23] it says it there, it's probably very accurate.

[24] **MR. TAYLOR:** Well, I would object, Your Honor,
[25] because I do not really think that the subject matter of

[1] that exchange in that deposition is the question that was
[2] asked the witness. The question that was asked the
[3] witness -

[4] **THE COURT:** Was whether or not he had ever
[5] discussed borrowing the money?

[6] **MR. TAYLOR:** - discussed borrowing money. This
[7] is a question of tax consequences of loans.

[8] **THE COURT:** It is not exactly the same.

[9] **MS. TRUHE:** Well, let me clarify it.

[10] **BY MS. TRUHE:**

[11] **Q:** Mr. Shofer, did you have any discussion with
[12] anyone at Greybush Newman about the monies which you were
[13] borrowing from your pension at the time you were borrowing
[14] them? And if so, who?

[15] **A:** When you say at the time I was borrowing money,
[16] the time I was borrowing money covers from August '84 to
[17] some time in '86.

[18] **Q:** That is right.

[19] **A:** But during that period of time, I obviously, when
[20] I supplied information to my accountants, they could see
[21] that there were loans because we showed everything
[22] accurately and exactly the way it happened when we gave our
[23] loan data to the accountants. Which the first time, my
[24] recollection is that the first time my accountants got a
[25] hold of any of my records from '84 was sometime around June

[1] of '85.
 [2] **Q:** We will get to that, Mr. Shofer. I am going to
 [3] try this again. Prior to late 1986, when your accountants
 [4] came to you and advised you that some of the monies which
 [5] you had borrowed from your pension were taxable to you as
 [6] income, do you recall any conversations with anyone at
 [7] Greybush about the loans from the pension, conversation, not
 [8] records; conversation?
 [9] **A:** I can't recall conversations. But I'm certain
 [10] there might've been discussion about loans before '86.
 [11] **MS. TRUHE:** Counsel, I am referring to Mr.
 [12] Shofer's deposition testimony, this time Volume 2, page 274,
 [13] beginning at line 1.

BY MS. TRUHE:

[14] **Q:** Question: "Prior to late 1986, do you recall any
 [15] conversations with anybody at Greybush Newman about the
 [16] loans from the pension plan?" Answer: "No, I don't recall
 [17] any conversations."
 [18] **A:** Well, I didn't just now say I recalled
 [19] conversations. I said that I probably had them, but I
 [20] can't -
 [21] **Q:** But that is not what you told me in 1990, is it?
 [22] **A:** Well, if I said I didn't recall them then, I
 [23] didn't recall them then or now.
 [24] **Q:** Well, the problem was brought to your attention

[1] when you went to Greybush's offices for a meeting with Ken
 [2] Larash about the new tax law changes and you were introduced
 [3] to Alan Marvel. Is that not correct?
 [4] **A:** Yes.
 [5] **Q:** Alan Marvel told you there might be a tax
 [6] consequence to your loans from the pension?
 [7] **A:** That's correct.
 [8] **Q:** Is that not when you expressed surprise and told
 [9] everyone you had a letter from Mr. Hack?
 [10] **A:** I might've said I had the letter from Mr. Hack at
 [11] that meeting, or I might've said I think I have a letter
 [12] from Mr. Hack because I'm not even sure now as I speak that
 [13] at that meeting, I knew whether I actually had the letter in
 [14] my possession or not.
 [15] **Q:** Is that the first time you told anyone at Greybush
 [16] about that letter?
 [17] **A:** It may've been.
 [18] **Q:** Up until this time, you had simply supplied Mr.
 [19] Larash, who was preparing your personal tax returns each
 [20] year, with worksheets showing various interest deductions,
 [21] including the one for interest on the loans from the
 [22] pension?
 [23] **A:** Can I have that question again?
 [24] **Q:** I believe you were referring earlier in your
 [25] testimony to the fact that you gave certain records to Mr.

[1] Larash each year -
 [2] **A:** Yes.
 [3] **Q:** - for the purpose of preparing your personal tax
 [4] returns -
 [5] **A:** Right.
 [6] **Q:** - correct? Did part of the information you gave
 [7] Mr. Larash in 1985 for tax year 1984 include the interest
 [8] expense on the loans you had taken from your pension in
 [9] 1984?
 [10] **A:** Correct.
 [11] **Q:** Now when you gave Mr. Larash that information,
 [12] namely, the interest expense on the monies which you had
 [13] borrowed from your pension in 1984, do you recall having any
 [14] discussion with him regarding this interest expense and
 [15] whether it was deductible or not?
 [16] **A:** I don't recall, but I may've had a conversation
 [17] with him about the deductibility of it.
 [18] **Q:** Mr. Shofer, is it not true that you have never
 [19] pursued a claim for negligent preparation of your tax
 [20] returns against Greybush Newman?
 [21] **A:** Yes.
 [22] **Q:** The reason for that is because of an agreement
 [23] which you had signed earlier not to sue them after they were
 [24] third-partied into this case?
 [25] **A:** No, that's not the reason.

[1] **Q:** Were you not counseled by your first attorneys in
 [2] this litigation to bring Greybush Newman into this case, or
 [3] at least amend over and bring a direct claim against them
 [4] after they were brought into this litigation?
 [5] **A:** Yes, they did counsel me to do that.
 [6] **Q:** Mr. Shofer, you still own one of those properties
 [7] in the Virgin Islands, do you not?
 [8] **A:** Yes.
 [9] **Q:** And the purchase price of this property in 1985
 [10] was \$225,000, correct?
 [11] **A:** Correct.
 [12] **Q:** You put down 20 percent of the purchase price
 [13] which you took from your pension and you financed the rest,
 [14] correct?
 [15] **A:** Correct.
 [16] **Q:** After that, you paid a little over \$2,000 a month
 [17] in mortgage payments, correct?
 [18] **A:** Correct.
 [19] **Q:** Do you still pay that mortgage today?
 [20] **A:** Correct.
 [21] **Q:** In addition to the mortgage, do you incur any
 [22] other expenses in maintaining that property?
 [23] **A:** Considerable.
 [24] **Q:** Can you ballpark it for us?
 [25] **A:** \$1,000 a month.

[1] Q: Have you ever rented that property out?
[2] A: Trying.
[3] Q: Well, is it not true that -
[4] A: A few times.
[5] Q: Is it not true that you have not really tried to
[6] rent that property out because it is very nice and you do
[7] not want to see it torn up?
[8] A: No. I had it for rent. It was in a rental plan
[9] the first year. Then the rental company folded, and the
[10] bankruptcy proceedings lasted several years and deteriorated
[11] the value of the properties to a point where it couldn't be
[12] sold. And I can give you that history in more detail, if
[13] you'd like, right up to the present -
[14] Q: Well -
[15] A: - including four hurricanes.
[16] Q: Mr. Shofer -
[17] MS. TRUHE: Counsel, I am referring to Volume 3 of
[18] Mr. Shofer's deposition testimony, specifically page 336,
[19] or, beginning on page 336, beginning at line 18.
[20] BY MS. TRUHE:
[21] Q: Question: "Do you rent the property out?"
[22] Answer: "No, it sits empty." Question: "Why?" Answer:
[23] "Because the rental, difficult rental property. It's very
[24] difficult. It's a very nice property. It's not something
[25] that I would like to see torn up." Do you recall that

[1] testimony?
[2] A: I recall something similar to that. I don't
[3] recall the exact words.
[4] Q: Well, do you personally go to the Virgin Islands
[5] and use this home?
[6] A: Now?
[7] Q: At any time?
[8] A: I've been there once in '92. That's the last time
[9] I was there, I think.
[10] Q: How about before 1992? How often -
[11] A: I used to go well, they were the better days
[12] before Hack. And I used to go three or four weeks a year in
[13] January. I used to be able to afford to take a month off and
[14] go, but since the Hack thing, I haven't been able to go down
[15] there the last five years.
[16] Q: Since 1992?
[17] A: Since 1992.
[18] Q: And this problem with the loans surfaced, or at
[19] least was first brought to your attention in 1986, correct?
[20] A: Yes, but the effects started compounding
[21] themselves more drastically in the '90's, and since then I
[22] haven't been able to get down there. And four hurricanes
[23] have kept it from being sold -
[24] Q: Well, is -
[25] A: - like a roof, things like that.

[1] Q: Is it not true, Mr. Shofer, as you told me back in
[2] 1990, that you were not going to be putting this property up
[3] for sale any time soon because "I like it too much,"
[4] correct?
[5] A: That might be how I felt about it in 1990, before
[6] things got hard on me.
[7] Q: Okay. When the IRS first assessed taxes,
[8] interest, and penalties on the monies you borrowed from the
[9] pension in 1984, 1985, and 1986, you were looking at an
[10] additional tax liability totaling \$120,428.19, correct?
[11] A: Correct.
[12] Q: So that is how things looked in the beginning?
[13] MS. WHELIHAN: Janet, can you move it?
[14] MS. TRUHE: I am sorry.
[15] THE WITNESS: No.
[16] (Discussion off the record.)
[17] THE WITNESS: That's part of how they looked.
[18] BY MS. TRUHE:
[19] Q: All right.
[20] A: That's how they might've looked if I'd had the
[21] money to pay it.
[22] Q: All right. Well, you claim, do you not, that you
[23] were unable to pay this tax liability when it came due
[24] because you did not have the money, correct?
[25] A: Correct.

[1] Q: You knew that interest would continue to grow on
[2] any taxes you owed the IRS for as long as they remained
[3] unpaid, correct?
[4] A: Correct.
[5] Q: I would like to turn next to the monies you have
[6] paid various attorneys over the past 8 years to prosecute
[7] this action against Mr. Hack. According to your deposition
[8] testimony, you first filed suit, I am sorry, according to
[9] court records, you first filed suit against Mr. Hack in
[10] 1988, correct?
[11] A: Correct.
[12] Q: At that time, you were being represented by the
[13] law firm of Blom Younquist here in Baltimore?
[14] A: Correct.
[15] Q: According to your deposition testimony, you have
[16] paid that firm approximately \$130,000 in legal fees?
[17] A: Correct.
[18] Q: Now your second attorney in this case was Thomas
[19] Bornhorst, correct?
[20] A: Correct.
[21] Q: How long did he represent you in this litigation?
[22] A: More than two years.
[23] Q: According to your prior deposition testimony, you
[24] estimate that you have paid Mr. Bornhorst approximately
[25] \$30,000 to represent you in your case against Mr. Hack,

[1] correct?

[2] **A:** That or more.

[3] **Q:** Or more?

[4] **A:** Yes.

[5] **Q:** Your third attorney in this litigation is your

[6] present one, Douglas Taylor. When did you hire Mr. Taylor?

[7] **A:** I think Mr. Taylor and I met in about March of

[8] 1985, '95.

[9] **Q:** So from 1993 to 1995, you were being represented

[10] by Mr. Bornhorst?

[11] **A:** Correct.

[12] **Q:** And prior to that, Blom Younquist, correct?

[13] **A:** Correct.

[14] **Q:** Now, you testified at your recent deposition that

[15] you have paid Mr. Taylor somewhere between \$50,000 and

[16] \$100,000 in legal fees?

[17] **A:** Correct.

[18] **Q:** Well, assuming you paid Mr. Taylor on the low side

[19] of that estimate, my calculations indicate that you have

[20] paid at least \$210,000 in legal fees to these attorneys,

[21] correct?

[22] **A:** At least.

[23] **Q:** Is it not true, Mr. Shofer, that you could have

[24] paid your tax debt when it came due but preferred instead to

[25] pay various attorneys over \$200,000 to prosecute this case

[1] against Mr. Hack?

[2] **A:** No.

[3] **MR. TAYLOR:** I would object to the question.

[4] **THE WITNESS:** No, that's not true.

[5] **THE COURT:** What is the basis of the objection?

[6] **MR. TAYLOR:** Well, I think that there was more to

[7] prosecuting the case against Mr. Hack than just the taxes

[8] themselves. In other words, there were greater damages in

[9] this case, and I do not think it is appropriate to ask a

[10] question in this particular proceeding with limited damages

[11] as to whether or not this Plaintiff could utilize his money

[12] to pay off taxes because he has other damages.

[13] **THE COURT:** Well, let me stop you, Mr. Taylor.

[14] You can take it up on redirect. I will overrule the

[15] objection, but you certainly are entitled to go into that on

[16] redirect.

[17] **THE WITNESS:** What was the question, again,

[18] please?

[19] **BY MS. TRUHE:**

[20] **Q:** Mr. Shofer, you could have paid your tax debt when

[21] it came due, which was approximately \$120,000, but preferred

[22] instead to pay various attorneys over \$200,000 to prosecute

[23] this case against Mr. Hack?

[24] **A:** Well, you say preferred. I really didn't prefer

[25] to do this. It's just that it's my feeling about the

[1] insurance company that makes me do it.

[2] **MS. TRUHE:** Objection, Your Honor, move to strike.

[3] **THE COURT:** Well, the Court will strike the

[4] testimony, at least the reference to -

[5] **THE WITNESS:** I can't help it. I got to tell the

[6] truth.

[7] **BY MS. TRUHE:**

[8] **Q:** Are you finished with your answer?

[9] **A:** That answer, yes.

[10] **Q:** You finally paid your entire tax debt off on

[11] December 19, 1996, just last year, according to the IRS,

[12] correct?

[13] **A:** Correct.

[14] **Q:** Now prior to that, you had been instructed by the

[15] IRS earlier in the year to sell your lot on Park Heights

[16] Avenue valued at approximately \$214,000, correct?

[17] **A:** No.

[18] **Q:** So if Ms. Tyler at the IRS has testified to that,

[19] you would dispute that testimony?

[20] **A:** She wouldn't testify to that because your question

[21] was you said valued at \$200,000-and-some, and I don't agree

[22] that it was valued at that.

[23] **Q:** Well, let's approach it -

[24] **A:** That's where -

[25] **Q:** - this way.

[1] **A:** That's where we have the problem.

[2] **Q:** Do you recall being instructed by the IRS to sell

[3] your lot on Park Heights Avenue?

[4] **A:** They suggested that that's how I could get money

[5] to pay them.

[6] **Q:** But you never did that, did you?

[7] **A:** No.

[8] **Q:** Eventually, you went to Vivian King, who is a

[9] private investor living in Coral Gables, Florida, correct?

[10] **A:** Correct.

[11] **Q:** She currently holds the mortgage on your Virgin

[12] Islands property, does she not?

[13] **A:** Correct.

[14] **Q:** She lent you a little over \$200,000 which you used

[15] to pay off your taxes late last year?

[16] **A:** Partially correct. She lent me \$300,000.

[17] **Q:** All right.

[18] **A:** A hundred of it's still in escrow -

[19] **Q:** In return -

[20] **A:** - to build a bridge that has to be built before

[21] the property can be sold.

[22] **Q:** All right, and in return you put up your property

[23] at Park Heights Avenue as security, correct?

[24] **A:** Correct.

[25] **Q:** Which you have owned, this property, since the

[1] late 1960's and had eventually planned to develop, correct?
[2] **A:** Partially correct because it was owned by myself
[3] jointly with my wife for a portion of that time, and we were
[4] in the process of getting permits to develop it. And then
[5] there was a part of time when I was buying it from her. And
[6] so considerable period of time elapsed during the purchase
[7] and the permits and such.

[8] **Q:** Well, Mr. Shofer, since you stopped taking money
[9] from your pension in September of 1986, is it not true that
[10] you have borrowed money on a rather regular basis from Crown
[11] Motors, your business?

[12] **A:** On an irregular basis.

[13] **Q:** All right, but today you owe Crown Motors, you and
[14] your wife together, about \$300,000 to \$400,000?

[15] **A:** No, considerably more.

[16] **Q:** All right. In addition, is it not true that you
[17] have used that money for legal expenses, personal expenses,
[18] and upkeep on your Virgin Islands property?

[19] **A:** Among other things. I also used it for income
[20] taxes, defenses against, in this litigation, paying off
[21] credit card interest rates; sort of, you know, Peter to pay
[22] Paul, hand-to-mouth sort of thing.

[23] **Q:** Mr. Shofer, finally, I would like to get to this
[24] category of damage that you are claiming for fees paid to
[25] various professional advisors. If I could refer to that

[1] exhibit, it has not yet been introduced, but I think it
[2] would be a good vehicle for us to cover this next line of
[3] questioning.

[4] **THE COURT:** Is that number 30?

[5] **MR. TAYLOR:** Yes, Your Honor, I think that is
[6] number 30.

[7] **MS. TRUHE:** Plaintiff's Number 30. Mr. Taylor,
[8] does Mr. Shofer have a copy of that?

[9] **MR. TAYLOR:** Yes, I will hand him one.

[10] **BY MS. TRUHE:**

[11] **Q:** Mr. Shofer, in this category, Fees for
[12] Professional Advisors, am I correct that you are claiming
[13] \$100,348 plus interest of \$247,143.24?

[14] **A:** Yes.

[15] **Q:** So basically, \$100,000 in fees to professional
[16] advisors and nearly a quarter million dollars of interest on
[17] top of that, correct?

[18] **A:** Through the end of this month.

[19] **Q:** All right. Let's go to page 3 of this exhibit.
[20] First of all, I believe you testified earlier that you
[21] prepared this exhibit in its entirety?

[22] **A:** No. I prepared it in its entirety with the help
[23] of Ted Rosenberg and Carl Auck.

[24] **Q:** Well, the title of page 3 is, and I quote,
[25] "Professional and Other Expenses Related to Determining and

[1] Correcting Hack-Caused Prohibited Transactions and Tax
[2] Liabilities for Periods from November 1986 through June
[3] 1997." Do you see that?

[4] **A:** Yes.

[5] **Q:** Now can you tell us what expenses on your itemized
[6] list relate solely to the loans from the pension as they
[7] pertain to your increased tax liability and not the
[8] prohibited transaction?

[9] **A:** As I say, it's very difficult to break out -
[10] number one, if I have someone like Nicholas Giampietro doing
[11] work for me, I have to first break out the work he does with
[12] me that relates to Hack loans as opposed to other non-Hack
[13] loan matters. Then I have to take and break it out from
[14] Hack loan prohibited transaction matters to Hack loan loan
[15] matters about undoing the loan transactions.

[16] **Q:** Exactly, and what I wanted to find out was whether
[17] you are including, because that appears to be the title of
[18] this document, are you including damages for fees paid in
[19] connection with Hack loan prohibited transaction problems on
[20] this document -

[21] **A:** No.

[22] **Q:** - even though that is the title of it?

[23] **A:** Well, that's the title of it. But I think that
[24] title is somewhat erroneous then because I think that I keep
[25] hearing the terminology prohibited transaction so much that

[1] it just became part of the title. These -

[2] **Q:** Well -

[3] **A:** And there again also, I'm only taking small
[4] percentages of many professionals' bills, like 10 percent or
[5] 15 percent. So for instance, Greybush Newman, when they
[6] were working on my account, they pegged the portion that was
[7] related to Hack at about 30 percent of their total billings,
[8] looking at what they were billing me for. So when I started
[9] using Martucci, I dropped it down from 30 to 15 percent and
[10] said well, if one accountant is documenting 30 and I use 15,
[11] that's got to be half of what the other one's using and it
[12] certainly should be considered reasonable. In other words,
[13] I was trying to be conservative so that it wouldn't be
[14] questioned, but nevertheless, I guess it is.

[15] **Q:** Let's go step by step through each one of these
[16] professionals. The first one listed is Carl Auck. Do you
[17] see that?

[18] **A:** Yes.

[19] **Q:** You are claiming various fees paid to Mr. Auck
[20] from 1991 to 1997, correct, through June 30, correct?

[21] **A:** Correct. I'm using the number for Carl Auck,
[22] who's an internal person, as 10 percent.

[23] **Q:** Mr. Shofer, do you have any documentation that you
[24] personally paid Mr. Auck any of this money?

[25] **A:** Oh, yes, there are -

[1] Q: Where is it?
 [2] A: - canceled checks for everything that he
 [3] received. I mean -
 [4] Q: Whose checks?
 [5] A: Whose checks?
 [6] Q: Yes.
 [7] A: Our company's checks.
 [8] Q: Thank you. The second professional listed on this
 [9] exhibit is -
 [10] A: Incidentally, I owe my company this money.
 [11] Q: Have you paid it?
 [12] A: No. They haven't been able to pay me salary for
 [13] the last four or five years. And my agreement with them is
 [14] I'll pay them this money when they pay me my salary.
 [15] Q: All right, let's go to the second professional,
 [16] which is actually the law firm of Blom Younquist. The
 [17] amount you claim is \$2,000 paid in 1989. Do you see that?
 [18] A: Yes.
 [19] Q: Who actually paid that money?
 [20] A: I did.
 [21] Q: Do you have a canceled check drawn on your
 [22] personal account?
 [23] A: That was a journal entry and it was charged back
 [24] to me. Any money given to Blom Younquist by Crown Motors
 [25] was charged back to me. Carl Auck can testify to that.

[1] He's my accountant. Even my records will show that.
 [2] Q: Have you paid it?
 [3] A: Yes.
 [4] Q: Do you have proof of that?
 [5] A: I have proof that it was charged to me by my
 [6] company.
 [7] Q: But do you have proof that you in fact have paid
 [8] it?
 [9] A: Well, I it's hard to segregate. It goes into a
 [10] lot of money that I still owe my company, and it's on the
 [11] books that I owe it to them.
 [12] Q: Let's go to the next professional, I am sorry?
 [13] A: Well, it's on the books that I owe it to them, and
 [14] I don't know, I have paid them money, so I don't know
 [15] whether you could say this is part of what I paid them, or
 [16] it's part of what hasn't been paid because when I owe my
 [17] company money, there's one number that says you owe this.
 [18] It doesn't break it down when I give it to them as to what
 [19] it's credited for.
 [20] Q: Well, let's go to the next professional, Thomas
 [21] Bornhorst. I see here you are claiming \$2,000 paid to him
 [22] in 1994. Do you see that?
 [23] A: Yes.
 [24] Q: Is the fact that you are claiming \$2,000 for Blom
 [25] Younquist in 1989 and \$2,000 for Mr. Bornhorst in 1994 just

[1] a coincidence?
 [2] A: I took a mental picture of how much time and
 [3] effort they put into particular projects. And it looked to
 [4] me like it wasn't full-time. It was like part-time work
 [5] over a 2-month or a 3-month period, and I rounded it off.
 [6] In other words, had that agreement that Blom Younquist been
 [7] working on with Greybush Newman taken a year and involved
 [8] many more meetings, it wouldn't have been \$2,000; it
 [9] would've been a higher number. But it was something that
 [10] was completed over a 6- or 8-week period from beginning to
 [11] end, and was a portion of what Blom Younquist did for me
 [12] during that time. So I only took a portion of their total
 [13] billings during that time that would sort of be relative to
 [14] the portion of the time that they spent on that as to other
 [15] matters.
 [16] Q: Do you have any evidence that you personally paid
 [17] Mr. Bornhorst's \$2,000 bill?
 [18] A: Yes, because with Mr. Bornhorst, he was getting
 [19] Richard Shofer checks rather than company checks.
 [20] Q: Do you have those checks?
 [21] A: I don't have them with me, but they're in my
 [22] office, I'm sure.
 [23] Q: You next claim fees paid to Nicholas Giampietro.
 [24] Do you see those?
 [25] A: Yes.

[1] Q: In all of the bills I have seen produced by you in
 [2] the course of this litigation from Mr. Giampietro, they were
 [3] all directed to Catalina Enterprises. Is that not correct?
 [4] A: Correct.
 [5] Q: Do you have any evidence that you personally paid
 [6] any of these bills?
 [7] A: As I say, my agreement with my company is that I
 [8] owe them that money and they owe me salary, and when I get
 [9] my salary, I'll pay them.
 [10] Q: But so far, the only one who has paid Nicholas
 [11] Giampietro is your company, correct?
 [12] A: Well, no, some of this may've been paid to Mr.
 [13] Giampietro through me and not due. I have to check with my
 [14] settlement documentation from the IRS audits because when
 [15] the IRS audited me, one of the issues was who pays the Hack
 [16] litigation expense? And some things were charged back to me
 [17] as not being appropriately to be paid by my company, I
 [18] think.
 [19] Q: But up until that point, the company had been
 [20] paying everything, correct?
 [21] A: Yes, but as a result of the audit, some things
 [22] were charged back and things were done differently. So I
 [23] have to actually look at some of that documentation and see
 [24] if some of the Giampietro and some of the Greybush Newman
 [25] money wasn't in fact charged to me -

[1] Q: When you say -
 [2] A: - already.
 [3] Q: - charged to you, you are saying there is an
 [4] entry on the books of Crown Motors that -
 [5] A: Yes.
 [6] Q: - you would owe them that money?
 [7] A: Well, yes, it would be separately. Something's
 [8] that's been recognized and owe, and something that's - due
 [9] that'll be paid when I get paid my salary.
 [10] Q: Let's go to the next professional, Stuart Hack:
 [11] \$1,435. Do you see that?
 [12] A: Yes.
 [13] Q: Is it not true -
 [14] A: Paid by my company.
 [15] Q: - that Crown Motors paid this bill to Mr. Hack's
 [16] company?
 [17] A: Laid it out for me. Yes, they paid it, but they
 [18] want it back because they didn't get the advice and I didn't
 [19] get the advice that represented that money.
 [20] Q: I thought you testified earlier that the reason
 [21] the invoices from Mr. Hack's company were all made out to
 [22] Catalina Enterprises was so that Catalina could take a
 [23] deduction?
 [24] A: Exactly.
 [25] Q: Then why is this your expense ultimately?

[1] A: Well, they didn't get, they paid the bills -
 [2] Q: But you were not going to -
 [3] A: - but the product was supposed to be accurate
 [4] information, and it was not accurate information.
 [5] Q: Well, regardless of the issue of whether anybody
 [6] got what they paid for, is it not true, as I believe you
 [7] just admitted that -
 [8] A: The money -
 [9] Q: - invoices -
 [10] A: The money that's come out of -
 [11] Q: - excuse me, from the invoices from Mr. Hack's
 [12] company were directed to Catalina Enterprises so that
 [13] Catalina could pay his bills and take them as deductions,
 [14] correct?
 [15] A: Correct.
 [16] Q: Well, you were not, as bills were being submitted
 [17] by Mr. Hack's company, then reimbursing Catalina, were you?
 [18] A: No.
 [19] Q: The next professional on this list is Edward
 [20] Kabala. Now he is, as I understand it, your primary
 [21] liability expert witness in this case?
 [22] A: Yes.
 [23] Q: Do you have any evidence that you personally paid
 [24] him any of the fees shown here?
 [25] A: I believe in his case it may be Richard Shofer

[1] checks, and I would have to speak with my wife or Carl Auck
 [2] to determine that. But they may be Richard Shofer checks in
 [3] that case. I have to check on that.
 [4] Q: Well, let's go to Martucci Associates. This is
 [5] your current accountant?
 [6] A: Yes.
 [7] Q: Well, in all the bills that I reviewed from Ms.
 [8] Martucci, I note that they were all addressed to Crown
 [9] Motors. Is that not correct?
 [10] A: Correct. It's money that I'm going to be paying
 [11] back to Crown Motors when I get my salary from Crown Motors.
 [12] Q: But so far, she has just been paid by Crown
 [13] Motors, correct?
 [14] A: Correct. Well, Crown Motors knows that I'm
 [15] working for it, and not getting my salary. So it can't very
 [16] well say it's got to help keep me alive.
 [17] Q: But did Ms. Martucci render any services related
 [18] to the Hack loan problem?
 [19] A: Yes.
 [20] Q: Well, in her deposition, she states that she was
 [21] never asked to provide any services on issues related to
 [22] loans and that if she had, she would have no way of knowing
 [23] what she had charged you. Would you dispute that?
 [24] A: Yes.
 [25] Q: The next category -

[1] A: No, excuse me, one thing because you're on that
 [2] issue, one of the things she did that she charged me over
 [3] \$1,000 for, as I recall, was provide me with a report on the
 [4] duty to file amended returns. She did the research. She
 [5] charged me for going to Loyola Library and looking. I
 [6] remember it was the Loyola Law Library involved.
 [7] And somewhere, I can find that letter but there were bills
 [8] over \$1,000 related to that issue.
 [9] Q: Well, if there were such bills, they were sent to
 [10] Crown Motors, were they not?
 [11] A: Yes, they were sent to Crown Motors.
 [12] Q: And they were paid by Crown Motors, correct?
 [13] A: Yes.
 [14] Q: Now the next category listed here is
 [15] miscellaneous. I see \$500 for every year, it looks like,
 [16] until the present in which you claim \$300, correct?
 [17] A: Yes.
 [18] Q: But in reviewing the bills for this category, or,
 [19] I should say, where are the bills for this category?
 [20] A: As I told you, a more detailed analysis of how I
 [21] got those numbers was "Miscellaneous: very conservative
 [22] annual estimates of expenses related to undoing prohibited
 [23] transactions and Hack-related income tax matters. Copying
 [24] costs, \$100; heavy postage, \$100; parking fees, \$100;
 [25] telephone expenses, including long-distance, \$100;

[1] transportation, including gasoline, \$100; total, \$500 a
[2] year." Now I'd really rather think that if I got very
[3] careful in analyzing it, I was probably a little light on
[4] the gasoline and quite light on the parking fees, and maybe
[5] a little heavy on the long-distance phone calls. I don't
[6] know, and copying costs, it's about right. I know before I
[7] came here, I spent a lot of \$35 to \$75 bills just in the
[8] last month or few months at Staples.

[9] **Q:** Mr. Shofer, did you just testify that you might be
[10] a little heavy on one of these expenses: telephone?

[11] **A:** Well, if I'm heavy on telephone, then, I say,
[12] I'm much lighter on gasoline. You know, I'm rounding it,
[13] and you look shocked.

[14] **Q:** Well, I believe you are just admitting to us that
[15] at least one of these expenses is -

[16] **A:** Well, I'm rounding it -

[17] **Q:** - inflated.

[18] **A:** - up. It's quite obviously I'm rounding
[19] everything, you see, so gasoline, it's really hard to say
[20] you only spend \$100 a year. A gallon 1.6 gallons a week on
[21] all your travels to people like Giampietro and all these
[22] trips back and forth. I think a gallon-point-six a week is
[23] light, so it's probably more than \$100 a year. I just
[24] ballparked it, you know, to be able to finally get this
[25] chart completed.

[1] **Q:** Okay well, let me ask you about miscellaneous
[2] again. You just read to me that these various expenses
[3] related, and I quote, "to undoing prohibited transactions
[4] and Hack-related income tax matters." Would you not
[5] concede, as indicated on this document, that at least some
[6] of these expenses relate to undoing prohibited transactions?

[7] **A:** Well actually, part of Mr. Hack's letter led me
[8] into what was prohibited transactions, yes.

[9] **Q:** Is that a yes, Mr. Shofer?

[10] **A:** I imagine prohibited transaction is in there a
[11] little bit somewhere. It's hard to carve it out. There was
[12] so many classes prohibited transaction related to this Hack
[13] situation. Taking the loans was a prohibited transaction.

[14] **Q:** Well, all I am trying to establish, Mr. Shofer, is
[15] that with reference to this, I believe, ninth category of
[16] expense in this category of professional fees and billings,
[17] that at least some of those expenses relate to prohibited
[18] transactions, correct, and the cost of undoing those?

[19] **A:** Yes, but taking the loans was a prohibited
[20] transaction.

[21] **Q:** That was not my question. You will concede that
[22] at least a portion of these expenses listed in category
[23] number 9, miscellaneous, relate to undoing prohibited
[24] transactions, correct?

[25] **A:** Probably some, yes.

[1] **Q:** All right. Do you have any evidence that you
[2] personally paid any of these expenses in this category
[3] marked miscellaneous?

[4] **A:** Do I have any evidence? No. Every time I pay a
[5] parking fee or a ticket for an overdue meter, it's -

[6] **Q:** Do you have any documentation?

[7] **A:** I'm afraid I don't have all that.

[8] **Q:** All right. Let's go to the next professional:
[9] Alan Schwaite. I see two fees in 1991 and 1992 for services
[10] rendered by him.

[11] **A:** Yes.

[12] **Q:** Who paid those bills?

[13] **A:** I'll have to check. It may've been my office, and
[14] it might've been either my personal check or a company
[15] check, and I don't know.

[16] **Q:** Well, in reviewing -

[17] **A:** I'll ask Carl Auck.

[18] **Q:** Well, in reviewing the bills from Mr. Schwaite, I
[19] noted that they were all addressed to Crown Motors. Is that
[20] not correct?

[21] **A:** If that's how they were addressed.

[22] **Q:** Were they not paid by Crown Motors, too?

[23] **A:** They may've been if they were addressed to Crown
[24] Motors, and then I would owe Crown Motors back for it.

[25] **Q:** Now with respect to the last professional listed

[1] here, Douglas Taylor, your present attorney, I note that you
[2] are claiming as part of your damages in this category \$2,000
[3] in 1996. Do you see that?

[4] **A:** Yes.

[5] **Q:** Now again, is it just a coincidence that you are
[6] claiming \$2,000 for Douglas Taylor, your present attorney;
[7] and \$2,000 for the second attorney in this case, Mr.
[8] Bornhorst; and \$2,000 for your first attorneys from Blom
[9] Younquist?

[10] **A:** Yes, that is just a coincidence.

[11] **Q:** Finally, Mr. Shofer, directing your attention to
[12] Defendant's Exhibit Number 11, which is a letter from the
[13] United States Department of Labor to you dated February 18,
[14] 1994. Do you see that?

[15] **A:** Yes.

[16] **Q:** Is it not true, Mr. Shofer, that your problems
[17] with the IRS and the Department of Labor were not limited to
[18] just this loan situation, but there were other issues as
[19] well on which various professionals were assisting you?

[20] **A:** Well, once a Labor audit starts, they sift into
[21] everything. And they find or allege lots of things. Some
[22] of them turned out to have some substance; and some, they
[23] just say okay, we're satisfied and they walk away from.

[24] **Q:** Well, with reference to that letter itself, what
[25] were the other problems which the Department of Labor

[1] discovered with respect to your pension, and specifically,
[2] your actions as a trustee besides the loan problems?

[3] **A:** Well, I have a settlement agreement, so I would
[4] have to review the settle agreement to be able to
[5] specifically key in on every one that there is and explain
[6] it. And as I look here at page 2, maybe that's done for us.
[7] Okay, so should I start reading down here?

[8] **Q:** Well, let's start with page 1. It appears,
[9] according to the Department of Labor, that you as trustee
[10] may have violated several provisions of ERISA. Do you see
[11] that?

[12] **MR. TAYLOR:** Well, Your Honor, let me object to
[13] questions that may get us into ERISA or prohibited
[14] transactions. These issues are expressly excluded from this
[15] case. It seems to me that if Mr. Shofer, by virtue of prior
[16] orders of the Court, is prohibited really from going into
[17] the expanded damages that he has which deal with these
[18] prohibited transactions, I do not think it is appropriate
[19] for Counsel to question him about issues that are not in the
[20] case.

[21] **THE COURT:** Well, I assume, maybe I should not
[22] assume. What is the relevance of the document?

[23] **MS. TRUHE:**

[24] **MS. TRUHE:** Well, Your Honor, I might be able to
[25] solve this. I just want to establish that the various

[1] professionals which Mr. Shofer has been testifying about,
[2] especially Mr. Giampietro, Mr. Bornhorst, and even Mr.
[3] Taylor, and to some extent, even Greybush Newman, when they
[4] were negotiating and communicating with the Department of
[5] Labor and the IRS, this document demonstrates that they were
[6] doing that with respect to a lot of other issues besides
[7] just the Hack loan problem. If Mr. Shofer will agree with
[8] that, then I think we can move on.

[9] **THE COURT:** Well, why do you not ask him?

[10] **MS. TRUHE:** All right.

[11] **BY MS. TRUHE:**

[12] **Q:** Mr. Shofer, would you agree with that?

[13] **A:** I would agree that whatever they have written
[14] there as being a problem was a problem that had to be dealt
[15] with, and that -

[16] **Q:** By these other professionals?

[17] **A:** Those professionals, to some degree, were involved
[18] in them.

[19] **Q:** But I notice that showing a carbon copy - or, a
[20] carbon copy is shown on this February 19, 1994, letter to
[21] Nicholas Giampietro and Thomas Bornhorst. Do you see that?

[22] **A:** Correct.

[23] **Q:** One other matter with respect to this letter, and
[24] this relates to the Hack loan problem specifically, on
[25] page 2, the Department of Labor gets into that issue. Do

[1] you see that here where it states: "In addition, our
[2] investigation has disclosed that you have borrowed \$375,000
[3] from the plan. Nine loans were issued between August 9,
[4] 1984, and September 30, 1986."

[5] **A:** Correct.

[6] **Q:** And it also states that: "These loans were deemed
[7] demand notes with no security provided?"

[8] **A:** That's what the letter says.

[9] **Q:** All right. Is it not true that the Department of
[10] Labor concluded that you as trustee had behaved
[11] inappropriately in terms of federal law with respect to the
[12] manner in which you took money from the pension?

[13] **A:** I don't think that issue was ever an issue.

[14] **Q:** Well -

[15] **A:** The manner in which I took the money was not an
[16] issue. In the first place, that statement is somewhat
[17] erroneous for two reasons. It says that it was not secured,
[18] and it was always secured by my volunteer account, so it was
[19] completely secured. But besides the fact that it was
[20] secured by my volunteer account, \$75,000 of it was secured
[21] by a second mortgage on one of the Island properties. So it
[22] was partially secured by an Island property mortgage, and it
[23] was totally secured in that it was my own volunteer account
[24] that was the security. So the plan could not possibly have
[25] lost a penny because my volunteer account would've been used

[1] to satisfy the loan.

[2] **Q:** Well, Mr. Shofer, it states in this letter that:

[3] "This office," - referring to the Department of Labor, -
[4] "has concluded its investigation of the plan and your
[5] activities as its trustee." Is it your testimony that you
[6] are disputing what the Department of Labor found on this
[7] issue with respect to whether your loans were properly
[8] secured?

[9] **MR. TAYLOR:** Your Honor, let me object to the
[10] question. I would simply note that the document Counsel is
[11] using to question the witness is not in evidence. She may
[12] be about to offer it. I want to object to it because it is
[13] a Department of Labor document. Department of Labor, the
[14] Court might take notice of, is specifically empowered to
[15] handle the enforcement of ERISA provisions and prohibited
[16] transactions. Those are issues which are outside this case.
[17] I think if this letter comes in, then we should be permitted
[18] to bring in evidence to establish what actually occurred
[19] with regard to prohibited transactions and whether we were
[20] in compliance with ERISA or not.

[21] **THE COURT:** If I were going to turn this letter in
[22] its entirety over to a jury, I may be opening doors. But I
[23] do not have any doubt that I can read this letter and not
[24] take into consideration the elements of it that go beyond
[25] the scope of the damages that I am allowing in the case. So

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[1] I am going to admit it.
[2] (Defendant's Exhibit No. 11, Department
[3] of Labor letter to Shofer, previously
[4] marked for identification, was received
[5] in evidence.)
[6] **THE COURT:** Your remarks are well-taken. I
[7] understand that I have limited the Plaintiff to certain
[8] damages; so have a number of other judges, not only in this
[9] court but in others. And I think I can read it in the
[10] context of those rulings.
[11] **MR. TAYLOR:** Thank you, Your Honor.
[12] **MS. TRUHE:** Thank you, Your Honor. Your Honor,
[13] that is all I have.
[14] **THE COURT:** Okay. I think that perhaps that
[15] should be all any of us have for today. Well, let me ask
[16] this. Mr. Shofer, you may step down, but you are still
[17] under oath because we are going to have to continue with
[18] your testimony, and you may not discuss it in the interim.
[19] (The witness stepped down.)
[20] **THE COURT:** I had not scheduled trial time in this
[21] case tomorrow because I had a collateral day, but my Clerk
[22] tells me that I have a fairly light collateral day, for a
[23] change. I am wondering whether Counsel are available to try
[24] to get a few hours of testimony in tomorrow?
[25] **MS. WHELIHAN:** We actually had it scheduled for a

This is to certify that the proceedings in the matter of Richard Shofer v. Stuart Hack, et al., heard on June 26, 1997, were recorded by means of videotape.

I do hereby certify that the foregoing pages constitute the official transcript of said videotaped proceedings to the best of my ability in a complete and accurate manner.

In Witness Whereof, I have hereunto subscribed my name this 17th day of March 1998.

Connie Jones
Transcriber

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[1] half-day, Your Honor (inaudible).
[2] **THE COURT:** Oh, we did, okay.
[3] **MS. WHELIHAN:** So we were thinking a half-day.
[4] **THE COURT:** The way my schedule looks now, I might
[5] even be free as early as 10:30, quarter of 11:00. I have a
[6] post-conviction hearing at 3:00. So I was wondering if it
[7] would be possible to get you all here by about 10:30, get
[8] started, and then stop it at 3:00 so I can take my post-
[9] conviction? Then we will pick up again on Monday following
[10] that.
[11] **MR. TAYLOR:** That would be fine, Your Honor.
[12] **THE COURT:** Is that okay? All right, then I will
[13] see everybody at 10:30 tomorrow morning.
[14] **MR. TAYLOR:** Thank you, Your Honor.
[15] **MS. TRUHE:** Thank you, Your Honor.
[16] **MS. WHELIHAN:** Thank you, Your Honor.
[17] (The trial was recessed at 4:59 p.m.)
[18]
[19]
[20]
[21]
[22]
[23]
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[25]

TRANSCRIBER'S CERTIFICATE

Lawyer's Notes

TRANSCRIBER'S CERTIFICATE

This is to certify that the proceedings in the matter of Richard Shofer v. Stuart Hack, et al., heard on June 26, 1997, were recorded by means of videotape.

I do hereby certify that the foregoing pages constitute the official transcript of said videotaped proceedings to the best of my ability in a complete and accurate manner.

In Witness Whereof, I have hereunto subscribed my name this 17th day of March 1998.



Connie Jones
Transcriber

2/98M

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C O U R T R E C O R D I N G
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IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

RICHARD SHOFER,

Plaintiff,

v. Case No. 88102069/CL79993

STUART HACK, et al.,

Defendants.

----- X

OFFICIAL TRANSCRIPT OF PROCEEDINGS

Baltimore, Maryland

June 27, 1997

BEFORE:

HONORABLE JUDGE MATRICCIANI

APPEARANCES:

For the Plaintiff:

DOUGLAS TAYLOR, ESQUIRE

For Defendants, Stuart Hack and the

Stuart Hack Company:

JANET TRUHE, ESQUIRE

For the Defendant, Greybush Newman:

DEBORAH WHELIHAN, ESQUIRE

JOHN MAY, ESQUIRE

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CIRCUIT COURT FOR
BALTIMORE CITY

PROCEEDINGS

[1]

[2] (These proceedings commenced at 11:01 a.m.)

[3] THE COURT: Okay, we are back on the record in the
[4] matter of, Shofer v. Hack, et al. Mr. Shofer, would you
[5] resume the witness stand, please?

[6] (The witness resumed the stand.)

[7] MS. WHELIHAN: Your Honor, may I approach the
[8] witness?

[9] THE COURT: You may.

[10] MS. WHELIHAN: Thank you.

[11] CROSS-EXAMINATION BY DEFENDANT HACK'S COUNSEL
[12] BY MS. WHELIHAN:

[13] Q: Mr. Shofer, I am going to hand you two volumes of
[14] your deposition: the one dated February 2, 1990, and the
[15] one dated February 9, 1990, so that you can read along as we
[16] go through your cross. Now yesterday, you testified that
[17] with Maryland National Bank was happy with its relationship
[18] with you in 1984. Was that not your testimony?

[19] A: I believe what I said yesterday was that the
[20] relationship had improved from the period of 1980 to 1984,
[21] that it was on a general track of being a more solid
[22] relationship.

[23] Q: All right. Is it not a fact, sir, that Maryland
[24] National Bank actually you were in disfavor with in 1984?

[25] A: In disfavor with?

Page 4

[1] Q: Correct.

[2] A: Well, let me say this: the loan officer at
[3] Maryland National, I said, I found a home that I wanted to
[4] buy in Homeland, and I said I'd like to get a conventional
[5] mortgage. And he said okay, we'll lend you the downpayment
[6] unsecured to do that. So I imagine that they must've been
[7] very satisfied with me if they were willing to lend me
[8] \$60,000 unsecured on my personal signature at that time. I
[9] think it's an indication that they were satisfied with me.

[10] Q: All right.

[11] A: They just had their - and to carry it further, at
[12] that time, they had their limits as to how far they would go
[13] without a more in-depth consideration that went beyond the
[14] normal loan officer authority.

[15] Q: All right, well, let's turn to your deposition
[16] testimony. I would like you to pick up the first volume of
[17] your deposition, February 2, 1990, and turn to page 116. I
[18] would like you to read pages 116 to the bottom of 117.

[19] A: You want me to read it out loud?

[20] Q: Well, you can read it out loud, or you can read it
[21] to yourself. What I am mostly interested in is the bottom
[22] of page 117. But I want you to have the full question and
[23] answer.

[24] (Pause.)

[25]

BY MS. WHELIHAN:

[1] Q: Are you finished reading?
 [2] A: No, I'm a slow reader. And you told me to go to
 [3] the bottom of 117.
 [4] Q: Right. Just let me -
 [5] A: If you want me to -
 [6] Q: - know when you are finished.
 [7] A: If you want me to read it out loud, I will, but
 [8] I'm a slow reader.
 [9] (Pause.)
 [10] MS. WHELIHAN: Your Honor, do you want a copy
 [11] of -
 [12] THE WITNESS: Okay, I'm at the bottom of that
 [13] page.
 [14] BY MS. WHELIHAN:
 [15] Q: Okay. Now would you please read aloud for the
 [16] Court your answer starting at line 18 going to 20. That is
 [17] read aloud, Mr. Shofer.
 [18] A: Should I read the question also?
 [19] Q: I do not think that is necessary. But if you
 [20] would like to read the question, the question starts on the
 [21] earlier page. So, I mean, it does not make any difference
 [22] to me. I am really mostly interested in your answer.
 [23] A: Well, the question that I'm looking at, the last
 [24] question I see answered, is: "How much did you wind up
 [25] owing Crown Motors." Is that the question that I should be

[1] answering?
 [2] Q: Well, no. That is the question that was asked,
 [3] and then as part of your answer at lines 18 to 20, did you
 [4] not say, and you can read along with me.
 [5] A: Okay.
 [6] Q: - "And also, it's the reason why Crown was so
 [7] heavily indebted and in disfavor with Maryland National Bank
 [8] was because of its own balance sheet was pulled down by the
 [9] Itel situation."
 [10] A: Right.
 [11] Q: Is that what your testimony was?
 [12] A: That's correct.
 [13] Q: Does it refresh your recollection that Crown
 [14] Motors was in disfavor with Maryland National Bank?
 [15] A: As I say, as well, that's out of context
 [16] because -
 [17] Q: Yes.
 [18] A: - what no, you asked me - and on page 116, it
 [19] said: "So, this period 1980, '81, and '82, in those two or
 [20] three years when the interest rates were double and I was at
 [21] my lowest ebb in relationship with the bank and solvency
 [22] interest was compounding." But when I say in that thing
 [23] that's when I was at my lowest ebb, if I was in my lowest
 [24] ebb in 1982, then I must not've been at my lowest ebb in
 [25] 1984. I must've passed my lowest ebb. So I must've been in

[1] a better favor in 1984 than in 1982.
 [2] Q: All right, well, this testimony, if you read
 [3] page 116, all relates to your situation in 1984. But let's
 [4] turn to page 79 of your deposition testimony, and you can
 [5] read that page.
 [6] A: Do you want me to read the page 79?
 [7] Q: Read the page 79 to yourself, but then I am going
 [8] to ask you a question about it.
 [9] A: Well, it starts off with: "How many times did you
 [10] speak with Mr. Wilson about this matter?" And if I start on
 [11] page 79, I won't know what matter he's talking about. So I
 [12] have to go back to page 78.
 [13] Q: All right, well, let me try this. Before you read
 [14] page 79, let me ask you this. You testified yesterday that
 [15] Crown Motors had made headway on its balance sheet, and that
 [16] was one of the reasons why Maryland National Bank was happy
 [17] with Crown Motors in 1984. Is that still your testimony?
 [18] A: I'll have to qualify that, and because what I
 [19] meant was in its entirety, Maryland Nationals was more
 [20] satisfied with my balance sheet, not necessarily the Crown
 [21] Motors element of it. But taken together with the pension,
 [22] which as I earlier said yesterday, made a half a million
 [23] dollars in two years, and that I, that for purposes of
 [24] looking at progress, Maryland National put the entities
 [25] together and looked at what was happening with the Dick

[1] Shofer entities.
 [2] And I said that yesterday. They were happy
 [3] because they saw that the entities had grown together by
 [4] half a million dollars in two years. You - when you take
 [5] them and pull them apart, the money was all ending up in a
 [6] shelter. And I think I used the expression it was getting
 [7] to be that the tail was wagging the dog because too much was
 [8] getting into a shelter. And even though that has its good
 [9] side to it, it wasn't leaving liquidity with Crown Motors.
 [10] Q: All right, so, it is -
 [11] A: So -
 [12] Q: - true, is it not, that in 1984 Crown Motors had
 [13] not made any headway on -
 [14] A: The entity, Crown Motors -
 [15] Q: - its balance sheet?
 [16] A: The entity, Crown Motors, had not made headway.
 [17] Q: It is also true, is it not, that Maryland National
 [18] Bank was very concerned and wanted to see improvement in
 [19] Crown's balance sheet?
 [20] A: That's true.
 [21] Q: Okay, and that is what precipitated your
 [22] conversations with Glen Wilson about borrowing from your
 [23] pension plan, is -
 [24] A: Well, I -
 [25] Q: - that not also correct?

[1] A: Well, I'd like to say this, too. It wasn't so
[2] much Glen Wilson's concern as my concern, and that I sort of
[3] suggested to Glen Wilson. I made it, I wanted to make it a
[4] point to Glen Wilson because I wanted to curry favor with
[5] him in seeing Crown get its balance sheet improved. And
[6] therefore, once I learned from Stuart Hack that I could
[7] borrow money personally, I wanted to create a favorable
[8] impression to Glen Wilson that the whole idea was to improve
[9] the balance sheet.

[10] So more than Glen Wilson coming to me and saying
[11] we're not happy with Crown's balance sheet, I went to Glen
[12] Wilson and said Glen, here's a chance to improve the balance
[13] sheet. And that was more or less the way it happened. I
[14] had the, I got the idea. I went to Stuart Hack. He said
[15] that I could borrow the money. And then I went back to Glen
[16] Wilson, and probably with that letter from Stuart Hack as
[17] evidence that it was permissible, put the idea to Glen
[18] Wilson.

[19] Q: All right. But, Mr. Shofer, that was not my
[20] question.

[21] A: I know, but what your question was, your question
[22] was was Glen Wilson in disfavor with Crown Motors' balance
[23] sheet. And in order to give you an answer to that question,
[24] I have to explain to you that I was in disfavor with the
[25] balance sheet, and I put the idea in Glen Wilson's head.

[1] Q: No, my question to you was was Maryland National
[2] not Bank concerned and did they not want to see an
[3] improvement in Crown's balance sheet, and is that not what
[4] precipitated you going to Glen Wilson about borrowing from
[5] your pension plan? That was the question.

[6] A: No, it was -

[7] Q: Okay.

[8] A: It was my, it was my own concern that precipitated
[9] me to think of that as a solution.

[10] Q: All right. Well, look on page 79 of your
[11] deposition testimony where it says skip down to line 16:
[12] "So the bank was concerned in wanting to see an improvement
[13] in Crown's balance sheet and there were discussions with
[14] Glen Wilson about that issue?" So it is now your testimony
[15] that you initiated those conversations and not Maryland
[16] National Bank?

[17] A: They always would like to see a weak balance sheet
[18] improved. I mean, I think it goes without saying that the
[19] balance sheet of Crown Motors had been deteriorating
[20] steadily as a result of all of the profits going into the
[21] pension. And it was, I can't say it was the tail wagging
[22] the dog, and it was getting out of hand. And in fact, I had
[23] a comment from Harvey Newman who looked at me in the face
[24] one day and said you're over-sheltered.

[25] MS. WHELIHAN: Your Honor, could you instruct the

[1] witness to actually respond to my question in a responsive
[2] way so that we can sort of move this along?

[3] THE COURT: What question is before the witness at
[4] this point?

[5] MS. WHELIHAN: Well, the original question, and I
[6] do not know what he is testifying about now was whether or
[7] not he testified that he was the one who initiated the
[8] conversations with Glen Wilson as opposed to Maryland
[9] National Bank initiating the conversations with him about
[10] how he was in disfavor with Maryland National Bank in
[11] improving the balance sheet, which he did answer. Now he is
[12] going on to say something -

[13] THE COURT: Ask him the next question.

[14] MS. WHELIHAN: All right.

[15] THE COURT: And you are, I remind you, entitled to
[16] lead the witness.

[17] MS. WHELIHAN: Well, thank you very much.

[18] BY MS. WHELIHAN:

[19] Q: Mr. Shofer, when you were considering borrowing
[20] from your pension plan, is it not true that you were just
[21] trying to stay alive financially?

[22] A: No.

[23] Q: Okay. Turn to page 187 of your deposition
[24] testimony.

[25] A: I'm on page 187.

[1] Q: All right. Do you see where it says: "I left it
[2] up to other people, and I really didn't want to know about
[3] the forms because my head was already full of trying to
[4] balance everything and just stay alive financially?" Do you
[5] see your testimony there?

[6] A: No. Why don't you tell me what number to look at?

[7] Q: Lines 4 to 7.

[8] A: Let's see.

[9] THE COURT: Is there a question in front of the
[10] witness?

[11] THE WITNESS: Okay, so I made that statement. I
[12] made it in the context of a discussion about why I left
[13] forms up to Pam instead of myself.

[14] BY MS. WHELIHAN:

[15] Q: Okay. But the question is you were just trying to
[16] stay alive financially when you were borrowing from your
[17] pension. Is that not right?

[18] A: No.

[19] Q: Okay. Now your habit is to file tax returns
[20] delayed. Is that not right?

[21] A: Yes.

[22] Q: All right, and in fact, in 1990, you did not even
[23] know if your tax returns had ever been filed on time. Is
[24] that not right?

[25] A: It might be a true statement.

[1] Q: All right.

[2] A: I can't think of ever filing them timely.

[3] Q: All right, let's talk about your damages. In 1990

[4] when your deposition was taken, did you not testify that

[5] Crown Motors was paying your attorney's fees and all of your

[6] other professional fees?

[7] A: When I testified in 1990, that was true.

[8] Q: Okay.

[9] A: But subsequent to that, my agreement with the IRS

[10] was that I would be charged those attorneys fees that I paid

[11] and would owe it to Crown Motors. So it was disallowed to

[12] Crown Motors and charged to me.

[13] Q: All right, but that is still a debt that you

[14] owe -

[15] A: It became deductible to me when it was charged to

[16] me, which was a partial off-set.

[17] Q: All right, but that debt that you owe to Crown

[18] Motors has not in fact been paid, right?

[19] A: Correct.

[20] Q: Okay. Let's look at Deposition Exhibit Number 30,

[21] your itemization of damages.

[22] MS. WHELIHAN: May I have that, Madam Clerk,

[23] please? May I approach the witness, Your Honor? Oh,

[24] Plaintiff's Exhibit Number 30, I am sorry.

[25] THE COURT: You may.

[1] BY MS. WHELIHAN:

[2] Q: Those professional fees are not broken down into

[3] each loan transaction, is that right?

[4] A: No.

[5] Q: In fact -

[6] A: That's right, they're not.

[7] Q: That is right.

[8] A: With very few exceptions, like it's quite possible

[9] that I see one \$65 item for Edward Kabala. I can't imagine

[10] that's more than one invoice. There's a couple here for

[11] Alan Schwaite that are so small they might've been one item.

[12] There might be a few items scattered through here that were

[13] one item. The \$2,000 to Bornhorst was for one particular

[14] piece of work that he did over -

[15] Q: Mr. Shofer, this will go so much more quickly if

[16] you will just answer my question.

[17] A: Well, then -

[18] Q: My question was those professional fees are not

[19] broken down into each individual loan transaction. Your

[20] answer was yes, okay? I do not need to have the rest of

[21] your answer now. What I would like to know is does that

[22] Exhibit 30 show what professional fees were generated as a

[23] result of the loans that you took before your 1984 tax

[24] return was prepared?

[25] A: Could you please say that again?

[1] Q: Sure. Does that chart, Plaintiff's Exhibit 30,

[2] show a breakdown on how the professional fees were

[3] calculated as to what professional fees were incurred with

[4] your borrowings that occurred before your 1984 tax return

[5] was prepared?

[6] A: Does that I'm still a little -

[7] Q: Is there a breakdown on Plaintiff's Exhibit 30 for

[8] the allocation of professional fees for your pre-1984 tax

[9] preparation borrowings?

[10] A: From the pension?

[11] Q: Correct.

[12] A: There were no pre-1984 borrowings from the

[13] pension.

[14] Q: When your tax return was prepared. It was

[15] prepared on August 7, 1985, correct?

[16] A: I haven't seen my tax return. I'll assume it's

[17] correct.

[18] Q: All right. You took loans before your 1984 tax

[19] return was prepared in 1985, is that right?

[20] A: I took loans in 1984, right.

[21] Q: Right. Now does that, Plaintiff's Exhibit

[22] Number 30, show any allocation of professional fees as to

[23] the loans as to the fees that were incurred as a result of

[24] the loans that you took before your 1984 tax return was

[25] prepared?

[1] A: The original tax return?

[2] Q: Right.

[3] A: The original tax return?

[4] Q: Right. Is there any breakdown -

[5] A: No, there, well, there were no - when my original

[6] tax return was prepared in August of 1985, there are no sums

[7] of money on this chart that go back to that period of time.

[8] Does that answer your question?

[9] Q: Okay, that answers my question. Now the

[10] undeveloped piece of property at Park Heights Avenue that

[11] you used as collateral for your 1995 loan with Ms. King, did

[12] you not own that property continuously since 1984?

[13] A: Well, first of all, the question's incorrect.

[14] Q: All right. You did not use your Park Heights

[15] undeveloped property as collateral for your loan?

[16] A: No, you asked me if - about the loan I made in

[17] 1995.

[18] Q: Right.

[19] A: I didn't make a loan in 1995.

[20] Q: Okay. The loan that you borrowed from Ms. King,

[21] all right, December 1994, is that right?

[22] A: No, that's not right.

[23] Q: All right, the loan that you borrowed from Ms.

[24] King, okay, whenever that was, was the collateral for that

[25] loan the undeveloped piece of property at Park Heights

[1] Avenue?
 [2] **A:** To clarify it, the loan was in December of 1996,
 [3] and the collateral was the Park Heights property.
 [4] **Q:** Okay. Did you own that property in 1984?
 [5] **A:** I owned it in 1984 jointly with my wife.
 [6] **Q:** All right. When did your wife stop having an
 [7] ownership interest in that property?
 [8] **A:** I bought her interest sometime around 1990 or '91.
 [9] **Q:** Okay. Do you recall Alan Marvel recommending to
 [10] you in 1986 that you sell that property?
 [11] **A:** In 1986?
 [12] **Q:** Right.
 [13] **A:** No, I don't recall that.
 [14] **Q:** Okay, do you recall Alan Marvel recommending to
 [15] you that you sell your Virgin Islands properties?
 [16] **A:** No, I don't recall that.
 [17] **Q:** Okay. Going back to Plaintiff's Exhibit Number 30
 [18] and going to the charges for Mr. Schwaite, Mr. Schwaite's
 [19] role for you was in your Department of Labor audit. Is that
 [20] right?
 [21] **A:** No, that's not right.
 [22] **Q:** Okay. Did Mr. Schwaite ever enter his appearance
 [23] for you either with the IRS or the Department of Labor?
 [24] **A:** Yes.
 [25] **Q:** Okay. Have you ever produced any kind of

[1] documents showing that Mr. Schwaite entered his appearance
 [2] to either the Department of Labor or the IRS proceedings?
 [3] **A:** You mean to this court?
 [4] **Q:** To anybody: Ms. Truhe, me; anybody in discovery?
 [5] **A:** I imagine that the document had to be introduced
 [6] to the IRS because that's where he represented me with, not
 [7] the Labor Department.
 [8] **Q:** Okay, that was not my question. My question was
 [9] did you ever produce evidence of the fact that Mr. Schwaite
 [10] actually represented you to Ms. Truhe or to me in this
 [11] proceeding?
 [12] **A:** I think I produced bills by Mr. Schwaite -
 [13] **Q:** Okay.
 [14] **A:** - and the bills may specify what the subject
 [15] matter was.
 [16] **Q:** Now Mr. Giampietro, did he replace Mr. Hack as
 [17] your pension consultant?
 [18] **A:** Excuse me?
 [19] **Q:** Did Mr. Giampietro, did he become your pension
 [20] consultant?
 [21] **A:** Yes.
 [22] **Q:** Okay. Was it not your testimony that Mr.
 [23] Giampietro assisted you very little in your negotiations
 [24] with the IRS?
 [25] **A:** Assisted me very little?

[1] **Q:** That is what I am asking you. Did you not
 [2] previously say that?
 [3] **A:** I don't believe I said that in the context that he
 [4] assisted me very little in negotiations in totality. He may
 [5] have assisted me to a lesser degree at the very end when I
 [6] was dealing with Mr. Copeland. Now taken out of context,
 [7] and referring only to that portion of the negotiations with
 [8] Mr. Copeland, he assisted me very little in those
 [9] negotiations. In the entirety of the situation, he assisted
 [10] me extensively and continually.
 [11] **What happened is that he and Mr. Copeland, I**
 [12] **didn't think I was ever going to get to a meeting of the**
 [13] **minds and have this finished because he was abrasive with**
 [14] **Mr. Copeland and the survival of my pension was at risk.**
 [15] **And I felt like I could deal with Mr. Copeland from a more**
 [16] **hat-in-hand kind of a position that Mr. Giampietro was**
 [17] **willing to take.**
 [18] **Q:** Okay. Now Mr. Auck, he is your bookkeeper for
 [19] Crown Motors, is that right?
 [20] **A:** Correct.
 [21] **Q:** Okay, and your calculation on Exhibit 30 is the
 [22] portion of his salary that you estimate was necessary for
 [23] this litigation including the prohibited transactions, is
 [24] that right?
 [25] **A:** Well, this represents the numbers on Mr. Auck's

[1] part of the chart are 10 percent of what I paid him in total
 [2] for those periods of time. And as I explained in the chart,
 [3] my calculation was that approximately 10 percent of what he
 [4] did for me was related to the Hack loan subject matter. And
 [5] what he was not only bookkeeping, but he helped me prepare
 [6] documents and gather materials for various IRS agencies,
 [7] Labor Department. He did a number of different tasks -
 [8] **Q:** Okay.
 [9] **A:** - that go into this, not only bookkeeping.
 [10] **Q:** All right, and you have not produced any evidence
 [11] to Ms. Truhe or to me that shows that you paid any of the
 [12] damages that you are claiming in this case personally. Is
 [13] that not right?
 [14] **A:** No, that's not right. Well, it may be. I don't
 [15] know. I think at various times, I might've, in this
 [16] litigation in years past, produced you canceled checks from
 [17] Richard Shofer over various part of this. Substantially
 [18] most of this is money that I owe Crown Motors, and my
 [19] agreement with them is that I will pay them this when they
 [20] pay me the years of salary that they owe me that I cannot
 [21] get now.
 [22] **Q:** Well, in fact, you have not been a salary for
 [23] several years, right?
 [24] **A:** Several years.
 [25] **Q:** And that is your choice, is it not?

[1] A: No, well, no. They don't have the money now -
 [2] Q: Right.
 [3] A: - since the Stuart Hack thing happened.
 [4] Q: But you are the decision-maker for Crown Motors,
 [5] is that right?
 [6] A: Yes.
 [7] Q: Okay, and you have several hundred-thousands of
 [8] dollars of loans that you owe Crown Motors, right?
 [9] A: That's correct.
 [10] Q: Yes, and in your past relationship with your
 [11] company, you have not made yourself pay a debt when your
 [12] company had no money, is that right?
 [13] A: I have not made myself pay a debt -
 [14] Q: When your company has not had the money.
 [15] A: I haven't, you mean, I haven't paid a debt to
 [16] Crown Motors when they don't have any money?
 [17] Q: You have not had Crown Motors pay you when Crown
 [18] Motors has not had any money -
 [19] A: How could they?
 [20] Q: - right, and vice versa?
 [21] A: Vice versa. It's -
 [22] Q: Okay.
 [23] A: - gets to be a mixed-up mess.
 [24] Q: Yes. All right, let's talk about the period 8/84
 [25] to November 1996. You never discussed the tax consequences

[1] of borrowing from the Catalina pension plan with Greybush
 [2] when you were contemplating taking the loans, is that not
 [3] right?
 [4] A: That's correct.
 [5] Q: Okay.
 [6] THE COURT: I am sorry, I did not hear with whom.
 [7] MS. WHELIHAN: With Greybush.
 [8] THE COURT: Oh, okay.
 [9] BY MS. WHELIHAN:
 [10] Q: You never discussed your loans with Greybush prior
 [11] to August of 1985, is that right or June of 1985?
 [12] A: I can't recall, but I can't recall that I ever
 [13] did.
 [14] Q: All right. When your 1984 returns were prepared
 [15] by Greybush in August of 1985, your borrowings had already
 [16] totaled \$250,000, is that right?
 [17] A: I think that's the right number.
 [18] Q: All right, and you did not contact Greybush about
 [19] the fact that you were going to borrow from your pension
 [20] plan prior to you beginning your borrowings because you
 [21] yourself never imagined there would be tax consequences. Is
 [22] that right?
 [23] A: That's exactly right.
 [24] Q: All right, and in fact, you thought there would
 [25] not be tax consequences because what you were taking from

[1] your pension was loans, is that right?
 [2] A: Exactly right.
 [3] Q: All right.
 [4] A: And I - and to add to it, I think today if you
 [5] asked a person on the street, I think 99 out of 100 people
 [6] will say a loan is not income.
 [7] Q: Okay. When you submitted your 1984 tax
 [8] information to Mr. Larash in 1985, that information did not
 [9] include a 1099 showing income from your pension plan to you.
 [10] Is that right?
 [11] A: Correct.
 [12] Q: Okay. In fact, when you first discovered the
 [13] question of whether or not your pension borrowings could be
 [14] taxable, that was from Greybush Newman, correct?
 [15] A: Correct.
 [16] Q: All right. When Mr. Larash and Mr. Marvel first
 [17] raised the issue of whether your loans might be taxable, you
 [18] did not believe Greybush. Is that right?
 [19] A: Well, I didn't totally disbelieve them, but I was
 [20] inclined to not want to believe them, and certainly was
 [21] hoping that Stuart Hack knew more about it in the end than
 [22] they did. When I say I didn't believe them, I can't say
 [23] that I 100 percent disbelieved them. I was just hoping that
 [24] their information was wrong.
 [25] Q: All right, and you were hoping that Greybush would

[1] be wrong because you believed that Mr. Hack, as your pension
 [2] specialist, knew more about pension tax law than Greybush.
 [3] Is that right?
 [4] A: Yes.
 [5] Q: Okay. In fact, Mr. Marvel, when he raised the
 [6] issue of whether your pension loans were taxable, he
 [7] referred you to Nicholas Giampietro, a pension law tax
 [8] specialist. Is that not right?
 [9] A: Yes, and in fact, I mentioned to him that I wasn't
 [10] satisfied with his answers, and that I independently would
 [11] be looking for someone. That's when he referred me.
 [12] Q: Okay.
 [13] A: In other words, I might've, I'm pretty sure that I
 [14] made a comment before that that I was going to have to look
 [15] deeper into it before I just took it on the words of my
 [16] accountants.
 [17] Q: Okay. Prior to November of 1986, you never sought
 [18] any pension advice from Greybush on how to run your pension,
 [19] right?
 [20] A: Well, I can't say that because you said any
 [21] pension advice.
 [22] Q: On how to run your pension?
 [23] A: Well, they did my books on the pension and
 [24] prepared the 990's. So it would be accurate for me to make
 [25] a general statement that when I had questions about my

[1] pension, I went to the Hack Company. But if I'm sitting, if
[2] I'm sitting in a room across or with Ken Larash and his
[3] doing work at the end of a year and something comes up about
[4] a pension and I'll give you an example of it, I would be
[5] dealing with Ken Larash, and I would ask him questions.

[6] And one of the examples of that is in debt-
[7] relating financing income, a formula had to be, we had to
[8] stick to a certain formula about what tax was due on income
[9] that the pension received that was related to pension having
[10] debt. So that was a complicated formula, and it involved my
[11] pension, and I did discuss it with Ken Larash. But
[12] generally speaking, as a rule, pension matters I always went
[13] to Stuart Hack.

[14] Q: Okay. In that instance you just gave, you went to
[15] Stuart Hack first?

[16] A: The instance that I gave?

[17] Q: Right.

[18] A: No. In the instance that I gave, I went to -
[19] yes, I went to Stuart Hack before I ever started dealing
[20] between Crown and the pension for financing. I went to
[21] Stuart Hack several times, and continually, about that
[22] issue.

[23] Q: All right, and in fact, the only pension services
[24] that Greybush provided to you were a reconciliation of your
[25] pension balance sheet and the preparation of the 990-T. Is

[1] that right?

[2] A: That's substantially accurate.

[3] Q: All right. The 990-T, that is a form that just
[4] shows income that the pension plan has earned, right?

[5] A: Correct.

[6] Q: Okay.

[7] A: I think taxable income, even to be more
[8] specific -

[9] Q: All right.

[10] A: - 'cause if it earns income that's not subject to
[11] tax, I think a 990-T isn't due.

[12] Q: All right. In August of 1984, when you testified
[13] that you had your conversation with Mr. Hack about borrowing
[14] from your voluntary contributions, you borrowed \$60,000
[15] before you got Mr. Hack's letter. Is that right?

[16] A: Yes.

[17] Q: All right, and at the time you borrowed the
[18] \$60,000 in August of 1984, your voluntary contributions
[19] exceeded \$60,000. Is that not right?

[20] A: Correct.

[21] Q: Okay. After you began your borrowings, you never
[22] had any followup questions with Mr. Hack or his company
[23] about borrowing from your pension plan?

[24] A: Correct.

[25] Q: All right. In fact, you did not speak to Mr. Hack

[1] personally about borrowing from your pension plan and the
[2] specifics of your loans from the period August 9, 1994,
[3] until September 30, 1996, that you recall?

[4] A: That I recall, no, I didn't.

[5] Q: All right, and you did not ask Mr. Hack about the
[6] terms of your loans, is that right?

[7] A: Subsequent to the initial conversations that we
[8] had in August that resulted in the letter, I don't, I can't
[9] recall having any conversation, further conversations with
[10] Mr. Hack on the loan matter.

[11] Q: In fact, you did not consult with anybody as you
[12] took the loans from your pension plan. Is that not right?

[13] A: Well, in some cases, the bank, my bank loan
[14] officer.

[15] Q: All right, you did not consult with -

[16] A: You said anyone.

[17] Q: - Mr. Hack well, we will get to that - Mr. Hack
[18] or Greybush when you took your loans, as you were taking
[19] them?

[20] A: No.

[21] Q: Okay. Turn to page 128 of your deposition.

[22] A: Of February 2nd?

[23] Q: Of February 2.

[24] A: I'm there.

[25] Q: Okay, look at questions 9, and your answer

[1] starting at page 128, line 11.

[2] A: Question on line 9: "Now when you took the second
[3] loan, did you consult with anyone?" Answer: "No." "After
[4] you took the loan, did you tell anyone about it?" "Well, it
[5] speaks for all of the loans that I think Ms. Ciccone was
[6] aware, not Ms. Ciccone, Ms. McHale was aware of all the
[7] loans because she was the bookkeeper and she handled the
[8] checkbooks. I don't know that on each - and in fact, I
[9] feel so", "I feel certain that" on, of course, we're only
[10] talking about the second loan, but right." Do you want me
[11] to just keep reading?

[12] Q: No, that is it. You used your pension to fund
[13] your loans because it was the easiest and most readily
[14] available source of funding for you in the period 1984 to
[15] 1986. Is that right?

[16] A: It's probably, it's probably very accurate. And I
[17] would have to do a lot of thinking to think if there was
[18] really any other way.

[19] Q: Okay.

[20] MS. WHELIHAN: I have no further questions, Your
[21] Honor.

[22] THE COURT: Is there redirect?

[23] MR. TAYLOR: I have a few questions, Your Honor.
[24] Thank you.

[25] REDIRECT EXAMINATION BY COUNSEL FOR PLAINTIFF

BY MR. TAYLOR:

[1] Q: Mr. Shofer, Ms. Truhe asked you yesterday why it
[2] was that you did not consult or talk to Mr. Matz at Greybush
[3] Newman concerning the loans that you were going to take or
[4] that you wished to take from the pension. Ms. Whelihan has
[5] asked you again the same question as to why there was no
[6] consultation with Greybush Newman concerning the loans if
[7] they were the firm that was doing your tax work. Why did
[8] you not consult with Mr. Matz?

[9] A: Well, I didn't think there was a tax issue.
[10] I assumed they were just loans. Had I known that there was
[11] a tax issue, or even suspected that there was a tax issue, I
[12] would've thought very carefully who I talked to regarding
[13] taxes because, as it turned out, I've paid more than 100
[14] percent to the IRS on what were loans that I was paying
[15] interest on.

[16] Q: Mr. Shofer, I wanted to have you look at
[17] Defendant's Exhibit Number 3 again. Ms. Truhe asked you
[18] questions about that letter yesterday. I was not at least
[19] clear in my own mind with respect to the subject matter that
[20] appears on page 3 of that letter. Would you turn to the
[21] third page. There are headings there: Tax Consequences of
[22] the Trust, and Tax Consequences to Crown. Could you
[23] clarify, at least for me, what tax consequences we are
[24] talking about?
[25]

[1] A: We're talking about when we talk about tax
[2] consequences to the trust, we're talking about income that
[3] the trust would have to report related to money that it
[4] borrowed to finance cars. It's called debt-related income,
[5] and it's proportionate to the amount of borrowings that
[6] a pension does in order to achieve income. The theory being
[7] that a pension has a competitive advantage if it can go out
[8] and borrow money and make money in a shelter with it. So,
[9] the government doesn't want to see that happen and creates a
[10] ratio. So in other words, if I had and maybe I'm going too
[11] far with this. But if I had \$1 million in financing and
[12] borrowed \$100,000 to get the million dollars in receivable,
[13] then the net income on \$100, one-tenth of my finance income
[14] from that operation would be taxable.

[15] Q: Well, is there any relationship between what you
[16] have discussed in that letter and the type of loans that you
[17] took in -

[18] A: No.

[19] Q: - 1984, 1985, and 1986?

[20] A: No. No, I was in speaking of tax consequences
[21] regarding the subject matter that I just mentioned to you.

[22] THE COURT: What is the number on that exhibit,
[23] Mr. Taylor?

[24] MR. TAYLOR: This exhibit, Your Honor, is
[25] Defendant's Exhibit 3.

[1] (Plaintiff's Exhibit No. 32, 1984
[2] 5500-C, was marked for identification.

BY MR. TAYLOR:

[3] Q: Mr. Shofer, I wanted to show you what has been
[4] marked as Plaintiff's Exhibit 32 for identification. I
[5] wonder if you could identify that document for the record.

[6] A: This is the 5500-C for 1984 that was sent to the
[7] government, prepared by the Hack people and sent to the
[8] government on October 18th of 1985.

[9] Q: There is a signature that appears on that form, is
[10] there not?

[11] A: Yes.

[12] Q: Whose signature is that?

[13] A: Mine.

[14] Q: Thank you.

[15] MR. TAYLOR: Your Honor, I am going to hold this
[16] document, not offer it at this time. I have another witness
[17] to question about it and then offer it at that time.

BY MR. TAYLOR:

[18] Q: Mr. Shofer, Ms. Truhe yesterday asked you
[19] questions concerning your relationship with your
[20] accountants, Greybush Newman, and particularly, the question
[21] concerning advice that you may have been given with respect
[22] to suing Greybush Newman. There were even questions
[23] pertaining to an agreement that had been worked out at about
[24] that time you were getting advice along those lines. Why
[25] did you not sue Greybush Newman?

[1] MS. WHELIHAN: Objection, Your Honor.

[2] THE COURT: Basis?

[3] MS. WHELIHAN: Relevance. He did not sue them;
[4] who cares?

[5] THE COURT: Well, I think it is fair redirect
[6] because it came out in cross. So I will allow it.
[7] Overruled.

[8] THE WITNESS: I had no intention of suing Greybush
[9] Newman from the very beginning of this whole matter. And
[10] when I got a letter from Blom Younquist asking me to bring
[11] them into it, I said no to them verbally and adamantly.
[12] That I would rather risk the loss and not recover some of my
[13] tax problem than to put it on Greybush Newman because what I
[14] felt at the time that it was such an obscure regulation that
[15] it could've been an honest mistake on their part. It was
[16] just something that I could understand their not knowing
[17] about, loan being income.

[18] That was one reason. Another reason is that
[19] because of my long-standing good relationship with Greybush
[20] Newman and my feeling of friendship for Ken Larash,
[21] particularly, I didn't want there to be any adversity over
[22] something that and then I even looked at the ratio of what
[23] they could be responsible for as a part of this. And
[24]
[25]

[1] I figured heck, their portion of the loan that I took after
[2] they became aware of it, could only come to \$30,000 or
[3] \$40,000 to them anyway. And I just roughed that in my mind
[4] and said what would I do, ruin my relationship with my
[5] accountants and my friends of 15 years over \$30,000? And I
[6] was just adamant that I wouldn't do it.

[7] However, while I had that in my mind, I didn't
[8] express it verbally to Greybush, and when they stopped doing
[9] my work, I sort of like hurt about that because I was
[10] shocked that they would they considered our relationship
[11] different than I did. And when they stopped doing my work
[12] or holding up my work and insisted on that, what I thought,
[13] was a somewhat coercive type agreement, I had no choice but
[14] to do it anyway because, the agreement because they were
[15] going to be handling an audit for me with the IRS. And part
[16] of my survival depended on me keeping my accountants.

[17] So I had to do whatever they wanted me to do. But
[18] at the same time, since they made my not suing them a
[19] condition that I wasn't going to do it anyway, I said okay,
[20] let them do that. If they want an agreement, we'll make an
[21] agreement that leaves the door open. So it was sort of my
[22] reaction to that surprising move that they did. My reaction
[23] was to structure the agreement to keep the door open under
[24] certain circumstances.

[25] Q: Let me turn your attention to the Virgin Islands

[1] property which was the subject of cross-examination
[2] yesterday. Again, just to refresh my recollection, Mr.
[3] Shofer, when did you buy the property in the Virgin Islands?

[4] A: In the spring of 1985.

[5] Q: I think you had testified that some portion of the
[6] loans you made from the pension went into the purchase of
[7] those properties, or that property. Is that not correct?

[8] A: Correct.

[9] Q: Why did you buy the Virgin Islands properties?

[10] A: They were a business investment. The Mahogany
[11] Run, I have in fact brought with me in my briefcase
[12] documentation that I had acquired in the spring of 1985,
[13] when I was looking at the properties, documentation on the
[14] business aspects of the properties. The very fact that I
[15] bought two condos instead of one, what could I do: live in
[16] two homes? I bought them and fur, refurbished them not as
[17] homes. They were investment properties. They were assigned
[18] over to an in-place management, hotel management, resort and
[19] the properties were bringing in as much as \$400 a night at
[20] that time of the season. So to pay \$200,000 for a property
[21] that's bringing in \$400 a night, it's good math, and -

[22] Q: Did you ever get \$400 a night after you acquired
[23] the property?

[24] A: Well, the hotel management that I turned it over
[25] to did in on occasion rent them for those kinds of rates.

[1] But the problem was that the hotel management company, for
[2] other internal reasons, went bankrupt the next year, and the
[3] management, the whole complex stayed in a bankruptcy except
[4] for people living there on long, now long-term or short-term
[5] rentals. The thing stayed in and I have documentation with
[6] me also on that. It stayed in a clouded bankruptcy,
[7] couldn't sell it situation for years and years. It took
[8] Merrill Lynch was the mortgage holder, and I don't know if
[9] they're out of it yet. But they were trying to dispose of
[10] it for 10 years and couldn't find a buyer for the resort
[11] complex.

[12] Q: Well, did there come a time when you recognized
[13] that this was not a good investment?

[14] A: Yes.

[15] Q: When was that?

[16] A: Well, I had as soon as they went bankrupt, I put
[17] one of the units up for sale. I put both of the units up
[18] for sale and sold one of them at a loss. I actually had, I
[19] had a deal on one of them at \$190,000, and I was going to
[20] take a \$20,000 loss on it. I had the deal. The lady sent
[21] me the contract. There was a deposit with the contract, and
[22] I accepted the contract with the only condition to the
[23] contract being that if it took more three or four months to
[24] settle it, that she would assume the interest expense and
[25] tax expense for that period of time beyond the normal

[1] settlement date.

[2] And just by putting that airmailed that contract
[3] back to the Islands, and while the contract was in the
[4] airmail going back to the Islands, some native went berserk
[5] and beheaded a couple tourists. And by the time the
[6] contract got there, she had an out on the contract 'cause I
[7] made a little change in it. She tore up the contract and
[8] moved back to the States. I ended up selling the that condo
[9] several months later for many thousands less than her
[10] contract.

[11] The remaining property, I wanted to make a go of
[12] the remaining property. So while it stayed up for sale, I
[13] wasn't willing to take as big a bath in it. Since then,
[14] it's not only the cloud of the lack of management that has
[15] depressed the price. There's been a series of four
[16] hurricanes starting in the early '90's that've actually, I
[17] think, before the early '90's, Hugo being the first. And
[18] it's made so many condos for sale, it's just depressed it
[19] by - well, I can't, 10 years later after I bought it,
[20] prices are substantially lower than the purchase price.

[21] Q: What year did you sell the one property?

[22] A: I think the one that I bought in 1985, the one
[23] that I did sell was, I think, around 1988 or 9.

[24] Q: Are you actively interested in selling the other
[25] property?

[1] A: It's been listed for the last several years. I
 [2] keep lowering the price, but there's only so low I can go.
 [3] And I haven't been there for five years, so I'm not gaining
 [4] any personal use out of it.
 [5] Q: Ms. Truhe asked you as to whether or not it would
 [6] not have been more prudent for you, Mr. Shofer, to mitigate
 [7] your damages by taking the money you have paid your lawyers
 [8] and paid the taxes in this case as opposed to going out and
 [9] running up the credit cards to do that. Why did you not
 [10] follow that advice by simply taking the money, the available
 [11] money you had, which you were spending on attorneys and put
 [12] it into your retiring your tax debt?
 [13] A: I never had a sum of money to pay my tax debt, and
 [14] I never dreamed that events would turn out the way they did.
 [15] When this matter started in 1988, I expected it to be over
 [16] with by 19, sometime in, during the year 1989 or '90 at the
 [17] latest. Then there were a series of postponements that
 [18] stretched it into some time late in 1990, and I still
 [19] thought it would be over by then. And at that time, I had a
 [20] much more contained exposure for attorneys fees, and I
 [21] already had an offer on the table that would've made me -
 [22] MS. TRUHE: Objection, Your Honor -
 [23] THE WITNESS: Well -
 [24] MS. TRUHE: - move to strike.
 [25] BY MR. TAYLOR:

[1] Q: Well -
 [2] A: I had an offer, and I'm not mentioning what it is,
 [3] but I had an offer on the table that would have made me
 [4] whole except for legal, attorneys fees.
 [5] MS. TRUHE: Your Honor, I have a real problem now.
 [6] I understand you are both the fact-finder and the judge and
 [7] performing a number of purposes. But this kind of testimony
 [8] is off the charts in terms of what can come into a trial.
 [9] THE COURT: I will strike the testimony. Let's
 [10] just -
 [11] MS. TRUHE: Thank you.
 [12] THE COURT: - continue.
 [13] THE WITNESS: Anyway, what's at - exposed now is
 [14] I have millions of dollars that I have my general condition
 [15] has changed by millions of dollars due to this litigation.
 [16] And what I'm looking for now in my investment in legal fees
 [17] and other time, my time, is to recover millions of dollars
 [18] that I believe is due by a professional who refuses to
 [19] acknowledge, who's treated me worse than I've ever treated
 [20] any of my customers in all the years I've been in business.
 [21] BY MR. TAYLOR:
 [22] Q: Mr. Shofer, your testimony has been that you
 [23] borrowed your first loan or made your first loan from the
 [24] pension before you had received the letter of August 9,
 [25] 1984, from Mr. Hack. Is that correct?

[1] A: Would you repeat that again?
 [2] Q: Yes. I think the testimony has been, your
 [3] testimony has been you made the first loan from your pension
 [4] in 1984 before you had received the letter from Mr. Hack
 [5] dated August 9, 1984. Is that true?
 [6] A: That's correct.
 [7] Q: Why did you make that loan prior to receipt of Mr.
 [8] Hack's letter?
 [9] A: Well, my first conversation with Mr. Hack, as I
 [10] think his records show, it was in August 3rd. And I imagine
 [11] it was in August 3rd or some time around that when he said
 [12] that I could do this. And when he gave his blessing to it,
 [13] I had available to me, I think, certificates of deposit that
 [14] was like \$50,000 or \$60,000 just sitting there at 3 percent
 [15] that could've been turned into 15 or 20 automobiles for
 [16] sale. And it made good sense to do that as quickly as
 [17] possible because cars for sale bring a lot better return
 [18] than 3 or 4 percent certificates of deposit. So I, then I
 [19] didn't need my bank for that because it was just sitting
 [20] there in a bank account or a certificate of deposit. So
 [21] even - I had his verbal okay. And I didn't need the letter
 [22] to do it. I just relied on Mr. Hack's verbal opinions.
 [23] Q: Ms. Truhe asked you about the fact that you
 [24] apparently just wrote yourself a check and assumed that you
 [25] knew how to borrow money from your pension. Is that right?

[1] A: Yes.
 [2] Q: Have you ever made loans before -
 [3] A: Yes.
 [4] Q: - 1984?
 [5] A: Well, you mean from my pension?
 [6] Q: Not from your pension, but loans generally.
 [7] A: Yes.
 [8] Q: Did you think that you knew how to borrow money
 [9] from your pension in 1984?
 [10] A: I don't know of any other way to do it except for
 [11] by checkbook and a promissory note. I don't know if there
 [12] is another way to borrow money.
 [13] MR. TAYLOR: I do not have any other questions,
 [14] Your Honor.
 [15] THE COURT: Is there any recross of the witness?
 [16] MS. TRUHE: Just a few questions, Your Honor.
 [17] RECROSS EXAMINATION BY DEFENDANT HACK'S COUNSEL
 [18] BY MS. TRUHE:
 [19] Q: Mr. Shofer, directing your attention to this
 [20] 5500-C, the copy that Mr. Hack's company received, this is
 [21] the 5500-C for 1984. Do you see that?
 [22] A: I see it.
 [23] Q: At the very top of this form, it states "Mailed to
 [24] Hack 10/18/85." Whose handwriting is that?
 [25] A: That's mine.

[1] Q: Did you mail this form to Mr. Hack's office after
[2] you signed the 5500-C and mailed it to the government?

[3] A: I can't recall, but I think that's customarily how
[4] it was done.

[5] Q: All right.

[6] MS. TRUHE: May I please see the Exhibit, the
[7] 5500-C, Plaintiff's Exhibit Number 32.

[8] BY MS. TRUHE:

[9] Q: As I understand your earlier testimony, Mr.
[10] Shofer, you mailed Plaintiff's Exhibit Number 32 to the
[11] government, correct?

[12] A: Yes.

[13] Q: I note that the last page on this document
[14] includes -

[15] A: Well, wait a minute; excuse me. You just asked me
[16] if I mailed it to the government. I don't recall mailing it
[17] to the government. I think that's our normal practice is to
[18] keep a copy, mail a copy to the government, and mail a copy
[19] back to Mr. Hack. I think that's normally the way we do it.

[20] Q: Well, do you recall, let's try this again. Do you
[21] recall mailing Mr. Hack's copy to his office as you have
[22] indicated at the top of -

[23] A: No, I don't re -

[24] Q: - this document?

[25] A: I don't recall it. This says that I did.

[1] Q: All right, and do you have any recollection of
[2] filing the 5500-C with the government in 1984 (inaudible).

[3] A: I don't have a recollection of filing it, but
[4] according to this document, it was signed on October 18th
[5] and sent to the government, I assume sent to the government
[6] on October 18th.

[7] Q: Well, Mr. Shofer, referring again to Plaintiff's
[8] Exhibit Number 32 -

[9] A: Yes.

[10] Q: - which is the document you claim someone in your
[11] office sent to the government, I note that the last page is
[12] a balance sheet, correct?

[13] A: Well, I'm not sure that that balance sheet was
[14] part of the document that went to the government because
[15] the - there is a balance sheet, actually, and I don't know
[16] whose handwriting it is, but I'm going to assume if it's
[17] like most of the other 5500's, that it's a balance sheet on
[18] page 3 filled out by the Hack Company that went to the
[19] government in 19 - on September of 1985 or October.

[20] Q: Mr. Shofer, please -

[21] A: So -

[22] Q: Try to follow along. I am referring now to
[23] Plaintiff's Exhibit Number 32, which is the -

[24] A: Okay.

[25] Q: - 1984 5500-C that you testified earlier was

[1] filed by your office with the government. Is that correct
[2] or not?

[3] A: I may have testified to that, but I'm, when you're
[4] holding that little bottom sheet to it, that's doesn't go to
[5] the government along with the rest of it.

[6] Q: So are you recanting your earlier testimony that
[7] this balance sheet prepared by Catalina Enterprises went to
[8] the government when you filed the 1984 5500-C?

[9] A: Well, you're saying, I'm qualifying what I said to
[10] say that the normal forms that go to the government do not
[11] include that rear balance sheet because the balance sheet's
[12] on the inside of it.

[13] Q: Exactly, and the only form that went to the
[14] government was the 5500-C that was previously introduced
[15] into evidence that did not contain a balance sheet prepared
[16] by Catalina Enterprises that showed a \$200,000 loan in 1984.
[17] Is that not correct?

[18] A: I don't think that went to the government.

[19] Q: Right. In fact, the 5500-C that went to the
[20] government did not reveal that loan at all, is that not
[21] correct, as indicated in the question -

[22] A: As it turns out, it doesn't.

[23] Q: It does not, thank you.

[24] A: It doesn't reveal the loan.

[25] (Discussion off the record.)

[1] THE WITNESS: But, of course, that wasn't prepared
[2] by me. It was prepared by Hack. The information we sent to
[3] Hack revealed the loan and showed the loan.

[4] BY MS. TRUHE:

[5] Q: But the 5500-C which you filed in 1984 and signed
[6] by you under penalties of perjury was incorrect with
[7] reference to question 17, loans participants -

[8] A: Yes, but -

[9] Q: - correct?

[10] A: Yes, and the incorrect, the fact that it's wrong
[11] was Hack's mistake, not mine because -

[12] Q: And you never corrected it as you affirmed on this
[13] document was correct?

[14] A: Because I don't read them which I've also
[15] affirmed. And -

[16] Q: Mr. Shofer -

[17] A: And of course, even had I read it, I wouldn't have
[18] know that there was a tax consequence so I wouldn't have
[19] seen any reason.

[20] Q: Mr. Shofer, finally, I would like to ask you about
[21] Plaintiff's Exhibit Number 3, which is a letter written to
[22] you by Louis Omansky at Mr. Hack's office, dated October 6,
[23] 1976. Do you see that?

[24] A: Yes.

[25] Q: All right. Now, the letter begins: "Dear Mr.

[1] Shofer, Stuart tells me that your pension and profit-sharing
[2] plans are considering two possible transactions, both of
[3] which would involve second mortgages on the real estate now
[4] owned by the plans. As I understand it, a second mortgage
[5] in the amount of \$25,000 to \$35,000 is being considered to
[6] finance a new roof" and then it goes on to say "or \$100,000
[7] is being considered with part of the proceeds going to the
[8] roof and part to do something else." Do you see that?

[9] **A:** Yes.

[10] **Q:** Do you recall contacting Mr. Hack during that time
[11] period in 1976 and telling him that that was what you had in
[12] mind?

[13] **A:** No, I don't recall that.

[14] **Q:** Do you deny that?

[15] **A:** No, I don't deny that I might've called him.

[16] **Q:** And you shared the specific amounts that you were
[17] intending to borrow, is that not correct, with Mr. Hack?

[18] **A:** Apparent, I don't know if it was with Mr. Hack or
[19] Mr. Omansky. But if I called someone and those amounts are
[20] in there, then I must've shared the amounts with him.

[21] **Q:** Is there some reason why in 1976, you would tell
[22] Mr. Hack or someone in his office about borrowing \$25,000 to
[23] \$35,000 from your pension but not telling Mr. Hack in August
[24] of 1984 that you were planning to borrow a quarter of a
[25] million from your pension?

[1] **A:** Is there some reason?

[2] **Q:** Right.

[3] **A:** Yes, there -

[4] **Q:** Why -

[5] **A:** Yes, there is some reason.

[6] **Q:** What is that?

[7] **A:** Well, conversations don't always go the exact way.
[8] Sometimes, someone will go to a restaurant and say I'll have
[9] a glass of water, and sometimes they'll say I'll have a,
[10] would you please bring me some water. They asked the same
[11] thing a different way, so I don't necessarily I'm not going
[12] to answer the same thing the same way. But of course, you
[13] can pick it, you can find some way to say that I didn't ask
[14] it the same way on purpose. But I just didn't ask it the
[15] same way, perhaps.

[16] **Q:** And you asked -

[17] **A:** I asked it generally.

[18] **Q:** And in 1976, you also revealed to Mr. Hack, or
[19] someone in his office, the purpose for which you were going
[20] to borrow from your pension, correct, but you did not do
[21] that in August of 1984?

[22] **A:** In '84? No, I didn't mention the purpose for
[23] which I'd borrow personally.

[24] **Q:** I note that Mr. Omansky writes on page 2 of this
[25] letter: "This is one area where you certainly would be wise

[1] to discuss the matter with your legal counsel before going
[2] ahead." Do you see that?

[3] **A:** Absolutely.

[4] **Q:** So when you were borrowing from your pension in
[5] 1976, the advice you got from Mr. Hack's office was in part
[6] to consult with legal counsel, correct?

[7] **A:** Yes, absolutely.

[8] **Q:** So you knew as trustee and as one who was going to
[9] be borrowing from his pension, or thinking of borrowing from
[10] his pension in 1976, that you would do well to consult with
[11] more than one professional, correct?

[12] **A:** No. To be perfectly honest with you, I didn't go
[13] back and review all of the correspondence that I had with
[14] Mr. Hack since the inception of my relationship with him,
[15] which would've included this letter, before I called Mr.
[16] Hack about that asking for advice on the loan. Had I gone
[17] back and looked at every piece of correspondence for more
[18] than 10 years before I called Mr. Hack, I might've noticed
[19] this letter, and I might've gotten that thought, but I
[20] didn't. And as you're commenting here, it was really nice
[21] of Mr. Omansky to mention that I should contact my legal
[22] counsel. I wish Mr. Hack had've done that.

[23] **Q:** But you were on notice in 1976, at least, when you
[24] were contemplating a similar -

[25] **A:** In 1976 -

[1] **Q:** - transaction?

[2] **A:** - I was on notice, but Mr. Omansky put me on
[3] better notice than Mr. Hack did -

[4] **Q:** Thank you, Mr. Shofer.

[5] **A:** - in 1976.

[6] **MS. TRUHE:** Your Honor, I have no further
[7] questions.

[8] **THE COURT:** Ms. Whelihan?

[9] **MS. WHELIHAN:** None, Your Honor.

[10] **THE COURT:** Is there anything further of the
[11] witness?

[12] **MR. TAYLOR:** No.

[13] **THE COURT:** Okay. Thank you, Mr. Shofer. You may
[14] step down.

[15] (The witness was excused.)

[16] **THE COURT:** Are you prepared to present another
[17] witness, or do you want to wait until this afternoon?

[18] **MR. TAYLOR:** Well, Your Honor, I have a witness,
[19] although the only other witness I have that is here for
[20] today's session, I thought Your Honor might consider
[21] terminating proceedings after that one witness had
[22] testified.

[23] **THE COURT:** Well, how long is the witness going to
[24] be?

[25] **MR. TAYLOR:** Oh, maybe an hour.

[1] THE COURT: I mean, I have to take a break. I
 [2] have to handle postponements in part during the lunch break,
 [3] too, so can we take him at 2:00?
 [4] MR. TAYLOR: Yes, we certainly can.
 [5] THE COURT: Okay, let's recess until 2:00.
 [6] MS. WHELIHAN: We should probably clear the
 [7] tables?
 [8] THE COURT: No, I am not going to do them in here.
 [9] MS. WHELIHAN: All right.
 [10] THE COURT: I am going to be in the lawyers'
 [11] conference room, so that is fine. You can leave your things
 [12] here.
 [13] MS. WHELIHAN: Thank you.
 [14] (At 12:12 p.m. a luncheon recess was taken.)
 [15] THE COURT: Mr. Taylor, are you ready to proceed?
 [16] MR. TAYLOR: Yes, we are, Your Honor. I would
 [17] like to call Ms. Pam Summers.
 [18] THE COURT: Ms. Summers, would you come forward,
 [19] please?
 [20] PAMELA SUMMERS,
 [21] a witness produced on call of the State, having first been
 [22] duly sworn, was examined and testified as follows:
 [23] THE CLERK: State your name and address for the
 [24] record, please.
 [25] THE WITNESS: Pamela Summers, 9106 Deviation Road

[1] THE CLERK: Thank you.
 [2] DIRECT EXAMINATION BY COUNSEL FOR PLAINTIFF
 [3] BY MR. TAYLOR:
 [4] Q: Ms. Summers, where are you employed?
 [5] A: The Baltimore City Health Department.
 [6] Q: How long have you been so employed?
 [7] A: I have been with the Department either part-time
 [8] or full-time since 1981. I started out as part-time in
 [9] 1981.
 [10] Q: Prior to joining the Baltimore City Health
 [11] Department, where did you work?
 [12] A: Crown Motors; they overlap.
 [13] Q: Okay, is that because of the part-time nature of
 [14] your work initially?
 [15] A: Yes.
 [16] Q: When you say Crown Motors, is that Catalina
 [17] Enterprises, Inc.?
 [18] A: Yes.
 [19] Q: For what period of time did you work at Crown
 [20] Motors?
 [21] A: '77 or '78 on through the mid-80's, around '86,
 [22] '87.
 [23] Q: Who hired you to work at Crown Motors?
 [24] A: Richard Shofer.
 [25] Q: How did it come that you worked for Mr. Shofer?

[1] A: Before I worked for Mr. Shofer, I worked for Hack
 [2] Pension Service, and Mr. Shofer was a client. When I left
 [3] Hack, he tracked me down and offered me a job.
 [4] Q: Did you have a job title at Crown Motors?
 [5] A: Not a real formal one. I was sort of the
 [6] Assistant to the President.
 [7] Q: What were your duties?
 [8] A: I kept the books. I have some background
 [9] in bookkeeping, and I kept the books for the pension and
 [10] profit-sharing plans, and assisted Mr. Shofer on projects
 [11] that he did. And I had - was sort of the jack-of-all-
 [12] trades.
 [13] Q: What period of time did you work for the Stuart
 [14] Hack Company?
 [15] A: From about '71 or so to 'til I went to work for
 [16] Richard, '77 or '78.
 [17] Q: What was your job title at the Hack Company?
 [18] A: Account Manager.
 [19] Q: What were your specific duties as an account
 [20] manager at the Hack Company?
 [21] A: I had a group of accounts assigned to me that I
 [22] basically did bookkeeping on. We tracked them. I usually
 [23] saw them about once a year. I would check the assets,
 [24] balance the transactions for the year, and put together tax
 [25] forms for those accounts.

[1] Q: When you initially joined the Hack Company in
 [2] 1971, were you an account manager at that time?
 [3] A: I don't think that was my title at that time. I
 [4] think I - when I originally went on there, I was an
 [5] accounting clerk or some such thing.
 [6] Q: Did you get any training at the Hack Company when
 [7] you joined it in 1971?
 [8] A: My initial training when I first went to work
 [9] there, it just came from there was only one other accounting
 [10] clerk. And she familiarized me with the office and with the
 [11] kinds of work I would have to do. Then over and above that,
 [12] Stuart provided to us either outside educational
 [13] opportunities or in-house training. He conducted in-house
 [14] training sessions from time to time to keep us familiar with
 [15] the pension laws and to keep us familiar with changes in
 [16] what was going on.
 [17] Q: Is there any way that you could quantify how
 [18] frequently training would occur at the Hack Company?
 [19] A: A lot of it depended on what was going on with the
 [20] law. And there - sometimes, we trained every couple of
 [21] weeks. When ERISA was passed and there were a lot of major
 [22] changes, we had a lot of training going on. And then prior
 [23] to that, we might together once a month, once every other
 [24] month. If things were relatively stable, we met less. But
 [25] he tried to meet with all the employees on a fairly some

[1] semi-regular basis so that we could keep track of what was
[2] happening.

[3] **Q:** What types of services did the Hack Company
[4] provide for its clients when you worked there?

[5] **A:** When I worked there, we did we prepared pension
[6] documents, pension trust documents, set up the trusts,
[7] tracked the assets. We did actuarial work for fixed-benefit
[8] pension plans. We sold insurance, disability insurance.
[9] I'm trying to remember, I think, I don't know if we sold key
[10] man life insurance or not. I don't recall. But I know we
[11] sold disability. That's it.

[12] **Q:** Do you recall whether, during the time you worked
[13] there, that there were any actuaries who were on staff at
[14] the Hack Company?

[15] **A:** We did have a specific person who was designated
[16] the actuary. I don't know what her training or background
[17] is. But she - we had one person who was identified to me
[18] as the actuary who did all of the actuarial work on the
[19] fixed-benefit plans, yes.

[20] **Q:** Do you know whether or not Mr. Hack himself is an
[21] actuary?

[22] **A:** I believe he is an actuary. I don't know what his
[23] credentials are. I don't recall if I ever knew what his
[24] credentials are. He had, I think that, I do know that, the
[25] firm was identified as and I think he identified himself as

[1] an actuarial consultant.

[2] **Q:** Did the Hack Company have a legal department when
[3] you were employed there?

[4] **A:** We had an attorney who worked there at - that
[5] more than only one at a time, but several different
[6] attorneys over the course of my employment, yes.

[7] **Q:** What role, if any, did the attorney play during
[8] the time you were employed there in the training or
[9] education that you received?

[10] **A:** The attorneys when I was trained there, this was a
[11] very small company, so the training was almost sometimes
[12] one-on-one. It was a small staff, and sometimes training
[13] was more than one-on-one. But the attorneys explained to me
[14] and probably more than me, what the pension laws were, what
[15] kinds of transactions we should watch for. If there was
[16] ever a question, if I had a question about whether or not a
[17] particular action that a pension trust took was okay, I
[18] would go back to the attorneys or go back to Stuart. The
[19] attorneys were more in the matter of drafting the
[20] instruments and then applying the instruments to what we
[21] were doing.

[22] **Q:** That would be their principal function?

[23] **A:** Yes.

[24] **Q:** How many clients were you responsible for when you
[25] were an account manager at the Hack Company?

[1] **A:** Well, I don't I honestly don't remember exactly
[2] how many; somewhere in the neighborhood of 100 or 150.

[3] **Q:** And -

[4] **A:** I can't -

[5] **Q:** And of those, how many would you have direct
[6] contact with?

[7] **A:** At some time of the year, with all of them.
[8] Sometimes - when you say direct contact, I'm not sure I
[9] understand. Sometimes, it was by mail. And then there were
[10] probably 30 or 40 that I would actually physically see
[11] during the year. But at some point in the year, I had
[12] contact with all of my clients.

[13] **Q:** Did all of your clients have a way of
[14] communicating with you if they had to?

[15] **A:** Sure, they could call me on the phone.

[16] **Q:** Would that be the normal way that a client would
[17] contact you?

[18] **A:** Yes.

[19] **Q:** Was one of your clients Catalina Enterprises, Inc.
[20] pension trust?

[21] **A:** Yes.

[22] **Q:** Who was the person or persons that you would
[23] normally interact with at Catalina Enterprises regarding the
[24] pension?

[25] **A:** Mr. Shofer.

[1] **Q:** Did you deal with him directly?

[2] **A:** He was the only person that knew what was going on
[3] with him.

[4] **Q:** As a part of your duties during the time that you
[5] were employed at the Hack Company, did you prepare any forms
[6] for either the Internal Revenue Service or the Department of
[7] Labor?

[8] **A:** I, initially, when I went to work there, I
[9] prepared a form called a 990-T. After the pension laws were
[10] changed, the forms were changed. And I well, there was
[11] another form that I initially prepared, something called a
[12] 4848. And then after the pension laws were changed, I used
[13] to prepare 5500's.

[14] **Q:** How would you get the information that was
[15] required on these forms?

[16] **A:** Normally, the client would mail us the
[17] information. We would write them a letter toward the end of
[18] the fiscal year. They would mail us the information. Some
[19] clients mailed us raw data. Some clients would mail us
[20] accounting things from accountants. Most frequently, the
[21] clients mailed raw data. Some clients and Mr. Shofer was
[22] one - I would go personally visit and pick up the data.

[23] **Q:** Now did the data include any backup documentation
[24] or other kinds of information that would support the data
[25] that you were getting?

[1] **A:** Data that we got - everything that we got was
[2] backed up. We would get copies of checking account
[3] statements, stock transactions. If there were loans, for
[4] example, we would have copies of the loan documents. Any -
[5] all of the financial data had to have hard-copy proof that
[6] it actually happened. So any transaction you can imagine,
[7] we knew that it happened. Now I didn't, I did not, for
[8] example, usually get individual deposit slips but I got the
[9] checking account statement.

[10] **Q:** Now was this your personal requirement, or was
[11] this a policy of the Hack Company?

[12] **A:** A policy of the company.

[13] **Q:** Now you mentioned that one of the forms that you
[14] would have been responsible for completing was a 990. Is
[15] that correct?

[16] **A:** Yes.

[17] **Q:** When was the 990 used, if you recall?

[18] **A:** It was a form filed at the end of the fiscal year,
[19] and was used to report assets, income tran and expense
[20] transactions, and balance sheets. And some specific
[21] transactions were reportable on the 990.

[22] **Q:** Now as a part of your training at the Hack
[23] Company, were there ever any instructions specifically given
[24] to you about the 990 form?

[25] **A:** How to do it. There were certain transactions

[1] that had to be placed on the form that we were instructed to
[2] watch for that could have adverse consequences for the trust
[3] or for the client.

[4] **Q:** Were you given any written instructions or
[5] guidelines in connection with this form?

[6] **A:** I don't recall getting any written guidelines in
[7] connection with the 990. I think it was all done verbally.

[8] **Q:** Typically, what kinds of problems would you be
[9] looking for in the completion of a 990 form?

[10] **A:** We looked for any kind of a transaction that would
[11] place the tax-deferred status of the trust in jeopardy.
[12] They changed from time to time, but when I first went -
[13] when it was a 990, we looked for things like there was a -
[14] it was a big deal about real estate transactions. It was
[15] very iffy for these small pension trusts to have real estate
[16] in their - so that was one of the things we looked for. We
[17] looked for loans to the principals of the corporation. That
[18] was another thing that we looked for. We had like a
[19] little and all of these things were questions on the form.
[20] So those things which were questioned on the form were
[21] transactions that we specifically watched for.

[22] **Q:** Now you mentioned that the 990 form was
[23] subsequently replaced. Was that as a result of the passage
[24] of the ERISA statute?

[25] **A:** Yes, as I recall.

[1] **Q:** Was the 990 then replaced with a 5500 form.

[2] **A:** 5500-C.

[3] **Q:** 5500-C - what, if anything, were the differences
[4] between the 5500-C and the 990 form, if you can recall?

[5] **A:** The 5500 was a lot more complex. The 990 form
[6] was as I remember, was like a two-page or three-page form.
[7] The 5500 was several pages. They asked a lot more
[8] questions. ERISA made major changes in the kinds of things
[9] that we would look for so that they just asked for more
[10] detailed information. They it did follow the 990 insofar as
[11] we also reported income statements and balance sheets, year-
[12] beginning to year-end.

[13] **Q:** Did you get any specific instructions as to what
[14] to do if you found a problem or potential problem in
[15] connection with completing these forms?

[16] **A:** Any potential problem went to Stuart or to - or,
[17] in his absence, to one of the attorneys; normally, to Stuart
[18] for his review and comment.

[19] **Q:** As a part of your training and instructions during
[20] the course of your employment at the Hack Company, did you
[21] receive any specific instructions with regard to the tax
[22] code itself?

[23] **A:** I can't say that. I don't know, honestly, whether
[24] it was tax code or what it was. We received instruction in
[25] those laws which pertained to pension plans. As far as I

[1] don't know what that's covered under, to be honest. They
[2] told me what the laws, these are, well, I guess, they're
[3] Labor Department regulations. I don't know. But we did
[4] receive instruction in those things that pertained to
[5] pension plans. After the passage of ERISA, we all took some
[6] kind of a little course in the new law, like a
[7] correspondence course or some such thing that the company
[8] provided.

[9] **Q:** Ms. Summers, let me show you what has been marked
[10] as Plaintiff's Exhibit 32 for identification. First of all,
[11] for the record, would you identify that document by telling
[12] us what it is?

[13] **A:** It's a form 5500-C for fiscal year 1984 which, in
[14] Mr. Shofer's case was the calendar year, for Catalina
[15] Enterprises.

[16] **Q:** Now there is a signature, is there not, that
[17] appears on the first page of that document?

[18] **A:** Yeah, that's Mr. Shofer's signature.

[19] **Q:** Would that document have been signed at a time
[20] when you were employed at Crown Motors?

[21] **A:** I was still there in 1985, yes, sir.

[22] **Q:** If you can look through that exhibit, could you
[23] identify those portions of the exhibit that you may have
[24] worked on?

[25] **MS. WHELIHAN:** Excuse me, Your Honor, which 5500-C

[1] exhibit are we dealing with? Is that Plaintiff's
 [2] Exhibit 32?
 [3] **THE COURT:** That is Plaintiff's 32.
 [4] **MS. WHELIHAN:** Is that 32?
 [5] **THE COURT:** That is what Mr. Taylor said.
 [6] **MS. WHELIHAN:** Okay, I am sorry. I missed it.
 [7] **MR. TAYLOR:** Yes, do you need a number on that?
 [8] **MS. WHELIHAN:** It is 36.
 [9] **THE WITNESS:** On page 3, there's a statement of
 [10] assets and a statement of income. That's my handwriting. I
 [11] did that. And there is attached to it a computer printout
 [12] that I prepared consisting of balance sheets and statement
 [13] of income and expense.
 [14] **BY MR. TAYLOR:**
 [15] **Q:** How do you know that you prepared that?
 [16] **A:** I recognize it.
 [17] **Q:** Okay.
 [18] **A:** It came off my computer.
 [19] **Q:** That last page of that exhibit, is that something
 [20] that is filed with the government?
 [21] **A:** No, that was prepared for the use of the people
 [22] who were going to do the tax return.
 [23] **Q:** Who were those people, if you know?
 [24] **A:** That would've been Stuart Hack at that time.
 [25] **Q:** That last page of that exhibit which you prepared,

[1] was sent to whom, if you know?
 [2] **A:** This would normally be sent to the Hack Company to
 [3] give them the asset data that they needed to bring the trust
 [4] into balance and prepare the form.
 [5] **Q:** Am I correct in assuming that that would go in
 [6] first, and then the 5500-C would be prepared and sent back
 [7] to Crown Motors?
 [8] **A:** Yes, no. Wait a minute, say that question again.
 [9] **Q:** What would be the sequence in events in terms of
 [10] the preparation -
 [11] **A:** Okay.
 [12] **Q:** - and filing of the 5500-C in relation to that
 [13] last page of that exhibit?
 [14] **A:** Normally, I would prepare this balance sheet, and
 [15] it, and I would sent it to the Stuart Hack Company with
 [16] appropriate backup data. And they would prepare the form
 [17] and mail it back to us. That's what would normally happen.
 [18] That's not what happened in this year, but that's what would
 [19] normally happen.
 [20] **MS. TRUHE:** I am sorry, Your Honor, I did not hear
 [21] the last part of that. Did you say that is not what
 [22] happened this year?
 [23] **THE WITNESS:** It didn't happen in that sequence.
 [24] **MS. TRUHE:** All right, in 1985?
 [25] **THE WITNESS:** For fiscal year 1984.

[1] **MS. TRUHE:** Okay.
 [2] **BY MR. TAYLOR:**
 [3] **Q:** In 1984, Ms. Summers, did you have a particular
 [4] person that you were in contact with at the Hack Company in
 [5] connection with the completion of documents like the 5500
 [6] form (inaudible)?
 [7] **A:** I think at that point in time, it was a girl named
 [8] Hardy.
 [9] (Discussion off the record.)
 [10] **MR. TAYLOR:** The Court's indulgence.
 [11] (Plaintiff's Exhibit No. 33, trust
 [12] fund statement, was marked for
 [13] identification.)
 [14] **BY MR. TAYLOR:**
 [15] **Q:** Ms. Summers, what form did your contacts take with
 [16] Ms. Hardy at the Stuart Hack Company?
 [17] **A:** Normally, I sent the data to her, and she prepared
 [18] the tax forms. We didn't have a whole lot of contact, just
 [19] enough to get the work done.
 [20] **Q:** Ms. Summers, I would like to show you what has
 [21] been marked as Plaintiff's Exhibit Number 33 for
 [22] identification. I would like to just ask you to look
 [23] through that document, and I wanted to ask you a question as
 [24] to whether or not you saw any portions of that document that
 [25] you may have worked on or that you recognize.

[1] **A:** There's a really poor photocopy of the same
 [2] computer printout of assets and liabilities with a note from
 [3] me to Janelle.
 [4] **Q:** Do you recognize the handwriting on the other
 [5] pages of that exhibit?
 [6] **A:** No, I do not.
 [7] **MR. TAYLOR:** I am not going to offer this, Your
 [8] Honor, at this point. I would like to reserve that.
 [9] **BY MR. TAYLOR:**
 [10] **Q:** Ms. Summers, do you know whether or not Mr. Hack
 [11] is an attorney?
 [12] **A:** I don't know.
 [13] **MR. TAYLOR:** I have no other questions.
 [14] **THE COURT:** Cross-examination of the witness?
 [15] **MS. TRUHE:** Yes, thank you, Your Honor.
 [16] **CROSS-EXAMINATION BY DEFENDANT HACK'S COUNSEL**
 [17] **BY MS. TRUHE:**
 [18] **Q:** Ms. Summers, as I understand it, you worked for
 [19] the Stuart Hack Company from the early 1970's until 1978?
 [20] **A:** Approximately, yes, ma'am.
 [21] **Q:** So by 1978 or thereabouts, you were gone from the
 [22] Stuart Hack Company, correct?
 [23] **A:** Yes.
 [24] **Q:** Now when you were at the Hack Company, you
 [25] monitored, I believe you said, about 100 to 150 accounts?

[1] A: Actually, I think that's probably low. I don't
[2] remember exactly how many; it was a bunch.
[3] Q: All right. In the course of your work, you
[4] eventually came to prepare what is known as the 5500-C?
[5] A: Yes, ma'am.
[6] Q: Were 5500-C forms prepared each year for each
[7] pension?
[8] A: Yes.
[9] Q: Again, these forms reflected the assets and
[10] liabilities of the pension as well as any transactions which
[11] might have occurred during the particular year in question?
[12] A: Yes.
[13] Q: Would among these transactions be loans?
[14] A: Yes.
[15] Q: Now in preparing the 5500-C, when would you
[16] typically receive the pertinent data from the client in
[17] order to do that?
[18] A: We normally contacted the client shortly before or
[19] after the end of their fiscal year, and we would receive the
[20] data in the normal course of events, within a month or two
[21] after the end of their fiscal year. I think, I don't
[22] remember the exact dates. It might've been a little
[23] shorter. You know, a personal income tax return is due on
[24] the 15th of April, and I think our cut-off might've been a
[25] little shorter than that.

[1] Q: All right. Now I believe you also testified that
[2] when you were at the Hack Company, Crown Motors was one of
[3] the accounts you were responsible for?
[4] A: Yes.
[5] Q: But with respect to Crown Motors, you testified
[6] that you actually went down to the office each year to
[7] gather the data you needed to prepare the 5500-C. Is that
[8] not correct?
[9] A: Most often, yes, ma'am.
[10] Q: That was because Mr. Shofer was something of a
[11] procrastinator, and that if you did not make an appointment
[12] to go down there and get that data, it would not come to the
[13] Hack Company?
[14] A: That's a very tactful way to put it, yes, ma'am.
[15] Q: All right. Now you left Mr. Hack's office in, I
[16] believe you said, around 1978. Was that not because your
[17] supervisor was not satisfied with your services?
[18] A: That's not such a simple question to answer, and
[19] I think that's a simplistic answer to that question. We did
[20] have some personality differences, yes.
[21] Q: All right. I believe, as you explained it to me
[22] at your deposition, now about four years ago, your
[23] supervisor presented you with a list of things that he
[24] thought you were doing wrong or did not care for, and you
[25] had a disagreement with him about those?

[1] A: Yes.
[2] Q: Then you left the Hack Company?
[3] A: Yes.
[4] Q: A short time later, when Mr. Shofer was calling
[5] the Hack Company for you, he found out that you had left and
[6] then he hired you as his assistant, correct?
[7] A: Uh-huh.
[8] Q: What was your title at Mr. Shofer's company?
[9] A: Assistant to the President. It's a small company;
[10] nobody really had titles.
[11] Q: All right. Your duties, as Assistant to the
[12] President, Mr. Shofer, were to monitor the pension's books,
[13] assist the bookkeeper in balancing the company's books and
[14] by the way, who was the bookkeeper?
[15] A: Sally Ciccone.
[16] Q: Pardon me?
[17] A: Her name is Sally Ciccone.
[18] Q: Was that Mr. Shofer's wife?
[19] A: Ultimately, yes.
[20] Q: All right, and to work on a variety of special
[21] projects for Mr. Shofer, correct?
[22] A: Uh-huh.
[23] Q: Now during the time you worked for the Hack
[24] Company in the '70's, do you ever recall a time when Mr.
[25] Shofer came to Mr. Hack's office?

[1] A: Never. I don't recall such a time.
[2] Q: All right. In the time you worked for Mr. Shofer,
[3] do you ever recall a time when Mr. Hack came to Mr. Shofer's
[4] office to meet with him?
[5] A: Never. I don't remember anything like that.
[6] Q: All right. Now during the time you worked for Mr.
[7] Shofer, is it not true that Mr. Shofer's habits with respect
[8] to supplying the information which Mr. Hack's company needed
[9] to complete the 5500-C never really improved?
[10] A: That's true.
[11] Q: In fact, it was sort of a constant battle with Mr.
[12] Shofer to get the information from him that you needed to
[13] send to the Hack Company?
[14] A: Yes.
[15] Q: What contact, if any, did you have with the
[16] accounting firm of Greybush Newman during the time you were
[17] either with Mr. Hack's office or Mr. Shofer's?
[18] A: Well, when I was with the Hack Company,
[19] the Greybush Newman was Richard's accountant. When I was
[20] with the Hack Company, one of the things that Mr. Shofer had
[21] done was to purchase some real estate. And at that time,
[22] under the laws in effect at that time, because it mortgaged
[23] the real estate, that was considered a taxable event.
[24] Stuart Hack, at the time, did not produce income tax forms;
[25] we produced pension forms. So there became a second form or

[1] another form that needed to be filed to cover that taxable
[2] event. And I had contact with Greybush Newman because they
[3] did that form. Subsequently, under ERISA, the laws changed.
[4] We didn't have to file that was no longer a taxable event.
[5] We didn't have to file the form anymore. And then when I
[6] left the Hack Company and went to work for Mr. Shofer, I
[7] would see Greybush Newman when they came in to audit the
[8] company books once a year.

[9] Q: Now when you say that was a taxable event, you
[10] mean a taxable event to the pension?

[11] A: Yes.

[12] Q: That was something Mr. Hack's office did not
[13] handle but Greybush Newman did, correct?

[14] A: We reported it to Mr. Shofer and told him that
[15] there would need to be forms that we did not prepare, yes.

[16] Q: And then Greybush handled those tax forms for the
[17] pension, correct?

[18] A: Yes.

[19] Q: Now when you were with Mr. Hack's office, how
[20] would you know when the clients that you were responsible
[21] for monitoring had taken a loan from their pension?

[22] A: We would see the transaction in the court,
[23] actually, the normally, a client would call us before doing
[24] that. But if the client didn't contact us or contact
[25] Stuart, then it, we would see it in the course of the year

[1] end audit looking at the books.

[2] Q: Do you recall a time when Mr. Shofer raised the
[3] question of borrowing from his pension with you?

[4] A: With me?

[5] Q: Yes.

[6] A: He raised a question while I worked for Hack. In
[7] the very early years, he had a couple of loans with the
[8] pension trust while I worked for Hack.

[9] Q: No, while you were working for him -

[10] A: For him?

[11] Q: - in the - I am talking now about the 1984 time
[12] period. Do you recall a time when he mentioned the idea of
[13] borrowing from his pension to you?

[14] A: He borrowed from the pension, yes.

[15] Q: All right. Is it not true, though, that he
[16] raised this issue with you on more than one occasion, and
[17] you told him that you were no longer current with the law
[18] and could not give him any answers?

[19] A: Yeah.

[20] Q: All right. I believe you testified just a moment
[21] ago that you were aware of the fact that Mr. Shofer was
[22] borrowing money from his pension in 1984?

[23] A: I saw the checks.

[24] Q: All right. Do you recall a time period in 1984 or
[25] shortly before that when Mr. Shofer's bank was putting

[1] pressure on him to make some progress on Crown's rather
[2] large line of credit with the bank?

[3] A: Yes.

[4] Q: Do you recall explaining to me at your deposition
[5] that Mr. Shofer had run into a real serious cash flow
[6] problem, as you put it, and the bank was putting him very,
[7] very heavy pressure to reduce the amount of his loans any
[8] way that he could?

[9] A: Yes.

[10] Q: Now when Mr. Shofer borrowed from his pension, did
[11] he cut all of the checks from the pension himself?

[12] A: I don't remember.

[13] Q: Did you get involved in that?

[14] A: In what, cutting checks?

[15] Q: Yes, from the pension for the purpose of giving
[16] Mr. Shofer money.

[17] A: It's possible. I don't recall doing it, but it's
[18] certainly possible I could've.

[19] Q: Is it not true that he handled everything with
[20] respect to those transactions?

[21] A: I think that probably is so. Without looking at
[22] the checks, I couldn't tell you, but I think that's probably
[23] accurate.

[24] Q: Were you aware of the fact that Mr. Shofer was
[25] borrowing from his pension in 1985?

[1] A: I don't remember. Let's see, if I did the books,
[2] I knew about it. I was still doing the books then, I think.

[3] Q: Directing your attention to what has been marked
[4] as Defendant's Exhibit Number 12, do you recognize this
[5] document?

[6] A: Yeah, this is another copy of the same
[7] document basically, the same document. It's balance sheets
[8] from 12/31 of '84 to 12/31 of '85.

[9] Q: And it is a statement of assets for the pension?

[10] A: Yes.

[11] Q: All right. Again, you prepared that document?

[12] A: Uh-huh.

[13] MS. TRUHE: Your Honor, I would like to move for
[14] admission into evidence Defendant's Exhibit Number 12.

[15] THE COURT: Admitted.

[16] (Defendant's Exhibit No. 12,
[17] 12/31/84-12/31/85 balance sheets,
[18] previously marked for
[19] identification, was received in
[20] evidence.)

BY MS. TRUHE:

[22] Q: Ms. Summers, do you have any idea when this
[23] particular balance sheet showing assets for 1984 and 1985
[24] was sent to the Hack Company?

[25] A: May I see it?

[1] Q: Yes.

[2] A: Don't know. Don't know.

[3] Q: You do not know? And in fact, looking down in the

[4] column marked 12/31/84, it shows notes receivable from

[5] participant \$200,000. Is that not correct?

[6] A: Uh-huh.

[7] Q: Do you have any evidence or any idea as to when

[8] this might have been sent to the Hack Company by Mr. Shofer?

[9] A: No.

[10] Q: Thank you. Was there anyone else at Crown Motors

[11] besides yourself and Mr. Shofer who would send material or

[12] information regarding the pension to the Hack Company?

[13] A: Not that I know of.

[14] Q: So between you and Mr. Shofer, that would be it in

[15] terms of anyone at Crown Motors sending information to Mr.

[16] Hack about the pension, correct?

[17] A: Yes.

[18] MS. TRUHE: May I have Defendant's Exhibit

[19] Number 8?

BY MS. TRUHE:

[20]

[21] Q: Ms. Summers, showing you what has been previously

[22] admitted into evidence as Defendant's Exhibit Number 8, this

[23] is a memorandum sent by Janelle Hardy to Mr. Shofer dated

[24] October 11, 1985. As you can see, it states: "Dear

[25] Mr. Shofer, enclosed are the 1984 government forms due

[1] 10/15/85 for the Catalina Enterprises, Inc. pension plan.

[2] As we have never received asset data or completed

[3] contribution statement for the plan year ending 12/31/84, we

[4] were unable to complete questions" and then she lists some

[5] questions.

[6] A: Uh-huh.

[7] Q: Then at the bottom, she asks that certain

[8] information be filled in and "please send us a copy of the

[9] completed form for our records, and call with any

[10] questions." Who dealt with that memo? Did Mr. Shofer

[11] receive that memo, or did he give it to you, do you recall?

[12] A: If it was addressed to him, it would've gone to

[13] him.

[14] Q: Do you recall ever receiving it?

[15] A: I don't remember it, but it was 11 years ago it

[16] was, excuse me. It was 7, 12 years ago.

[17] Q: Do you have any information that what is indicated

[18] in that memo is not correct; namely, that by October 11,

[19] 1985, which is the date of the memo, the Hack Company still

[20] had not received -

[21] A: Then -

[22] Q: - the 1984 asset data?

[23] A: Then it's probably correct.

[24] Q: All right.

[25] MS. TRUHE: Defendant's Number 9.

BY MS. TRUHE:

[1]

[2] Q: Ms. Summers, directing your attention to what has

[3] been previously marked as Defendant's Exhibit Number 9, this

[4] is the 5500-C form for 1984.

[5] A: Uh-huh.

[6] Q: I would like to ask you several questions about

[7] that form. You indicated in your direct testimony that your

[8] handwriting does appear on page 3, correct?

[9] A: Uh-huh. Yes, I did.

[10] Q: Now does your handwriting appear anywhere else on

[11] that form?

[12] A: No.

[13] Q: Is it not true that the information which you

[14] filled out in your own handwriting on page 3, was done at

[15] the request of Mr. Shofer?

[16] A: Well, we needed to file a form, so I'm sure he

[17] asked me to.

[18] Q: All right. Did Mr. Shofer ever ask you to review

[19] any other part of the form for accuracy?

[20] A: No.

[21] Q: Did you in fact review any other part of the form

[22] for accuracy?

[23] A: No. It would've done me no good to review it. By

[24] that point, I was so long out of pension work, I didn't have

[25] a clue anymore.

[1] Q: Did you generally get involved with the supplying

[2] of data on the 5500 form when it came to Mr. Shofer for

[3] signature?

[4] A: I'm not sure I'm -

[5] Q: Let me try that again. When the 5500-C form had

[6] been prepared, at least in part by Mr. Hack's Company -

[7] A: Uh-huh.

[8] Q: - and sent to Mr. Shofer for signature, did you

[9] have any involvement at that point, any role to play?

[10] A: No. Normally, he just signed it and mailed it.

[11] MS. TRUHE: Your Honor, that is all I have.

[12] THE COURT: Ms. Whelihan?

[13] MS. WHELIHAN: I have no questions, Your Honor.

[14] THE COURT: Okay.

[15] MR. TAYLOR: Your Honor, I just have -

[16] THE COURT: Is there redirect?

[17] MR. TAYLOR: I just had a couple of questions,

[18] Your Honor.

[19] REDIRECT EXAMINATION BY COUNSEL FOR PLAINTIFF

[20] BY MR. TAYLOR:

[21] Q: Ms. Summers, you have Defendant's Exhibit 9 in

[22] front of you. I am going to return that and ask you to look

[23] at Plaintiff's Exhibit 32. You will also have a copy of

[24] Defendant's Exhibit 12. What I am a little confused about,

[25] Ms. Summers, is the last page of the Plaintiff's Exhibit 32,

[1] you already identified as a computer-generated statement
 [2] which you generated. You have Defendant's Exhibit 12 in
 [3] front of you. I wanted to ask you what the differences are
 [4] or the relationship between those two documents.
 [5] **A:** Okay, the Plaintiff's 32 contains a balance sheet
 [6] beginning on 12/31/83 and ending on 12/31/84. And
 [7] Defendant's Exhibit 12 contains a balance sheet beginning
 [8] 12/31/84 and ending 12/31/85. So they're a year apart.
 [9] That's the first difference. There is a minor
 [10] difference relatively speaking, minor difference between the
 [11] year-end balance on one copy to the next copy, and I'd have
 [12] to sit here and read the figures to figure out what that
 [13] difference is.
 [14] **Q:** Well, without going into that difference, did you
 [15] generate Defendant's Exhibit 12 as well as the other
 [16] exhibit?
 [17] **A:** They both came off my computer, yes, sir.
 [18] **Q:** Does the computer-generated statement, the last
 [19] page of Plaintiff's Exhibit 32, does it show or reflect
 [20] anywhere loans from the pension?
 [21] **A:** This is -
 [22] **Q:** Thirty-two.
 [23] **A:** - Defendant's 32?
 [24] **Q:** Yes.
 [25] **A:** Okay, yes, it shows at 12/31/84 that there was a

[1] note receivable from the pension participant, yes.
 [2] **Q:** For what purpose would you have generated that
 [3] last page of the Plaintiff's Exhibit 32?
 [4] **A:** I generated it to show the transactions that
 [5] happened, to summarize the transactions that happened during
 [6] the year.
 [7] **Q:** For what purpose would that document be used?
 [8] **A:** It's a summary, and it normally would go to Stuart
 [9] Hack's office to be used to prepare the tax forms. It's
 [10] also used internally for Mr. Shofer to know what happened
 [11] through the year. That's what it's used for.
 [12] **Q:** Looking at Defendant's Exhibit 12, does that
 [13] exhibit reflect loans from the pension?
 [14] **A:** It reflects a note receivable, yes.
 [15] **Q:** You testified in response to, I think, one of Ms.
 [16] Truhe's questions that you were aware that Mr. Shofer had
 [17] borrowed money from his pension in 1984. Is that correct?
 [18] **A:** Yes, sir.
 [19] **Q:** Just for the record, how did you become aware of
 [20] that fact?
 [21] **A:** It was a small office. I balanced the checkbook.
 [22] **Q:** Did you use the checkbook in the preparation of
 [23] Defendant's Exhibit 12 and the document that is attached to
 [24] Plaintiff's Exhibit 32?
 [25] **A:** Oh, yeah, that's a primary source of information.

[1] **Q:** Okay.
 [2] **MR. TAYLOR:** I do not have any other questions.
 [3] **THE COURT:** Is there any recross?
 [4] **MS. TRUHE:** Just a couple, Your Honor.
 [5] **RECCROSS EXAMINATION BY DEFENDANT HACK'S COUNSEL**
 [6] **BY MS. TRUHE:**
 [7] **Q:** Ms. Summers, with reference to Plaintiff's Exhibit
 [8] Number 32, again, this is the 5500-C for the year 1984,
 [9] correct?
 [10] **A:** Yes.
 [11] **Q:** Let's establish for the record once and for all
 [12] that the last page of this document, which is the income and
 [13] expense report balance sheet that you prepared -
 [14] **A:** Right.
 [15] **Q:** - reflecting transactions affecting the plan in
 [16] 1984 was not attached to the 5500-C filed with the
 [17] government, correct?
 [18] **A:** That's - I'm pretty sure that's correct, yes.
 [19] **Q:** All right. Now it states at the top of
 [20] Plaintiff's Exhibit 32, "Mailed to Hack 10/18/85." Is that
 [21] your handwriting?
 [22] **A:** That's Mr. Shofer's handwriting.
 [23] **Q:** All right. Do you know whether he mailed a copy
 [24] of the 5500 that was filed with the government to Mr. Hack's
 [25] office or not?

[1] **A:** I know that he did.
 [2] **Q:** He did? Do you know whether this last page was
 [3] attached to it?
 [4] **A:** I don't know if it was attached to it. I know it
 [5] was furnished to them.
 [6] **Q:** How do you know that?
 [7] **A:** Because we have another copy of it with my
 [8] handwriting on it with a note to Stuart Hack.
 [9] **Q:** Where is that?
 [10] **A:** I'm going to identify the exhibit.
 [11] (Discussion off the record.)
 [12] **BY MS. TRUHE:**
 [13] **Q:** Is the document you were referring to?
 [14] **A:** Yes.
 [15] **Q:** Can you show me, or can you tell me -
 [16] **THE COURT:** Excuse me, can you tell me what number
 [17] is on that?
 [18] **MS. TRUHE:** Plaintiff's Exhibit Number 33, which
 [19] was marked for identification.
 [20] **BY MS. TRUHE:**
 [21] **Q:** Do you know when that was sent to the Hack
 [22] Company?
 [23] **A:** Do I know when this was sent to -
 [24] **Q:** Yes.
 [25] **A:** - Stuart Hack? Not from looking at this exhibit,

[1] no.

[2] **Q:** Thank you very much.

[3] **MS. TRUHE:** Your Honor, that is all I have.

[4] **THE COURT:** Is there anything further of the
[5] witness?

[6] **MR. TAYLOR:** No, Your Honor. Thank you.

[7] **THE COURT:** Okay. Thank you, Ms. Summers. You
[8] are excused.

[9] (The witness was excused.)

[10] **THE COURT:** Counsel, we have to stop here for
[11] today because I have other matters to take up. Can I ask
[12] you to return on Monday morning at 9:30?

[13] **MR. TAYLOR:** Yes.

[14] **MS. TRUHE:** Yes, Your Honor.

[15] **THE COURT:** Everybody, have a nice weekend.

[16] **MR. MAY:** Thank you.

[17] **MS. TRUHE:** Thank you, Your Honor.

[18] **MR. TAYLOR:** Thank you, Your Honor.

[19] Whereupon this trial was recessed at 3:02 p.m.)

[20]

[21]

[22]

[23]

[24]

[25]

TRANSCRIBER'S CERTIFICATE

This is to certify that the proceedings in the
matter of Richard Shofer v. Stuart Hack, et al., heard on
June 27, 1997, were recorded by means of videotape.

I do hereby certify that the foregoing pages
constitute the official transcript of said videotaped
proceedings to the best of my ability in a complete and
accurate manner.

In Witness Whereof, I have hereunto subscribed
my name this 19th day of March 1998.

Connie Jones

Transcriber

Lawyer's Notes



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Connie Jones

Connie Jones
Transcriber

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IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

RICHARD SHOFER,

Plaintiff,

v. Case No. 88102069/CL79993

STUART HACK, et al.,

Defendants.

----- X

OFFICIAL TRANSCRIPT OF PROCEEDINGS

Baltimore, Maryland

June 30, 1997

BEFORE:

HONORABLE JUDGE ALBERT J. MATRICCIANI

APPEARANCES:

For the Plaintiff:

DOUGLAS TAYLOR, ESQUIRE

For Defendants:

JANET TRUHE, ESQUIRE

DEBORAH WHELIHEN, ESQUIRE

JOHN MAY, ESQUIRE

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FILED

APR 2 1998

CIRCUIT COURT FOR
BALTIMORE CITY

PROCEEDINGS

[1] (These proceedings commenced at 9:58 a.m.)

[3] THE COURT: Is everybody about ready?

[4] MS. TRUHE: Yes.

[5] THE COURT: Okay, let us go back on the record in
[6] the matter of Shofer v. Hack, et al. I believe we were
[7] ready for a new witness, Mr. Taylor, were we not?

[8] MR. TAYLOR: Yes, we were, Your Honor. I would
[9] like to call Mr. Larash, if I might.

[10] THE COURT: Okay.

KENNETH E. LARASH,

[11] A witness produced on call of the Plaintiff, having first
[12] been duly sworn, was examined and testified as follows:

[13] THE CLERK: State your name and address for the
[14] record, please.

[15] THE WITNESS: Kenneth E. Larash, 311 Wickersham
[16] Way, Cockeysville, Maryland.

[17] THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. TAYLOR:

[18] Q: Mr. Larash, what is your occupation or profession?

[19] A: I'm a CPA licensed in the State of Maryland.

[20] Q: By whom are you employed?

[21] A: I'm an officer and a stockholder in Greybush
[22] Newman and Co., P.A.

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[23] Q: How long have you been affiliated with Greybush
[24] Newman?

[25] A: Twenty years.

[1] Q: Could you just briefly recount your educational
[2] background?

[3] A: Yes. I graduated from the University of Maryland
[4] in 1969 with a B.S. degree. And in 1971, I became a CPA in
[5] the State of Maryland.

[6] Q: Are you licensed in any other states besides
[7] Maryland?

[8] A: No.

[9] Q: Do you have an accounting specialty?

[10] A: I'm in charge of the auditing and accounting
[11] department at Greybush Newman and have been for many years.

[12] Q: Do you know Richard Shofer, the Plaintiff in this
[13] case?

[14] A: Yes, I do.

[15] Q: How long have you known him?

[16] A: Approximately since '79 or 1980.

[17] Q: How was it that you came to meet him in that time
[18] frame?

[19] A: I was assigned at some point to work on the
[20] Catalina Enterprise account by Harvey Newman, and it
[21] would've been the first time I went out to start work on
[22] that account that I would've met him.

[1] Q: Do you recall what year you might have started to
[2] do that work?
[3] A: No, approximately '79 or '80.
[4] Q: 1970 or 1980. Was Mr. Shofer already a client of
[5] Greybush Newman when you joined the firm?
[6] A: Yes, in Catalina Enterprises, right.
[7] Q: At the time you began to work on Mr. Shofer's
[8] accounting and his company's accounting matters, what
[9] particular service or services were you performing for them?
[10] A: We were preparing financial statements on his
[11] corporation. We were - did some work on his general
[12] ledgers for his corporation and his pension plan. We
[13] prepared the income tax returns for the corporation and Mr.
[14] Shofer, individual. And we prepared a form 990-T for the
[15] pension plan whenever that was required.
[16] Q: When did Greybush Newman cease doing accounting
[17] work for Mr. Shofer?
[18] A: The last year we did our services was for the year
[19] 1990, and I believe it was around February of '92 that we
[20] may have stopped doing services for him.
[21] Q: Did the nature of the accounting work or
[22] accounting services that you performed, or that you
[23] testified to, change at all during that time frame, or was
[24] it essentially the same kind of work that you were doing?
[25] In other words, was there any change in the type of work

[1] that you did at any time during the course of your
[2] employment for Mr. Shofer?
[3] MS. WHELIHAN: Objection, Your Honor. I am not
[4] sure, with all due respect, that Mr. Taylor's question can
[5] be answered by the witness the way it was phrased because
[6] the pension loans materially changed Greybush's services.
[7] So he can testify generally as to what services he did and
[8] whether they changed. But there was a time period where
[9] those services did change, and I think that that is not the
[10] question that Mr. Taylor is trying to elicit from him.
[11] THE COURT: Mr. Larash, do you understand the
[12] question as posed to you?
[13] THE WITNESS: It depends on how much detail he
[14] wants to go into.
[15] MR. TAYLOR: Your Honor, let me withdraw the
[16] question. I am going to come back at it in a little
[17] different way.
[18] BY MR. TAYLOR:
[19] Q: Mr. Larash, were you the principal accountant at
[20] Greybush Newman who worked on Mr. Shofer's accounting work
[21] from the time you were assigned that work until Greybush
[22] stopped doing Mr. Shofer's work?
[23] A: Yes, I was.
[24] Q: You indicated that you did work on the general
[25] ledger of the corporation as a part of the services you

[1] performed?
[2] A: Yes.
[3] Q: And would it be fair to say, accurate to say, that
[4] work on the general ledger as well as the corporate and
[5] personal income tax returns and the work on doing any tax
[6] work related to the pensions were routinely done by Greybush
[7] Newman every year that you performed services for Mr.
[8] Shofer?
[9] A: Yes, within the confines that were previously
[10] described, yes.
[11] Q: Did anyone at your firm, to your knowledge, give
[12] Mr. Shofer advice concerning the tax law or answer any
[13] questions regarding the application of the tax law to any
[14] matter that Mr. Shofer may have been concerned with?
[15] A: I believe there were times when he called up with
[16] questions, and I forwarded them or turned his phone call
[17] over to somebody in the tax department.
[18] Q: Greybush had a tax department, is that correct?
[19] A: That's right.
[20] Q: Has it always had a tax department, or at least
[21] during the time that you have been employed there?
[22] A: Yes. Since I've been there, yes, they've had it.
[23] Q: What is the function of the tax department?
[24] A: The function is to review financial statements
[25] that are generally prepared by somebody in, on audit and

[1] accounting staff. And that helps serve as a sort of a
[2] check-and-balance. Besides reviewing the financial
[3] statement, excuse me, besides reviewing the tax returns,
[4] they would also do tax research as required from time to
[5] time. And they would also get involved in tax planning for
[6] individuals and corporations also.
[7] Q: You indicated that the tax department would review
[8] tax returns prepared by other members of the firm. Is that
[9] right?
[10] A: That's right.
[11] Q: Were there any particular circumstances that would
[12] trigger a review of a tax return prepared by another member
[13] of the firm, or was that something that was done routinely?
[14] A: As far as I'm aware, it was required in every
[15] instance for income tax returns, that they be reviewed by a
[16] separate person in the tax department.
[17] Q: Did that apply to both personal and corporate
[18] income tax returns?
[19] A: Yes.
[20] Q: Now from the time period of approximately 1980
[21] when you began performing accounting work for Mr. Shofer and
[22] his company, and if you were working on the corporate
[23] ledger, preparing the corporate and personal income tax
[24] returns, how did you get the data or information which you
[25] needed to prepare those returns?

[1] A: Well, to start I would visit Catalina's office,
 [2] and the bookkeeper usually would turn over the general
 [3] ledger to me and I would start from there.
 [4] Q: So the basic source of your information then would
 [5] be Catalina's records; that is, the records maintained by
 [6] the corporation?
 [7] A: Right.
 [8] Q: Where would the information for the preparation of
 [9] Mr. Shofer's personal returns come from?
 [10] A: I believe they were either prepared by his
 [11] bookkeeper, and some of the information may've been prepared
 [12] by himself from his personal checkbook, or it may've been on
 [13] the records, I'm not sure what they used, you know, beyond
 [14] that.
 [15] Q: Was that personal checkbook made available to you
 [16] during the time that you were gathering information?
 [17] A: I don't believe so. I remember being given
 [18] photocopies of, I believe it was, lists of checks. It might
 [19] have a name and a check number and a date. And I seem to
 [20] remember I think the bookkeeper did it, but she would have
 [21] it subdivided into columns and indicate what type of an
 [22] expense it might be.
 [23] Q: Would it be accurate to say that you would go to
 [24] the corporate offices every year when you were working on
 [25] these returns to get the information necessary to complete

[1] the returns?
 [2] A: Yes.
 [3] Q: Mr. Larash, I want to have you look at what has
 [4] been introduced into the record as Plaintiff's Exhibit 10
 [5] and ask you if you have seen that document, or are familiar
 [6] with that document?
 [7] A: Yes. This is Richard Shofer's original 1984
 [8] income tax return for his federal and State of Maryland that
 [9] our firm prepared for him.
 [10] Q: Did you in fact prepare the federal and state
 [11] returns for 1984?
 [12] A: No, I gathered the information at his office. And
 [13] this return was prepared - I don't see the cover sheet that
 [14] we have on our copy but it was prepared by David Lane. And
 [15] the officer that signed the return when it was mailed was
 [16] Harvey Newman.
 [17] Q: Is there any indication on that return when it was
 [18] prepared?
 [19] A: Well, Harvey Newman signed it on August the 7th of
 [20] '85, so that would've been the last day that we touched it
 [21] and put it in the mail.
 [22] Q: And it would have gotten from there to Mr. Shofer?
 [23] A: That's right.
 [24] Q: Does the 1984 return reflect a loan from Mr.
 [25] Shofer's pension account?

[1] A: No, it does not.
 [2] Q: When you worked on this 1984 return, both federal
 [3] and state, were you aware that Mr. Shofer had made a loan
 [4] from his pension?
 [5] A: Yes. I had, prior to receiving his personal
 [6] information, I had already worked on or looked at the
 [7] general ledger of his pension plan. And on the general
 [8] ledger of his pension plan, there was an indication that
 [9] there was a loan receivable from Richard Shofer as of
 [10] December 31, '84, of \$200,000. And I believe that was in
 [11] June of '85. And I started working on the individual return
 [12] late in July of '85. And there was an indication from
 [13] Richard Shofer's information that he had interest expense,
 [14] which is what I would've expected to see. If it wasn't
 [15] there, I would've asked him where it was because I already
 [16] knew he had a loan.
 [17] Q: So if I understand your testimony, the 1984
 [18] general ledger reflected evidence of a loan from the pension
 [19] account?
 [20] A: Yes.
 [21] Q: You would have seen that ledger when you were
 [22] gathering the data necessary to prepare the 1984 return. Is
 [23] that right?
 [24] A: That's right.
 [25] Q: When, if you can recall, would it have been that

[1] you would have looked at the general ledger of 1984 in order
 [2] to prepare the 1984 return?
 [3] A: Are you -
 [4] Q: Well -
 [5] A: - talking about the corporation or the pension
 [6] plan?
 [7] Q: I am talking about the corporate, the ledger, the
 [8] corporate ledger.
 [9] A: Oh, I do not -
 [10] MS. WHELIHAN: I am sorry, is the question when
 [11] would he have looked at the general ledger? Is that what
 [12] your question was?
 [13] MR. TAYLOR: Yes.
 [14] BY MR. TAYLOR:
 [15] Q: My question is you indicated a sequence of events
 [16] with regard to information about the pension loan. And you
 [17] mentioned the corporate ledger as being, I thought, the
 [18] first place that you would have looked. Is that right?
 [19] A: No, I - if I said that, I was mistaken. It was
 [20] the time when I got the general ledger for the pension
 [21] plan -
 [22] Q: I understand.
 [23] A: - that it would've been obvious -
 [24] Q: Okay.
 [25] A: - not the corporation.

[1] Q: All right. When would that have been, if you can
 [2] recall?
 [3] A: I believe there's a work paper that has a date on
 [4] it in June of '85. I forget the specific date now. And
 [5] that, I believe I said in my deposition in 1990, was the
 [6] first date I could prove that I had, you know, observed that
 [7] there was a loan.
 [8] Q: Now did I understand you to say that when you got
 [9] Mr. Shofer's personal data or information that you were
 [10] gathering for his personal return that there was interest
 [11] information there relating to the pension?
 [12] A: Yes.
 [13] Q: Notwithstanding that information, the 1984 tax
 [14] return does not reflect any income as a result of this
 [15] pension loan, does it not?
 [16] A: That's right.
 [17] Q: Is there a reason for that?
 [18] A: Well, there's a number of reasons. As I said, I
 [19] already knew he had a loan from the pension plan. And I was
 [20] expecting to see interest expense, which I did. He did give
 [21] me information on his personal return for interest expense.
 [22] We generally don't run across an experience where a brand
 [23] new loan to either an individual or other entity creates
 [24] taxable income. So you're not really, you know, a CPA
 [25] normally isn't thinking in that sort of line. In addition

[1] to that, Richard did indicate to me that he had either
 [2] communicated or corresponded with Stu Hack, who was the
 [3] corporation's pension consultant, and that Stu had indicated
 [4] to - to Richard that the - that it was - I forget his
 [5] terminology now - but that it was either proper or allowed
 [6] or allowable - something to that extent. And I felt
 [7] that - that if I put myself in his place and I want to
 [8] borrow a loan, that's what I would do. I wouldn't discuss
 [9] it with a pension consultant. I - so I left the matter
 [10] at - where it was at that point.
 [11] Q: Just by way of background, you and - well, you
 [12] are familiar with Stuart Hack, are you not? Or, were you
 [13] familiar with him back in 1985 when you were doing this
 [14] work?
 [15] A: Well, I knew that the Stu Hack Company was the
 [16] pension consultant for the plan for a number of years. I
 [17] don't remember how far back they went. So I was familiar in
 [18] that regard. Plus, I think Greybush Newman had other
 [19] clients that had gone to Stu Hack for pension consulting.
 [20] Q: Do you know whether or not Greybush Newman had
 [21] referred its clients to the Stuart Hack Company?
 [22] A: We may have.
 [23] Q: Did Mr. Shofer show you anything in writing from
 [24] Mr. Hack with regard to the pension loan?
 [25] A: Well, eventually I saw a letter or a memo from Stu

[1] Hack, and unfortunately, I'm not able to swear exactly when
 [2] I saw that. And I could not find it within the context of
 [3] the file for the '84 return, so it's possible I may've asked
 [4] him for a copy of it. He may've sent it to me later. I
 [5] may've gotten his file. Unfortunately, I just can't prove
 [6] that I saw it on that day.
 [7] Q: To what extent, if you can quantify it, would the
 [8] information that Mr. Hack had given Mr. Shofer, that it was
 [9] proper to take this loan, have stopped you from doing any
 [10] further investigation on the matter?
 [11] A: I would just have looked on it as an outside
 [12] confirmation, you know, that it was proper to take these
 [13] loans out.
 [14] Q: As a CPA, do you normally associate a taxable
 [15] event with a loan?
 [16] A: Well, this was taxable income because, as I said
 [17] previously, no, I've heard about it at the end where one
 [18] party may write off a bad debt and the other party's
 [19] required to pick up the income that's no longer outstanding.
 [20] But I considered it to be unusual.
 [21] Q: Did there come a time, Mr. Larash, where the
 [22] existence of a loan or loans from Mr. Shofer's pension
 [23] became a potential problem in your mind?
 [24] A: I was approached by Alan Marvel, who was a member
 [25] of our tax department, in the fall of '86. And he at that

[1] time, after having reviewed a lot of the files, said there
 [2] might be tax consequence of that loan.
 [3] Q: Is it accurate to say that Mr. Marvel was a new
 [4] member of the firm at that time?
 [5] A: Yes. I believe he joined our firm in, I'd say,
 [6] June or July of '86.
 [7] Q: Was he assigned to work with you on various
 [8] matters that you had charge of?
 [9] A: No, he would not have been directly assigned to
 [10] me. When a job's ready for the tax department, I believe
 [11] somebody in the tax department identifies which person's
 [12] going to be assigned that job. So I didn't have him just
 [13] work solely on Ken Larash's clients.
 [14] Q: But Mr. Marvel was not a member of the tax
 [15] department, is that true?
 [16] A: No, he was a member of the tax -
 [17] Q: He was a member of the tax department?
 [18] A: - the tax department, yes.
 [19] Q: So it was his job to review tax returns?
 [20] A: That's right.
 [21] Q: One of the returns that he reviewed, then, was the
 [22] 1984 personal income tax return of Mr. Shofer?
 [23] A: No. No, the '84 return of Mr. Shofer went out in
 [24] August of '85. Alan Marvel was not hired until June or July
 [25] of '86. So he did not review that return.

[1] Q: Would he have reviewed the 1985 return?
 [2] A: I believe he did. I would have to take a look at
 [3] the sign-off sheet to make sure, but I believe he did.
 [4] Q: Do you know specifically what it was that Mr.
 [5] Marvel reviewed that caused him to raise the question of
 [6] taxability of these loans from the pension account?
 [7] A: Well, I gave him access to all of the files which
 [8] would've been the corporation, the pension plan, and the
 [9] individual from prior years. So in regards to looking at
 [10] the prior years' information, he could've either picked it
 [11] up by looking at the pension plan or the individual files.
 [12] Q: In other words, the data that you had worked with
 [13] to prepare the 1984 return was there in the file. Is that
 [14] right?
 [15] A: That's right, yeah, we keep the back-up.
 [16] Q: All right, so you had the back-up data for the
 [17] 1984 returns?
 [18] A: That's right.
 [19] Q: And Mr. Marvel would have reviewed that back-up
 [20] data?
 [21] A: I believe so, yes.
 [22] Q: Approximately when, again, did Mr. Marvel bring
 [23] this potential problem to your attention?
 [24] A: Well, let's see, we had a meeting with Richard in
 [25] November of '86. So it was probably within a couple of

[1] weeks or a couple of days prior to that meeting date that he
 [2] brought it to my attention.
 [3] Q: Did you tell Mr. Shofer about the problem at that
 [4] time?
 [5] A: I believe I called him and told him. If I didn't,
 [6] then we discussed it with him when we had that meeting in
 [7] November of '86.
 [8] Q: Do you recall what accounting work you were doing
 [9] for Mr. Shofer or his company in November of 1986?
 [10] A: Well, the main thing we were working at was to be
 [11] proactive with regard to the new tax act that had been
 [12] passed in '86. And because of some of the articles I had
 [13] already read about the new tax act, I realized that there
 [14] was a potential for them to affect both Catalina and Richard
 [15] Shofer individually. So I thought it would be a good idea
 [16] for him to take a look at the files in that regard to try to
 [17] do some tax planning and et cetera.
 [18] Q: After this potential problem with regard to the
 [19] pension loan was brought to your attention, did you
 [20] personally research the matter or have someone do further
 [21] research on the issue?
 [22] A: This is once he told me we could -
 [23] Q: Yes.
 [24] A: - we could have some taxable income on the loan?
 [25] I turned right around and assigned the job to him doing tax

[1] research. I did not do any on my own, and I asked him to
 [2] report back to me. I believe I also would've asked him
 [3] to contact Stu Hack also because, you know, apparently, from
 [4] Richard's information, he had already contacted Stu and Stu
 [5] knew about these loans. So I thought well, maybe we could
 [6] reduce some of the tax research time by going and, you know,
 [7] talking directly with Stu in resolving the problem.
 [8] Q: Did Mr. Marvel in fact talk with Mr. Hack, if you
 [9] know?
 [10] A: I don't really know all of the phone calls
 [11] he would've made. There were some notes in the file in Alan
 [12] Marvel's handwriting. I'm trying to remember when those
 [13] were dated. He talked to Vanderdresche at the Hack Company,
 [14] and I believe that was in the fall of '86. But I just saw
 [15] notes about questions; I didn't see any answers on that
 [16] handwritten document.
 [17] (Plaintiff's Exhibit No. 34, memo from
 [18] Judith Reed, was marked for
 [19] identification.)
 [20] BY MR. TAYLOR:
 [21] Q: Mr. Larash, let me show you what has been marked
 [22] Plaintiff's Exhibit 34 for identification. I want you to
 [23] look at that document and tell me whether or not you have
 [24] ever seen it before.
 [25] A: Yes, I have. This is a memo from Judith Reed from

[1] the Stuart Hack Company. And I believe that it is in
 [2] response to - from what I can tell, to some questions that
 [3] Alan Marvel had asked with this Vanderdresche. Then he may
 [4] have turned over those questions to Judith Reed.
 [5] MS. TRUHE: Your Honor, I would object to the use
 [6] of this exhibit, at least at this time. We do not have Mr.
 [7] Marvel and we do not have Judith Reed; and it sounds like,
 [8] from the witness, he is guessing as to what the contents of
 [9] the letter are and what they were in response to.
 [10] THE COURT: Well, it is not being offered, is it?
 [11] MR. TAYLOR: Not yet. I just wanted to put it in
 [12] the proper context at this time.
 [13] THE COURT: Okay, maybe you are a little
 [14] premature.
 [15] MS. TRUHE: Okay.
 [16] BY MR. TAYLOR:
 [17] Q: Mr. Larash, what is the date of that? There is a
 [18] cover letter, is there not?
 [19] A: Yes. The letter's dated December 16th of '86 and
 [20] it's addressed to Alan Marvel, signed by Judith Reed.
 [21] Q: It is addressed to Alan Marvel at Greybush Newman,
 [22] is it not?
 [23] A: At Greybush Newman, that's right.
 [24] Q: To the best of your knowledge and recollection,
 [25] this letter pertains to the subject matter which you

[1] discussed with Mr. Marvel in terms of the issue of the
[2] taxability of the loans, does it not?

[3] **A:** Yes.

[4] **Q:** I believe your testimony was that it was your
[5] suggestion that Mr. Marvel contact Mr. Hack's office to
[6] clarify this issue, is that correct?

[7] **A:** That's correct.

[8] **Q:** Okay. Do you know, Mr. Larash, whether that
[9] document that you are holding would have been or the
[10] original would have been in the files at Greybush Newman?

[11] **A:** Yes. I don't remember what file it would've been
[12] in but, yes, we would've had this in our file.

[13] **Q:** All right.

[14] **MR. TAYLOR:** Your Honor, I would like to offer
[15] Plaintiff's Exhibit 34 into the record.

[16] **THE COURT:** Before you object, tell me what
[17] purpose you are offering the document for. Let's just
[18] establish that.

[19] **MR. TAYLOR:** Well, the purpose is that it contains
[20] a response to Greybush Newman's request for information, at
[21] least of the Hack Company's, position with regard to the
[22] taxability of these pension loans. I would proffer that it
[23] is a memo that was prepared by the Stuart Hack Company in
[24] response to a request for information which Greybush Newman
[25] was interested in getting.

[1] **THE COURT:** Do I understand that Mr. Marvel has
[2] died?

[3] **MR. TAYLOR:** Yes.

[4] **MS. WHELIHAN:** Yes, he is deceased.

[5] **THE COURT:** Is Ms. Reed with the Hack Company?

[6] **MR. TAYLOR:** Ms. Reed is no longer with the Hack
[7] Company and, apparently, is no longer in the area.

[8] **THE COURT:** What is your objection?

[9] **MS. TRUHE:** Well, the other problem, in addition
[10] to the fact that this has not really ever been authenticated
[11] by either Mr. Marvel or Ms. Reed, is the fact that it is so
[12] after-the-fact. In other words, the issue in this case is
[13] what was the scope of Mr. Hack's duty at the time these
[14] questions were posed to him in August of 1984. Opinions
[15] after the fact, three years later, as to what portion of
[16] these loans may be taxable to Mr. Shofer, given his own
[17] situation, I think, is irrelevant. What Mr. Hack's advice
[18] is at that point or opinions with regard to the taxability
[19] is completely irrelevant to what his duties were in 1984 and
[20] whether any advice he gave at that time was correct or not.
[21] This is all after the fact.

[22] **MS. WHELIHAN:** Your Honor, I think, as I
[23] understood Mr. Taylor's proffer, he is intending to submit
[24] this memorandum as a response from the Hack Company to Mr.
[25] Marvel's inquiry in November of 1986. I think, if you look

[1] at the document, that is clearly not what it is. It is
[2] hearsay. It is not self-authenticating. It is not a
[3] business record that this witness can establish. I mean,
[4] there is absolutely no reason, evidentially, at this point
[5] with this witness.

[6] **THE COURT:** Well, why don't you let me take a
[7] look. You can continue. I will reserve for the moment.

[8] **MR. TAYLOR:** Thank you.

[9] **BY MR. TAYLOR:**

[10] **Q:** Mr. Larash, if in fact there had been income going
[11] to Mr. Shofer which might have taken the form of this loan
[12] from the pension account, how would that income have been
[13] reported to the Internal Revenue Service?

[14] **A:** Well, I would have expected the pension consultant
[15] to prepare 1099's whenever there's an income tax situation
[16] to a participant of a plan. That's what I would've looked
[17] for. And since at the time I was gathering the information
[18] from Richard Shofer for his original '84 return, he did not
[19] produce to me any 1099's. I took that as further
[20] confirmation there was no income to pick up.

[21] **Q:** Why would you expect the pension consultant to
[22] prepare the 1099?

[23] **A:** I just regarded that in the, within his general
[24] responsibilities of preparing the 5500. For instance, when
[25] there's distributions out of pension plans, from my

[1] knowledge whenever there's been one, the pension plan
[2] consultant has prepared them. Even at Greybush Newman, our
[3] pension plan consultant prepared the 1099's when we took
[4] distributions.

[5] **Q:** Does the pension consultant ordinarily prepare the
[6] 5500's?

[7] **MS. WHELIHAN:** Are we talking about generally, or
[8] are we talking about -

[9] **MR. TAYLOR:** We are talking -

[10] **MS. WHELIHAN:** - this particular case?

[11] **MR. TAYLOR:** - generally.

[12] **MS. WHELIHAN:** I do not know. I mean, this
[13] witness is not an expert witness; he is a fact witness. I
[14] mean, I do not know what admissible -

[15] **THE COURT:** If the witness has knowledge about it,
[16] he may answer.

[17] **THE WITNESS:** I don't think I can generally. I've
[18] seen it a number of different ways where sometimes a pension
[19] consultant has prepared them, sometimes they haven't.

[20] **BY MR. TAYLOR:**

[21] **Q:** Would your firm ordinarily not prepare the 5500
[22] with respect to a pension?

[23] **A:** As long as the pension plan consultant has
[24] prepared it, yes.

[25] **Q:** What was the status of the issue of the taxability

[1] of the loans from the pension account in January of 1987, if
[2] you recall?

[3] **MS. WHELIHAN:** Objection, Your Honor; I do not
[4] understand the question. If the witness does, I presume
[5] that is okay.

[6] **THE COURT:** Do you understand the question, Mr.
[7] Larash?

[8] **MR. TAYLOR:** Well, let me rephrase it, Your Honor.

[9] **BY MR. TAYLOR:**

[10] **Q:** After you had received information from Alan
[11] Marvel and his contacts with the Hack Company, what was the
[12] status of this question of the taxability of the loans made
[13] in 1984 from Mr. Shofer's pension account?

[14] **A:** From my conversations with Alan Marvel, I don't
[15] believe the issue was resolved at that point. It took much
[16] longer to resolve it. So there was continuing research
[17] being done. And as a matter of fact, it was not just within
[18] the confines of Greybush Newman, but I believe we had to get
[19] more exact information. And Alan Marvel may very well have
[20] had to contact Richard Shofer for that, and we talked about
[21] previously him contacting Stu Hack. Eventually, Nick
[22] Giampietro took over the position of pension consultant, and
[23] then he was also discussing the situation with him.

[24] **Q:** Do you know Nicholas Giampietro?

[25] **A:** Yes, I've met him.

[1] **Q:** What does he do?

[2] **A:** He's a tax attorney and a tax consultant.

[3] **Q:** Do you know whether Mr. Shofer was referred to Mr.
[4] Giampietro by anyone at Greybush?

[5] **A:** Yes. Alan Marvel indicated to me that he knew him
[6] and said he was going to - thought it was appropriate to
[7] recommend that Richard see Nick Giampietro.

[8] **Q:** Was there a specific reason or purpose for Mr.
[9] Shofer to consult with Mr. Giampietro at that time?

[10] **A:** Well, yes. I had some concerns at this point
[11] because it appeared to me from what Alan Marvel was telling
[12] me that it certainly was not a simple issue to resolve about
[13] the taxability. It just seemed to be confusion of facts
[14] with regard to that prior memo you showed me from Judith
[15] Reed. And Alan Marvel, who, the main reason Alan Marvel had
[16] identified this as possible taxable income in the first
[17] place was not - I don't think it really came from his
[18] knowledge of tax law. He had indicated to me that at a
[19] prior -

[20] **MS. TRUHE:** Objection, Your Honor. I would object
[21] to this witness testifying as to anything Alan Marvel said
[22] to him.

[23] **THE COURT:** I will strike that testimony.

[24] **MS. TRUHE:** Thank you.

[25] **BY MR. TAYLOR:**

[1] **Q:** Well -

[2] **MS. WHELIHAN:** Although, Your Honor, I think it
[3] goes to his state of mind, this witness' state of mind, but
[4] I am not sure that it is actually being offered for the
[5] truth of the matter asserted.

[6] **THE COURT:** Well, Mr. Larash, if you can tell the
[7] Court what understandings you came to as a result of your
[8] work on these issues and discussions with others, you can
[9] testify to that, but I do not think specifically with
[10] respect to hearsay statements. I would rather you not
[11] testify about those.

[12] **THE WITNESS:** All right, well, let me try to
[13] rephrase. Well, I was concerned that we didn't have
[14] anything definite to point to how much, if anything was
[15] taxable. And in addition to that, from working on the
[16] pension plan in prior years, when we had prepared the Form
[17] 990-T we had decided at that point to put certain
[18] disclosures attached to the 990-T because it had been
[19] identified that Richard Shofer, excuse me, that the pension
[20] plan was not complying with certain requirements that the
[21] IRS or that the Department of Labor required in regard to
[22] the sale of customer loans from the corporation to the
[23] pension plan. So when I started looking at the potential
[24] loan taxability issue and these other disclosures, I thought
[25] should the IRS ever come in to audit, it would be prudent

[1] for the pension plan to straighten its records as much as
[2] possible. And I thought the best way to do that would be to
[3] have a tax attorney involved, so that's why I agreed with
[4] Alan to recommend a tax attorney.

[5] **Q:** You mentioned that at this time when you had
[6] initiated contact with the Hack Company, that there was
[7] confusion about these loans. Was there confusion in your
[8] mind with regard to the taxability issue or the way in which
[9] the matter could be resolved?

[10] **A:** Well, the confusion that I saw was really
[11] documented for me in that memo from Judith Reed. I believe
[12] she starts off in that memo saying that she's not sure she
[13] has all the facts, you know, of what the loans were. And I
[14] do remember noticing that some of her figures did not agree
[15] with some of the figures that we had as to not only to
[16] dollar amounts, but also dates. So there did seem to be
[17] some confusion. They may not have had all the information.

[18] **Q:** Did you come up with any idea or make any
[19] suggestions as to how the matter might be resolved?

[20] **A:** Well, I was hopeful in the beginning that just
[21] Alan Marvel and Stu Hack could come to a meeting of the
[22] minds in that either one would agree with the other as to
[23] whether they were taxable or non-taxable. But that didn't
[24] seem to happen, so the research and discussions continued.

[25] **Q:** Did there come a time when a meeting was arranged

[1] between you and others at Greybush and Mr. Hack?
 [2] **A:** Yes. We had a meeting, and I believe the meeting
 [3] was in May of '87. And Stu Hack and Richard Shofer and Alan
 [4] Marvel and myself were there.
 [5] **Q:** Where did the meeting take place?
 [6] **A:** At the Greybush Newman offices.
 [7] **Q:** Was one of the issues discussed at the meeting the
 [8] taxability of the loans that Mr. Shofer had made from his
 [9] pension?
 [10] **A:** I believe that was. The whole discussion was just
 [11] talking about the loans and whether they were taxable.
 [12] **Q:** Did Mr. Hack express an opinion on the matter?
 [13] **A:** He indicated that he felt that they were not
 [14] taxable at all.
 [15] **Q:** Did he provide any authority for his position?
 [16] **A:** He mentioned some tax code references, but I don't
 [17] recall what they were. And Alan Marvel, I believe,
 [18] mentioned some other tax code references and went out and
 [19] brought in a volume of the IRS code and regulations, I
 [20] believe, to quickly look something up. But they didn't come
 [21] to a meeting of the minds at that meeting, either.
 [22] **Q:** When you went into the meeting with Mr. Hack, did
 [23] you and Mr. Marvel have an opinion concerning the taxability
 [24] of these loans?
 [25] **A:** Yes. By that time, we were feeling more confident

[1] that there definitely was a tax issue. And if we back up
 [2] for a moment, in February of '87, we felt it necessary to
 [3] send Richard Shofer a letter that indicated we felt that the
 [4] '84 individual returns were incorrect and they needed to be
 [5] amended. And we mentioned the potential income tax figure
 [6] that would be put on there. And just prior to issuing that
 [7] letter, we had prepared and sent out the '85 individual tax
 [8] return to Richard. We had reported for '85 some of the
 [9] loans as income. So, yes, we had already made a partial
 [10] determination. By we, I mean the group. That's -
 [11] conferences, phone calls, research were, you know, also
 [12] being done by Nick Giampietro, and Richard was involved to
 [13] some extent to make sure we had the facts straight, et
 [14] cetera.
 [15] **Q:** At the meeting -
 [16] **THE COURT:** Excuse me, did you say February 1987?
 [17] **THE WITNESS:** Yes.
 [18] **THE COURT:** So it was three months before the
 [19] meeting?
 [20] **THE WITNESS:** Yes.
 [21] **THE COURT:** Okay. Thank you, I am sorry.
 [22] **MR. TAYLOR:** I am sorry.
 [23] **BY MR. TAYLOR:**
 [24] **Q:** At the meeting in May of 1987, Mr. Larash, did you
 [25] and Mr. Marvel produce any authority, anything from the tax

[1] code, to show Mr. Hack why your position was the correct
 [2] one?
 [3] **A:** I know that Alan Marvel discussed the tax code,
 [4] but I don't know precisely which sections he was referring
 [5] to anymore, or if he in fact gave him a copy of the research
 [6] he did. I just don't remember.
 [7] **Q:** Mr. Hack's position at the meeting was that there
 [8] was no tax due on these loans and not that he was not
 [9] responsible for the tax. Is that a fair statement?
 [10] **MS. WHELIHAN:** Objection to the question, Your
 [11] Honor, for a couple of reasons. Number one, it is not
 [12] exactly his prior testimony. Number two, the question
 [13] itself is leading and compound.
 [14] **THE COURT:** Well, if you want to clarify this
 [15] issue, you can try again. But I think you had already asked
 [16] that question, and I really do not need to hear the answer
 [17] more than once.
 [18] **BY MR. TAYLOR:**
 [19] **Q:** Mr. Larash, do you remember whether or not Mr.
 [20] Hack mentioned the name of Barry Berman at the meeting?
 [21] **A:** Yes. I believe it's in my notes to that meeting
 [22] that he mentioned that name.
 [23] **Q:** What was the context, if you recall, in which Mr.
 [24] Hack mentioned Mr. Berman's name?
 [25] **A:** I believe he said something to the fact that he

[1] could get a confirmation from him that these loans weren't
 [2] taxable income. And I believe he attempted to contact him
 [3] right while we were in the meeting.
 [4] **Q:** Do you know Barry Berman?
 [5] **A:** No, I don't.
 [6] **Q:** Do you know what he does?
 [7] **A:** I didn't at the time, and I'm not sure I remember
 [8] right now what he does.
 [9] **Q:** In February of 1987, three months before the
 [10] meeting, you had determined that amended returns for at
 [11] least 1984 would have to be filed, is that correct?
 [12] **A:** Yes.
 [13] **Q:** Was that still your opinion at the meeting in May
 [14] of 1987?
 [15] **A:** Yes.
 [16] **Q:** Did the issue of filing an amended personal
 [17] federal and state income tax return come up during the
 [18] course of the meeting that you had with Mr. Hack?
 [19] **A:** Yes.
 [20] **Q:** Did Mr. Hack express an opinion on whether or not
 [21] the 1984 of 1985 returns needed to be amended?
 [22] **A:** Yes. He thought that even if they were taxable
 [23] income, that we shouldn't amend the returns.
 [24] **Q:** Should not amend the returns?
 [25] **A:** Right.

[1] Q: Did he provide any reasons for that?
[2] A: The only thing I recall is that he may've said
[3] that the IRS would never pick it up.
[4] Q: Mr. Larash, let me show you what has been marked
[5] as Plaintiff's Exhibit Number 12. I wonder if you could
[6] look through that document and tell me if you recognize
[7] that.
[8] MS. WHELIHAN: Is that the 1985 tax return?
[9] MR. TAYLOR: Yes, it is.
[10] THE WITNESS: Yes, this is the original 1985
[11] Richard Shofer individual tax return that Greybush Newman
[12] prepared.

BY MR. TAYLOR:

[13] Q: Looking at Plaintiff's Exhibit 11, just look at
[14] that also, Mr. Larash, and tell us if you recognize that.
[15] A: Yes, this is a copy of the amended form 1040-X for
[16] 1984 that we prepared, that Greybush Newman prepared for
[17] Richard Shofer.
[18] Q: What was the date on that? Did you say that?
[19] A: Yes. I signed it and mailed it out on December
[20] the 9th of '87. Is that the date you're talking about?
[21] Q: Yes. Yes. Let me have you look at Plaintiff's
[22] Exhibit 13 and ask you if you can identify that or you
[23] recognize that document?
[24] A: Yes, this is the amended return, Form 1040-X, that

[1] we prepared for Richard Shofer for the year 1985. And I
[2] signed it and sent it out on December 9th of '87.
[3] Q: Mr. Larash, does the 1984 amended tax return
[4] reflect - talking about the federal return, does that
[5] reflect additional taxes due?
[6] A: Yes, it does.
[7] Q: How much additional tax does that return reflect?
[8] A: \$23,360. That's on the federal return.
[9] Q: All right. Would it be accurate to say that that
[10] additional tax that is reflected on the amended 1984 federal
[11] return is due to the pension loan income generated by that
[12] loan?
[13] A: Yes. Yes, that's the only change we made to
[14] income was reflecting income because of that loan in 1984.
[15] Q: You did an amended Maryland State return for 1984,
[16] did you not?
[17] A: Yes.
[18] Q: That is also reflected in that exhibit, is it not?
[19] A: Yes, it is.
[20] Q: Is there additional tax due the State of Maryland
[21] in 1984 as reflected on the amended return?
[22] A: Yes. The tax due is \$5,747.
[23] Q: Is that additional tax attributable to the
[24] taxability of the pension loan or loans?
[25] A: Yes, it is.

[1] Q: Now, when you prepared the 1985 return, I believe
[2] you indicated that you had reported some portion of a loan
[3] or loans as taxable income. Is that correct?
[4] A: Yes, \$3,400 on the original return was shown as -
[5] Q: On the original return?
[6] A: - was shown as taxable.
[7] Q: Then, a decision was made to amend the 1985
[8] return. Is that correct?
[9] A: That's right.
[10] Q: Was the 1985 return amended to reflect additional
[11] income tax generated by other pension loans?
[12] A: Yes, it was reporting - once we amended it, it
[13] reported the full amount for 1985 of \$80,000 of pension
[14] loans.
[15] Q: Well, all right. On your federal return then for
[16] 1985, what was the additional tax that you reported on the
[17] amended return for that tax year?
[18] A: For 1985, the total tax due on the amended return
[19] is \$34,838.
[20] Q: All right. Did you also prepare an amended
[21] Maryland State income tax return?
[22] THE COURT: I am sorry, I am confused. You asked
[23] him if there were additional taxes -
[24] MR. TAYLOR: Yes.
[25] THE COURT: - and the answer was the total taxes

[1] due. Is that only with respect to loan income, or is that
[2] with respect to other income?
[3] THE WITNESS: That was the only thing that was
[4] amended on the 1985 return.
[5] THE COURT: What was the amount again, \$34,000-
[6] what?
[7] THE WITNESS: \$34,838.
[8] THE COURT: Okay, thank you.
[9] BY MR. TAYLOR:
[10] Q: And that is the federal income tax, is that
[11] correct?
[12] A: It's federal income tax. That's the -
[13] Q: And -
[14] A: That's the increase.
[15] Q: All right. Is there also additional tax that was
[16] reported to the State of Maryland?
[17] A: Yes. That tax was, that increase in tax was
[18] \$6,032.
[19] Q: Mr. Larash, let me just also ask you to look at
[20] Plaintiff's Exhibit 14, and ask you if you would identify
[21] that document as well.
[22] MS. WHELIHAN: What number was that?
[23] MR. TAYLOR: That is 14.
[24] THE WITNESS: Yes. This is a individual tax
[25] return we prepared for Richard Shofer for '86 for

[1] federal and state.

[2]

BY MR. TAYLOR:

[3] **Q:** Does that return accurately reflect the taxability
[4] of pension loans?

[5] **A:** Yes. It shows the entire amount borrowed in '86
[6] as being income in '86 of \$35,000.

[7] **Q:** Is there any way you can determine by looking at
[8] that return what the tax was on the loans that were made in
[9] tax year 1986?

[10] **A:** No, it would be part of the total calculation.

[11] You would have to do a separate calculation to pull out what
[12] the tax was on that individual amount.

[13] **Q:** All right.

[14] **THE COURT:** Mr. Taylor, can I ask a question -

[15] **MR. TAYLOR:** Yes, Your Honor.

[16] **THE COURT:** - because I am a little confused.

[17] Mr. Larash, did you not testify that on the original 1985
[18] return, you reported \$3,400 income from these loans?

[19] **THE WITNESS:** On the original '85 return, that's
[20] correct. I reported \$3,400 in income.

[21] **THE COURT:** Where did you get that total?

[22] **THE WITNESS:** That total was calculated, and

[23] again, I believe, this was between Alan Marvel and Nick

[24] Giampietro, et cetera. But we realized at the time that he

[25] had taken out \$80,000 in 1985. And potentially, the entire

[1] \$80,000 was taxable; however, as of the date we're preparing
[2] the '85 return, which is in February of '87, Richard Shofer
[3] had not made a decision to amend his '84 return. Therefore,
[4] either Alan Marvel or Nick Giampietro said well, Richard has
[5] a voluntary contribution account with the pension plan, and
[6] his basis in that account can offset, if you will, the
[7] amount of the loan that could be taxable.

[8] **THE COURT:** This is the difference?

[9] **THE WITNESS:** Yes, so this is the difference,

[10] yeah. The amount of his voluntary account that he had
[11] contributed himself was \$76,600. And we subtracted that
[12] from the \$80,000.

[13] **THE COURT:** It was not self-evident.

[14] **THE WITNESS:** Right, and I don't -

[15] **MS. WHELIHAN:** Your Honor, I just - and I do not
[16] think there is any dispute, and I guess we could probably
[17] all stipulate that \$50,000 plus the \$76,600, for a total of
[18] \$126,600, was not determined to be taxable. So if you take
[19] his total borrowings, you can subtract \$126,600 before you
[20] get to the taxable amount of his income. When the amended
[21] returns were prepared, the \$76,600 and the \$50,000 were put
[22] on the 1984 return. Then the 1985 return did not have the
[23] \$76,000 deduction because it went to the earlier tax. Do
[24] you see what I mean?

[25] **THE COURT:** All that was in limbo at this time?

[1] **MS. WHELIHAN:** All of that was in limbo because he
[2] had not made the decision to amend. But that - I mean, I
[3] do not think that is a disputed fact among any of the
[4] parties, right?

[5] **MS. TRUHE:** No.

[6] **MR. TAYLOR:** No. I would agree that the - I
[7] think the accounting and the tax law is clear on that point.
[8] It may be that before Mr. Larash actually leaves the witness
[9] stand, some of that will come out. But that is correct,
[10] Your Honor.

[11] **THE COURT:** Okay.

BY MR. TAYLOR:

[12] **Q:** Mr. Larash, with regard to the amended 1984
[13] federal return, you have already testified with regard to
[14] the additional tax for that return. Were there any
[15] penalties associated with the filing of that amended return?

[16] **A:** All I can say is there probably were. They don't
[17] show up on the return we prepared.

[18] **Q:** Were there any interest calculations made on the
[19] 1984 federal return?

[20] **A:** On the amended one?

[21] **Q:** Yes.

[22] **A:** I believe we were requested to at some point down
[23] the road to do that, do those calculations.

[24] **Q:** All right.

[1] **MR. TAYLOR:** Your Honor, I have a couple of
[2] exhibits that I would like to get gathered together. I am
[3] just wondering if the Court will consider giving me about a
[4] 10-minute break.

[5] **THE COURT:** I will. Fine, we will take a brief
[6] recess. Thank you.

[7] (Brief recess.)

[8] **THE COURT:** Are you ready to resume?

BY MR. TAYLOR:

[9] **Q:** Mr. Larash, were any additional accounting
[10] services necessary in 1986 and 1987 because of these pension
[11] loans of 1984 and 1985?

[12] **A:** Alan Marvel was doing some research, so there
[13] would've been the tax research and the phone calls, et
[14] cetera, correspondence that he was having with other
[15] parties. That would have been additional, plus these
[16] additional meetings we had.

[17] **Q:** Let me show you what has been marked as
[18] Plaintiff's Number 24, and ask you if you can identify that
[19] document.

[20] **A:** Yes. This is a series of three letters.

[21] **Q:** First of all, Mr. Larash, if you give us, just
[22] taking those in turn, the first one first, if you would tell
[23] us the date, the name of the person to whom they are
[24] addressed, and who signed the letter.

[1] A: The first one is July the 9th of '87, addressed to
[2] Richard Shofer at Catalina Enterprises, and I signed the
[3] letter. And it concerns certain billing information between
[4] November '86 and June '87.
[5] Q: What were you specifically asked to do in, I
[6] guess, as you prepared the response which is reflected in
[7] that letter?
[8] A: This indicates that Richard had previously asked
[9] us to analyze our billing records for the period of time
[10] between November '86 and June '87 in regard to work done on
[11] the pension loan problem, as is stated in the letter.
[12] Q: Was that for a particular calendar year that you
[13] had analyzed your records?
[14] A: Well, it's a piece of two different years,
[15] November '86 through June of '87.
[16] Q: Did you in fact analyze your billing records?
[17] A: Yes, I did.
[18] Q: What did you conclude with regard to your fees as
[19] they related to this particular problem with the loans from
[20] the pension?
[21] A: I state in here that the portion of the fees
[22] applicable to this problem amounted to \$2,273.60.
[23] Q: All right, would you look at the second letter?
[24] Would you give us the date and to whom that is addressed and
[25] who signed it?

[1] A: All right, it's January 21 of 1988, addressed to
[2] Richard Shofer at Catalina Enterprises, and I signed the
[3] letter.
[4] Q: Did you also provide an opinion with respect to
[5] the fees for work related to the loan problem?
[6] A: Yes, this is relating to the pension loan problem
[7] and the work we did in regard to that.
[8] Q: What was the amount that you attributed to the
[9] pension loan problem?
[10] A: This was \$2,229.03 for the period between July of
[11] '87 and December of '87.
[12] Q: All right, then there is a third letter, is there
[13] not?
[14] A: Yes. The third letter is dated February 6th,
[15] 1989, addressed to Richard Shofer at Catalina Enterprises,
[16] and I signed the letter.
[17] Q: Did that also reflect billing related to the loan
[18] for a particular period?
[19] A: Yes, it does.
[20] Q: What is the amount that you attributed and for
[21] what period?
[22] A: The amount is \$2,462.60. It's for the entire year
[23] of 1988.
[24] Q: All right. Thank you very much.
[25] MR. TAYLOR: This, I believe, is 36.

[1] (Plaintiff's Exhibit No. 35, 1990-91
[2] accounts receivable records, was marked
[3] for identification.)
[4] MS. TRUHE: Your Honor, has the previous exhibit
[5] been moved into evidence?
[6] MS. WHELIHAN: Yes.
[7] THE COURT: Number 24?
[8] MS. TRUHE: Twenty-four because I would object to
[9] that in view of the prior testimony by Mr. Shofer that none
[10] of those bills which Mr. Larash just testified were
[11] submitted were in fact paid by him personally. I just do
[12] not see the relevance of that document.
[13] THE COURT: Well, I think that is argument, but I
[14] will allow the document in.
[15] MR. TAYLOR: Yes, the document is not in. I
[16] will -
[17] THE CLERK: It is in.
[18] MR. TAYLOR: Thank you.
[19] BY MR. TAYLOR:
[20] Q: Mr. Larash, let me have you look at what has been
[21] marked as Plaintiff's Exhibit 35. Do you recognize those
[22] documents, Mr. Larash?
[23] A: I don't really recognize the first sheet of the
[24] document. The second sheet, the remaining sheets, though,
[25] some of them are prepared in my handwriting, and some of the

[1] others are from Greybush Newman Accounts Receivable records.
[2] Q: Would you classify those records as billing
[3] records?
[4] A: Yes, I would.
[5] Q: Would you have consulted those records in
[6] connection with the preparation of the three letters which
[7] constituted Plaintiff's Exhibit Number 24?
[8] A: That's the prior exhibit you showed me?
[9] Q: Yes.
[10] A: No. This was prepared at a different time. The
[11] letters you showed me were - I'd have to take a look at the
[12] dates I signed the letters, if I may. Yes, the last letter
[13] I sent to Richard is dated February the 6th of '89, and I
[14] notice that on the documents, they're in my handwriting
[15] communicating I prepared this particular one I'm looking at
[16] on August the 9th of 1990. And the next one in the series
[17] was prepared on November the 2nd of '91. And this
[18] computerized record is dated March of 1990. And I have
[19] another sheet of paper with my handwriting on it dated
[20] August 9th of '90. So these were prepared separate and
[21] after these letters were sent out.
[22] Q: All right. Mr. Larash, after 1987 and up until
[23] the time Greybush's relationship with Mr. Shofer ceased, did
[24] your accounting services and work include assistance on
[25] audits?

[1] A: It would've included assistance on the IRS audits
 [2] of his corporation and of his pension plan.
 [3] Q: Do you know whether those audits involved any of
 [4] the tax returns that you would have prepared?
 [5] A: Yes, they would have. And I, excuse me, I also
 [6] believe his individual return might've also been audited at
 [7] the same time, so it would've included that, too.
 [8] Q: Without referring to your files, do you know from
 [9] memory what tax years or tax returns were in fact the
 [10] subject of those audits?
 [11] A: I believe the audit of the pension plan was for
 [12] the year end '86. The audit of the corporation - I recall
 [13] for some reason the IRS did not audit the same year on the
 [14] corporation as they did on the pension plan. I'm not really
 [15] sure why. I don't remember what year, but it may, they may
 [16] have eventually expanded it to multiple years.
 [17] Q: Were any of the amended personal federal income
 [18] tax returns that you prepared the subject of an IRS audit?
 [19] A: I don't really remember.
 [20] Q: Okay.
 [21] MR. TAYLOR: I do not have any other questions,
 [22] Your Honor.
 [23] THE COURT: Is there cross-examination of the
 [24] witness?
 [25] MS. TRUHE: Yes, Your Honor. Before beginning my

[1] cross-examination of Mr. Larash, I would like to pass up to
 [2] the Court those exhibits that I would be referring to
 [3] throughout my cross-examination.
 [4] THE COURT: Okay, thank you.
 [5] (Discussion off the record.)
 [6] CROSS-EXAMINATION
 [7] BY MS. TRUHE:
 [8] Q: As I understand it, Mr. Larash, you first met Mr.
 [9] Shofer in 1979 or 1980. Is that correct?
 [10] A: That's correct.
 [11] Q: That is when you were assigned to do the corporate
 [12] tax returns and financial statements for Crown Motors?
 [13] A: That's correct.
 [14] Q: You were assigned these tasks by Harvey Newman who
 [15] was the Greybush partner at that time in charge of Mr.
 [16] Shofer's account?
 [17] A: That's correct.
 [18] Q: Mr. Shofer had already been a client of Greybush
 [19] Newman's for a number of years by the time you were asked to
 [20] do some work on his file?
 [21] A: Yes, I believe so.
 [22] Q: Now at the time you were asked to work on Mr.
 [23] Shofer's account, which was in 1979 or 1980 or thereabouts,
 [24] you had been an accountant for about nine years by that
 [25] time?

[1] A: I've been in public accounting for at least 10
 [2] years.
 [3] Q: For 10 years, all right. In terms of the services
 [4] which Greybush had been retained to perform for Mr. Shofer,
 [5] these included his personal and corporate tax returns?
 [6] A: That's correct.
 [7] Q: It also included, as you testified on direct, work
 [8] on the general ledgers for both the corporation and the
 [9] pension?
 [10] A: Yes. But I seem to recall that Harvey may not
 [11] have, that's Harvey Newman, may not have assigned the
 [12] individual return to me right away. That might have been a
 [13] year or two later, but -
 [14] Q: All right, and how about the 990-T? Greybush also
 [15] prepared that for the pension?
 [16] A: Yes.
 [17] Q: What is a 990-T?
 [18] A: It's a form that reflects taxable income in an
 [19] organization or entity that normally doesn't have taxable
 [20] income. So it could be for a non-profit organization or for
 [21] a pension plan.
 [22] Q: All right. What knowledge or expertise would an
 [23] accountant have to have in order to properly prepare a
 [24] 990-T?
 [25] A: They would have to know the income tax laws.

[1] Q: As they pertain to pensions?
 [2] A: Yes, I believe so.
 [3] Q: At the time when you - by the way, was there a
 [4] time when you prepared Catalina's 990-T?
 [5] A: I don't remember what years, but I certainly at
 [6] least gathered the information for the return -
 [7] Q: All right.
 [8] A: - and I may've prepared it.
 [9] Q: All right. Were you preparing the 990-T's by the
 [10] mid-1980s?
 [11] A: Yes, I believe so.
 [12] Q: All right, and at the time when you first started
 [13] doing the 990-T's for the Catalina Enterprises pension plan,
 [14] did you consider yourself knowledgeable enough to prepare
 [15] the 990-T properly?
 [16] A: Yes, as long as the tax department was reviewing
 [17] it.
 [18] Q: All right.
 [19] A: I would not have done it on my own without review.
 [20] Q: Okay. Now, did you ever give Mr. Shofer personal
 [21] tax advice?
 [22] A: He'd call me up from time to time with a variety
 [23] of questions over the years.
 [24] Q: Did anyone else at Greybush field Mr. Shofer's
 [25] questions about personal tax matters?

[1] A: I believe Alan Marvel did, and I believe there are
[2] some notes in the file that indicate Phil Matz did.
[3] Q: Phil Matz was head of the tax department in the
[4] mid-1980s, was he not?
[5] A: That's correct.
[6] Q: Now did Mr. Shofer sometimes contact Mr. Matz
[7] directly without going through you?
[8] A: I believe he did.
[9] Q: All right, and would the kinds of tax questions
[10] which Mr. Shofer posed, at least to you, involve both his
[11] personal situation as well as his business?
[12] A: Yes, they would; both.
[13] Q: Now in terms of the fees which Greybush charged
[14] for all of the services which it was rendering to Mr.
[15] Shofer, his pension, and his business throughout the time
[16] period Greybush had a client relationship with these three
[17] individuals and entities, is it not true that Greybush's
[18] fees were always paid by Catalina Enterprises?
[19] A: As far as I'm aware, yes, we issued all of our
[20] bills to Catalina Enterprises. And the engagement letters I
[21] found in the file were addressed between Greybush Newman and
[22] Catalina Enterprises.
[23] Q: All right. I would like to talk about the process
[24] you would go through in preparing Mr. Shofer's tax returns
[25] for each year. First, you would pull the prior year's

[1] return?
[2] A: That's correct.
[3] Q: You would go down, you personally, to Mr. Shofer's
[4] office to either meet with him or his bookkeeper?
[5] A: That's correct.
[6] Q: Who was his bookkeeper?
[7] A: His wife. And I'm not too sure he was - they
[8] were married at the time I started working on the account.
[9] Her name was Sally. And I believe there was also Pam
[10] Summers who did something on all bookkeeping, also.
[11] Q: All right. Then either you would prepare the
[12] return, or you would turn it over to someone in the tax
[13] department if you did not have the time. Is that correct?
[14] A: That's correct.
[15] Q: Then you would send the previous year's return and
[16] the one that had just been prepared to the tax department
[17] for its review, correct?
[18] A: Along with whatever information Richard had
[19] supplied me, yes.
[20] Q: Was Mr. Shofer's, I am speaking now with reference
[21] to his personal return, sent to the tax department for
[22] review every year?
[23] A: Yes, it was.
[24] Q: Why?
[25] A: Well, that was the standard operating procedure at

[1] Greybush Newman which, as far as I can remember, was true
[2] the first day I was there. That the tax returns were always
[3] reviewed by somebody in the tax department to make sure that
[4] they were in compliance with tax laws.
[5] Q: Exactly. As you told me at your deposition, that
[6] it was standard procedure for the returns to be sent to the
[7] tax department "to be sure that the return, to the best of
[8] our ability, was prepared according to the tax laws and to
[9] check compliance with the tax laws," correct?
[10] A: That's correct.
[11] Q: Then eventually, it would be sent to the partner
[12] in charge of the account who would sign it and put it into
[13] the mail to Mr. Shofer, correct?
[14] A: That's correct.
[15] Q: Okay. I would like to go now to Mr. Shofer's 1984
[16] federal income tax return which I have marked as Defendant's
[17] Exhibit Number 13 for identification. It has already been
[18] moved into evidence. But I would like for you to refer to
[19] it any time during my cross. I believe we have established
[20] that it was signed by Harvey Newman on August 7, 1985?
[21] A: That's correct.
[22] Q: This particular year, you went down to Mr.
[23] Shofer's office to gather the information initially,
[24] correct?
[25] A: Yes.

[1] Q: Then it was this year that you turned it all over
[2] to David Lane and the tax department to prepare, correct,
[3] instead of preparing the return yourself?
[4] A: That's correct.
[5] Q: The return was actually signed off on by Harvey
[6] Newman because you had not yet become a partner at Greybush,
[7] that was the following year, correct?
[8] A: Yes, that's right. Harvey was the partner in
[9] charge, rather, the officer in charge of the account at that
[10] time.
[11] Q: Okay. Directing your attention to what has been
[12] marked as Defendant's Exhibit Number 14, these are notes you
[13] made from your initial meeting with Mr. Shofer when you were
[14] gathering the information to prepare his 1984 return,
[15] correct?
[16] A: That's correct.
[17] Q: What was the date of your meeting with Mr. Shofer
[18] for this purpose?
[19] A: Well, the year's blanked off of here, but I've
[20] seen the original. The year, the date of our meeting was
[21] July 29th of '85.
[22] Q: All right.
[23] MS. TRUHE: Your Honor, I would move for admission
[24] into evidence Defendant's Exhibit Number 14.
[25] THE COURT: It is admitted.

[1] (Defendant's Exhibit No. 14, Larash's
[2] notes from 7/2/85 meeting, previously
[3] marked for identification, was received
[4] in evidence.)

[5] **BY MS. TRUHE:**

[6] **Q:** Now is this your handwriting on that document?

[7] **A:** Yes. I believe most, if not all, of it is my
[8] handwriting.

[9] **Q:** All right. Tell us very briefly what type of
[10] information appears on it.

[11] **A:** It's a piece of the information that I gathered
[12] when I was out there doing his individual return. And
[13] specifically, it covers itemized deductions that we would be
[14] claiming on his individual tax return for '84.

[15] **Q:** Including interest on Mr. Shofer's pension loan -

[16] **A:** That's correct.

[17] **Q:** - for 1984?

[18] **A:** Yes.

[19] **Q:** In fact, by this point in time you had already
[20] done your work on the pension ledger for 1984, is that not
[21] correct?

[22] **A:** That's correct.

[23] **Q:** In fact, you had done it in June of 1985;
[24] actually, June 17, a month before this meeting with Mr.
[25] Shofer, correct?

[1] **A:** Right.

[2] **Q:** That is when you first became aware that he had
[3] borrowed \$200,000 from his pension in 1984, correct?

[4] **A:** Correct.

[5] **Q:** And you knew this at the time you sat down with
[6] Mr. Shofer to compile the information you needed to prepare
[7] his 1984 tax return, correct?

[8] **A:** Yes.

[9] **Q:** Is it not true, Mr. Larash, that you cannot recall
[10] any discussions with Mr. Shofer regarding these loans other
[11] than to obtain the interest expense for deduction purposes?

[12] **A:** I recall I had a discussion with Richard. All I
[13] can say is it more than likely occurred on that date, but I
[14] again, since I didn't take notes of it, I cannot verify that
[15] it happened on that date.

[16] **Q:** When I took your deposition in 1990, which was a
[17] little closer to the time of the events in this case than
[18] now -

[19] **MS. TRUHE:** Counsel, I am referring to pages 40
[20] and 41, beginning at line 20 on page 40.

[21] **MS. WHELIHAN:** Ms. Truhe, do you want him to have
[22] a copy?

[23] **MS. TRUHE:** It is not necessary.

[24] **MS. WHELIHAN:** Okay.

[25] **BY MS. TRUHE:**

[1] **Q:** Question: "Well, just to make sure it is
[2] absolutely clear, you knew at the time you sat down with Mr.
[3] Shofer to compile the information on Larash Deposition
[4] Exhibit Number 1 that he had taken loans from his pension
[5] plan in 1984?" Answer: "Yes." Question: "Do you recall
[6] discussing these loans with Mr. Shofer at any time prior to
[7] the completion of this individual tax return by Greybush?"

[8] **Answer:** "I don't specifically recall any discussions on the
[9] matter other than obtaining the interest expense on the loan
[10] which is noted on Exhibit 1." Does that refresh your
[11] recollection of any discussion you might have had with Mr.
[12] Shofer regarding these loans?

[13] **A:** That must be accurate. Unless we discuss it
[14] further on in the deposition, I don't, you know, recall the
[15] full deposition there, but -

[16] **Q:** Now referring to your testimony on page 44 -
[17] actually, let me go back and get the question, which is on
[18] 43. Question: "Well, prior to the time this return was
[19] completed by Greybush Newman, did you have any conversation
[20] with anyone?" Then there were a few interruptions, but
[21] getting to your answer: "No, I don't." Question: "I'm
[22] including in that question Mr. Shofer. Did you ever talk
[23] with him about the tax treatment of this money?" Answer:
[24] "Of the loan itself, no." Question: "Of anything else
[25] about this loan?" Answer: "Well, he's the one that

[1] would've calculated the amount of the interest. That
[2] would've probably been our only discussion as to how he
[3] calculated it." Does that refresh your recollection that the
[4] only discussion you had with Mr. Shofer in the summer of
[5] 1985 when you sat down to prepare his 1984 return was the
[6] interest deduction itself?

[7] **A:** I would say that must be accurate then, yes.

[8] **Q:** All right. Who made the decision to treat that as
[9] an interest deduction at Greybush?

[10] **A:** Well, I did initially as listing it down here, and
[11] then the tax preparer listed it as a itemized deduction, and
[12] the tax reviewer would've agreed with it at that point.

[13] **Q:** The preparer in this case was David Lane?

[14] **A:** Yes.

[15] **Q:** But again, you knew at this time that this was
[16] interest on a loan from a pension, did you not?

[17] **A:** Yes.

[18] **Q:** Were you familiar with the general concept at that
[19] time period of the tax-deferred nature of monies put into a
[20] pension?

[21] **A:** Yes.

[22] **Q:** Did you do any research into whether some of the
[23] \$200,000 which Mr. Shofer had borrowed from his pension
[24] might be taxable to him as income?

[25] **A:** I did not, but I'm not aware of what the tax

[1] department may have done.
[2] **Q:** All right. Now you testified on direct that one
[3] reason you did not think any of these monies borrowed by Mr.
[4] Shofer in 1984 were taxable was because you did not receive
[5] a 1099 from Mr. Hack, correct?
[6] **MS. WHELIHAN:** No, from Mr. Shofer.
[7] **THE WITNESS:** From Mr. Shofer -
[8] **BY MS. TRUHE:**
[9] **Q:** From Mr. Shofer.
[10] **A:** - that presumably would've been prepared.
[11] **Q:** Prepared by Mr. Hack, all right. But again, is it
[12] not true that the only way Mr. Hack would have known to
[13] prepare a 1099 to give to Mr. Shofer for that purpose is if
[14] he were on notice of the loans and were aware that they had
[15] been taken?
[16] **A:** Of - yes, of course. Yeah, I did not know what
[17] Mr. Hack was aware of or what he wasn't aware of at that
[18] date.
[19] **Q:** Did you have any discussions with Mr. Hack at any
[20] time during your preparation of the 1984 tax return?
[21] **A:** No.
[22] **Q:** In fact, as you conceded on direct, you are not
[23] exactly sure when you even saw Mr. Hack's August 9, 1984,
[24] letter to Mr. Shofer, correct?
[25] **A:** That's correct.

[1] **Q:** Is it not true, Mr. Larash, that that letter does
[2] not even address tax consequences from the pension - of
[3] monies withdrawn from the pension?
[4] **A:** It doesn't refer to income taxes.
[5] **Q:** All right. Is it not true, Mr. Larash, that in
[6] the mid-1980s, you did not consider yourself an expert, nor
[7] did you consider anyone else in the tax department at
[8] Greybush an expert in the area of pension and tax issues?
[9] **MS. WHELIHAN:** Objection.
[10] **THE COURT:** Basis?
[11] **MS. WHELIHAN:** I think the question is a
[12] disjunctive, and I do not think she meant it to be. It says
[13] pension and tax issues, and I think there is probably no
[14] disputing -
[15] **MS. TRUHE:** I can redo the question.
[16] **MS. WHELIHAN:** All right.
[17] **MS. TRUHE:** All right.
[18] **BY MS. TRUHE:**
[19] **Q:** Is it not true, Mr. Larash, first, let's take
[20] yourself that in the mid-1980s, you did not regard yourself
[21] as an expert when it came to the taxation of transactions
[22] that originated from a pension?
[23] **A:** That's correct.
[24] **Q:** Is it not also true that you did not regard anyone
[25] else at Greybush, including accountants in the tax

[1] department, as having any expertise when it came to the
[2] taxation of transactions that originated from a pension?
[3] **A:** That's correct.
[4] **Q:** Yet, you yourself prepared the 990-T for the
[5] pension, correct?
[6] **A:** That is correct.
[7] **Q:** That is only filed when there is a taxable
[8] transaction within the pension entity, correct?
[9] **A:** Correct.
[10] **Q:** In 1982, three years before you prepared Mr.
[11] Shofer's 1984 income tax return, is it not true that you
[12] were consulted by Mr. Shofer regarding his plan to have the
[13] pension finance the company's receivables?
[14] **A:** Yes.
[15] **Q:** In fact, there were a lot of discussions between
[16] you and Mr. Shofer and Mr. Hack's office regarding that
[17] idea, correct?
[18] **A:** Yes.
[19] **Q:** What was your contribution to all of this?
[20] **A:** The main thing I was interested in was to set up
[21] an accounting system within the books of Catalina
[22] Enterprises and within the books, general ledger of the
[23] pension plan to account for these transactions.
[24] **Q:** Is it also not true that you and several others in
[25] the tax department at Greybush also did some research into

[1] the tax ramifications of this because those issues had not
[2] been addressed by Mr. Hack's company?
[3] **A:** I believe the tax department looked at the
[4] transaction from the point of view of the corporation to see
[5] what was going to happen with these customer loans mainly
[6] because they were initially recorded as installment sales on
[7] the books of the corporation.
[8] **Q:** Did you think that those who were looking into
[9] that issue at Greybush were capable of determining the tax
[10] ramifications?
[11] **A:** Yes, I do.
[12] **Q:** You would concede, would you not, that the basic
[13] idea of using the pension to finance the company's
[14] receivables was proper and lawful, correct?
[15] **A:** Well, we got that information from Louis Amanski
[16] at Stu Hack's, so without that confirmation, you know I
[17] wouldn't have known where to go.
[18] **Q:** During this period of time, you and your partners
[19] regarded Stuart Hack as a good pension consultant?
[20] **A:** Yes, we did. We had - he was the pension
[21] consultant on many of our clients.
[22] **Q:** I would like to go to the original 1985 tax return
[23] which is Defendant's Exhibit Number 15, which has been
[24] marked for identification and it is duplicative of one of
[25] the Plaintiff's exhibits which has already been admitted.

[1] Now this is the original 1985 return which you prepared,
[2] correct?
[3] **A:** Yes, I prepared it.
[4] **Q:** So this was not one of those situations where you
[5] had turned it over to someone else after you gathered the
[6] information?
[7] **A:** That's right.
[8] **Q:** I note that it is signed on February 17, 1987. Do
[9] you see that?
[10] **A:** I signed it on February the 12th of '87.
[11] **Q:** All right, and when did Mr. Shofer sign it?
[12] **A:** When did he sign it, I don't know.
[13] **Q:** Oh, I am sorry. Does it reflect his signature?
[14] **A:** No, this just says Client's Copy.
[15] **Q:** Oh.
[16] **A:** He didn't sign it.
[17] **Q:** I see. Why was this return being prepared so
[18] late?
[19] **A:** Well, in the normal course of doing business with
[20] Catalina and Richard Shofer, he did have a habit of
[21] procrastinating in giving us information. I believe we
[22] received the original information on the '85 return around
[23] December of '86, which was already after our meeting that
[24] Alan Marvel and I had with Richard to talk about tax
[25] problems.

[1] **Q:** But by the time the original 1985 return was being
[2] prepared, or at least finalized, in February of 1987, Alan
[3] Marvel had spotted the issue of the taxability of the loans,
[4] or at least some of them, from the pension, and you were
[5] aware that was an issue, correct?
[6] **A:** Correct.
[7] **Q:** I believe you testified on direct that only \$3,400
[8] was shown as taxable income to Mr. Shofer on the original
[9] 1985 return, correct?
[10] **A:** Correct.
[11] **Q:** It should have been \$80,000, correct, as taxable
[12] income?
[13] **A:** Well, I think I stated previously that the - when
[14] we prepared the '85 return, it was discovered either by Alan
[15] Marvel or Nick Giampietro, or someone like that, that our
[16] client had an option or an election to apply \$76,600 of the
[17] voluntary account to reduce the taxability. Since we didn't
[18] know for sure whether Richard Shofer was going to amend his
[19] '84 return, we applied it in '85.
[20] **Q:** Was it up to Mr. Shofer to decide whether to amend
[21] his 1984 return? Were you leaving it up to him?
[22] **A:** Yes, it was. It was his decision.
[23] **Q:** Now you eventually came to amend the 1985 tax
[24] return -
[25] **A:** That's correct.

[1] **Q:** - which is Defendant's Exhibit Number 16. On
[2] that return, you reflected the entire \$80,000 as taxable
[3] income to Mr. Shofer which was the amount he had borrowed in
[4] 1985, correct?
[5] **A:** That's correct.
[6] **Q:** Now when you and Mr. Marvel were advising Mr.
[7] Shofer of a problem concerning the monies he had withdrawn
[8] from his pension, the two of you had recommended that he
[9] also consult with Nicholas Giampietro, correct -
[10] **A:** Correct.
[11] **Q:** - who was an attorney who specialized in pension
[12] tax law, correct?
[13] **A:** Correct.
[14] **Q:** He was also a client of Greybush Newman's, was he
[15] not? Did you know whether he was?
[16] **A:** I'm not really sure.
[17] **Q:** Directing your attention to Defendant's Exhibit
[18] Number 17 which has been marked for identification. That is
[19] a letter from you to Mr. Shofer dated February 20, correct,
[20] 1987?
[21] **A:** That's correct.
[22] **Q:** This is just after you had sent him, or I should
[23] say signed, his original 1985 return in which you showed
[24] only \$3,400 as taxable income to him for 1985, correct?
[25] **A:** That's correct.

[1] **Q:** You state in your letter: "It has come to our
[2] attention during the preparation of your corporation and
[3] individual income tax returns for 1985 that your individual
[4] tax return, Form 1040, should be amended for the year ended
[5] December 31, 1984." Do you see that?
[6] **A:** Yes.
[7] **Q:** Why are you finalizing the preparation of the 1985
[8] return and sending it to a client for signature at the same
[9] time you are only just advising the client that the prior
[10] year's return should be amended?
[11] **MS. WHELIHAN:** Objection -
[12] **THE COURT:** Basis?
[13] **MS. WHELIHAN:** - as to the form of the question.
[14] It is a picky little objection, but the 1985 return was
[15] mailed to Mr. Shofer on February 12. This letter is
[16] actually eight days later. So her question said the same
[17] time, and that is not right.
[18] **THE COURT:** All right, rephrase the question.
[19] **MS. TRUHE:** All right.
[20] **BY MS. TRUHE:**
[21] **Q:** Mr. Larash, prior to the time you mailed Mr.
[22] Shofer's original 1985 return to him for his signature, had
[23] you determined that his Form 1040 for the year 1984 should
[24] be amended as indicated in the February 20 letter?
[25] **A:** Well, it was in and around that time, yes.

[1] Q: All right. My question to you is if everything
[2] was so up in the air during that time as to exactly what was
[3] taxable and what should be shown on the various returns at
[4] issue and by now, you are dealing with 1985 and 1984 why are
[5] you signing off at all on the 1985 return until you get the
[6] 1984 issue pinned down?

[7] A: We weren't sure at this point whether, as I said,
[8] whether Richard Shofer was going to amend his '84 return.
[9] So in order to complete the '85 return and have the client
[10] send it and get it into the IRS it was already very late, we
[11] thought the best possible way of doing that was to prepare
[12] it from the information we had as of that date.

[13] Q: But is it not true that if Mr. Shofer had decided
[14] after receiving the February 20, 1987, letter from you to
[15] amend his 1984 return, that the information you had just put
[16] on his 1985 return would be incorrect?

[17] A: Well, it would have to, it would require an
[18] amendment, amendment, yes.

[19] Q: All right.

[20] A: But as part of history, Richard Shofer doesn't
[21] make, in the normal course of events, decisions that
[22] quickly.

[23] Q: Directing your attention to what has been marked
[24] as Defendant's Exhibit Number 18 - this has already been
[25] admitted into evidence, this is the amended tax return for

[1] 1984.

[2] A: And you also gave me another one.

[3] Q: Oh.

[4] A: Do you want that?

[5] Q: Is that the amended return -

[6] A: Oh, yes.

[7] Q: - for 1984 -

[8] A: Yes, it is.

[9] Q: - which Greybush prepared?

[10] A: Yes.

[11] Q: So Mr. Shofer came to the decision that the 1984
[12] return should be amended?

[13] A: Yes, he did.

[14] Q: And again, that was his decision?

[15] A: Yes.

[16] Q: On the 1984 amended return, an additional \$73,400
[17] was shown as taxable income, correct -

[18] A: That's correct.

[19] Q: - which was computed by taking the \$200,000 which
[20] Mr. Shofer had borrowed in 1984 and subtracting the amount
[21] of his own voluntary contributions of \$76,600 and the
[22] \$50,000 which the IRS also allows without adverse tax
[23] consequences, correct?

[24] A: That's correct.

[25] Q: Finally, Mr. Larash, I would like to ask you about

[1] Defendant's Exhibit Number 19 which has been marked for
[2] identification. This is a draft of a letter dated
[3] November 7, 1986. The draft is for your signature. This
[4] was right around the time that Alan Marvel had spotted the
[5] problem of the taxability of the loans from the pension and
[6] you were getting together with Mr. Shofer, correct?

[7] A: Correct.

[8] Q: Now as I understand it, you had planned to send
[9] Mr. Shofer this letter during the time when you were all
[10] discussing the tax treatment of the loans from the pension
[11] as well as other issues regarding Mr. Shofer's pension and
[12] tax problems in general, correct?

[13] A: Correct.

[14] Q: What other problems did Mr. Shofer have going on
[15] with his pension or with his personal tax situation which
[16] caused you concern other than this tax issue as it related
[17] to the loans?

[18] MR. TAYLOR: Well, Your Honor, I object to the
[19] question. I do not see the relevancy of bringing in other
[20] matters unless it has some impact on the lawsuit we are
[21] trying.

[22] THE COURT: Where is it going?

[23] MS. TRUHE: Well, the problem, Your Honor, is Mr.
[24] Shofer is claiming fees for professional services rendered
[25] by Greybush, in particular, as they pertain to the audit

[1] work done by Greybush which Mr. Larash testified to on
[2] direct. When the IRS and the Department of Labor audited
[3] Mr. Shofer, his pension, and his business, they were
[4] concerned about a lot of issues other than simply these
[5] loans from the pension in 1984, 1985, and 1986. I think it
[6] is important for this witness to establish that there were
[7] other issues and that these fees need to be segregated as
[8] far as what issues relate to Hack versus Mr. Shofer.

[9] MR. TAYLOR: Well, Your Honor, that is a far, her
[10] question is far broader than what the basis for the question
[11] which she is asserting now. We already have in evidence
[12] Plaintiff's Exhibit 24 in which this witness testified that
[13] he had broken down the fees relating specifically to the
[14] Hack loan problem.

[15] THE COURT: Well, I think she is allowed to
[16] explore it. I mean, I will overrule it.

[17] BY MS. TRUHE:

[18] Q: Mr. Larash, what other problems was Mr. Shofer
[19] having with respect to his pension and his personal tax
[20] situation that was causing you concern aside from these
[21] monies that Mr. Shofer had withdrawn from his pension?

[22] A: It'd probably be best if I just went through these
[23] paragraphs. Shall I do that?

[24] Q: That is fine.

[25] A: Perhaps I should hit the paragraphs first and just

[1] go with the pension plan. Okay well, obviously, there is
[2] one paragraph dealing with the borrowing from the plan, his
[3] personal borrowing. There's another paragraph that deals
[4] with late payment of contributions between Crown Motors and
[5] the pension plan. And that would be - this is a brief
[6] description - if the '84 year-end corporation accrued a
[7] pension benefit to the plan of \$50,000, they'd have until
[8] the filing date of the tax return, including extensions, to
[9] pay that \$50,000. And apparently, there was at least one
[10] year where either no check had been drawn, or else the check
[11] had been drawn but it didn't clear the bank. So the actual
[12] physical payment hadn't been made.

[13] Q: These were payments which Crown owed the pension
[14] on behalf of various employees?

[15] A: Yes.

[16] Q: All right, anything else?

[17] A: I believe that's the kind of thing that Stu Hack's
[18] company would have calculated. Let's see, there's a point
[19] being raised about the 990-T in the future and that the IRS
[20] would now require estimated payments instead of in the past,
[21] he was paying after he had received the return and sent it
[22] in. There's another item here where the 5500, I don't
[23] believe it specifies the year, but the 5500 form itself was
[24] late and had not been filed, so there was another problem.

[25] Q: Did Mr. Shofer have a problem with past-due

[1] individual tax returns in general?

[2] A: I'm sorry, if I could go back and finish my other
[3] answer, I don't see it in this sheet but I recall that there
[4] was another problem, too. And that was there was a
[5] voluminous amount of transactions going on between the
[6] corporation and the pension plan. And one of the things
[7] that was apparently happening was the pension, excuse me,
[8] the corporation was collecting on these customer notes that
[9] really were in the possession of the pension plan. And the
[10] corporation was supposed to turn that money over immediately
[11] to the pension plan, and we discovered at some point, I
[12] don't think it was here in '86 but further down the road,
[13] that again, those checks were drawn but hadn't been
[14] clearing. Also in that regard, the pension plan was not
[15] allowed to suffer losses on these customer notes that they
[16] were now investing in. So that when these notes were
[17] determined at the end of every year, Richard Shofer would go
[18] down the list and decide what's a bad debt, he would pull
[19] these bad debts out and it would become a receivable for the
[20] corporation. The corporation was supposed to immediately
[21] pay those off. And there were quite a few years where he
[22] just didn't have the money in his corporation to pay them
[23] off. So again, that built up a receivable balance between
[24] the corporation and the pension plan.

[25] Q: Okay. I would like to ask you about the last page

[1] of this document where it states: "I feel that it is
[2] imperative that you take the following steps immediately;
[3] specifically (d) and (e)." Was Greybush recommending to Mr.
[4] Shofer that he sell his condominiums?

[5] A: I believe we did discuss that.

[6] Q: What was the purpose of that?

[7] A: Well, the main purpose was he had a tremendous,
[8] what I perceived to be a tremendous, cash flow problem.

[9] Q: All right.

[10] A: He had, I believe in the 1980s, invested in a new
[11] home, his new personal residence of Saint Vincent's Street
[12] and two condominiums down in the Virgin Islands. And I
[13] believe that each one of those had at least one mortgage, if
[14] not two mortgages, on them; perhaps a home equity loan also.
[15] And we just, you know, thought it was obvious from what was
[16] happening within the corporation that he was just stretched
[17] too far.

[18] Q: To your knowledge, did Mr. Shofer ever act on that
[19] advice?

[20] A: I believe during the time that we handled his
[21] account, he eventually sold one of his condos in the Virgin
[22] Islands. I don't remember when that was.

[23] Q: You also recommend or it appears that Greybush is
[24] recommending that he sell his land on Park Heights Avenue?

[25] A: Yes.

[1] Q: Did Mr. Shofer ever act on that advice?

[2] A: Not during the time we handled the account.

[3] MS. TRUHE: Your Honor, I would move for admission
[4] into evidence of Defendant's Exhibit Number 19.

[5] MR. TAYLOR: And I would object, Your Honor. It
[6] is a draft of a letter which was never sent to the
[7] Plaintiff, and I do not know its relevance.

[8] THE COURT: I am not sure that a draft does not
[9] come into evidence so I will admit it.

[10] (Defendant's Exhibit No. 19, Shofer
[11] draft letter of 11/7/86 to Shofer,
[12] previously marked for identification,
[13] was received in evidence.)

[14] MS. TRUHE: Thank you, Your Honor. That is all I
[15] have.

[16] THE COURT: Ms. Whelihan?

[17] MS. WHELIHAN: I have a couple of follow-up
[18] questions.

CROSS-EXAMINATION

BY MS. WHELIHAN:

[21] Q: Mr. Larash, how long after the 1985 tax returns
[22] were prepared for Mr. Shofer were the amended returns
[23] prepared by Greybush?

[24] A: Only after the '85 return.

[25] Q: Right, were the amended -

[1] A: And again, the original '85 return we sent out in
[2] February of '87. The two amended returns for '84 and '85
[3] were sent out on the same day, which was December 9th of
[4] '87.
[5] Q: What was your understanding of how Mr. Marvel
[6] happened to raise the question of the potential taxability
[7] of the pension loan?
[8] A: Going back here to -
[9] Q: November of 1986.
[10] A: Yes, that's right November of '86. I recall that
[11] when Alan approached me about it, he said that -
[12] MS. TRUHE: Objection, Your Honor; hearsay.
[13] MS. WHELIHAN: Wait, let me - I will rephrase the
[14] question. I do not want to know what Mr. Marvel said to
[15] you. I want to know what your understanding was of why Mr.
[16] Marvel happened to question the potential taxability of the
[17] pension loans in November of 1986?
[18] A: Okay, my understanding was that Mr. Marvel had
[19] previously either handled a certain client at another CPA
[20] firm or else somebody else in that firm had handled it. And
[21] that particular client had borrowed from their pension plan
[22] and it had - that borrowing had somehow created a taxable
[23] event.
[24] Q: All right. In response to one of the questions
[25] Ms. Truhe asked you, when you and Mr. Marvel recommended to

[1] Mr. Shofer that he consider selling the Virgin Islands
[2] properties, is it not true that Mr. Shofer balked at that
[3] idea?
[4] A: Yes. He was not keen about selling any of that.
[5] Q: Okay.
[6] MS. WHELIHAN: Your Honor, this is going to be
[7] probably a little cumbersome. But Ms. Truhe asked Mr.
[8] Larash a question based upon his deposition testimony. What
[9] I would like to do under 5-802(1)(b) is introduce the rest
[10] of those pages as a consistent statement made by this
[11] witness.
[12] THE COURT: Are you going to read them, or are you
[13] just going to submit them?
[14] MS. WHELIHAN: I can do either one.
[15] THE COURT: How many pages are there?
[16] MS. WHELIHAN: It is page 45 through 49.
[17] THE COURT: Why don't you read them?
[18] MS. WHELIHAN: Question by Ms. Truhe at page 45 of
[19] Mr. Larash's deposition transcript: "Well, that gets back
[20] to one of my earlier questions as to whether you had any
[21] conversations with Mr. Shofer about the tax treatment of
[22] these loans. And now you're saying that you were aware that
[23] he, Mr. Shofer, had had discussions with Mr. Hack about the
[24] tax treatment of these loans."
[25] Then there is an objection by Ms. Truhe, and then

[1] Ms. Truhe's question continues: "I believe my earlier
[2] question to you on this subject was prior to the completion
[3] of this return" - that is referring to the 1984 return -
[4] "by Greybush. Did you speak with anyone, including Mr.
[5] Shofer, about the tax treatment of these loans from the
[6] pension plan? Did you understand that as being my earlier
[7] question?" Answer: "Yes. I may have misinterpreted it
[8] because I would not have raised the question initially. It
[9] would've been raised, you know, from Mr. Shofer to me as
[10] it -."
[11] Question: "Okay." Answer: "As I should say as a
[12] statement of fact." Question: "All right, tell me about
[13] your conversations with Mr. Shofer concerning the tax
[14] treatment of the monies taken by him in 1984 from his
[15] pension plan. Tell me what you recall." Then Ms. Truhe
[16] clarifies that we are talking, you know, about the
[17] conversations up-to-date, not the 1985 conversations. Then
[18] the question continues. Ms. Truhe says: "No, any
[19] conversations that Mr. Larash had with Mr. Shofer prior to
[20] the completion of this 1984 return." Answer: "All I
[21] remember is a discussion of that document from Hack, and I
[22] would - I would be guessing as to what I actually said in
[23] any conversation."
[24] Question: "Did Mr. Shofer answer?" Answer: "I
[25] don't remember." Question: "I show you a copy of that

[1] document." Answer: "To my knowledge, he did, yes."
[2] Question: "Did you keep a copy of that document?"
[3] Answer -
[4] MS. TRUHE: Your Honor, just for clarification,
[5] that document, as referred to in the deposition, refers to
[6] Mr. Hack's August 9, 1984, letter.
[7] MS. WHELIHAN: Right.
[8] BY MS. WHELIHAN:
[9] Q: Answer: "I was looking for my files in the last
[10] two days to refresh for this and I didn't run across a copy
[11] of that document." Question: "Do you recall whether you
[12] asked him for a copy of that document?" Answer: "I can
[13] only say that I probably did." Question: "Do you
[14] recall" - "Ms. Truhe, just to clarify the record, in the
[15] file that we talked about prior to the beginning of this
[16] deposition, there is a copy of that letter in Mr. - . All
[17] right, thank you."
[18] Question: "Do you recall whether you read this
[19] document?" Answer: "I'm sure I read it." Question: "What
[20] was your understanding of the meaning of that document or
[21] the opinion expressed therein?" Answer: "Well, as I said,
[22] I reviewed the file in the last few days. I didn't run
[23] across that document, so I haven't read it recently. So I
[24] don't have any recollection anymore to any specifics in it
[25] other than a general impression that it allowed loans from

[1] the pension plan to Mr. Shofer." You know, discussion of
 [2] Counsel.
 [3] **Question:** "Did the letter talk about the tax
 [4] treatment of these loans?" Answer: "I don't recall."
 [5] **Question:** "What was your understanding as to Mr. Hack's
 [6] opinion regarding the taxability or tax treatment of these
 [7] loans?" Answer: "It was my understanding that the loans
 [8] would be considered as a legitimate loan and there was
 [9] nothing more to be concerned about from a tax point of
 [10] view." Question: "So let me see if I understand what your
 [11] understanding was in, I believe, 1985 as to the tax
 [12] treatment of these loans. It was your impression from your
 [13] conversation with Mr. Shofer and your reading of this letter
 [14] from Mr. Hack that it was Mr. Hack's opinion that Mr. Shofer
 [15] could borrow without limitation from his pension plan and
 [16] that there would be no tax consequences to him. Is that
 [17] correct?" Answer: "Yes." And that is it.
 [18] **THE COURT:** Okay. Is there anything further of
 [19] the witness?
 [20] **MS. WHELIHAN:** Yes, Your Honor. I am not sure -
 [21] I do not have extra copies of these because, frankly, what I
 [22] had intended to do was call Mr. Larash in our case just for
 [23] the purposes of marking our exhibits and putting them into
 [24] evidence. So what I would like to do is mark these and then
 [25] I will copy them for everyone including the Court and bring

[1] them back. But just so that we can speed the process up.
 [2] (Third-Party Defendant's Exhibit No. 1,
 [3] Larash's handwritten notes of 1/20/87
 [4] meeting, was marked for identification.)
 [5] **BY MS. WHELIHAN:**
 [6] **Q:** Let me show you what would be marked as Third-
 [7] Party Defendant Exhibit Number 1, which is a two-part
 [8] document. Can you tell me what that document represents?
 [9] **A:** It represents my handwritten notes about a meeting
 [10] that took place between Nick Giampietro, Alan Marvel, and
 [11] myself. And it's dated January 20th of 1987.
 [12] **Q:** All right, and could you skip down to your note
 [13] number (f) and read that aloud?
 [14] **A:** It says: "5500 R, 1984 and '85 file but no
 [15] balance sheet."
 [16] **Q:** Does that note refresh your recollection that as
 [17] of the date of that meeting, January 20, 1987, the balance
 [18] sheet had not been attached or produced with the 5500?
 [19] **A:** Oh, I would say that's what it means. There's no
 [20] balance sheet included in that return.
 [21] **Q:** All right. Let me show you what will be marked as
 [22] Third-Party Defendant's Exhibit Number 2, which, for the
 [23] record, is a November 23, 1984, letter to Mr. Shofer from
 [24] Alan Vanderdresche" - excuse me.
 [25] (Discussion off the record.)

[1] **THE COURT:** I am sorry, I did not hear any of
 [2] that.
 [3] **MS. WHELIHAN:** I am going to add mine to Ms.
 [4] Truhe's list so it will be Defendant's Number Third-Party
 [5] Defendant's Number 21, which is really Defendant's
 [6] Number 23.
 [7] **MS. TRUHE:** Right, if that's okay with you?
 [8] **THE COURT:** Okay, and Number 22, right? Is that
 [9] what is coming up next?
 [10] **THE CLERK:** What is coming up now is Third-Party
 [11] Defendant's 21.
 [12] **MS. WHELIHAN:** Right, this is the third one.
 [13] **THE COURT:** What was the last one.
 [14] **MS. WHELIHAN:** What would be the other one, 1 or
 [15] 20?
 [16] **THE CLERK:** 20.
 [17] **MS. WHELIHAN:** Okay, so that will be 20.
 [18] **MS. TRUHE:** The only problem I have with that -
 [19] **MS. WHELIHAN:** She has three more exhibits, so
 [20] this could become more complicated.
 [21] **MS. TRUHE:** Yes, because if you lump - we are not
 [22] all Defendants is the only problem, and I am concerned that
 [23] there is going to be -
 [24] **THE COURT:** Yes, we have to keep them separate -
 [25] **MS. TRUHE:** - a distinction lost.

[1] **THE COURT:** Okay.
 [2] **MS. TRUHE:** So if they could be Third-Party
 [3] Defendant's 1, 2, 3.
 [4] **THE COURT:** I think we are going to have to do
 [5] that, Madam Clerk.
 [6] (Third-Party Defendant's Exhibit No. 2,
 [7] Vanderdresche 11/23/84 letter to Shofer,
 [8] was marked for identification.)
 [9] **BY MS. WHELIHAN:**
 [10] **Q:** All right, what is Third-Party Defendant's
 [11] Number 2?
 [12] **A:** Identified, yes. This is a letter addressed to
 [13] Richard Shofer at Catalina Enterprises. It concerns
 [14] Catalina Enterprise's pension plan, and it's from Alan
 [15] Vanderdresche at Stuart Hack. And at the bottom, Harvey
 [16] Newman from Greybush Newman received a copy of it. And it's
 [17] dated November 23rd of '84.
 [18] **Q:** All right, is there a stamp in the corner? Could
 [19] you read that?
 [20] **A:** Oh, the stamp in the corner, it says: "Third
 [21] request," and it's dated April 2nd, 1985.
 [22] **Q:** All right, and what is the gist of that letter?
 [23] **A:** It's indicating that they want the 1984
 [24] information for the pension plan.
 [25] **Q:** All right. Let me show you what will be marked as

[1] Third-Party Defendant's Exhibit Number 3.
 [2] (Third-Party Defendant's Exhibit No. 3,
 [3] Hardy 1/23/86 letter to Shofer, was
 [4] marked for identification.)
 [5] **BY MS. WHELIHAN:**
 [6] **Q:** Would you identify that for the record?
 [7] **A:** Yes, this is a copy from the Greybush Newman
 [8] files. It is Stuart Hack Company letterhead addressed to
 [9] Richard Shofer, Catalina Enterprises, re the Catalina
 [10] Enterprises pension plan dated January the 13th of '85, but
 [11] I manually corrected the date to '86. And it's from Janelle
 [12] Hardy, Pension Administrator at Stuart Hack. And again,
 [13] Harvey Newman received a copy of it. And it includes a 5500
 [14] and other reports that were prepared for the December '84
 [15] year-end pension plan.
 [16] **Q:** All right. That letter was actually received by
 [17] you as the account monitor for the Catalina Enterprises
 [18] account, is that right?
 [19] **A:** Yes, I can tell that because I sign off in
 [20] the bottom right-hand corner by initialling it and dating
 [21] it. And I dated it as when I received it: January 16th of
 [22] '86.
 [23] **Q:** All right, and take a look at the enclosure with
 [24] that letter for a minute, and then I want to ask you a
 [25] question about that.

[1] (Pause.)
 [2] **THE WITNESS:** All right.
 [3] **BY MS. WHELIHAN:**
 [4] **Q:** All right, in the enclosures attached to that
 [5] letter, there is no balance sheet prepared by Catalina
 [6] Enterprises attached to the 5500-C is there, for 1984?
 [7] **A:** Oh, prepared by Catalina Enterprises?
 [8] **Q:** Right.
 [9] **A:** No, I don't see anything prepared in here by
 [10] Catalina Enterprises.
 [11] **Q:** All right, in the plan summary and in the 5500-C,
 [12] it is true, is it not, that there are also no references to
 [13] any loans to Mr. Shofer?
 [14] **MS. TRUHE:** I am sorry, you said no references?
 [15] **MS. WHELIHAN:** No references.
 [16] (Pause.)
 [17] **THE WITNESS:** Right, I do not see any specific
 [18] references in those areas you talked about. And also on, it
 [19] looks like it's question number 17 on page 4 of the 5500, it
 [20] says specifically about being loans to a party in interest,
 [21] and it says zero. So it's indicating there are no loans.
 [22] **MS. WHELIHAN:** I have no further questions of this
 [23] witness, Your Honor. What I would like to do is make copies
 [24] of these and then I will move the originals into evidence.
 [25] **THE COURT:** Do you have a lot of redirect?

[1] **MR. TAYLOR:** Well, not very much, Your Honor.
 [2] **THE COURT:** About how much?
 [3] **MR. TAYLOR:** Oh, about maybe five minutes' worth.
 [4] **THE COURT:** Okay, let's go. I am not cutting it
 [5] off. We can take it up later if you have more. But if you
 [6] have five minutes, we will do it now.
 [7] **REDIRECT EXAMINATION**
 [8] **BY MR. TAYLOR:**
 [9] **Q:** Mr. Larash, you testified with regard to
 [10] Greybush's recommendations to Mr. Shofer concerning his
 [11] condominiums in the Virgin Islands. Do you know whether or
 [12] not Mr. Shofer was treating those condominiums as investment
 [13] properties for tax purposes?
 [14] **A:** We were reflecting them as rental properties.
 [15] There was one point in time where one of the properties, I
 [16] believe he stopped renting it, and it became a second
 [17] vacation home. But I think prior to that, both of the
 [18] properties were being rented to some extent.
 [19] **Q:** And you were treating them, for tax purposes, as
 [20] rental properties, were you not?
 [21] **A:** Yes.
 [22] **Q:** Your draft letter reflecting advice you gave to
 [23] Mr. Shofer with regard to the Park Avenue property was to
 [24] sell that property. Is that correct?
 [25] **A:** Yes.

[1] **Q:** What exactly was the Park Avenue property, if you
 [2] recall?
 [3] **A:** Well, it was my understanding that this was an
 [4] unimproved section of land on Park Heights Avenue outside of
 [5] the Beltway, and that that might potentially contain
 [6] somewhere between one and three building lots but that it
 [7] needed some work, I think; some engineering work in order to
 [8] make it sellable at a full potential price.
 [9] **Q:** Was it being treated as an investment property for
 [10] tax purposes, if you know?
 [11] **A:** No, we were just considering it to be an
 [12] unimproved piece of land that was lying dormant. The only
 [13] thing we did as far as taxes were whenever he paid his real
 [14] estate taxes to Baltimore County, we would have deducted
 [15] those on his individual return as an itemized deduction. We
 [16] do not consider that as being a rental property or anything
 [17] like that.
 [18] **Q:** Do you know whether or not the property could in
 [19] fact be sold without some engineering work or other work
 [20] being done to it first?
 [21] **A:** No.
 [22] **MR. TAYLOR:** Ms. Whelihan, do you have Third-Party
 [23] Exhibit Number 1 -?
 [24] **THE COURT:** Did you offer those, Ms. Whelihan?
 [25] **MS. WHELIHAN:** I did offer them, but I am going to

[1] have to offer and move them formally when I get the copies
 [2] made.
 [3] **THE COURT:** All right, so you are not offering
 [4] them at this time?
 [5] **MS. WHELIHAN:** Well, I am offering them subject to
 [6] housekeeping and being able to put them in.
 [7] **THE COURT:** Was there any objection to them?
 [8] **MR. TAYLOR:** Well, Your Honor, could I just
 [9] reserve on that for a moment? I would like to ask the
 [10] witness just a couple of questions. I did not really fully
 [11] understand Exhibit Number 1 and I would like to know about
 [12] that.

BY MR. TAYLOR:

[13]
 [14] **Q:** Mr. Larash, looking at Third-Party Exhibit
 [15] Number 1, I think you indicated that it was notes made at a
 [16] meeting that you attended on January 20, 1987?
 [17] **A:** That's correct.
 [18] **Q:** Did you indicate that Mr. Giampietro and Mr.
 [19] Marvel were present at the meeting?
 [20] **A:** Yes.
 [21] **Q:** What was the purpose of the meeting?
 [22] **A:** Well, according to my notes, they cover a variety
 [23] of tax issues with - the first one talks about loans with
 [24] the pension plan. It, the other one we pointed out before
 [25] was - we discussed the 5500 for '84 and '85. There's a

[1] brief mention down here about the Form 1120 for '84 and '85.
 [2] And it also discovers, excuse me, discusses the \$75,000
 [3] mortgage.
 [4] **Q:** Well, with regard to the 5500 form, which year
 [5] were you looking at for the 5500?
 [6] **A:** This says Form 5500-R for 1984 and '85.
 [7] **Q:** Did I understand your testimony to reflect that
 [8] there was on those forms no indication of loans from the
 [9] pension?
 [10] **A:** Oh, on the form, on the '84 5500 that I was shown
 [11] just a couple of minutes ago -
 [12] **Q:** Yes.
 [13] **A:** - there is no indication of a loan between the
 [14] pension plan and Richard Shofer.
 [15] **Q:** All right, was that the subject you were
 [16] addressing when you looked at Third-Party Exhibit 1 earlier?
 [17] **A:** This is 1.
 [18] **Q:** That is 1, yes. Were you discussing the - I
 [19] mean, is there any indication that your meeting involved the
 [20] 5500 form for 1984?
 [21] **A:** Well, it appears that it - that discussion
 [22] included the 5500 for '84 and '85, but it doesn't go into
 [23] any lengthy discussions. It just says something about no
 [24] balance sheet.
 [25] **Q:** You testified that in looking at Third-Party

[1] Exhibit Number 3, that there is no balance sheet from
 [2] Catalina attached to the 5500. Is that what you said?
 [3] **A:** Yes. I understood the question to mean that a
 [4] balance sheet was specifically prepared by Catalina.
 [5] **Q:** Do you know whether or not a balance sheet is
 [6] required or must be attached to a 5500 when it is filed?
 [7] **A:** Well, there is a balance sheet on the form
 [8] itself -
 [9] **Q:** Yes.
 [10] **A:** - but it's prepared by, presumably, Stu Hack
 [11] Company.
 [12] **Q:** Yes. Thank you.
 [13] **MR. TAYLOR:** I do not have any other questions,
 [14] Your Honor.
 [15] **THE COURT:** Is there anything further of the
 [16] witness?
 [17] **MS. TRUHE:** No, Your Honor.
 [18] **THE COURT:** Okay, thank you, Mr. Larash. You are
 [19] excused.
 [20] (The witness was excused.)
 [21] (Discussion off the record.)
 [22] **THE COURT:** For the record, Third-Party
 [23] Defendant's 1, 2, and 3 are admitted. Do you have any
 [24] objection to those, Mr. Taylor?
 [25] **MR. TAYLOR:** No, Your Honor.

[1] **THE COURT:** All right.
 [2] (Third-Party Defendant's Exhibit Nos. 1,
 [3] Larash's handwritten notes of 1/20/87
 [4] meeting; 2, Vanderdresche 11/23/84
 [5] letter to Shofer; and 3, Hardy 1/23/86
 [6] letter to Shofer, previously marked for
 [7] identification, were received in
 [8] evidence.)
 [9] **THE COURT:** Counsel, we are going to recess for
 [10] lunch and resume a little after 2:00. I have a brief
 [11] chambers hearing at 2:00 o'clock. It should only take a few
 [12] minutes if people show up on time, which is always a
 [13] problem. So I anticipate that I will be ready to go a
 [14] little after that. Thank you.
 [15] (At 12:35 p.m. a luncheon recess was taken.)
 [16] AFTERNOON SESSION 2:37 p.m.
 [17] **THE COURT:** Good afternoon, everyone.
 [18] **MS. TRUHE:** Good afternoon, Your Honor.
 [19] **MR. TAYLOR:** Good afternoon, Your Honor.
 [20] **THE COURT:** Please be seated. I apologize for
 [21] being held up. I had a couple of administrative matters.
 [22] (Discussion off the record.)
 [23] **MS. WHELIHAN:** Your Honor, as to my housekeeping
 [24] matter, I gave everyone copies of the exhibits, and I have
 [25] given them to the Clerk, Third-Party Defendant's Exhibits 1

[1] through 3.
 [2] **THE COURT:** The substituted exhibits?
 [3] **MS. WHELIHAN:** Yes.
 [4] **THE COURT:** Okay, thank you. Okay, and we are
 [5] back on the record. Are you ready to call your next
 [6] witness, Mr. Taylor?
 [7] **MR. TAYLOR:** Yes, Your Honor. I would like to
 [8] call Theodore Rosenberg.
 [9] **THE COURT:** Mr. Rosenberg, would you come forward,
 [10] please.

THEODORE ROSENBERG,

[11] a witness produced on call of the Plaintiff, having first
 [12] been duly sworn, was examined and testified as follows:

[14] **THE CLERK:** State your name and address for the
 [15] record, please.

[16] **THE WITNESS:** My name is Theodore Rosenberg. My
 [17] address is 5007 West Forest Park Avenue, Baltimore,
 [18] Maryland, 21207.

VOIR DIRE EXAMINATION

BY MR. TAYLOR:

[21] **Q:** Mr. Rosenberg, are you presently employed?
 [22] **A:** Yes.
 [23] **Q:** By whom?
 [24] **A:** M.L.R., Incorporated.
 [25] **Q:** Do you have a job description or a title?

[1] **A:** President.
 [2] **Q:** For what period of time have you been so employed?
 [3] **A:** About 20 years. I don't remember the exact -
 [4] **Q:** What type of business services does M.L.R., Inc.
 [5] provide?
 [6] **A:** Well basically, things to do with analyzing time
 [7] and money. We do valuations; a lot of estate tax analysis,
 [8] Section 6166 where there's timing problems; and discounted
 [9] cash flow analysis, businesses.
 [10] **Q:** Where were you employed prior to becoming
 [11] President of M.L.R., Inc.?
 [12] **A:** Chesapeake Life Insurance Company.
 [13] **Q:** For what period of time were you employed by
 [14] Chesapeake Life Insurance Company?
 [15] **A:** I was there full-time about 18 years. I was there
 [16] part-time before that.
 [17] **Q:** What was the nature of your work with Chesapeake
 [18] Life?
 [19] **A:** Well, at - over the entire life, I started out as
 [20] an actuarial clerk. And then I went into the pension
 [21] section. And then I became chief of product design and
 [22] capital planning for the company.
 [23] **Q:** Did any of that work involve actuarial -
 [24] **A:** Yes, it did.
 [25] **Q:** - calculations? To what extent were you involved

[1] in actuarial work when you worked with Chesapeake Life?
 [2] **A:** I oversaw the actuaries, the design of all the
 [3] products, and the internal analysis of the profit and loss
 [4] potential in the products.
 [5] **Q:** What percentage of your duties would you say
 [6] involved actuarial work while you worked at Chesapeake Life?
 [7] **A:** That's very hard - over 20 years. It fluctuated
 [8] wildly. I mean, I started out as an actuarial clerk, and it
 [9] was 100 percent. And by the time I ended up doing capital
 [10] planning, it was probably 75 percent of my time.
 [11] **Q:** Did you attend college or university?
 [12] **A:** Yes, I did.
 [13] **Q:** Where did you go to college?
 [14] **A:** I attended the University of Oklahoma.
 [15] **Q:** Did you obtain a degree from Oklahoma?
 [16] **A:** No, I did not.
 [17] **Q:** Have you done any teaching or lecturing yourself?
 [18] **A:** Yes, I have.
 [19] **Q:** On what subject matters and where have you done
 [20] that?
 [21] **A:** Well, I taught courses in the insurance company
 [22] and for two other insurance companies on introduction to
 [23] actuarial science. And I also did some lecturing with, I
 [24] think it was with the American Management Association on
 [25] quantification of risk and debt instruments and on linked

[1] equity insurance products.
 [2] **Q:** Have you published any work or written anything on
 [3] the subject of actuarial science or actuarial calculations
 [4] or dealing with actuarial work?
 [5] **A:** Directly dealing with - well, definitionally, I
 [6] was a co-author of an article on time value of money and the
 [7] Tax Reform Act of '84, I think, with Mark Blum and Les
 [8] Bailey from Gordon Feinblatt.
 [9] **Q:** Are you a member of any professional associations
 [10] or societies?
 [11] **A:** The only one I'm a member of at the moment is
 [12] Landauf International, which is the Honorary Land Economics
 [13] Society.
 [14] **Q:** Are there specific qualifications that one has to
 [15] have in order to become a member of that society?
 [16] **A:** You have to be nominated and voted in; it is an
 [17] honorary society. You don't, you know, just join.
 [18] **Q:** In your current position as President of M.L.R.,
 [19] Inc., are you involved in actuarial work in that job?
 [20] **A:** Yes.
 [21] **Q:** What types of actuarial calculations can you do?
 [22] **A:** Well, recently I figured out the present value of
 [23] a life interest in a building that somebody had given their
 [24] mistress. And we needed to file a tax return, gift tax
 [25] return. And the majority - probably, the largest single

[1] thing I do is with time value of money with Section 6166,
 [2] which is part of the Tax Code which creates tremendous
 [3] timing differences. And figuring out what the payments are
 [4] is something which the IRS has never been able to quite do
 [5] properly.
 [6] Q: Does that require an understanding of actuarial
 [7] science to do those calculations?
 [8] A: Yes, it does.
 [9] Q: How many years have you been doing those
 [10] calculations?
 [11] A: Seventeen.
 [12] Q: How much of your work is devoted to those types of
 [13] calculations?
 [14] A: That one item alone is probably half of it.
 [15] Q: Have you ever qualified as an expert witness in
 [16] the area of actuarial science?
 [17] A: Yes.
 [18] Q: Could you state what court or courts have so
 [19] qualified you?
 [20] A: Well, I qualified in Baltimore City, Judge Pines'
 [21] court. And I was an expert on a panelist appointed by the
 [22] Howard County Circuit Court, Judge Sweeney, for figuring
 [23] discounted cash flows in business. Tax Court: again,
 [24] discounted cash flows, analysis of discounted cash flows.
 [25] And I've prepared a number of reports which have been used

[1] in federal cases. You don't normally appear in the federal
 [2] court as an expert; you file a report, and that's the last
 [3] you hear about it.
 [4] Q: On those occasions when you have qualified as an
 [5] expert, has that qualification been in any specific area or
 [6] areas, or involve actuarial work?
 [7] A: It always involved time value of money.
 [8] Q: What is the relationship between doing
 [9] calculations involving the time value of money and actuarial
 [10] science?
 [11] A: Well basically, there is no difference.
 [12] It's common practice, you're also - with actuary, you're
 [13] talking about life values in addition to simply time, the
 [14] relationship of time value. But the time value of money,
 [15] which was developed - concepts and tools which were
 [16] developed by Markham in England in around 1840, was
 [17] considered the first actuary and carried on by right in the
 [18] United States. And that's the basis of actuarial science
 [19] and the basis of analyzing income streams and for other
 [20] types of streams of time.
 [21] THE COURT: Excuse me one moment.
 [22] (Discussion off the record.)
 [23] THE COURT: I am sorry, go ahead.
 [24] BY MR. TAYLOR:
 [25] Q: Mr. Rosenberg, you were called here as a witness

[1] by the Plaintiff. Is that correct?
 [2] A: That is correct.
 [3] Q: What specifically were you called to do here
 [4] today?
 [5] A: To try and quantify the differences caused by the
 [6] timing difference in the payment of tax. In other words,
 [7] taxes were paid at some point in the past points in the past
 [8] which would otherwise have been due at some point in the
 [9] future, and try and quantify the timing difference.
 [10] Q: Does the testimony that you propose to offer in
 [11] this case involve actuarial calculations?
 [12] A: Yes.
 [13] MR. TAYLOR: Your Honor, I would offer Mr.
 [14] Rosenberg as an expert in actuarial science in order that he
 [15] might express his opinion regarding the subject matter which
 [16] he says he is here to discuss.
 [17] THE COURT: Would Counsel like to voir dire Mr.
 [18] Rosenberg?
 [19] MR. MAY: Yes, I would like to, Your Honor.
 [20] VOIR DIRE CROSS-EXAMINATION
 [21] BY MR. MAY:
 [22] Q: Mr. Rosenberg, you just testified that you did not
 [23] graduate from the University of Oklahoma?
 [24] A: Right.
 [25] Q: Is there a reason why you testified in your

[1] deposition that you had achieved a Bachelor of Liberal
 [2] Studies from the University of Oklahoma?
 [3] A: At the time, actually I thought I had. It turns
 [4] out one paper is still owed them.
 [5] Q: When did you find that out?
 [6] A: I found that out about a little over a year ago.
 [7] Q: Did you notify Mr. Taylor that your testimony was
 [8] incorrect?
 [9] A: I frankly was - since I have not seen that, I was
 [10] not aware that I had made a mistake on that; otherwise, I
 [11] would've notified him.
 [12] Q: You did not take any accounting courses at the
 [13] University of Oklahoma, did you?
 [14] A: At the University of Oklahoma -
 [15] Q: Right.
 [16] A: - no.
 [17] Q: You say you started out as an actuarial clerk.
 [18] A: Yes.
 [19] Q: You were not actually an actuary -
 [20] A: No.
 [21] Q: - at Chesapeake Life, were you?
 [22] A: And I was also in ninth grade when I started
 [23] there -
 [24] Q: Okay.
 [25] A: - you know.

[1] Q: Now, you are not an expert in pension law, are
 [2] you?
 [3] A: I am not an expert in pension law.
 [4] Q: You are not an economist?
 [5] A: Sorry?
 [6] Q: You are not an economist, are you?
 [7] A: Yes, I am an economist.
 [8] Q: Do you have a degree in economics?
 [9] A: You do not need a degree in economics to qualify
 [10] as an economist.
 [11] Q: You do not have a degree in economics, do you?
 [12] A: No. You do not need one to qualify as an
 [13] economist.
 [14] Q: You are not an enrolled actuary, are you?
 [15] A: I am not an enrolled actuary 'cause I don't do
 [16] pension plans. It's -
 [17] Q: Have you ever taken any exam that would qualify
 [18] you as an actuary?
 [19] A: Yes, I've taken exams from the New York Society of
 [20] Actuaries and from the Canadian Society of Actuaries.
 [21] Q: Did you pass those exams?
 [22] A: Yes.
 [23] Q: What -
 [24] A: I wouldn't, it's, you know, what's it, 40, 30-
 [25] some-odd years ago; I don't have the vaguest idea.

[1] Q: Do you know what qualifications those exams
 [2] entitled you to list as a result of passing them?
 [3] A: No. I do not, am not - if you're looking for
 [4] whether I am a member of the, if I'm a fellow of the
 [5] Society, I am not.
 [6] Q: Okay.
 [7] A: You know, I don't deal with pensions on a regular
 [8] basis, and I don't feel it necessary to maintain a fairly
 [9] expensive registration.
 [10] Q: You are not an accountant, are you?
 [11] A: I am not an accountant.
 [12] MR. MAY: Your Honor, I would object to Mr.
 [13] Rosenberg as a expert. I am very concerned that he gave
 [14] testimony to a degree that he does not have, that we were
 [15] never notified of until this very second. That testimony
 [16] goes to his qualifications. Obviously, his qualifications
 [17] are the backbone of whether or not he is qualified as an
 [18] expert. He has testified that he is not an enrolled
 [19] actuary. He does not seem to have any kind of legitimate
 [20] designation as an actuary. He never worked as an actual
 [21] actuary; he was a clerk. He is being offered as an expert
 [22] in the field of actuarial sciences.
 [23] THE COURT: Well, let me clarify something. Mr.
 [24] Taylor, did I understand the witness to say that he was
 [25] engaged for the purpose of offering opinions about the value

[1] of the timing of the payment of taxes -
 [2] MR. TAYLOR: That is correct, Your Honor.
 [3] THE COURT: - in this case?
 [4] MR. TAYLOR: The difference, I think, between
 [5] values between paying the taxes now and -
 [6] THE COURT: Today as opposed to some other -
 [7] MR. TAYLOR: - as opposed to later.
 [8] THE COURT: - at some other point in time.
 [9] MR. TAYLOR: That is correct.
 [10] THE COURT: Is that going to be the limited area
 [11] in which he is going to offer expert opinions.
 [12] MR. TAYLOR: Yes, Your Honor. As Your Honor is
 [13] well aware, the categories of damages in the case are
 [14] limited. I would proffer that Mr. Rosenberg has done some
 [15] calculations with regard to that limited question of the
 [16] difference in value between taxes being paid now and later.
 [17] It was on that subject alone that he was going to express
 [18] his opinion with regard to his calculations.
 [19] MR. MAY: Well, Your Honor, among other things,
 [20] the calculation of the value of paying taxes later includes
 [21] some estimate of the life expectancy of the person who is
 [22] going to be paying the taxes later. This is either the work
 [23] of an economist or an accountant or an actuary.
 [24] THE COURT: But, as you know, the test in Maryland
 [25] for being allowed to testify as an expert is whether you

[1] would aid the trier of fact. In my particular case, almost
 [2] anyone who can operate a calculator qualifies as an expert
 [3] in doing arithmetic computations. But so that we are clear
 [4] for the record, I mean, I do not know whether the witness
 [5] has established himself as an expert in the general field of
 [6] actuarial science, although it sounds like he has done a
 [7] tremendous amount of work over the years around and about
 [8] those areas. But I will allow him to offer opinions in this
 [9] area that he certainly has worked in for the last 20 years
 [10] apparently, dealing with analyzing the relationship between
 [11] the value of money or, about the value of money over periods
 [12] of time. That is, apparently, what he is going to testify
 [13] about here today. You will have wide open cross-examination
 [14] on all those issues.
 [15] MR. MAY: Fine, thank you.
 [16] THE COURT: All right.
 [17] MR. TAYLOR: Thank you, Your Honor.
 [18] (Discussion off the record.)
 [19] (Plaintiff's Exhibit No. 36, valuation
 [20] of Shofer's taxes, was marked for
 [21] identification.)
 [22] DIRECT EXAMINATION
 [23] BY MR. TAYLOR:
 [24] Q: Mr. Rosenberg, let me show you what has been
 [25] marked as Plaintiff's Exhibit 36. Just for the record,

[1] would you identify that document?
 [2] **A:** Yes. It was a report that I made to Mr. Shofer
 [3] about the valuation taxes now and later.
 [4] **Q:** Again, for the record, for the clarity of the
 [5] record, what was it that you were asked to do with regard to
 [6] the taxes now versus taxes later question?
 [7] **A:** Find out what the cost at a particular point in
 [8] time, what the net cost was that was caused by the timing
 [9] difference.
 [10] **Q:** All right. In order to do the calculations, what
 [11] did you do first? What was the first thing -
 [12] **A:** I -
 [13] **Q:** - you actually did?
 [14] **A:** First, was to find out what taxes were actually
 [15] paid.
 [16] **Q:** Do you have figures which reflect the taxes that
 [17] were actually paid?
 [18] **A:** Yes. Table 1, we list the taxes that were due
 [19] for - on the amendment on each of the three years caused by
 [20] the change in tax status.
 [21] **Q:** What three years did you work with in doing the
 [22] calculations?
 [23] **A:** 1984, '85, and '86.
 [24] **Q:** Where did you get the amounts of taxes paid in
 [25] those years attributable to the premature payment of taxes

[1] on these loans?
 [2] **A:** All right, I met with Mr. Shofer's accountant who
 [3] had the amended tax returns and had statements from the IRS.
 [4] Then after I got these numbers, I called the IRS agent and
 [5] verified the numbers with them, and I called the State and
 [6] verified the numbers with them. That gave us the taxes and
 [7] penalties figures.
 [8] **Q:** Once you had those numbers, what was the next step
 [9] you did?
 [10] **A:** Well, the next step was to figure out what the
 [11] cost as of today is, or as of the point in time that we're
 [12] looking at. And to do that, I carried them forward at the
 [13] interest rate specified by the IRS from -
 [14] **Q:** Do you show interest rates on Chart number 1?
 [15] **A:** Yes, it shows the interest rate for each quarter.
 [16] **Q:** And the interest rates on Chart number 1 are
 [17] Internal Revenue Service rates?
 [18] **A:** Yes, they are. They're the rates that the
 [19] Internal Revenue Services charges on unpaid tax - that's
 [20] the first column, the column under the federal side. The
 [21] State side is what the State charges.
 [22] **Q:** After ascertaining that information, what did you
 [23] do next?
 [24] **A:** Totaled it. Totaled interest plus the total of
 [25] each of the items.

[1] **Q:** What is involved in actually making the
 [2] calculations, in comparing taxes paid now versus taxes paid
 [3] at some later date? What are the assumptions? How do you
 [4] go forward and do the calculations?
 [5] **A:** Well, on the federal, if you're using the federal
 [6] rates - rate which is compounded daily. So you have to
 [7] figure the number of days and compound the rate daily for
 [8] each period. The State is compounded monthly, so it's
 [9] calculated a little bit differently. And it's pretty
 [10] simple; the way a bank does it or the you know, it's -
 [11] whatever you've got in the account, it just keeps running up
 [12] interest as it goes along.
 [13] **Q:** Do you use a computer program in doing these
 [14] calculations?
 [15] **A:** Yes.
 [16] **Q:** For the record, your report contains a number of
 [17] charts. You have already made reference to Chart number 1.
 [18] You have other charts or tables in your report, do you not?
 [19] **A:** Yes.
 [20] **Q:** Could you briefly describe what those tables or
 [21] charts are, and how they are used in the calculations that
 [22] you made?
 [23] **A:** All right, Table 2 is a death rate table, and this
 [24] was taken from an IRS table of lives as being, it's an
 [25] annuitants table. The - seemed to be the most appropriate.

[1] When it comes to annuitants tables, current annuitants
 [2] tables, there are four or five, but they're not going to
 [3] make much difference no matter what the - they're all very,
 [4] very close. And then, all right, this - we have a
 [5] situation where Mr. Shofer's pension is what's called a
 [6] joint pension. So it doesn't pay out.
 [7] It pays out 'til his wife dies actually, 'til both
 [8] of them die. So we have to figure out not just the life of
 [9] one of them, but the life of both. And so we take this plan
 [10] and we follow it through and start out with a theoretical
 [11] number of people that would be starting. And each year,
 [12] some of the one spouse dies, some of another spouse die,
 [13] some of both die. So this gives us our the amount that die
 [14] each year, and the joint mortality rate.
 [15] And that was Table 3, right. What's shown next
 [16] here is Table 4, okay? Based on that prior table, Table 4
 [17] shows the annuity payout as a percentage of plan assets, and
 [18] the death payout as a percentage of plan assets. And
 [19] Table 5 was done originally, when I first did this in 1993,
 [20] and was a calculation of what interest rate the plan
 [21] was earning. It was a 10-year calculation of actual
 [22] interest rates that the plan earned each year for the prior
 [23] 10 years, and then analyzing them to come up with a most
 [24] common rate.
 [25] So that then leads to Table 6, which says if the

[1] plan earned the rate that it's been earning, then this is
 [2] what the assets are going to do each year and what the
 [3] payments are going to be each year in dollars. And then
 [4] follows to Table 7, which summarizes the - well, let's see.
 [5] No, Table 7 is not in this. Table 8, all right. Assumedly,
 [6] if the taxes paid in the future are going to be paid on the
 [7] money that's there and that's earned in the future.
 [8] So the percentage of taxes is going to be the
 [9] same - it's going to be that which reflects the entire
 [10] amount of taxes, so they'll be paid pro rata over the entire
 [11] period of time. And this is a list of what tax payments are
 [12] anticipated and the present value factor and the present
 [13] value itself of each year's payment. As you can see, while
 [14] theoretically there's still one person alive in 2048, in
 [15] fact the payments are predominantly made over the next 20
 [16] years. Twenty-five years is when it all pays out; almost
 [17] all of it pays out.
 [18] **Q:** Does your calculation reflect the difference in
 [19] value between taxes now and taxes later?
 [20] **A:** Yes, it does.
 [21] **Q:** What is the date through which your figures are
 [22] reflected?
 [23] **A:** This is as of June 30, 1997.
 [24] **Q:** Were you able to calculate a difference between
 [25] the taxes now versus the taxes later?

[1] **A:** Yes. The present value of the future payment of
 [2] tax is \$6,869. So the net would be \$299,387.47.
 [3] **Q:** Would that be the final figure?
 [4] **A:** That would be the final figure, yes.
 [5] **MR. TAYLOR:** Your Honor, I would like to offer
 [6] Plaintiff's Exhibit 36 at this time.
 [7] **MR. MAY:** Your Honor, we object to the
 [8] introduction of the exhibit. Among other things, my
 [9] understanding is that the Court ruled that discovery not
 [10] provided by a certain date could not be used at trial. My
 [11] information is that this exhibit was provided after that
 [12] date.
 [13] **THE COURT:** If that is the case, it is sustained.
 [14] **MR. TAYLOR:** Well, for the record, Your Honor, let
 [15] me at least just indicate that this exhibit is simply an
 [16] updated version of an earlier exhibit which had been -
 [17] **THE COURT:** You used a different date for the
 [18] calculations?
 [19] **MR. TAYLOR:** No different dates. The - and I was
 [20] not prepared to have the witness identify the other exhibit
 [21] and explain the differences. But I do not believe that this
 [22] exhibit really prejudices the Defendants in any way because
 [23] it is simply bringing the calculations using the same
 [24] methodology. They were fully aware of, and had copies of,
 [25] the earlier reports.

[1] **THE COURT:** Do you have the other exhibit?
 [2] **MR. TAYLOR:** Yes, I do, Your Honor.
 [3] **THE COURT:** May I see it?
 [4] **MR. MAY:** To assist the Court, Your Honor, the one
 [5] major difference between that report and this report is that
 [6] the other report, which was Exhibit 3 to Mr. Rosenberg's
 [7] deposition, had no analysis of the present value of paying
 [8] taxes in the future. And in fact, Plaintiff's prior
 [9] attorney, Mr. Bornhorst, asked Mr. Rosenberg at that
 [10] deposition, which was taken in November of 1993, to please
 [11] do that analysis. This report is the first I know of that
 [12] we received that analysis.
 [13] **MR. TAYLOR:** Your Honor, might I at this time have
 [14] this exhibit marked and ask a few preliminary questions of
 [15] the witness?
 [16] **THE COURT:** You may.
 [17] (Plaintiff's Exhibit No. 37, tax
 [18] analysis, was marked for
 [19] identification.)

BY MR. TAYLOR:

 [21] **Q:** Mr. Rosenberg, let me show you what has been
 [22] marked as Plaintiff's Exhibit 37 for identification. Would
 [23] you tell us what that is, please?
 [24] **A:** This is a calculation as of March of '95 of the
 [25] taxes, present value at that time taxes.

[1] **Q:** Does that exhibit contain a chart similar to Chart
 [2] Number 1 -
 [3] **A:** Yes, it does.
 [4] **Q:** - in the previous exhibit?
 [5] **A:** Uh-huh.
 [6] **Q:** What was the methodology that you used in creating
 [7] Plaintiff's Exhibit 37?
 [8] **A:** It was the sa, it was the, do you want me to go
 [9] through and re -
 [10] **Q:** Well, I -
 [11] **A:** - cite all this or -
 [12] **Q:** What is the date -
 [13] **A:** It was basically -
 [14] **Q:** What -
 [15] **A:** - the same methodology.
 [16] **Q:** All right, what is the -
 [17] **A:** Yeah.
 [18] **Q:** What is the difference between Exhibits 36 and 37?
 [19] **A:** There's two items. One is that the IRS abated
 [20] some tax - some penalties between 3 - between 37 and 36;
 [21] 36 being later in time. And the time and the date is, is
 [22] different, calculation date. Otherwise, the calculations
 [23] are absolutely identical.
 [24] **Q:** In Exhibit 37, which is the earlier of the two
 [25] exhibits, did you arrive at a calculation of the difference

[1] of value between paying taxes now and paying taxes later?
 [2] **A:** Yes, I did.
 [3] **Q:** What is the date on which that calculation was
 [4] made?
 [5] **A:** It would've been as of March of '95.
 [6] **Q:** Are you able to express an opinion with regard to
 [7] the difference in value as of March of 1995 in the same way
 [8] that you have expressed an opinion with respect to
 [9] Exhibit 36?
 [10] **A:** Yeah, the methodology hasn't changed at all. The
 [11] only thing that's changed is the start, is the date. It's a
 [12] little more complicated with the future one because of the
 [13] starting point has moved rather than the ending point. But
 [14] it's basically the same. And I'd already provided copies of
 [15] the software, including disks, to the Defendants.
 [16] **Q:** What did the disks or software contain?
 [17] **A:** They contained everything I did, plus all the
 [18] formulas, all the back-up, and they were requested by Mr.
 [19] Bornhorst and somebody representing Greybush Newman.
 [20] **Q:** Do you remember when that was?
 [21] **A:** That was shortly after the deposition. I went
 [22] down, I made up individual disks at the - some of them
 [23] were - they were in three or four different formats
 [24] depending on who's using what program to be able to read it.
 [25] And I we put them in mailers and we mailed them out. We'd

[1] also prior - provided copies of much more analysis than
 [2] this.
 [3] **MR. TAYLOR:** Your Honor, I would actually offer
 [4] both exhibits into the record at this time. I would renew
 [5] my offer of Plaintiff's Exhibit 36.
 [6] **THE COURT:** Let me do this, Mr. Taylor. I will
 [7] admit 37. I will reserve on 36 and allow the Defendants to
 [8] cross-examine the witness with respect to that.
 [9] (Plaintiff's Exhibit No. 37, tax
 [10] analysis, previously marked for
 [11] identification, was received in
 [12] evidence.)
 [13] **MR. TAYLOR:** Thank you, Your Honor. I have no
 [14] other questions, Your Honor.
 [15] **THE COURT:** Okay. Who is going to cross-examine
 [16] the witness?
 [17] **MR. MAY:** I am. This is 37?
 [18] **MR. TAYLOR:** Yes -
 [19] **THE COURT:** Yes.
 [20] **MR. TAYLOR:** - 37; right.
 [21] **MS. WHELIHAN:** Your Honor, would you please
 [22] reserve on Exhibit 37 until after Mr. May has finished his
 [23] cross? I think that may make it clearer as to whether or
 [24] not that can be an exhibit as well under Rule 5-703.
 [25] **THE COURT:** I do not have all the numbers

[1] memorized. Is that the basis for an expert opinion?
 [2] **MS. WHELIHAN:** Well, the expert basis that
 [3] requires either substantive proof upon which his opinion is
 [4] predicated, or trustworthiness, and I think that those will
 [5] both become clearer.
 [6] **THE COURT:** Well, you can move to strike it -
 [7] **MS. WHELIHAN:** Okay.
 [8] **THE COURT:** - if you think you have met that
 [9] burden at the end of the cross-examination. It clearly is
 [10] not subject to the same evidentiary objection with respect
 [11] to being disclosed.
 [12] **MS. WHELIHAN:** No, I understand that, Your Honor.
 [13] **BY MR. MAY:**
 [14] **Q:** A little background, Mr. Rosenberg. When you were
 [15] working at Chesapeake Life, you knew Stuart Hack, did you
 [16] not?
 [17] **A:** Yes.
 [18] **Q:** In fact, you referred some clients to him?
 [19] **A:** Yes, I did.
 [20] **Q:** You did that because he seemed to be doing the job
 [21] or else you would not have sent people to him? Now, you
 [22] were retained by Mr. Shofer to do this analysis, is that
 [23] right?
 [24] **A:** (No audible response.)
 [25] **Q:** And in fact, you met with Mr. Shofer, and he told

[1] you what he thought his losses were, is that right?
 [2] **A:** No. He told me what the problems were, you know,
 [3] what the specific -
 [4] **Q:** Did he also suggest some losses to you?
 [5] **A:** Yes.
 [6] **Q:** In your meeting with Mr. Shofer, he had actually
 [7] put together some calculations. Is that not right?
 [8] **A:** I don't remember -
 [9] **Q:** Well, let me -
 [10] **A:** - at this point. This has been some years -
 [11] **MR. TAYLOR:** Let me just object and ask -
 [12] **THE WITNESS:** Yeah.
 [13] **MR. TAYLOR:** - what the time frame is because I
 [14] am not sure.
 [15] **THE WITNESS:** Yeah.
 [16] **MR. TAYLOR:** There may have been many meetings
 [17] between the two.
 [18] **THE COURT:** Absolutely.
 [19] **BY MR. MAY:**
 [20] **Q:** Initial meetings, in the initial meetings.
 [21] **A:** I, not that I can recall, but it's been a long
 [22] time. But none of them -
 [23] **Q:** Did he -
 [24] **A:** - were any relation to anything I did.
 [25] **Q:** But Mr. Shofer at least showed you they had some

[1] understanding of what pensions were and time value of money
 [2] and how money grows overtime?
 [3] **A:** Well actually, no. The big, the one thing that he
 [4] did show me how to do something I just said was outside my
 [5] scope and I wasn't ready to tackle it, which was a very
 [6] collateral thing which isn't here.
 [7] **Q:** Let me read your deposition from November 23,
 [8] 1993, at page 28. "Let's go to the first meeting. Can you
 [9] tell me generally what the gist of that one was?" Answer:
 [10] "Basically, he laid out what his problems were and what he
 [11] thought his losses were, and I told him what I thought I
 [12] could do some reasonable analysis and what I thought beyond
 [13] anything I could do." Also turning to your testimony at
 [14] page 48, line 7: "In all of your conversations with Mr.
 [15] Shofer, did you have any understanding as to whether he
 [16] understood that basic principle which you have just
 [17] described to us; namely, that money put in a pension are
 [18] sheltered from taxes for a period of time?" Answer: "Yes."
 [19] So you had those conversations with Mr. Shofer?
 [20] **A:** Right.
 [21] **Q:** Okay.
 [22] **A:** On that basis.
 [23] **Q:** All right, now let's look at Plaintiff's
 [24] Exhibit 37, the second page of that exhibit which is the
 [25] chart. You indicated that you got these tax numbers based

[1] on a phone call to the IRS. Is that right?
 [2] **A:** No, I got the tax numbers from the material that
 [3] they had in house and written communications from the IRS
 [4] and the amended tax returns when - and then I verified them
 [5] by talking to the agent that was in charge of the case.
 [6] **Q:** What about the penalties?
 [7] **A:** That was the penalties as of that time.
 [8] **Q:** Well, the penalties were not reflected in any tax
 [9] returns, were they?
 [10] **A:** No.
 [11] **Q:** Okay, so the only -
 [12] **A:** We had these printouts from the IRS, and then
 [13] they - at the time.
 [14] **Q:** Where did you get the printouts?
 [15] **A:** The printouts were from the IRS. They were all,
 [16] you know, official -
 [17] **Q:** How do you know that?
 [18] **A:** Well, because I talked to the agent, and the
 [19] agents verified the numbers.
 [20] **Q:** What was the name of the agent?
 [21] **A:** I would not remember now.
 [22] **Q:** You did not write -
 [23] **A:** It was years ago.
 [24] **Q:** Okay. But in any event, you come up with these
 [25] numbers -

[1] **A:** I'll be -
 [2] **Q:** - taxes, penalties.
 [3] **A:** Right.
 [4] **Q:** Did you do the same thing for the State taxes?
 [5] Did you -
 [6] **A:** Yes.
 [7] **Q:** Did you talk to a State agent.
 [8] **A:** Yes, I did.
 [9] **Q:** Do you remember his name?
 [10] **A:** No, I don't remember her name.
 [11] **Q:** Her name, all right.
 [12] **A:** I do remember that much.
 [13] **Q:** Now, the interest calculation you have got here,
 [14] that is a hypothetical calculation, correct?
 [15] **A:** That is the calculation which the Internal Revenue
 [16] Service specifies is the rate to be used on underpayment of
 [17] tax.
 [18] **Q:** Right, and it assumes that no payments on the tax
 [19] are made, correct?
 [20] **A:** Yes.
 [21] **Q:** Okay. In fact, it assumes that no payments are
 [22] made through the date of this chart which is March 31, 1995?
 [23] **A:** Yes.
 [24] **Q:** Is that right?
 [25] **A:** Yes.

[1] **Q:** If in fact payments were made in that interim,
 [2] that would change your numbers, would it not?
 [3] **A:** No. If it would change the numbers, it would
 [4] probably raise them because if you borrow money at a higher
 [5] cost to pay the taxes because the IRS is on your back, then
 [6] it's more, which is what in fact appears to have been done
 [7] in some cases here and I don't, it would come up with a much
 [8] higher loss than if you just used the IRS rate. I figure
 [9] the IRS' rate is the more conservative rate to use.
 [10] **Q:** Let's stick to this chart, Mr. Rosenberg.
 [11] **A:** Yes.
 [12] **Q:** If I told you that a payment of \$20,000, this is a
 [13] hypothetical, was made on December 31, 1988, would that not
 [14] lower the bottom line on this chart?
 [15] **A:** Not because I would have to bring in the interest
 [16] on any other debt or any other - a lost opportunity cost
 [17] for that money having payments made. It has to come from
 [18] somewhere. It didn't materialize out of the air.
 [19] **Q:** Okay so, have you made any such calculations on
 [20] other -
 [21] **A:** No.
 [22] **Q:** - interest payments or other opportunity costs as
 [23] a result -
 [24] **A:** No.
 [25] **Q:** - of payments on interest? No. So you do not

[1] know what the actual amount of interest owed or paid by Mr.
 [2] Shofer is, do you?
 [3] **A:** No. I do know that he was carrying debt at
 [4] interest rates of upwards of 22 percent, which would - they
 [5] seem to indicate that these are very conservative numbers.
 [6] **Q:** Just so we are all on the same page, on this
 [7] page 2 of the chart, when you calculate the interest, look
 [8] at the second line: \$331.85 for the federal payment. The
 [9] interest for that period is \$951.19. Tell me how you did
 [10] that calculation.
 [11] **A:** All right, that's for the days between
 [12] December 31st, '85, and March '85 at 13 percent compounded
 [13] daily.
 [14] **Q:** The base amount that is compounded is what?
 [15] **A:** It would be \$29,206.
 [16] **Q:** Okay. All right, let's talk about the present
 [17] value of paying the taxes. On this, Plaintiff's Exhibit
 [18] Number 37, that calculation is shown on the last page on the
 [19] right-hand column, is that right?
 [20] **A:** Uh-huh.
 [21] **Q:** Are there any other numbers on this page that show
 [22] the calculation of the present value of paying the taxes?
 [23] **A:** That is on death tax annuity. No.
 [24] **Q:** Okay so, you took a number of federal taxes. Now,
 [25] the total incurred is - let's start with federal tax.

[1] **MR. MAY:** Does the Court have a copy of this
 [2] document? Would the Court like to follow along? I hate to
 [3] do this.
 [4] **THE COURT:** It might make it easier.
 [5] **MR. MAY:** It might make it a lot easier. Sorry.
 [6] **THE COURT:** Thank you. What page are you on?
 [7] **MR. MAY:** I am on the last page of this exhibit,
 [8] Your Honor.
 [9] **THE COURT:** Okay.
 [10] **MR. MAY:** In the right-hand corner is a little
 [11] block of calculations.
 [12] **BY MR. MAY:**
 [13] **Q:** It says: "Federal tax total incurred, \$65,418."
 [14] That is the amount that Mr. Shofer -
 [15] **A:** Right.
 [16] **Q:** - was allegedly charged, correct? You are
 [17] projecting that in the future, Mr. Shofer would have had to
 [18] pay \$40,000 in -
 [19] **A:** Right.
 [20] **Q:** - taxes -
 [21] **A:** Right.
 [22] **Q:** - as opposed to \$65,000?
 [23] **A:** Correct. This was as of the date this projection
 [24] was made.
 [25] **Q:** So in other words, in the future, he would have

[1] had to have paid at a lower marginal rate, is that what you
 [2] are saying?
 [3] **A:** Yes. Oh, definitely, yes.
 [4] **Q:** You do the same analysis. Now, with the Maryland
 [5] tax, you just have a Maryland tax number; you do not have a
 [6] projected number. Why is that?
 [7] **A:** There was no change in the marginal tax rate -
 [8] **Q:** Okay.
 [9] **A:** - for Maryland.
 [10] **Q:** Why did you use a lower marginal rate in the
 [11] future?
 [12] **A:** Because the tax law changed, and there was in fact
 [13] that if you file taxes now you pay a lower rate than if you
 [14] filed it then. This is all at the maximum rate. None of
 [15] this is - you know, it's no assumption that he gets out of
 [16] any bracket or anything. It's just the tax law changed.
 [17] **Q:** When is Mr. Shofer going to pay these taxes,
 [18] according to your knowledge?
 [19] **A:** Well, he's going to pay these taxes. Well, the
 [20] first thing is there's some - you have to deal with it
 [21] statistically, not - we don't know when Mr. Shofer's going
 [22] to pay these taxes. We know if we took 10,000 people that
 [23] were Mr. Shofers together, we know one of them is going to
 [24] die this year, one of them, and so forth. We know how the
 [25] group would work; not how the individual would work. So on

[1] this, it assumes that there's a set chance of dying this
 [2] year.
 [3] There's a set chance of the spouse dying. And you
 [4] carry this forward as a joint annuity. And it's paid out.
 [5] According to the annuity table, it goes to 2061 by that
 [6] time. But actually, there's virtually - we're dealing
 [7] with minuscule numbers by that point. We're dealing with
 [8] the present value of un - present values of under a penny.
 [9] We're dealing with values of under a penny 'cause there's
 [10] virtually nobody left out of the group. Most of them are
 [11] over the next 20 years. Most of it's going to come in.
 [12] **Q:** So on any particular date, let's take the year
 [13] 2025 -
 [14] **A:** Right.
 [15] **Q:** - in honor of the song. You have calculated a
 [16] tax on the annuity that year for \$1,411, is that right?
 [17] **A:** A tax that's not the total tax on the annuity.
 [18] **Q:** That is for that year's -?
 [19] **A:** Yes, that's the tax on the annuity that is related
 [20] to the original tax. The actual tax on the annuity is
 [21] higher because you have other earnings in there which you'd
 [22] pay taxes on. This is only the pro rata share of the taxes
 [23] that would've been paid prior.
 [24] **Q:** Where is that calculation?
 [25] **A:** That's this tax on annuity is not the total tax on

[1] the annuity.
[2] **Q:** But where is the calculation for the total
[3] annuity?
[4] **A:** It's not shown on this chart.
[5] **Q:** It is not on this chart. Is it on the chart for
[6] Exhibit 36?
[7] **A:** Thirty-six has got it shown, yes.
[8] **Q:** Okay, 36 shows it, 37 does not?
[9] **A:** Yeah.
[10] **Q:** So somehow you have to reduce that amount to be
[11] paid in the future to present value today, correct?
[12] **A:** Right.
[13] **Q:** And you did that in this Exhibit 37 -
[14] **A:** Right.
[15] **Q:** - correct? And you did it by reducing it by 9
[16] percent?
[17] **A:** That's what it says.
[18] **Q:** So that is in fact what you used in this
[19] Exhibit 37 is 9 percent, is that right?
[20] **A:** Yes.
[21] **Q:** What present value rate did you use in Exhibit 36?
[22] **A:** I used 15.61.
[23] **Q:** 15.61 percent?
[24] **A:** Right.
[25] **Q:** That is quite a difference.

[1] **A:** Actually, it's not for a present value. There's
[2] more of a difference in the change in, just getting four
[3] years closer to the payouts. The reason was that was the
[4] rate of earnings on the pension fund, so that's an
[5] assumption that that's the opportunity cost.
[6] **Q:** Well, the higher the discount rate, the lower the
[7] present value, correct?
[8] **A:** Well, at the same time.
[9] **Q:** At the same time, okay.
[10] **A:** At the same time. Every year, we go into the
[11] future. Regardless of the discount rate, the present value
[12] of future earnings gets bigger because we're closer to it.
[13] **Q:** What is Mr. Shofer's life expectancy today?
[14] **A:** I've got life expectancy - I only have the joint
[15] life expectancy here. Beginning 2003, the joint life
[16] expectancy is 27-1/2 years.
[17] **Q:** So it is expected that Mr. or Ms. Shofer will live
[18] another 27-1/2 years -
[19] **A:** Yes.
[20] **Q:** - after the year 2003?
[21] **A:** Yes.
[22] **Q:** What is Mr. Shofer's age?
[23] **A:** I didn't bring that with me. I don't remember.
[24] **Q:** How do you know she is expected to live 27-1/2
[25] years?

[1] **A:** Well, the first thing is that I took the -
[2] well, as I said, it's a joint life expectancy.
[3] **Q:** Right.
[4] **A:** Her life expectancy, their individual expectancy
[5] would be slightly less than the joint. But the joint is
[6] very similar to the female mortality -
[7] **Q:** Okay.
[8] **A:** - particularly, when there's a difference in age
[9] of even a couple of years.
[10] **Q:** But to calculate that life expectancy, do you not
[11] have to know her age?
[12] **A:** Yes. Yes, I just -
[13] **Q:** Okay.
[14] **A:** - don't have it sitting in the report. And we
[15] can actually figure it out by backing out of the mortality
[16] table. I checked both their birthdays for the age, but I
[17] didn't print it out.
[18] **Q:** You do not have it?
[19] **A:** I didn't -
[20] **Q:** Okay.
[21] **A:** I just don't have it. I've got it -
[22] **Q:** Now, this chart, the third page of Exhibit 37, had
[23] the calculations going to the year 2061, right -
[24] **A:** Yes.
[25] **Q:** - 31 years past the joint life expectancy as you

[1] described it?
[2] **A:** Oh, yeah.
[3] **Q:** Okay.
[4] **A:** The joint life expectancy assumes no is the
[5] average for the entire period.
[6] **Q:** Now, what you have done here is you have assumed
[7] that a certain amount would be paid out of this pension
[8] every year?
[9] **A:** Yes.
[10] **Q:** And that amount is in fact the minimum allowable
[11] amount, correct?
[12] **A:** Yes.
[13] **Q:** In fact, Mr. Shofer could take more than the
[14] minimum allowable amount in any one year, could he not?
[15] **A:** He could, but it would be very unlikely.
[16] **Q:** How do you know that?
[17] **A:** How do I know that, because I've worked - I was a
[18] \$1 million round-table producer, for an insurance company in
[19] selling pension plans. I worked in presentation of pension
[20] plans and worked in design of pension plans. And this is a
[21] tax shelter. You do not want to take your money out of a
[22] tax shelter until you absolutely have to.
[23] **Q:** What would Mr. Shofer's financial needs be in the
[24] year 2010?
[25] **A:** I don't have the slightest idea.

[1] Q: You do not have any idea, all right. By the way,
[2] what tax rate are you assuming on the federal rate for Mr.
[3] Shofer in this Exhibit 37?

[4] A: I don't know from here. See, this was, I got
[5] handed this, I haven't seen this in years, and it was part
[6] of a fuller report. And so I don't know what that figure
[7] is. I could calculate it out.

[8] Q: Plaintiff's Exhibit 37 is not the complete report?

[9] A: We had this, I don't know when this came through
[10] because - I said, it was just handed to me last night, the
[11] first time I've seen it in many years. And I, you know, and
[12] of course, I know I provided a much more detailed report to
[13] the Defendants including all of the software backing it up.

[14] Q: Well, you testified that you assumed a federal tax
[15] rate that would be less -

[16] A: Yes.

[17] Q: - than the current tax rate -

[18] A: Yes.

[19] Q: - which is how much?

[20] A: The - whatever it was looking it up in the tax
[21] tables.

[22] Q: No, I am sorry. What rate was Mr. Shofer charged
[23] on these taxes that you have listed in the second page of
[24] Exhibit 37?

[25] A: I cannot answer that without my documentation to

[1] it here.

[2] Q: You do not know?

[3] A: I don't know.

[4] Q: Do you know what the highest marginal rate is
[5] today?

[6] A: As I recall, it's about 39 percent, approximately.

[7] Q: So -

[8] A: I used the exact one.

[9] Q: The federal tax rate you have used on the
[10] projected taxes is at least less than 39 percent?

[11] A: I used whatever the tax guide said was the rate
[12] and checked the rates for each year from the tax guide.

[13] Q: Do you recall that when your deposition was taken,
[14] you assumed that Mr. Shofer would have to withdraw his money
[15] and pay tax on it at the rate of 45 percent?

[16] A: That may've been what the marginal tax was at that
[17] time.

[18] Q: Not what it was -

[19] A: Oh, 45 -

[20] Q: - when you -

[21] A: Oh, 45 percent including State tax, that would be
[22] about right. Including the State taxes, that would be about
[23] right.

[24] Q: Okay.

[25] A: You see, the federal and the State, when you put

[1] them together, that's about the 45 percent range at the
[2] moment. It may go down next year. It probably will go down
[3] next year.

[4] Q: If you redid this analysis and assumed that both
[5] Shofers would only live however many years you earlier
[6] testified, 23-and-some years, to the year, I think it was to
[7] the year 2030, would that give you different numbers?

[8] A: I couldn't make that assumption. It's an
[9] incorrect assumption. That's not the way a life table
[10] works. We're talking about your average life span there.
[11] It's the same thing as the actuary who supposedly drowned by
[12] walking across a stream with an average depth of a foot. I
[13] can't say that's it all going to be a foot because it's an
[14] average of a foot.

[15] Q: If I ask you to assume then that the Shofers were
[16] only going to live to the year 2030, would that change the
[17] numbers on this table?

[18] A: They would be worthless.

[19] Q: Would it change the numbers, sir?

[20] A: I wouldn't do it so I don't know. It would be an
[21] absolutely worthless exercise. I would -

[22] Q: You do not know the answer to that question?

[23] A: touch it. I'm telling you that I wouldn't you
[24] know.

[25] Q: You cannot answer that question?

[1] A: I can answer that question.

[2] Q: Okay, what is the answer? Do you know if the
[3] numbers would change?

[4] A: The answer is the numbers would change in some
[5] way.

[6] Q: In fact, they would go down, would they not?

[7] A: No, they probably wouldn't. I'll tell you why,
[8] because you're assuming that there's no deaths for the next
[9] 26 years, either. They might very well go up.

[10] Q: You do not know?

[11] A: Without running them, there's no way I could tell.

[12]

[13] Q: By the way, the discount rate that you use on
[14] Exhibit 36 of 15.61 percent, you said that that was the
[15] average earnings on Mr. Shofer's pension plan. Is that
[16] right?

[17] A: Yeah, as I recall.

[18] (Pause.)

[19] THE WITNESS: Yeah, 15.61 -

BY MR. MAY:

[21] Q: Was the average -

[22] A: - average, yeah.

[23] Q: Okay.

[24] A: Table 5.

[25] Q: Through what year?

[1] A: Through 1993.
 [2] Q: When did you create this report?
 [3] A: 1994.
 [4] Q: Exhibit 36 -
 [5] A: Right.
 [6] Q: - was created in 1994?
 [7] A: The -
 [8] Q: Exhibit -
 [9] A: This?
 [10] Q: - 36?
 [11] A: This portion of it?
 [12] Q: No, the whole thing.
 [13] A: No, the whole thing wasn't, but this particular
 [14] portion was - was taxed - was give - was handed out in
 [15] 1994.
 [16] Q: I understand that. I want to know did you update
 [17] this to include 1994, 1995, 1996 -
 [18] A: Did I update the -
 [19] Q: - or a portion of 1996?
 [20] A: This particular one?
 [21] Q: Right.
 [22] A: No.
 [23] Q: So you have not adjusted the average earnings on
 [24] the pension plan to show the most recent two years of
 [25] activity in the plan?

[1] A: It would be more than that. It would be three
 [2] years more. No, I haven't. I didn't see any reason to.
 [3] Q: Well, if the earnings from the plan went down in
 [4] the last three years, that would lower the average earnings,
 [5] would it not?
 [6] A: It would lower the average earnings if in fact
 [7] the - yeah, but if you look at the statistics for what
 [8] pension plans have been doing, the odds are more it's likely
 [9] to be up than down. I - but I must say I did not check and
 [10] find out exactly what it is.
 [11] MR. MAY: Your Honor, I have no further questions,
 [12] and would renew my motion to exclude Exhibit 36. There is a
 [13] calculation here of future earnings that has clearly been
 [14] excluded by the Court of \$3,100,000.
 [15] THE COURT: Ms. Truhe, do you have questions of
 [16] the witness?
 [17] MS. TRUHE: Yes, just a few, Your Honor. And if I
 [18] may, echo Mr. May's objection. There are some calculations
 [19] and assumptions on Mr. Rosenberg's latest report which were
 [20] produced after discovery which, I believe, form the basis of
 [21] the Court's ruling about a week ago.
 [22] **CROSS-EXAMINATION**
 [23] **BY MS. TRUHE:**
 [24] Q: Mr. Rosenberg, as I understand it, in calculating
 [25] the difference between Mr. Shofer having to pay taxes on the

[1] monies he withdrew from the pension in 1984, 1985, and 1986
 [2] versus the time when he withdrew those same monies later on
 [3] when he retired, that you have not taken simply the taxes,
 [4] correct? You have also thrown in there the interest and the
 [5] penalties?
 [6] A: Yes.
 [7] Q: All right now, had Mr. Shofer's tax returns been
 [8] prepared correctly for the tax years 1984 and 1985, such
 [9] that he paid the taxes due when they came due and when he
 [10] should have paid them on the monies he withdrew in 1984 and
 [11] 1985, he would not be paying any interest or penalties,
 [12] would he?
 [13] A: Well, I think that's what you're litigating right
 [14] now. Whether it was done because he didn't file things, or
 [15] it was done because there was something that caused it to be
 [16] done, I can't answer that question. All I can do is
 [17] calculate that if in fact this was a result of bad advice,
 [18] then this is what the numbers are. I can't say that it was
 [19] or it wasn't or, you know, what would happened if he hadn't
 [20] had advice on that because that's definitely beyond my
 [21] scope. All I can do is run the numbers based on the
 [22] assumption. Now there is an implicit assumption in this is
 [23] that in fact, you know, that he was given bad advice which
 [24] caused this to happen and it caused the penalties.
 [25] THE COURT: Mr. Rosenberg, can you answer the

[1] question?
 [2] THE WITNESS: Yeah, well, no, I cannot.
 [3] THE COURT: You do not know whether there would be
 [4] interest and penalties?
 [5] THE WITNESS: Well, obviously if he paid them all
 [6] on time, and if he filed them all on time, there would not
 [7] be interest and penalties.
 [8] THE COURT: That would have been the simple
 [9] answer.
 [10] THE WITNESS: It would've been a simple case, yes.
 [11] MS. TRUHE: Your Honor, that is all I have.
 [12] THE COURT: Anything further? Do you have
 [13] redirect?
 [14] MR. TAYLOR: I do not have any redirect, Your
 [15] Honor.
 [16] THE COURT: Okay. I have a couple of questions.
 [17] Mr. Rosenberg, if I looked at your Exhibit 37, on the last
 [18] page, tell me what the total tax number, \$55,895.16,
 [19] represents as far as what you are representing to the Court.
 [20] Is that to represent Mr. Shofer's total damages in this
 [21] area?
 [22] THE WITNESS: No, that was the projected future
 [23] taxes to be paid.
 [24] THE COURT: Okay.
 [25] THE WITNESS: That's the amount of taxes which

[1] would be paid in the future which are less than the taxes
 [2] that were paid in the past before you take the present
 [3] value, before you talk about timing differences. It was
 [4] just a difference in tax rate between 1984 and 1997.
 [5] **THE COURT:** Did you calculate what it would have
 [6] been at the earlier time as a part of this exhibit?
 [7] **THE WITNESS:** Well, this one is as of '9 -
 [8] **THE COURT:** This one is as of March of 1995.
 [9] **THE WITNESS:** - March '95. This was, you know,
 [10] and the only two that I have here are the one which is as of
 [11] March '95 and the one as of June 30th, '97.
 [12] **THE COURT:** Okay. Does this front piece indicate
 [13] what the basic assumptions are that go into the calculation?
 [14] **THE WITNESS:** Yeah.
 [15] **THE COURT:** Okay. Thank you. Are there any other
 [16] questions of the witness?
 [17] **MR. TAYLOR:** No, Your Honor.
 [18] **MR. MAY:** No, Your Honor.
 [19] **MS. TRUHE:** No, Your Honor.
 [20] **THE COURT:** Okay, thank you, Mr. Rosenberg. You
 [21] are excused.
 [22] (The witness was excused.)
 [23] **THE COURT:** Counsel, I am going to admit
 [24] Exhibit 37. I am going to sustain the objection to 36.
 [25] **MR. TAYLOR:** Thank you, Your Honor.

[1] **MS. TRUHE:** Four.
 [2] **THE COURT:** Okay.
 [3] **MS. WHELIHAN:** One.
 [4] **THE COURT:** Okay. Because that is going to leave
 [5] us 2-1/2 days if we get done at noon tomorrow, right?
 [6] **MS. TRUHE:** Yes. As a matter of fact, Your Honor,
 [7] I have a problem with my expert witness. I would like to
 [8] get Mr. Hack on the stand tomorrow afternoon, finish with my
 [9] expert as to liability tomorrow afternoon as well. Then the
 [10] following morning I just have an accountant as a fact
 [11] witness, and then my accounting expert, and then I am done.
 [12] **THE COURT:** Okay. Is there anybody we can do this
 [13] afternoon? You have to take out of turn, or do the
 [14] Defendants not want to do that?
 [15] **MS. TRUHE:** We do not really want to do that.
 [16] **THE COURT:** Okay. All right, Counsel. I mean,
 [17] the Court has given you these days. I am satisfied to sit
 [18] here until at least 5:00 or a little after. I am not saying
 [19] this in any punitive sense, but sands are coursing through
 [20] the hourglass, and I cannot -
 [21] **MR. TAYLOR:** I understand, Your Honor.
 [22] **THE COURT:** - turn that back when we get to the
 [23] end of the day on Thursday.
 [24] **MR. TAYLOR:** I had intended to use every minute
 [25] the Court had allotted. But I do think that, based on the

[1] **THE COURT:** Do you have another witness?
 [2] **MR. TAYLOR:** Well, Your Honor, I had intended to
 [3] call Mr. Giampietro as the next witness. Unfortunately, he
 [4] is involved in some sort of a settlement that apparently he
 [5] did not know about last week. I want to advise the Court
 [6] that at this point Plaintiff has two more witnesses: Mr.
 [7] Giampietro, and then we have an expert who will be here
 [8] tomorrow morning.
 [9] **THE COURT:** Who is that?
 [10] **MR. TAYLOR:** That is Edward -
 [11] **THE COURT:** Kabala?
 [12] **MR. TAYLOR:** - Kabala.
 [13] **THE COURT:** Mr. Giampietro, when will he be
 [14] available?
 [15] **MR. TAYLOR:** He would be available in the morning,
 [16] Your Honor. I had hoped that the Court might allow me to
 [17] adjourn at this point, and I would put the two witnesses on
 [18] first thing in the morning. I do not think they will be
 [19] very long witnesses, and I would anticipate completing the
 [20] case by noon time. Ms. Truhe, I think, is prepared to begin
 [21] tomorrow afternoon.
 [22] **THE COURT:** Is that acceptable to the Defense?
 [23] **MS. TRUHE:** Yes, Your Honor.
 [24] **THE COURT:** All right. How many witnesses are you
 [25] anticipating calling at this time?

[1] number of witnesses that are available, we should be able to
 [2] complete the case.
 [3] **THE COURT:** Okay well, I will rely on your
 [4] estimations about that. Thank you very much. We will see
 [5] you at 9:30 tomorrow morning then?
 [6] **MR. TAYLOR:** Yes, Your Honor.
 [7] **MS. TRUHE:** Thank you.
 [8] (The trial was recessed at 3:39 p.m.)
 [9]
 [10]
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TRANSCRIBER'S CERTIFICATE

This is to certify that the proceedings in the matter of Richard Shofer v. Stuart Hack, et al., heard on June 30, 1997, were recorded by means of videotape.

I do hereby certify that the foregoing pages constitute the official transcript of said videotaped proceedings to the best of my ability in a complete and accurate manner.

In Witness Whereof, I have hereunto subscribed my name this 3rd day of March 1998.

Connie Jones
Transcriber


Lawyer's Notes

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Connie Jones
Transcriber

12/97D

DATE FORMED 0700Z JUN 98 0404B OCO DAPGZEP

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

RICHARD SHOFER,

Plaintiff,

v. Case No. 88102069/CL79993

STUART HACK, et al.,

Defendants.

----- X

OFFICIAL TRANSCRIPT OF PROCEEDINGS

Baltimore, Maryland

July 1, 1997

BEFORE:

HONORABLE JUDGE ALBERT J. MATRICCIANI, JR.

APPEARANCES:

For the Plaintiff:

DOUGLAS TAYLOR, ESQUIRE

For Defendants:

JANET TRUHE, ESQUIRE

DEBORAH WHELIHAN, ESQUIRE

JOHN MAY, ESQUIRE

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CIRCUIT COURT FOR BALTIMORE CITY

PROCEEDINGS

[1]

[2] (These proceedings commenced at 9:49 a.m.)

[3] **THE COURT:** We are back on the record, then, in

[4] Shofer v. Hack, et al. Are you ready to proceed, Mr.

[5] Taylor?

[6] **MR. TAYLOR:** Yes, Your Honor, I am. I would like

[7] to call Mr. Edward Kabala.

[8] **THE COURT:** Mr. Kabala, will you come forward,

[9] please?

[10]

EDWARD KABALA,

[11] a witness produced on call of the Plaintiff, having first

[12] been duly sworn, was examined and testified as follows:

[13] **THE CLERK:** State your name and your address for

[14] the record, please.

[15] **THE WITNESS:** My name is Edward J. Kabala. My

[16] address is 18 Forest Glen, Pittsburgh, Pennsylvania.

[17] **THE CLERK:** Thank you.

[18]

DIRECT EXAMINATION

[19]

BY MR. TAYLOR:

[20]

Q: Mr. Kabala, what is your occupation or profession?

[21]

A: I'm an attorney.

[22]

Q: In what jurisdictions are you admitted to

[23]

practice?

[24]

A: I practice in Pennsylvania.

[25]

Q: Would you provide us with your educational

Page 4

[1] background, beginning with where you attended college and

[2] what degrees you received?

[3] **A:** I have a Bachelor of Science in Industrial

[4] Management from the Pennsylvania State University in 1964.

[5] And then I attended night law school at Temple University

[6] for one semester, and then Duquesne University for the

[7] balance of 3-1/2 years, received a J.D. in 1970 from

[8] Duquesne University.

[9] **Q:** When did you begin the practice of law?

[10] **A:** Right away.

[11] **Q:** In 1970?

[12] **A:** 1970.

[13] **Q:** Are you a member of any professional

[14] organizations?

[15] **A:** I am.

[16] **Q:** Could you list those?

[17] **A:** I'm a member of the County, State, and Federal,

[18] and American Bar Associations; a member of the American

[19] Hospital Attorney; member of the Health Care Lawyers Section

[20] of the ABA; member of the Employee Benefit Section of the

[21] American Bar Association; and a member of the Professional

[22] Corporations Subcommittee of the ABA. I've been in all of

[23] those since the early '70's.

[24] **Q:** In your practice, have you specialized in any

[25] particular area of the law?

[1] A: Well, we don't really specialize, but our practice
[2] has concentrated in the area of small and medium size
[3] businesses, employee benefits, taxation; that sort of thing.
[4] And we, through the firm, handle about 1,000, well, at one
[5] time 1,000, probably 800 now with all the recent changes,
[6] pension and profit-sharing plans, and other assorted benefit
[7] plans.

[8] Q: What relationship, if any, does your practice have
[9] to the administration of pension plans?

[10] A: We've represented administration companies over
[11] the years. At one time, I owned a piece of an
[12] administration company, so -

[13] Q: Have you yourself been involved in the
[14] administration of pension plans?

[15] A: No.

[16] Q: What types of services do companies that
[17] administer pension plans typically provide?

[18] A: Well, generally, they start from the design of a
[19] plan, the explanation of the tax advantages of it, the
[20] design - the development of the appropriate types of plans,
[21] the implementation of the plan, and the selection of various
[22] terms and conditions from among the options that are
[23] available. From there, they proceed to providing, usually,
[24] annual administration services; sometimes, more or less
[25] frequently. But at least once a year, there are annual

[1] reports that have to be filed.

[2] Usually, get the information in terms of asset
[3] data; review the asset data; and assist or complete annual
[4] reporting forms, 5500, 5500-C or R depending on the size.
[5] And then, advise the client on what they see that is or
[6] could be a problem; generally advise the client on changes
[7] in the law and what would have to happen to the plans,
[8] whether they have to be amended or terminated; that sort of
[9] thing.

[10] Q: In your practice, have you acted as a pension
[11] consultant?

[12] A: I have.

[13] Q: Have you ever testified as an expert witness?

[14] A: I have.

[15] Q: Could you indicate in what court or courts you
[16] have been qualified as an expert?

[17] A: I've testified in the federal courts, and in the
[18] Third Circuit, and in the Allegheny County Court of Common
[19] Pleas.

[20] Q: In what areas of expertise have you been qualified
[21] as an expert?

[22] A: Legal malpractice and administrative malpractice.

[23] Q: Did those cases relate to pension law or pension
[24] matters?

[25] A: Yes, they did.

[1] MR. TAYLOR: Your Honor, I would offer Mr. Kabala
[2] as an expert in the area of pension administration and
[3] pension law.

[4] THE COURT: Would you like to voir dire the
[5] witness?

[6] MS. TRUHE: Yes, Your Honor.

[7] THE COURT: Okay.

[8] VOIR DIRE EXAMINATION

[9] BY MS. TRUHE:

[10] Q: Mr. Kabala, I believe you testified that you and
[11] your law firm concentrate in the employee benefits and tax
[12] areas, correct?

[13] A: (No audible response.)

[14] Q: But neither you nor anyone in your firm actually
[15] do plan administration work like the Stuart Hack Company,
[16] correct?

[17] A: That's right. We do our own, but nobody else's.

[18] Q: All right. Now with respect to your firm's
[19] clients, you would agree that you have an attorney-client
[20] relationship with any firm client for whom you are engaged
[21] to render services, correct?

[22] A: That's correct.

[23] Q: Do you have to be a lawyer to be a pension
[24] consultant?

[25] A: No.

[1] Q: Are pension consultants engaged in the practice of
[2] law in rendering pension consulting and administrative
[3] services to their clients?

[4] A: That's been debated back and forth. I think some
[5] of them may have crossed the line, some may not.

[6] Q: Is it possible to render pension consulting and
[7] administrative services to clients and not be a lawyer?

[8] A: Absolutely.

[9] Q: And not be considered to be engaged in the
[10] unauthorized practice of law?

[11] A: Absolutely.

[12] Q: Is it not true, Mr. Kabala, that in the employee
[13] benefits area, you believe you have greater expertise than
[14] other professionals, such as pension consultants like Mr.
[15] Hack?

[16] A: No, as a matter of fact, I don't think that's
[17] necessarily true.

[18] Q: Well, when I took your deposition in 1990, let's
[19] see, one moment while I find the page. Page 8, Counsel,
[20] line 13: "In the employee benefits area, do you see
[21] yourself as having any broader role than any other
[22] professional in this area? And by any other professional,
[23] I'm referring to a pension consultant or plan administrator,
[24] if you understand my question." Answer: "I'm not sure
[25] broader role in what sense." Question: "Greater

[1] expertise." Answer: "I think we have greater expertise
 [2] than some."
 [3] **A:** I think that's true.
 [4] **Q:** All right. Have you testified as an expert
 [5] witness on the issue of the standard of care applicable to a
 [6] pension consultant?
 [7] **A:** I don't believe I have.
 [8] **MS. TRUHE:** Your Honor, I have a problem with Mr.
 [9] Kabala. Let me establish also with him -
 [10] **BY MS. TRUHE:**
 [11] **Q:** Do you believe, Mr. Kabala, that the standard of
 [12] care applicable to a pension attorney is the same as the
 [13] standard of care applicable to a pension consultant?
 [14] **A:** I do.
 [15] **MS. TRUHE:** Your Honor, that is exactly my
 [16] problem. This witness is an attorney who practices in
 [17] Pennsylvania, and who is going to render an opinion as to
 [18] what a pension consultant not engaged in the practice of law
 [19] should have done in Maryland. That would be like any, by
 [20] his own admission, he believes the standard of care is the
 [21] same. That would be like saying the standard of care
 [22] applicable to an attorney is the same as applicable to a
 [23] paralegal. If anything, this witness is over-qualified or
 [24] qualified in a different area than the one at issue in this
 [25] case.

[1] **THE COURT:** Well, the issue of which standard of
 [2] care applies, is that a legal issue?
 [3] **MS. TRUHE:** I believe it is.
 [4] **THE COURT:** I mean, I have not been given anything
 [5] about it from either side. This is the first time we have
 [6] addressed it in the course of the proceedings. I guess I
 [7] have been sort of waiting for this to arise, and it is not
 [8] an easy issue, I do not think. I am not inclined to
 [9] preclude the witness. I am sure that the Defense is going
 [10] to present an expert with a contrary view. At some point,
 [11] we are going to have to address as a matter of law, which
 [12] standard of care applies. So while I will hear the
 [13] testimony, I do not know yet which standard of care is
 [14] applicable.
 [15] **MS. TRUHE:** All right.
 [16] **THE COURT:** Okay.
 [17] **MR. TAYLOR:** Does that mean, Your Honor, that you
 [18] would accept Mr. Kabala as an expert?
 [19] **THE COURT:** I will accept Mr. Kabala as an expert.
 [20] He is going to offer opinions as to what the standard of
 [21] care is as it applies to a pension consultant, is that
 [22] correct?
 [23] **MR. TAYLOR:** A pension consultant or a pension
 [24] administrator, yes.
 [25] **THE COURT:** I will permit him to do that.

[1] **MR. TAYLOR:** Thank you.
 [2] **REDIRECT EXAMINATION**
 [3] **BY MR. TAYLOR:**
 [4] **Q:** Mr. Kabala, what were you asked to do in this
 [5] case?
 [6] **A:** I was asked to review the depositions and certain
 [7] exhibits, to evaluate those based on the material contained
 [8] in them, to take a look at the advice that was given at
 [9] various times to determine, in my view, it matched the law
 [10] at those times, and to render an opinion on whether I
 [11] thought the advice given or the actions taken met the
 [12] appropriate standard of care as I saw it.
 [13] **Q:** Did you in fact do that, that is, look at the
 [14] materials in connection with this case?
 [15] **A:** Yes, I did.
 [16] **Q:** What, specifically, did you review?
 [17] **A:** I reviewed Mr. Hack's depositions, and there were
 [18] three volumes. I reviewed depositions of Mr. Shofer and
 [19] Mr. Larash, and the attachments to those. I think I
 [20] reviewed the complaint, the answer, and the plan documents;
 [21] the annual reports of the plans from 1983 through '86 or so,
 [22] 1986 or 1987; various correspondence among the parties.
 [23] **Q:** In August of 1984, based upon the information that
 [24] you have testified that you reviewed, what function or
 [25] functions do you recall that Mr. Hack and his company were

[1] performing for the Catalina Enterprises, Inc. pension trust?
 [2] **A:** That company was - it's my understanding they
 [3] were the contract administrator for the plan at the time,
 [4] and Mr. Hack individually appears to have been one of the -
 [5] the people involved in that individual case.
 [6] **Q:** In your practice, Mr. Kabala, do you represent
 [7] companies like the Stuart Hack Company in terms of what they
 [8] do?
 [9] **A:** We have over the years, yes.
 [10] **Q:** Do you know Mr. Hack, Mr. Kabala?
 [11] **A:** No, I don't.
 [12] **Q:** Mr. Kabala, let me show you what has been
 [13] introduced into evidence as Plaintiff's Exhibit 5. Just for
 [14] the record, can you identify that document?
 [15] **A:** It's a letter from Mr. Stuart Hack to Mr. Richard
 [16] Shofer, dated August 9, 1984.
 [17] **Q:** Have you reviewed that document in the past?
 [18] **A:** Yes, I have.
 [19] **Q:** In connection with that document, did you also
 [20] review the Catalina Enterprises, Inc. pension plan and the
 [21] amendments that were made thereto?
 [22] **A:** At that - yes, I did.
 [23] **Q:** In reviewing the letter which is Plaintiff's
 [24] Exhibit Number 5 and comparing the contents of that letter
 [25] with the Catalina Enterprises pension plan itself, are there

[1] any provisions in that letter which are in contradiction to
[2] what is in the plan?

[3] **A:** Yes. Both the original plan, the one that was in
[4] existence actually when this letter was written, and the
[5] plan that was subsequently restated to be effective
[6] January 1, 1984, have loan provisions that are materially
[7] different with respect to the voluntary accounts.

[8] **MS. TRUHE:** Objection, Your Honor; move to strike
[9] any testimony relating to plan amendments; that is, related
[10] to the plan, related to ERISA, and not an issue in this
[11] case. The only plan at issue is the one which Mr. Hack
[12] initially drafted for Catalina Enterprises. The one that -
[13] I forget what exhibit it is but the amended plan has not, I
[14] believe, been introduced into evidence. Whether Mr. Hack
[15] breached any standard of care with reference to his later
[16] amendments of the plan in terms of whether there were
[17] outstanding loans or checking in with the client to see if
[18] there were loans, is not at issue in this case. That was
[19] one of the issues raised before the Court of Appeals.

[20] **THE COURT:** I thought I heard the witness say that
[21] the original plan was the plan in effect at the time of the
[22] letter.

[23] **MR. TAYLOR:** There were amendments that I think
[24] were made retroactive to 1984 at the time the letter was
[25] written.

[1] **THE COURT:** When were they made, after August 9,
[2] 1984?

[3] **MR. TAYLOR:** I think the amendments to the plan
[4] were made after -

[5] **THE COURT:** So they would not have been in the
[6] mind of anybody at the time the letter was written?

[7] **MR. TAYLOR:** All right. Very well, Your Honor.

[8] **THE COURT:** I mean, I am inclined to sustain the
[9] objection since the review of the letter has to be based on
[10] what was in existence at the time.

[11] **MR. TAYLOR:** Well, perhaps I could ask the witness
[12] about the original plan itself.

[13] **THE COURT:** That is fine.

[14] **MR. TAYLOR:** As a matter of fact -

[15] **BY MR. TAYLOR:**

[16] **Q:** Mr. Kabala, let me hand you what has been
[17] introduced as Plaintiff's Exhibit 2. Just for
[18] clarification's sake, did you review Plaintiff's Exhibit 2
[19] as a part of your preparation for this matter?

[20] **A:** Yes.

[21] **Q:** Does the original plan, Plaintiff's Exhibit 2,
[22] address the issue of loans from the pension?

[23] **A:** It does, if I can find it. On page 30; and in the
[24] life insurance section, there's loans from life insurance
[25] plans; and on page 44 at 12.02(M), there are provisions on

[1] loans.

[2] **Q:** Are the provisions on loans which you just
[3] referred to in contradiction to what is contained in the
[4] letter of August 9, 1984?

[5] **A:** The provisions of loans basically are somewhat in
[6] contradiction because they deal with the discrimination
[7] aspects. They basically say that loans are available to
[8] participants if elected by the employer, and the employer
[9] did so elect, provided that they are not made available in
[10] amounts to employees who are key employees in amounts that
[11] are greater than other employees, and they bear a reasonable
[12] rate of interest and are adequately secured.

[13] **MS. TRUHE:** Objection, Your Honor; move to strike.

[14] That testimony goes to the issue of whether these loans
[15] constituted a prohibited transaction.

[16] **THE COURT:** It would seem to be the case.

[17] **MR. TAYLOR:** Well, Your Honor, the issue in this
[18] case is going to be whether or not this letter that was
[19] written was erroneous or incorrect or fails to -

[20] **THE COURT:** Isn't the issue in the case whether or
[21] not there was an obligation to provide advice to the client,
[22] that these were taxable events?

[23] **MR. TAYLOR:** Well -

[24] **THE COURT:** I mean, why don't we just cut to the
[25] chase and go to that?

[1] **MR. TAYLOR:** Of course, those are taxable events,
[2] Your Honor, that -

[3] **THE COURT:** Well, you can elicit that testimony
[4] any way you wish from the witness, but that is really the
[5] issue that I am concerned about.

[6] **MR. TAYLOR:** Thank you.

[7] **BY MR. TAYLOR:**

[8] **Q:** Mr. Kabala, in reviewing the letter of August 9,
[9] 1984, did you determine, at least in your own mind, whether
[10] or not that letter met or failed to meet a reasonable
[11] standard of care for a pension consultant?

[12] **MS. TRUHE:** Objection, Your Honor. I think at
[13] this point, given the posture of this case, we need to
[14] either narrow or clarify that question. Met the standard of
[15] care in what respect on what issue?

[16] **THE COURT:** It does seem a little vague. Do you
[17] want to focus it a bit?

[18] **BY MR. TAYLOR:**

[19] **Q:** As you reviewed the letter, Mr. Kabala, are there
[20] any provisions in that letter which fail to meet the law as
[21] it was in 1984?

[22] **MS. TRUHE:** Objection, Your Honor. Again, I do
[23] not think that solves the problem. If Mr. Taylor wants to
[24] ask Mr. Kabala whether that letter met the standard of care
[25] in that it failed to make any reference to tax advice in

[1] connection with the client's question - or, I should say,
[2] Mr. Shofer's question; not the client's - about taking
[3] loans from a pension, I think that would be within the scope
[4] of the issue to be tried in this case. But again, I think
[5] the question just posed is way too broad.

[6] **THE COURT:** Yes. I mean, I would sustain the
[7] objection if we were in front of a jury. I mean, I am happy
[8] to hear the witness' opinions about these things, but they
[9] are not of particular interest to me. You know, I am
[10] focused on whether or not there is advice in there that goes
[11] to the issue of whether or not these were taxable events,
[12] and whether that was correct or incorrect.

[13] **BY MR. TAYLOR:**

[14] **Q:** Mr. Kabala, the subject matter of that letter is
[15] loans from the pension fund. Is that not correct?

[16] **A:** That's correct.

[17] **Q:** Does the letter contain any advice with regard to
[18] the taxability of such loans?

[19] **A:** Not directly. I mean, it basically talks about
[20] what is permitted. But the tax aspects of loans in the
[21] post-TEFRA area, 1982 and following, was really the basis
[22] for most plan loans and most loan advice. The provisions of
[23] ERISA at the time said that if you had a loan that met the
[24] terms of the plan and was not a prohibited transaction, that
[25] certain of those loans can be taken out without tax

[1] consequences and others cannot.

[2] **Q:** You mentioned TEFRA. What is TEFRA?

[3] **A:** Tax Equity and Fiscal Responsibility Act.

[4] **Q:** When did that law come into effect?

[5] **A:** August 13, 1982.

[6] **Q:** Did that law change the taxability of, or change
[7] the tax law with respect to, loans from pension accounts?

[8] **A:** It did.

[9] **Q:** As you look at the letter of August 9, 1984, is
[10] there advice in that letter which would relate to the TEFRA
[11] Act of 1982?

[12] **A:** Yes. The letter starts out asking for replying
[13] about whether pension or profit-sharing plans can be used as
[14] collateral for loans, or whether you can borrow against the
[15] plans or voluntary accounts. The second paragraph refers to
[16] the \$50,000 limit which found its way in the law in TEFRA
[17] and the 5-year limit. The provisions that were enacted
[18] stated that what was a - if you had a bona fide loan, and
[19] if that loan did not exceed \$50,000, that it would not be
[20] treated as a distribution for tax purposes.

[21] If the loan exceeded \$50,000, then it was a
[22] distribution for tax purposes. The requirement was \$50,000
[23] and the loan had to be paid back within five years, and
[24] that's what the second paragraph deals with. If the loan
[25] exceeded \$50,000 or was not a bona fide loan and it didn't

[1] meet the usual documentation, non-discrimination and other
[2] tests, or exceeded five years, then it was a distribution.
[3] If it was a distribution, then what happened was you first
[4] had to see whether the individual had any basis; that is,
[5] had they made any non-deductible contributions.

[6] If they made non-deductible contributions, then
[7] those monies could be distributed, if you will. It's a
[8] deemed distribution that can be distributed without tax
[9] consequences. Everything else has tax consequences, income
[10] tax consequences, and that generates, in some cases, early
[11] distribution penalty taxes, too. If the loan was not a bona
[12] fide loan, was not properly documented, was for more than
[13] five years, or didn't meet the non-discrimination tests,
[14] then the Section 72(P) taxation section, which had just been
[15] put in TEFRA did not apply. And so that the entire loan
[16] would be a distribution, and not only could there be income
[17] tax consequences and excise tax consequences, there could be
[18] plan disqualification consequences.

[19] **MS. TRUHE:** Objection, Your Honor; move to strike
[20] that portion of Mr. Kabala's testimony that refers to
[21] consequences relating to plan disqualification and excise
[22] taxes.

[23] **THE COURT:** I will overrule the objection. That
[24] is fine.

[25] **BY MR. TAYLOR:**

[1] **Q:** Mr. Kabala, was it common or uncommon for
[2] individuals in the early 1980's to be interested in
[3] borrowing money from their pension accounts if they had such
[4] accounts?

[5] **MS. WHELIHAN:** Objection, Your Honor. I do not
[6] know how this witness could possibly answer that question.

[7] **THE COURT:** Well, I guess we need some foundation
[8] for it.

[9] **BY MR. TAYLOR:**

[10] **Q:** Mr. Kabala, in your practice, were you
[11] representing pension administration companies and pension
[12] consultants in the early 1980's?

[13] **A:** Yes.

[14] **Q:** In the course of your practice, did you encounter
[15] situations where individuals were interested in borrowing
[16] money from their pension accounts?

[17] **A:** We did in those cases and in any number of cases
[18] where we were consulting with the plan sponsors directly.

[19] **Q:** In those cases, was it your experience that the
[20] pension administrators or consultants would provide advice
[21] with respect to the advisability of such loans and how to
[22] take them?

[23] **A:** More on how to take them and what the requirements
[24] were if you were going to take them, and what the
[25] consequences were if you didn't do it right.

[1] Q: Based on your experience in this, do you have an
[2] opinion as to whether or not a pension administrator or a
[3] pension consultant should be familiar with the law as it
[4] relates to these loans and the proper method of making such
[5] loans?

[6] A: There's no doubt in my mind that pension
[7] consultants and pension administrators should have been
[8] familiar with that law, both before and after TEFRA.

[9] Q: Would that be an integral part of the standard of
[10] care that a pension consultant or pension administrator
[11] should exercise?

[12] A: It definitely would.

[13] Q: Do you have an opinion as to whether or not those
[14] provisions of paragraph 2 of this letter which you just read
[15] meet or fail to meet that standard care.

[16] A: The paragraph -

[17] MS. TRUHE: Objection, Your Honor. Now we have a
[18] new issue in the case as to whether Mr. Hack's failure to
[19] also gratuitously volunteer to Mr. Shofer advice about how
[20] to borrow money from the plan when Mr. Shofer has admitted
[21] in testimony he never asked has never been an issue in this
[22] case, ever.

[23] THE COURT: Well, I do not have the document in
[24] front of me. You asked him about paragraph 2, and I do not
[25] recall exactly what paragraph 2 says.

[1] MR. TAYLOR: Well, paragraph 2, he had commented
[2] on with regard to, I think, the changes that the 1982 law
[3] may have made with regard to the taxability of loans. He
[4] also testified, I think, with respect to the limitations
[5] that were included in that law with regards to those loans.
[6] I think all of those will -

[7] THE COURT: I will allow the witness to testify as
[8] to what his opinion is concerning what is or is not in
[9] paragraph 2. But I understand Ms. Truhe's point, and it may
[10] or may not be an issue in the case.

[11] MR. TAYLOR: Well, I think if I can just for the
[12] record, Your Honor, disagree with Ms. Truhe that the way in
[13] which loans are taken from a pension plan has always been an
[14] issue in this case. That the allegations have been that the
[15] advice was erroneous. It was erroneous with regard to
[16] taxability and the way in which the loans were taken because
[17] we are dealing really with whether or not the advice was
[18] complete with regard to the process for taking a loan.

[19] THE COURT: Is it not an important issue, then,
[20] whether or not there is an independent responsibility within
[21] the standard of care to gratuitously offer that advice if
[22] not asked?

[23] MR. TAYLOR: Well, I understand what Your Honor is
[24] saying.

[25] THE COURT: That will be good cross.

[1] MR. TAYLOR: Yes, I -

[2] THE COURT: I am going to overrule the objection.
[3] I will allow you to ask the question.

[4] MS. TRUHE: Your Honor, though, for the record, I
[5] would like to state that the only consequence to Mr. Shofer
[6] of his having violated any federal law or term of the plan
[7] with respect to the manner in which he withdrew monies from
[8] his pension would have been in the form of excise taxes and
[9] other prohibited transaction penalties which the Court of
[10] Appeals has specifically ruled out of this case. Indeed,
[11] that was one of the arguments I made at Court of Appeals.

[12] That is, that there was some suggestion in the
[13] case that Mr. Hack should have somehow known to advise Mr.
[14] Shofer when he called in August of 1984, should have known
[15] to advise him how to take money. One of the damages that he
[16] listed in answers to interrogatories was excise taxes which
[17] are simply a direct result of taking money from the pension
[18] in ways that it is not secured, or not paid back timely, or
[19] not at the appropriate rate of interest. This all goes into
[20] the mechanics of -

[21] THE COURT: I understand. I have repeatedly said
[22] what I am interested in from -

[23] MS. TRUHE: Fine.

[24] THE COURT: - this witness is to what extent this
[25] letter or anything else the Defendant did violated the

[1] standard of care with respect to advising Mr. Shofer whether
[2] or not these were taxable events.

[3] BY MR. TAYLOR:

[4] Q: Mr. Kabala, again directing your attention to the
[5] taxability issue of these loans, what, in your opinion,
[6] should this letter have stated with regard to the taxability
[7] of loans if it was to meet the standard of care?

[8] A: The letter goes totally off the law in
[9] paragraphs 3 and 4.

[10] Q: And how does it do that?

[11] A: It's incorrect as to the law as it existed at that
[12] time. The letter says: "There's an entirely different
[13] treatment for voluntary accounts. First, there is no limit
[14] on the amount that can be borrowed against the account or
[15] the length of time for which it can be outstanding." If the
[16] loan is outstanding or is written for a period of time more
[17] than five years, from the beginning it will be a
[18] distribution and all of it or the excess, depending on the
[19] calculation and where you are in - in prior loans, will be
[20] subject to income taxes. And to the extent that the
[21] individual is under 59-1/2 and also subject, could be
[22] subject to early distribution excise taxes. The paragraph
[23] says: "Further, the voluntary account can be put up as
[24] collateral for a loan from a bank or other source." That is
[25] clearly -

[1] **MS. TRUHE:** Objection, Your Honor.
 [2] **THE WITNESS:** - wrong.
 [3] **MS. TRUHE:** That has never been an issue in the
 [4] case because Mr. Shofer never put his pension up as
 [5] collateral for a loan.
 [6] **MR. TAYLOR:** Your Honor, I do not think that is
 [7] the issue. The issue is whether this letter meets or fails
 [8] to meet the standard of care, and what should have been
 [9] included with regard to -
 [10] **THE COURT:** The difficulty that we keep getting
 [11] into is that there are obviously within the letter a number
 [12] of issues, some of them excluded from the case.
 [13] **MR. TAYLOR:** Well, the damages have been excluded,
 [14] Your Honor.
 [15] **THE COURT:** Right.
 [16] **MS. TRUHE:** In some cases, Your Honor, for
 [17] example, this issue with regard to putting the pension up as
 [18] collateral for a loan, it was not the proximate cause of any
 [19] damage because it was never done. So whether it met the
 [20] standard of care or not is an esoteric discussion.
 [21] **MR. TAYLOR:** But, I mean, if you are looking at
 [22] the letter itself to determine whether that letter meets the
 [23] standard of care, whether that letter was, you know,
 [24] properly written. Whether or not it produced a damage or
 [25] not, I do not think it is it necessarily essential to

[1] whether or not the letter is accurate or not. I mean, we
 [2] are maintaining, and I think there is evidence in the
 [3] record that there were damages sustained by the Plaintiff
 [4] when he followed the advice in this letter.
 [5] That related to taxability of loans he took.
 [6] There are other problems with the letter, and the witness is
 [7] simply addressing the issue of whether or not this letter,
 [8] written by a pension consultant, meets a reasonable standard
 [9] of care for a pension consultant. I think it is a way of
 [10] testing whether or not there has been negligence here. That
 [11] is what this witness is here to testify about.
 [12] **MS. TRUHE:** But there cannot be negligence as to
 [13] an issue that was never acted upon as a factual matter by
 [14] the Plaintiff, never proximately caused him any damage.
 [15] Assuming there were other problems with this letter, and
 [16] that is strictly an assumption, they are collateral to this
 [17] case. The only issue in this case pertains to the
 [18] transactions in 1984, 1985, and 1986 when Mr. Shofer
 [19] borrowed money from his pension, and whether anything in
 [20] that letter pertaining to the taxability of that transaction
 [21] meets the standard of care. Whether Mr. Hack advised Mr.
 [22] Shofer at all about putting his pension up as collateral for
 [23] a loan is irrelevant because he never did it.
 [24] **THE COURT:** I think you put your finger on it
 [25] earlier. It really goes to the proximate cause issue, not

[1] to whether or not there was negligence. The witness is
 [2] testifying as to whether or not the information provided in
 [3] the letter comported with the pension tax law as it was in
 [4] existence on August 9, 1984. I think he is permitted to do
 [5] that. Whether it did or not, and if it did not, did that
 [6] proximately cause damage to the Plaintiff is another issue.
 [7] So I will allow you to proceed, Mr. Taylor.
 [8] **THE WITNESS:** The voluntary account or any account
 [9] being put up as collateral for a loan would be a
 [10] distribution -
 [11] **BY MR. TAYLOR:**
 [12] **Q:** Is that -
 [13] **A:** - a deemed distribution.
 [14] **Q:** Is that a taxable event?
 [15] **A:** It is a taxable event. Since, in that situation,
 [16] it's unlikely that it - there would be decent loan
 [17] documents. If you have a pledge of an account from a bank,
 [18] and if it is not totally revocable, and if it is for more
 [19] than 10 percent of the account balance under Regulation
 [20] 401(A)(13), it's a distribution event. And so, the letter
 [21] is totally off on that. The letter goes on, in paragraph 4.
 [22] **It says:** "There's no law on restrictions of using voluntary
 [23] account money for collateral for a loan."
 [24] Again, 401(A)(13) is totally opposite to that
 [25] because it doesn't make a distinction between voluntary and

[1] non-voluntary. It says: "The TEFRA provisions on the
 [2] limits on loans apply only to employer "accounts and
 [3] specifically do not apply to employee voluntary accounts."
 [4] That is a complete misstatement because there is no specific
 [5] exclusion in TEFRA. And as the articles and the law and the
 [6] regulations have developed, it is clear that it did not
 [7] exempt voluntary accounts. And this would - it says
 [8] specifically doesn't apply to employee voluntary accounts.
 [9] **Q:** Well -
 [10] **A:** It says -
 [11] **Q:** Accepting that advice, would that lead to tax
 [12] consequences?
 [13] **A:** It would. It would be a deemed distribution or
 [14] actual distribution. And it would make the amount of money
 [15] taken taxable. It says: "In my opinion, you can use your
 [16] voluntary account as collateral for a loan, or you can
 [17] borrow up to 100 percent of your voluntary account." Now
 [18] certainly, borrowing up to 100 percent of the voluntary
 [19] account - if it met the non-discrimination area, and if it
 [20] was documented, and if it was not made available to highly
 [21] paid employees in amounts greater than to other
 [22] employees can be done, but it's a distribution if it is
 [23] beyond \$50,000. And it is a taxable distribution if it is
 [24] beyond \$50,000 plus essentially non-deductible contributions
 [25] that've been made before.

[1] It finally says: "The terms of the loan must be
[2] reasonable as to the interest rate and payback period." If
[3] that payback period is stated as more than five years, from
[4] the beginning it's a distribution. The provisions of this
[5] letter are just totally off when it comes down to the law as
[6] it existed at the time. And in that, we looked back to see
[7] what the state of the law was, and looked at a number of
[8] articles. And the literature was replete in '83 and '84
[9] with articles that directed everybody's attention
[10] specifically to those issues. And we had in our firm, we
[11] had adopted policies because we were concerned about those
[12] issues.

[13] **Q:** A distribution, then, is always a taxable event,
[14] is that correct?

[15] **A:** Well, a distribution of anything other than
[16] previously taxed contributions would be a taxable event.

[17] **Q:** The opening sentence of Plaintiff's Exhibit 5 sets
[18] forth the purpose of the letter, does it not, Mr. Kabala?

[19] **A:** Yes.

[20] **Q:** What significance, if any, does the taxability
[21] question, at least in your opinion, play in determining the
[22] advisability of taking a loan from a pension?

[23] **A:** Well, as I would understand patterns of plan loans
[24] at that time, the only time or the only reason you really
[25] took plan loans was that you wanted to be able to use the

[1] money, all of it; you wanted to be able to pay interest on
[2] it and deduct the interest. But you didn't want to pay tax
[3] on the account balance. You could take your loans. In most
[4] plans, you could change your plan to say I'm going to take
[5] out my account, particularly voluntary accounts.

[6] And if you did that and it was money that you
[7] hadn't deducted, you had put in after tax, you could get it
[8] back. If it was earnings, you get it back, you pay tax, and
[9] you pay, in some cases, early distribution excise tax. It
[10] was only to have all of the money available and not be taxed
[11] that you went into the loan provisions.

[12] **Q:** In meeting the reasonable standard of care for
[13] pension consultants or administrators, to what degree should
[14] those individuals have knowledge of the taxability of loans
[15] from pensions?

[16] **A:** In my view, pension consultants in this area must
[17] have the knowledge of the tax consequences of distributions
[18] because they're drafting the plan documents, they're seeing
[19] the annual reports and the documents that come in. And they
[20] must determine whether there have been distributions or
[21] deemed distributions in order to deal with items such as
[22] withholding where they're advising employers on how much tax
[23] has to be withheld from distributions on items such as
[24] issuing 1099's or 990 or W-2-P's.

[25] At various times, you use different reporting

[1] mechanisms for reporting taxation. So that the
[2] administrator has to understand all of those. Also, the
[3] administrator is assisting in the completion, or actually
[4] completing, annual reports. Those annual reports talk about
[5] prohibited transactions. They talk about distributions.
[6] And in order to accurately answer those questions, you've
[7] got to know the terms of the plan, the actions taken. You
[8] have to match one against the other, and you also have to
[9] match the actions taken against the law as it applies to
[10] distributions so that you can properly issue 1099's or
[11] complete the 5500's or 5500-C or R.

[12] **Q:** As you review Plaintiff's Exhibit Number 5, is
[13] there any advice contained in that document that deals with
[14] the taxability of loans from the pension?

[15] **A:** Not directly.

[16] **Q:** In your opinion, should it have contained such
[17] information?

[18] **A:** Yes, it should.

[19] **Q:** Mr. Kabala, in the course of your review of the
[20] materials that you previously testified that you looked at
[21] in preparation for coming here and testifying, are you aware
[22] of how the Hack Company or Mr. Hack first learned about
[23] loans from the Catalina Enterprises, Incorporated pension
[24] trust? Do you know how that information got to Mr. Hack or
[25] his company?

[1] **A:** It's my understanding the issue first arose on a
[2] telephone conversation from Mr. Marvel to Mr. Vanderdresche.
[3] That's Mr. Vanderdresche at the Hack Company.

[4] **Q:** In pension administration or pension consulting
[5] work, are there any documents or any information that would
[6] be made available normally to a pension consultant that
[7] would suggest or indicate loans from the pension being made?

[8] **A:** Well, in order to complete the annual reports, the
[9] 5500's, those that require balance sheets in particular and
[10] every third year, you had to have those at the time you
[11] really have to have a list of assets and contributions
[12] earnings. Most of the administration companies, if not all
[13] the ones I know, collect annual statements of all assets,
[14] all items of income, all items of contribution, and all
[15] distributions, and then have a specific list of assets in
[16] their file each year that would indicate each asset at the
[17] end of each year.

[18] **Q:** Do you know whether or not there was a system in
[19] place at the Hack Company for collecting that information,
[20] or do you know how that was done?

[21] **A:** No, I don't know how it was done. It does appear
[22] that at times there was a balance sheet and that the assets
[23] were obtained. But other than one year, it did not appear
[24] that there were balance sheets in the material that I looked
[25] at.

[1] (Discussion off the record.)
 [2] **MS. TRUHE:** Your Honor, I would like to object at
 [3] this point. I think I know where Mr. Taylor is going. I
 [4] have a real problem with Plaintiff's Exhibit Number 32. We
 [5] have established for the record that the last page of that
 [6] document was not attached to that document at any time it
 [7] was filed with the IRS or at any time when it was mailed to
 [8] Mr. Hack. I am really not sure why Counsel stapled the
 [9] balance sheet for plan year 1984 to the 5500-C, but it
 [10] creates a very false, misleading impression that this was
 [11] provided to Mr. Hack when the 5500-C filed by Mr. Shofer was
 [12] mailed to Mr. Hack. And it certainly, by Mr. Shofer's own
 [13] admission and by Ms. Summer's own admission, that balance
 [14] sheet never went with that 5500-C.

[15] **THE COURT:** Well, there is no question in front of
 [16] the witness for me to rule on.

[17] **MS. TRUHE:** All right. Then I will renew.

[18] **BY MR. TAYLOR:**

[19] **Q:** Mr. Kabala, let me show you what has been
 [20] introduced as Plaintiff's Exhibit 32. For the record, what
 [21] is that document?

[22] **A:** The document is a Form 5500-C, a return or report
 [23] of a - an employee benefit plan for the calendar year 1984
 [24] for Catalina Enterprises, Inc. pension plan.

[25] **Q:** Have you seen that document before?

[1] **A:** I have.

[2] **Q:** Was that one of the documents that you reviewed in
 [3] terms of familiarizing yourself with the facts of this case?

[4] **A:** Yes.

[5] **Q:** Whose responsibility is it to prepare the 5500
 [6] forms?

[7] **A:** Well, it varies from case to case. But as I
 [8] understand from the depositions in this situation, this was
 [9] prepared by the Hack Company, and generally submitted, and I
 [10] think specifically in this case, submitted to Mr. Shofer for
 [11] signature. And I'm not sure whether it came back and got
 [12] filed or got filed directly from there.

[13] **Q:** In the review of the materials that you did, was
 [14] there any reference to whether or not the Hack Company had
 [15] all the information that was required when this form was
 [16] prepared?

[17] **A:** There was -

[18] **MS. WHELIHAN:** Objection, Your Honor.

[19] **THE COURT:** Basis?

[20] **MS. WHELIHAN:** That question is entirely
 [21] speculative. I am not even sure to what information he is
 [22] referring.

[23] **THE COURT:** Well, I will allow the witness to
 [24] answer if he understands the question.

[25] **THE WITNESS:** There was discussion in, I think,

[1] Mr. Hack's deposition to the effect that at various times,
 [2] they didn't have information but when they had it, they put
 [3] it on the balance sheet. And I believe the testimony was
 [4] that this information had come in from the company, Crown,
 [5] and that they had recapped it and put it on the balance
 [6] sheet.

[7] **MS. TRUHE:** Well, Your Honor, at this point I
 [8] would like to renew my objection. When Mr. Kabala says this
 [9] information, is he also referring to the last page of that
 [10] document -

[11] **THE WITNESS:** I have no idea -

[12] **MS. TRUHE:** - and suggesting that Mr. Hack had
 [13] that at the time he prepared the 5500-C and mailed it to Mr.
 [14] Shofer for completion and signature.

[15] **THE COURT:** Well, you will get a chance to ask him
 [16] that.

[17] **BY MR. TAYLOR:**

[18] **Q:** Mr. Kabala, what I really wanted to ask you was
 [19] whether or not you had determined whether all of the
 [20] information necessary to complete that form was in the hands
 [21] of the Hack Company or Mr. Hack at the time the form was
 [22] completed and sent to Mr. Shofer, if you know.

[23] **A:** If I couldn't say that at this (inaudible).

[24] **Q:** Let me just go back and revisit the issue of how
 [25] the Hack Company might have learned of the existence of any

[1] loans from the pension itself outside the area of
 [2] communications between Mr. Hack and Mr. Shofer. Is there
 [3] any data or documentation that the pension consultant would
 [4] normally get that would show whether or not there were any
 [5] participant loans from the plan?

[6] **MS. TRUHE:** Objection; asked and answered.

[7] **THE COURT:** I will overrule it. You can answer.

[8] **THE WITNESS:** The pension consultant would
 [9] normally get annual reports, annual lists of assets, and
 [10] annual documentation. In some cases where everything didn't
 [11] come in, they could tell or they at least they'd get an
 [12] indication that they needed something else from looking at
 [13] the documents. And in this case, for example, there are
 [14] items called receivables totalling \$79,934.28 at the
 [15] beginning of the year; \$401,661.49 at the end of the year.

[16] And receivables should have generated, under
 [17] normal procedures, a question, a series of questions, where
 [18] the plan administrator would want to know exactly what's
 [19] involved in those receivables. If they are delinquent
 [20] contributions, they have to treat them one way. If they are
 [21] loans to individuals, they may be distributions that create
 [22] a need to either withhold or to issue 1099's. If they are
 [23] prohibited transactions, such as loans to employers,
 [24] they may create a whole other set of problems.

[25] **BY MR. TAYLOR:**

[1] Q: From your review of the materials in this case, do
[2] you know whether or not there was any followup by the Hack
[3] Company or Mr. Hack on that issue of receivables?

[4] A: The information I saw in there was that there was
[5] some sort of recap of data to create this balance sheet.
[6] The copy of what came in to do that wasn't real clear. But
[7] there was no evidence in the material that I reviewed that
[8] there was a subsequent followup asking the nature of the
[9] receivables.

[10] Q: How is income generated by pension loans reported
[11] to the Internal Revenue Service?

[12] A: Well, if there is income from pension loans, it's
[13] put on generally on the balance sheet and on the income
[14] statement, on a 5500-C or 5500, when they're required to be
[15] filed.

[16] Q: If a loan from a pension becomes a distribution or
[17] is treated as income, how is that reported to the Internal
[18] Revenue Service?

[19] A: There's a Form 1099 which should be issued to the
[20] recipient. And if it's a prohibited transaction, then
[21] there's a Form 5330 which is supposed to be filed on -
[22] that's sort of a self-policing form, it's a report and you
[23] pay certain excise taxes when you file it.

[24] Q: Whose responsibility is it to prepare 1099's in a
[25] situation like that?

[1] A: Generally, the administration company will do the
[2] 1099's on distributions.

[3] MR. TAYLOR: I do not have any other questions,
[4] Your Honor.

[5] THE COURT: Ms. Truhe?

[6] MS. TRUHE: Yes, Your Honor. Thank you.

CROSS-EXAMINATION

BY MS. TRUHE:

[9] Q: Mr. Kabala, let us establish first of all for the
[10] record that with respect to your testimony regarding the
[11] standard of care applicable to Mr. Hack in his dealings with
[12] Mr. Shofer in August of 1984, that you believe the standard
[13] of care applicable to a pension attorney applies, correct?

[14] A: No, ma'am, I believe the standard of care is one
[15] of accuracy. And if one undertakes to do something, they
[16] have a standard of accuracy that they have to maintain, and
[17] in this area, that is not significantly different. In fact,
[18] it's an identical standard. You have a duty to give
[19] accurate advice.

[20] Q: But I thought you testified earlier, when I was
[21] questioning you as to your qualifications, that you believe
[22] the standard of care applicable to a pension attorney and a
[23] pension consultant are one and the same.

[24] A: I believe -

[25] Q: Is that not correct?

[1] A: - as to accuracy, that's exactly right.

[2] Q: And again, you do not do plan administration work,
[3] correct?

[4] A: That's right.

[5] Q: And you have never testified before as an expert
[6] witness on the issue of the standard of care applicable to a
[7] pension consultant and whether it was met or breached,
[8] correct -

[9] A: That's right.

[10] Q: - until today? Is it not true, Mr. Kabala, that
[11] you were initially retained as an expert in this case on the
[12] issue of liability by one of Mr. Shofer's first attorneys
[13] who was Thomas Bowden of the law firm of Bloom Lonquist here
[14] in Baltimore?

[15] A: Yes, ma'am.

[16] Q: That was towards the end of 1988, correct?

[17] A: Yes.

[18] Q: The purpose of your retention as an expert was to
[19] testify as to the correctness of certain advice given by Mr.
[20] Hack to Mr. Shofer in August of 1984, correct?

[21] A: Yes.

[22] Q: As I understand it, the principal reason why you
[23] believe Mr. Hack's August 9, 1984, letter fell below the
[24] standard of care, presumably applicable with Mr. Hack, is
[25] because it did not address directly the issue of possible

[1] tax consequences of loans from a pension, correct?

[2] A: It's just inaccurate. I mean, it's just wrong.
[3] Regardless of what the tax consequences are, it's just
[4] wrong. I mean, it has tax consequences, but the letter is
[5] just wrong.

[6] Q: Mr. Kabala, I am reading your testimony at
[7] page 31, from your deposition, line 19: "The letter doesn't
[8] address the issue of taxability of loans that violate 72-P.
[9] In my opinion, it should have."

[10] A: Yes, ma'am.

[11] Q: So you believe the principal flaw of that letter
[12] is that it did not address taxation issues as they arose
[13] under 72-P, correct?

[14] A: No. That letter is just wrong. It doesn't mean,
[15] whether it has tax conse - consequences or not, there's all
[16] kinds of things in there that are wrong.

[17] Q: No, I am focusing on tax consequences.

[18] A: Okay.

[19] Q: As I understand your testimony, on the issue of
[20] tax consequences and whether that letter should or should
[21] not have gotten into that area, you believe the principal
[22] flaw in that letter is that Mr. Hack did not address
[23] directly the issue of tax consequences, whatever they may
[24] be, when one borrows from a pension, correct?

[25] A: I'm not sure I can answer it that way. There are

[1] a series of things that he says you can do in here, all of
 [2] which have tax consequences, all of which are - some of
 [3] which have income tax, excise tax, and other
 [4] consequences all of which are just wrong.
 [5] **Q:** They are not wrong; they just have tax
 [6] consequences, correct?
 [7] **A:** No, ma'am, they're wrong. You cannot pledge your
 [8] loan, your account for a loan. It has tax consequences. It
 [9] has prohibited transaction consequences. And it has
 [10] disqualification consequences to the individual and to every
 [11] other participant in the plan.
 [12] **Q:** Did Mr. Shofer put his pension up as collateral
 [13] for a loan in this case?
 [14] **A:** I can't tell you that he did. I don't know that
 [15] he did.
 [16] **Q:** Can you tell me whether Mr. Shofer put his pension
 [17] up as collateral for a loan and thereafter sustained any
 [18] damage?
 [19] **A:** No, ma'am.
 [20] **Q:** No, you cannot tell; or no -
 [21] **A:** I can't tell you.
 [22] **Q:** - you do not know?
 [23] **A:** But I can tell you that if he took loans out of
 [24] his plan, and didn't properly document them, then he
 [25] could've had some prohibited transactions which could've

[1] caused the plan to be disqualified. There are things in
 [2] this letter that are just dead wrong.
 [3] **Q:** With respect to tax consequences?
 [4] **A:** The tax consequences don't even come out.
 [5] **Q:** Exactly. Mr. Kabala, I would like to show you
 [6] what has been marked as Defendant's Exhibit Number 20.
 [7] (State's (Plaintiff's (Defendant's
 [8] Exhibit No. 20, Kabala 7/12/88 memo to
 [9] Jordan, was marked for identification.)
 [10] **BY MS. TRUHE:**
 [11] **Q:** I would ask you, please, first of all, if you
 [12] recognize that document.
 [13] **A:** Yes, ma'am.
 [14] **MS. TRUHE:** Your Honor, for the Court's reference,
 [15] I would like to pass up a copy of that exhibit.
 [16] **BY MS. TRUHE:**
 [17] **Q:** First of all, Mr. Kabala, is it not true that this
 [18] is a memo authored by you to another colleague in your firm,
 [19] correct?
 [20] **A:** Yes, ma'am.
 [21] **Q:** Who is S.F.J., that colleague?
 [22] **A:** Susan Foreman Jordan. It's my partner.
 [23] **Q:** All right. This memo was written by you on
 [24] July 12, 1988, correct?
 [25] **A:** Yes.

[1] **Q:** Would it fair to say that this is a
 [2] memorialization of some of your preliminary thoughts in the
 [3] case after speaking with Mr. Shofer's first attorney?
 [4] **A:** Yes.
 [5] **Q:** All right. I would like to look towards the
 [6] bottom of your memorandum, the paragraph beginning: "I told
 [7] him I'd look at the case on an hourly basis." Do you see
 [8] that?
 [9] **A:** Yes.
 [10] **Q:** You go on to state: "and give him an analysis
 [11] both as to whether Hack gave the wrong advice or failed to
 [12] give him advice, and whether we think Hack has any
 [13] responsibility to give him tax advice." You go on to write:
 [14] "I told him I didn't think that most of the actuaries I know
 [15] would specifically give tax advice." Do you see that?
 [16] **A:** Yes.
 [17] **Q:** Did you believe that when you wrote it?
 [18] **A:** Yes.
 [19] **MS. TRUHE:** Your Honor, I would move for admission
 [20] into evidence of Mr. Kabala's memorandum of July 12, 1988,
 [21] which is Defendant's Exhibit Number 20.
 [22] **THE COURT:** It is admitted.
 [23] (Defendant's Exhibit No. 20, Kabala
 [24] 7/12/88 memo to Jordan, previously
 [25] marked for identification, was received

[1] in evidence.)
 [2] **BY MS. TRUHE:**
 [3] **Q:** Mr. Kabala, would you please refer to the
 [4] paragraph also highlighted on that memorandum that begins:
 [5] "In any event." You write -
 [6] **A:** Yeah, I was dealing with -
 [7] **Q:** I am sorry, I have not asked the question yet.
 [8] **A:** Oh, okay.
 [9] **Q:** Do you see the paragraph -
 [10] **A:** Yes, I do.
 [11] **Q:** - that begins: "In any event," okay. You write:
 [12] "In any event, the individual took out the money and assumed
 [13] that it was not taxable. This is somewhat ludicrous, but I
 [14] would have to see exactly what was said." Do you see that?
 [15] **A:** Yes, and the memo -
 [16] **Q:** I have not asked the question yet -
 [17] **A:** - was -
 [18] **Q:** - other than do you see that?
 [19] **A:** - dealing with - yes, ma'am, but -
 [20] **Q:** I am sorry, Mr. Kabala, I have not asked the
 [21] question. Mr. Kabala, is it not true that this sentence,
 [22] "The individual took the money out and assumed that it was
 [23] not taxable," is that what Mr. Bowden explained to you, that
 [24] Mr. Shofer took money out from his pension and assumed it
 [25] was not taxable?

[1] A: It was my understanding that we were talking about
 [2] a withdrawal at that stage, a withdrawal from the account.
 [3] Q: The pension?
 [4] A: Yes, just a plain, straight withdrawal rather than
 [5] loans.
 [6] Q: Well, and that Mr. Shofer assumed it was not
 [7] taxable, correct?
 [8] A: But it was relating to a withdrawal from the
 [9] voluntary -
 [10] Q: I am sorry, would you please answer my question?
 [11] MR. TAYLOR: Well, Your Honor, the witness
 [12] obviously does not like Mr. Kabala's answers. But I think
 [13] he ought to be given an opportunity to explain what -
 [14] THE COURT: The witness is Mr. Kabala, but I
 [15] understand. I understood him to say that at the time that
 [16] he wrote this memo, his understanding was that Mr. Shofer
 [17] was making withdrawals from the plan; not loans. I am lost
 [18] after that. Where are we next?
 [19] MS. TRUHE: I am sorry.
 [20] BY MS. TRUHE:
 [21] Q: Mr. Kabala, let's try this again. You write:
 [22] "The individual took the money and assumed that it was not
 [23] taxable." Are you referring to Mr. Shofer in that instance
 [24] taking money out of his pension?
 [25] A: Taking a withdrawal from his plan, that's right.

[1] Q: All right. And then you write: "This is somewhat
 [2] ludicrous."
 [3] A: Yes, I -
 [4] Q: Did you believe that when you wrote it?
 [5] A: I believed that anybody who took money from their
 [6] account, who took a withdrawal, would have to know that
 [7] there were tax consequences to it.
 [8] Q: Mr. Kabala, let's go to the actual conversation,
 [9] actually, there were two which Mr. Shofer had with Mr. Hack
 [10] in August of 1984. Is it not true that Mr. Shofer never
 [11] told Mr. Hack how much he was intending to borrow from his
 [12] pension?
 [13] A: I don't know one way or another. I think
 [14] there has been a number of comments, testimony from Mr. Hack
 [15] that it was just a general subject and there were no
 [16] specifics. There were times when he says he can remember
 [17] the conversation in detail, and other times when he doesn't.
 [18] Q: Well, I am not sure that answered my question. Is
 [19] it not true that Mr. Shofer never told Mr. Hack how much
 [20] he -
 [21] A: I can't tell you that. I was not -
 [22] Q: You are not sure, correct?
 [23] A: - a party to that conversation.
 [24] Q: Does that matter to you one way or another for
 [25] purposes of your opinion here today?

[1] A: As to whether that letter -
 [2] Q: No, as to whether Mr. Hack met the standard of
 [3] care in failing to give Mr. Shofer any tax advice about the
 [4] monies which he eventually withdrew from the pension?
 [5] A: Absolutely, it matters.
 [6] Q: It matters?
 [7] A: Sure. I think Mr. Hack, if he were going to
 [8] advise on loans, had a duty to look at the facts and deal
 [9] with whether there were or were not non-deductible
 [10] contributions that Mr. Shofer had made 'cause they had one
 [11] set of consequences. The earnings on voluntary accounts had
 [12] other consequences. And employer accounts had yet other
 [13] consequences. I think -
 [14] Q: Do you know whether Mr. Shofer ever gave Mr. Hack
 [15] any facts about how much he was intending to borrow from his
 [16] pension so that Mr. Hack could make those kinds of
 [17] determinations?
 [18] A: I couldn't tell you that.
 [19] Q: All right. Is it not also true that Mr. Shofer
 [20] never told Mr. Hack that he might borrow from the plan more
 [21] than once?
 [22] A: I can't tell you that.
 [23] Q: Is it not also true that Mr. Shofer never told Mr.
 [24] Hack during their August telephone conversations why he
 [25] needed to borrow from the pension?

[1] A: Again, I think Mr. Hack says that, but I don't
 [2] know that one way or another.
 [3] Q: Do you know whether Mr. Shofer has said that in
 [4] testimony?
 [5] A: I don't recall.
 [6] Q: Is it not also true that Mr. Shofer never asked
 [7] Mr. Hack how to borrow money from the pension?
 [8] A: I - I don't know that - that - I know exactly
 [9] what the substance of the conversation was. But the letter
 [10] deals with some of the hows and the -
 [11] Q: But that was not my question.
 [12] A: - the question - the test - the question that
 [13] he seemed to ask Mr. Berman when he said - Mr. Hack said
 [14] he went and talked to Mr. Berman in some respects dealt with
 [15] the hows, how to take the money out.
 [16] Q: Mr. Kabala, please listen to my question. Is it
 [17] not true that Mr. Shofer - focus on Mr. Shofer and what he
 [18] asked Mr. Hack or did not ask Mr. Hack during their two
 [19] August telephone conversations. Is it not true that Mr.
 [20] Shofer never asked Mr. Hack how to borrow money from his
 [21] pension, or do you know?
 [22] A: I don't know.
 [23] Q: Is it also not true that Mr. Shofer bounced more
 [24] than one idea off of Mr. Hack during their telephone
 [25] conversations in August of 1984? He also brought up the

[1] possibility of putting his pension up as collateral for a
 [2] loan, correct?
 [3] **A:** Yes.
 [4] **Q:** Now after Mr. Shofer made inquiry of Mr. Hack s to
 [5] his right to borrow money from his pension plan in 1984, do
 [6] you see any duty or responsibility on the part of Mr. Shofer
 [7] to check back in with Mr. Hack and tell him that in fact he
 [8] is going to borrow money from his pension?
 [9] **A:** As the plan administrator, I see a duty on the
 [10] company -
 [11] **Q:** No, I am asking about Mr. Shofer in any -
 [12] **MR. TAYLOR:** Your Honor, I think the witness ought
 [13] to be allowed to answer the question.
 [14] **THE COURT:** Well, if he would answer the question
 [15] and then he can explain his answer, okay? So, Mr. Kabala,
 [16] if you will respond to the question, then I will allow you
 [17] an opportunity to go on.
 [18] **THE WITNESS:** I see a duty on the Hack Company to
 [19] look at the annual assets every year and determine whether
 [20] any action has or has not been taken and to make appropriate
 [21] adjustments or appropriate advise from there.
 [22] **BY MS. TRUHE:**
 [23] **Q:** Assuming that data has been sent to him, correct?
 [24] **A:** Yes, ma'am.
 [25] **Q:** But again, my question - you answered a different

[1] one. My question is do you see any duty or responsibility
 [2] on the part of Mr. Shofer, who was trustee of this plan, to
 [3] check back in with Mr. Hack and tell him that in fact he is
 [4] going to take a significant amount of money from his pension
 [5] in 1984?
 [6] **A:** It depends on - no, I think he would normally
 [7] have checked back.
 [8] **Q:** In fact, as you told me in your deposition in
 [9] 1990, you think it would have been a good idea, correct?
 [10] **A:** Yes, ma'am.
 [11] **Q:** How about in 1985, do you think it would have been
 [12] prudent on the part of Mr. Shofer, especially as trustee, to
 [13] check back in again with Mr. Hack to find out whether what
 [14] was lawful in 1984 was still lawful in 1985 when he borrowed
 [15] \$80,000 from his pension?
 [16] **A:** I would've thought that the year-end statement
 [17] with the evidence of loans would've generated some comment
 [18] from the administration company.
 [19] **Q:** But do you know whether Mr. Shofer sent that in to
 [20] Mr. Hack?
 [21] **A:** No.
 [22] **Q:** If he had not, how would that affect your opinion?
 [23] **A:** Well, the plan had been amended by that time. I
 [24] would've thought that there would've been a discussion of
 [25] whether loans were to be permitted or not permitted in the

[1] amendment of the plan.
 [2] **Q:** Regardless of plan amendment, assume for a moment
 [3] that Mr. Shofer had not sent in in a timely fashion asset
 [4] data for plan year 1984, do you think it would have been
 [5] prudent for Mr. Shofer to check back in with Mr. Hack in
 [6] 1985 when he borrowed \$80,000 from his pension to find out
 [7] whether that was still appropriate?
 [8] **A:** Yes.
 [9] **Q:** How about in 1986, do you think it would have been
 [10] prudent for Mr. Shofer, especially as trustee, to check back
 [11] in again with Mr. Hack when he borrowed \$35,000 from the
 [12] pension?
 [13] **A:** Yes.
 [14] **Q:** Is it not true that Mr. Shofer could have borrowed
 [15] up to \$126,600 from his voluntary account without any
 [16] adverse tax consequences?
 [17] **A:** If you look at 72-P of the Internal Revenue Code
 [18] alone, you'll reach that conclusion. If you look at the
 [19] plan documents, you won't reach that conclusion.
 [20] **Q:** Well, is it not true that Mr. Shofer, according to
 [21] the plan documents, could borrow up to 100 percent of his
 [22] voluntary account? There were simply going to be tax
 [23] consequences of a variety of forms?
 [24] **A:** No, well, you can always do what is not permitted
 [25] by the plan, and there are -

[1] **Q:** But there would be tax consequences.
 [2] **A:** There are consequences of all types to that.
 [3] **Q:** Has your firm ever had a situation where the
 [4] pension plan is a client and some of the participants are
 [5] clients of the firm but some are not?
 [6] **A:** Yeah, I believe we have.
 [7] **Q:** All right now, in those situations where a loan is
 [8] taken by a participant who is not a client of your firm, do
 [9] you do any advising with regard to that person in terms of
 [10] tax consequences?
 [11] **A:** On what behalf - on whose behalf? I mean -
 [12] **Q:** Well, let's say the pension plan is a client -
 [13] **A:** Okay.
 [14] **Q:** - of your firm, and some but not all of the
 [15] participants are also clients of your firm. Speaking about
 [16] those participants, let's just take a given participant, who
 [17] is not a client of your firm, calls you up and says I want
 [18] to borrow money from my pension plan. Do you feel you have
 [19] a duty to advise that participant about all the tax
 [20] ramifications of loans from the pension?
 [21] **A:** If I represent the plan, it's unlikely that a non-
 [22] client participant would call. But if I represent the plan,
 [23] absolutely because I have to do documents. I have to tell
 [24] the plan that if they do these things, they may or may not
 [25] meet the terms of the plan, and if they're going to do them

[1] and they don't meet the terms of the plan, we have to change
[2] the plan. I have to tell the plan or the trustees or the
[3] administrator, the company that they may have a distribution
[4] for which they have a 1099 or they have withholding. And
[5] they may also have a problem of whether we have adequate
[6] collateral, how you're going to get the money back, what
[7] kind of payback schedule you're going to use. So I would
[8] basically be advising the plan and the participant at the
[9] same time. If that is not allowed by the plan, there's no
[10] doubt in my mind that I'd be doing that.

[11] **Q:** You would be doing all that with respect to a
[12] participant who was not a client of your firm, correct?

[13] **A:** The plan, in your hypothetical, the plan is my
[14] client.

[15] **Q:** Yes. Let me go to your deposition testimony on
[16] September 30, 1990, which was different. I am referring to
[17] page 101, line 12. Question: "Well given that specific
[18] context where the plan is a client of yours and some of the
[19] participants but not all of the participants are clients of
[20] yours, speaking just today about those participants, non-
[21] clients, who have taken loans from their pension plan, do
[22] you feel you have a duty to advise those participants, non-
[23] clients, about all tax ramifications of their loans from the
[24] pension plan?" Answer: "No, I don't." When I asked you
[25] why not, your response was, on page 102, line 1: "There's

[1] no way I'm going to contact all of them; they're not my
[2] clients." Do you see that testimony?

[3] **A:** That's right (inaudible).

[4] **Q:** Do you know whether Mr. Shofer was personally a
[5] client of Mr. Hack's firm?

[6] **A:** Pardon?

[7] **Q:** Do you know whether Mr. Shofer was personally ever
[8] a client of Mr. Hack's firm?

[9] **A:** No, I don't.

[10] **Q:** You do not know?

[11] **A:** No.

[12] **Q:** Well, assuming Mr. Shofer is not personally a
[13] client and was never personally a client of Mr. Hack's
[14] company, why do you believe Mr. Hack had a duty to explain
[15] the tax ramifications of borrowing money from a pension plan
[16] to him when you yourself, at least in 1980, did not believe
[17] you had such a duty with respect to non-client participants
[18] of your firm?

[19] **MR. TAYLOR:** Well, I would object to the question,
[20] Your Honor. It assumes facts which I do not think are in
[21] evidence.

[22] **THE COURT:** Well, you will get redirect. I will
[23] allow the witness to answer.

[24] **THE WITNESS:** Mr. Hack was talking to an
[25] individual who was the trustee; the - probably the

[1] administrator, on the 5500 with a - the capital A
[2] administrator as Mr. Hack seems to differentiate them; and a
[3] fiduciary. The tax consequences, the prohibited transaction
[4] consequences, and the document consequences are all relevant
[5] to that individual regardless of who's borrowing the money,
[6] whether it's a client or not because you don't want to
[7] disqualify your plan so that everybody get taxed on all the
[8] money.

[9] **Q:** That gets into the issue of disqualification of
[10] the plan, correct?

[11] **A:** Or distributions, or taxation, or all of it. It's
[12] all intertwined.

[13] **Q:** I would like to ask you just a few more questions
[14] about the 1984 5500-C that was filed with the IRS in this
[15] case.

[16] **MS. TRUHE:** Defendant's Exhibit Number 5, please.
[17] (Discussion off the record.)

[18] **BY MS. TRUHE:**

[19] **Q:** All right, Mr. Kabala, I am showing you what has
[20] been marked and admitted into evidence as Defendant's
[21] Exhibit Number 9. This is the 5500-C filed by Mr. Shofer
[22] for the plan year 1984. Do you see that?

[23] **A:** Yes, ma'am.

[24] **Q:** Mr. Shofer filed that form under the penalties of
[25] perjury, correct?

[1] **A:** That's right.

[2] **Q:** He also attested that he has examined this return
[3] report including accompanying schedules and statements; and
[4] to the best of his knowledge and belief, they are true,
[5] correct, and complete. Correct?

[6] **A:** Yes, ma'am.

[7] **Q:** That was not true, was it? Mr. Shofer did -

[8] **A:** No, I think that's not true. I think this is not
[9] accurate.

[10] **Q:** That is right. Mr. Shofer did not meet those
[11] obligations, did he?

[12] **A:** The rep - the form is not accurate.

[13] **Q:** He did not meet those obligations, did he?

[14] **A:** That's right.

[15] **Q:** Specifically with respect to question number 17,
[16] "What percentage of plan assets are loans to a party in
[17] interest?" It states zero, correct?

[18] **A:** That's right.

[19] **Q:** And that is not right?

[20] **A:** That's right.

[21] **Q:** Do you have any problem with Mr. Shofer filing
[22] this form with inaccurate information on it?

[23] **MR. TAYLOR:** Well, let me object to that question.

[24] I mean, I do not know what exactly what any problem with Mr.
[25] Shofer filing the form. I mean -

[1] **MS. TRUHE:** I will rephrase.
 [2] **THE COURT:** Please rephrase.
 [3] **BY MS. TRUHE:**
 [4] **Q:** Do you believe it was prudent as trustee of the
 [5] plan, for Mr. Shofer to have filed that 5500-C with that
 [6] incorrect information on it?
 [7] **A:** I don't think it's prudent for anybody to file a
 [8] form that has any knowingly incorrect information on it.
 [9] **Q:** Do you know whether Mr. Hack's firm had that
 [10] information specifically with respect to loans from the
 [11] pension in 1984 when this 5500-C came due?
 [12] **A:** The deposition seems to indicate that someone got
 [13] information and recall - in the Hack Company - and
 [14] recalculated to build that balance sheet.
 [15] **Q:** Who was that?
 [16] **A:** Summer - I think that was Mr. Hack's on the
 [17] exhibits. The -
 [18] **Q:** Can you tell us for sure where you are getting
 [19] that information?
 [20] **A:** If you had the exhibits to Mr. Hack's deposition,
 [21] I think I probably could.
 [22] **Q:** Do you mean like all of the exhibits to Mr. Hack's
 [23] deposition? Do you know what you are looking for?
 [24] **A:** I'm looking for a very bad copy of the computer
 [25] sheet, and then a handwritten 2-page summary balance sheet.

[1] The computer sheet that you were saying was not on the one
 [2] that was filed.
 [3] **Q:** Is that what you are referring to, Defendant's
 [4] Exhibit Number 10, which is a letter from Katherine
 [5] Goldsmith to Mr. Shofer attaching 1984 and 1985 asset data?
 [6] It is a fairly decipherable copy indicating \$200,000 in
 [7] loans.
 [8] **A:** It was a hand recap of that that was in as part of
 [9] the attachments that had the specific assets listed.
 [10] **MR. TAYLOR:** Well, Your Honor, let me, I do not
 [11] want to necessarily object. But I think the document that
 [12] the witness may be referring to is one of the Plaintiff's
 [13] exhibits that was marked but not admitted. I will offer it
 [14] during the course of the trial through one of the
 [15] Defendant's witnesses.
 [16] **MS. TRUHE:** Well, Mr. Taylor, can you -
 [17] **MR. TAYLOR:** Let me see if -
 [18] **MS. TRUHE:** - direct us to that exhibit?
 [19] **THE COURT:** Let's take a minute while you look for
 [20] that. The Court will take a brief recess.
 [21] (Brief recess.)
 [22] **THE COURT:** Please be seated. Have we found what
 [23] we need?
 [24] **MS. TRUHE:** We have.
 [25] **THE COURT:** Okay. We are back on the record,

[1] then.
 [2] **BY MS. TRUHE:**
 [3] **Q:** Mr. Kabala, I am showing you what has been marked
 [4] and moved into evidence as Plaintiff's Exhibit Number 33.
 [5] Is this the document reflecting the plan asset data for 1984
 [6] which you were referring to earlier?
 [7] **A:** Yes, ma'am.
 [8] **Q:** Do you have any idea when that was provided -
 [9] **A:** No.
 [10] **Q:** - to Mr. Hack's company?
 [11] **A:** No.
 [12] **Q:** So again, do you have any evidence in this case
 [13] that Mr. Hack was provided with different information other
 [14] than what was sent to him eventually by Mr. Shofer in the
 [15] form of the copy of the 5500-C?
 [16] **A:** I'm not sure I -
 [17] **Q:** Do you have -
 [18] **A:** I don't, I'm not sure I know whether Mr. Hack's
 [19] office prepared the 5500-C or Mr. Shofer's office sent it to
 [20] Mr. Hack. I couldn't answer that either way. It was my
 [21] understanding that Mr. Hack's office prepared the 5500-C and
 [22] then Mr. Shofer filed it.
 [23] **Q:** But the answer to question number 17 was zero
 [24] loans to parties in interest, correct?
 [25] **A:** Yes.

[1] **Q:** Do you know whether Mr. Hack had any different
 [2] information?
 [3] **A:** No, I don't.
 [4] **Q:** Finally, Mr. Kabala, is it not true that with
 [5] respect to tax planning in general, there can be those
 [6] situations where it would be good tax planning for an
 [7] individual to take money out of his pension knowing it will
 [8] be a distribution and taxable?
 [9] **A:** Yes.
 [10] **MS. TRUHE:** That is all I have.
 [11] **THE COURT:** Ms. Whelihan?
 [12] **MS. WHELIHAN:** I have no questions, Your Honor.
 [13] **THE COURT:** Redirect?
 [14] **MR. TAYLOR:** Just a couple, Your Honor.
 [15] **REDIRECT EXAMINATION**
 [16] **BY MR. TAYLOR:**
 [17] **Q:** Mr. Kabala, you already have Defendant's
 [18] Exhibit 20 in your possession. Is there a difference for
 [19] tax treatment between withdrawals and loans from a pension
 [20] account?
 [21] **A:** Yes.
 [22] **Q:** What is that difference?
 [23] **A:** Well, it depends on the way the loan is
 [24] structured. A loan, if it is a loan that under Section 72-P
 [25] is not a distribution, is just a loan. You've got to pay it

[1] back. It is not income to the recipient. And you pay
 [2] interest on it, and you pay the loan back either in a lump
 [3] sum or pursuant to the documents with an amortization
 [4] schedule; that sort of thing. A withdrawal is a taxable
 [5] distribution unless it is money that was put into the plan
 [6] after-tax dollars, and then you can get those back tax-free.
 [7] **Q:** The reference that is made in Defendant's
 [8] Exhibit 20, is that to withdrawals or loans?
 [9] **A:** It's to withdrawals.
 [10] **Q:** If a plan participant consults the pension
 [11] administrator concerning the advisability of making a loan
 [12] from the account, in your opinion, should information be
 [13] included in response to such an inquiry that would provide
 [14] instruction as to how to make such a loan as a part of the
 [15] total advice given?
 [16] **A:** Yes.
 [17] **MR. TAYLOR:** I do not have any other questions,
 [18] Your Honor.
 [19] **THE COURT:** Is there anything further?
 [20] **MS. TRUHE:** I have no further questions.
 [21] **THE COURT:** Okay, thank you, Mr. Kabala. You are
 [22] excused.
 [23] **THE WITNESS:** Thank you, Your Honor.
 [24] **THE COURT:** Do you want to call your next witness?
 [25] **MR. TAYLOR:** Yes. Mr. Giampietro.

[1] **NICHOLAS GIAMPIETRO,**
 [2] a witness produced on call of the Plaintiff, having first
 [3] been duly sworn, was examined and testified as follows:
 [4] **THE CLERK:** State your name and address for the
 [5] record, please.
 [6] **THE WITNESS:** Nicholas Giampietro. Residence?
 [7] **THE CLERK:** Yes.
 [8] **THE WITNESS:** 29 Iron Mill Garth, Hunt Valley,
 [9] Maryland.
 [10] **THE CLERK:** Thank you.
 [11] **DIRECT EXAMINATION**
 [12] **BY MR. TAYLOR:**
 [13] **Q:** Mr. Giampietro, what is your occupation or
 [14] profession?
 [15] **A:** I'm an attorney.
 [16] **Q:** Where is your practice located?
 [17] **A:** My practice is located in Towson, Maryland.
 [18] **Q:** What is your educational background?
 [19] **A:** I attended undergraduate school at Villanova
 [20] University in Villanova, Pennsylvania. I have a Bachelors
 [21] of Science and I have a J.D. from Weiner University School
 [22] of Law. And I have a Masters of Law in Taxation from Temple
 [23] University.
 [24] **Q:** For what period of time have you been involved in
 [25] the private practice of law?

[1] **A:** Since 1975.
 [2] **Q:** Do you specialize in any particular type of law?
 [3] **A:** I specialize in - among my specialties are
 [4] the tax practice which includes representation of qualified
 [5] retirement plans.
 [6] **Q:** Are you yourself a pension plan administrator?
 [7] **A:** I own a company which provides pension
 [8] administrative services.
 [9] **Q:** Were you familiar with the Stuart Hack Company?
 [10] **A:** Yes, I was.
 [11] **Q:** Does your company provide similar or the same
 [12] services that the Stuart Hack Company would provide, if you
 [13] know?
 [14] **A:** Yes, we do.
 [15] **Q:** How many plans would be under your administration
 [16] with your company?
 [17] **A:** Currently, we administer 150 qualified retirement
 [18] plans.
 [19] **Q:** Do you know Richard Shofer, the Plaintiff in this
 [20] case?
 [21] **A:** Yes, I do.
 [22] **Q:** For what period of time have you known him?
 [23] **A:** I've known Mr. Shofer since 1986.
 [24] **Q:** Is Mr. Shofer a client of yours?
 [25] **A:** Yes, he is.

[1] **Q:** What were the circumstances that brought you and
 [2] Mr. Shofer together?
 [3] **A:** I was contacted by Mr. Shofer's accounting firm in
 [4] the latter part of 1996 to consult and issue opinion
 [5] regarding a letter which Mr. Shofer received from Mr. Hack.
 [6] **Q:** Did that meeting in fact take place?
 [7] **A:** I met with Mr. Shofer in December of 1986, excuse
 [8] me.
 [9] **Q:** Let me show you what has been introduced into
 [10] evidence as Plaintiff's Exhibit 5, and ask you if you have
 [11] seen that document before?
 [12] **A:** Yes, I have.
 [13] **Q:** Was that document given to you, or a copy of it,
 [14] at the time you met with Mr. Shofer?
 [15] **A:** Around the time I met with Mr. Shofer, Mr.
 [16] Shofer's accountant provided me with a copy of this letter.
 [17] **Q:** Did you review that letter at that time?
 [18] **A:** Yes, I did.
 [19] **Q:** After reviewing the letter, were you asked to
 [20] express an opinion concerning the letter itself?
 [21] **A:** Yes, I was.
 [22] **Q:** What specifically were you asked to do and by
 [23] whom?
 [24] **MS. TRUHE:** Objection.
 [25] **THE COURT:** Basis?

[1] **MS. TRUHE:** Well, I think we are getting into the
[2] domain of expert testimony; at least, that would appear to
[3] be what we are trying to do. I believe the Court has ruled
[4] that any expert testimony duplicative of another expert's
[5] is -

[6] **THE COURT:** Can you proffer to me, Mr. Taylor,
[7] what is different about this testimony?

[8] **MR. TAYLOR:** Well, Your Honor, I actually was not
[9] going to offer Mr. Giampietro as an expert. But I think in
[10] order for Mr. Giampietro to testify with respect to what
[11] steps or actions he took on behalf of his client,
[12] Mr. Shofer, a predicate for that work would be his
[13] assessment of the letter itself; in other words, what the
[14] problems or difficulties the letter would give his client
[15] who acted upon the advice.

[16] **THE COURT:** Well, he can certainly testify as to
[17] difficulties that he ascertained and what actions he thought
[18] he needed to take on behalf of his client to correct those
[19] things or assist his client.

[20] **MR. TAYLOR:** Well, that is the basis that I wanted
[21] him to -

[22] **THE COURT:** I mean, he is a lawyer and he spotted
[23] issues, and he dealt with those issues.

[24] **MR. TAYLOR:** Thank you.

[25] **MS. TRUHE:** But, Your Honor, to the extent that

[1] Mr. Giampietro is about to critique this letter, I think we
[2] just heard that testimony.

[3] **THE COURT:** Well, I mean, I think it is very
[4] difficult not to have some duplicative testimony. But I do
[5] not, since he is not going to be offered as an expert and I
[6] am not going to be relying on his opinion with respect to
[7] standard of care, I do not view it as entirely duplicative.

[8] **MR. TAYLOR:** Thank you, Your Honor.

[9] **BY MR. TAYLOR:**

[10] **Q:** Mr. Giampietro, what was your opinion with respect
[11] to the information contained in that letter?

[12] **MS. TRUHE:** Objection. With respect to tax
[13] issues, which, I believe, is what Mr. Giampietro told -

[14] **MR. TAYLOR:** Well, Mr. Giampietro is a tax
[15] attorney. I can narrow it, if we -

[16] **THE COURT:** Why don't we try that?

[17] **BY MR. TAYLOR:**

[18] **Q:** Mr. Giampietro, directing your attention to the
[19] issue of taxability, when you reviewed that letter, were
[20] there any tax issues that appeared, or at least that you
[21] found, after your review of it?

[22] **A:** Yes, there were.

[23] **Q:** Could you summarize what the tax issues were with
[24] respect to the advice contained in the letter?

[25] **A:** To the extent that the amount of the loan exceeded

[1] Mr. Shofer's basis in his voluntary account plus \$50,000,
[2] the purported loan was a taxable distribution.

[3] **Q:** Does the letter say that?

[4] **A:** No.

[5] **Q:** What was the situation with regard to Mr. Shofer
[6] and any loans from his pension when you met him in 1986? In
[7] other words, had there been loans taken at that time?

[8] **A:** Yes, there were.

[9] **Q:** What were you asked to do after you rendered your
[10] opinion with regard to the taxability issues that are
[11] contained in that letter?

[12] **A:** I was asked to issue an opinion to Mr. Shofer and,
[13] I believe, his accountant with regard to whether the loans
[14] that Mr. Shofer took, I believe they were in 1984 and
[15] 1985 constituted taxable distributions, and to calculate
[16] based upon information that Mr. Shofer and/or his accountant
[17] supplied to me, taxable portion of the distribution -
[18] taxable portion of the loan, excuse me.

[19] **Q:** Had any taxes been assessed by the Internal
[20] Revenue Service at that time, if you know?

[21] **A:** No.

[22] (Plaintiff's Exhibit No. 38, Giampietro
[23] 4/30/87 letter to Shofer, was marked for
[24] identification.)

[25] **MR. TAYLOR:** The Court's indulgence.

[1] **THE COURT:** Yes.

[2] (Discussion off the record.)

[3] **BY MR. TAYLOR:**

[4] **Q:** Mr. Giampietro, let me have you look at
[5] Plaintiff's Exhibit 38, and ask you if you can identify that
[6] document just for the record.

[7] **A:** Yes. This is a letter that I wrote to Mr. Shofer
[8] on April 30th, 1987, which expresses an opinion with regard
[9] to the application of certain sections of the Internal
[10] Revenue Code with regard to loans from qualified plans.

[11] **Q:** All right. The date on that letter is what?

[12] **A:** April 30th, 1987.

[13] **Q:** Now you had testified that you initially met Mr.
[14] Shofer in 1986. After you had expressed your opinion with
[15] regard to Mr. Hack's letter, what actions were you requested
[16] to take and what did you do?

[17] **A:** We were, I say we - there were amended returns
[18] filed for the years that there were amended individual
[19] returns filed for the years that were affected by the loans
[20] in excess of the applicable sections of the Internal Revenue
[21] Code. And arrangements were made with the collection
[22] section of the IRS to pay the taxes attributable to the
[23] taxable distributions.

[24] **Q:** At the time you initially met Mr. Shofer, amended
[25] returns had not been prepared or filed at that point -

[1] A: That's correct.
 [2] Q: - is that correct?
 [3] A: That's correct.
 [4] Q: Did you participate in any way the preparation of
 [5] amended returns?
 [6] A: No, I did not, apart from providing this
 [7] information.
 [8] Q: After you had met Mr. Shofer and reviewed the
 [9] letter from Mr. Hack, did you have any contact with Mr.
 [10] Hack?
 [11] A: I spoke with Mr. Hack on one occasion.
 [12] Q: Do you remember who initiated that call?
 [13] A: I believe Mr. Hack called me, although -
 [14] Q: And -
 [15] A: - I believe that -
 [16] Q: Do you remember what the gist of the conversation
 [17] was?
 [18] A: We generally discussed the loans that Mr. Shofer
 [19] had taken in '84 and '85. And I believe Mr. Hack expressed
 [20] an opinion that with regard to his opinion regarding the -
 [21] the taxability of the loans.
 [22] Q: Do you remember what that opinion was?
 [23] A: I believe he concluded that there was something in
 [24] the regulations which supported the position that the loans
 [25] were not taxable, which I -

[1] Q: And -
 [2] A: - which, by the way, I expressed my opinion I
 [3] disagreed with him.
 [4] Q: Had you done research on that issue at that time,
 [5] or did you need to do research on it?
 [6] A: I did research it at the time.
 [7] Q: With regard to the additional taxes that were
 [8] generated by the filing of the amended 1984 and 1985
 [9] returns, did you have any contact with the Internal Revenue
 [10] Service with respect to those issues?
 [11] A: With regard to the collectability of the tax; not
 [12] with regard to the amount.
 [13] Q: What specifically did you do for Mr. Shofer?
 [14] A: Well, we met with the Internal Revenue Service and
 [15] attempted to negotiate a payout for Mr. Shofer's payment of
 [16] the tax assessments for 1984 and 1985. I believe we met
 [17] with an agent by the name of Mr. De Vicentis, and were, we
 [18] were successful in achieving an arrangement which Mr. Shofer
 [19] could live with and that's what I did.
 [20] Q: There was an agreement with the Internal Revenue
 [21] Service?
 [22] A: Yes, there was.
 [23] (Plaintiff's Exhibit No. 39, Giampietro
 [24] 3/19/93 letter to Bornhorst, was marked
 [25] for identification.)

BY MR. TAYLOR:

[1] Q: Mr. Giampietro, let me show you what has been
 [2] marked as Plaintiff's Exhibit 39. Do you recognize that
 [3] document?
 [4] A: Yes, I do.
 [5] Q: What is that?
 [6] A: It's a letter of March 19th, 1993, from myself to
 [7] Mr. Bornhorst, who at that time was Mr. Shofer's counsel,
 [8] which reflects the amount that was billed with regard to the
 [9] dispute between Mr. Shofer and Mr. Hack, and what portion of
 [10] that amount related to excise tax issues concerning pension
 [11] loans and related prohibited transactions.
 [12] Q: You segregated the fees that you had charged Mr.
 [13] Shofer on the excise tax and prohibited transaction issues,
 [14] had you not?
 [15] A: Yes, I did.
 [16] Q: Was that letter prepared after review of your
 [17] billing records?
 [18] A: Yes, it was.
 [19] MR. TAYLOR: Your Honor, at this time I would like
 [20] offer both Plaintiff's 38 and 39 into the record.
 [21] MS. TRUHE: No objection.
 [22] THE COURT: Admitted.
 [23] (Plaintiff's Exhibit Nos. 38, Giampietro
 [24] 4/30/87 letter to Shofer, and 39,
 [25]

[1] Giampietro 3/19/93 letter to Bornhorst,
 [2] previously marked for identification,
 [3] were received in evidence.)
 [4] MR. TAYLOR: I do not have any other questions.
 [5] THE COURT: Cross-examination of this witness?
 [6] MS. TRUHE: Yes, Your Honor. I would like to pass
 [7] up for the Court's reference the exhibits, or copies of the
 [8] exhibits, which I -
 [9] THE COURT: Thank you.
 [10] MS. TRUHE: - will be referring to during the
 [11] course of my cross.
 [12] CROSS-EXAMINATION
 [13] BY MS. TRUHE:
 [14] Q: Mr. Giampietro, as I understand it, your
 [15] involvement with Mr. Shofer and his business, including his
 [16] pension, began when you were contacted by Alan Marvel at the
 [17] accounting firm of Greybush Newman in late 1986, correct?
 [18] A: Correct.
 [19] Q: What was your relationship to Mr. Marvel at that
 [20] time?
 [21] A: Mr. Marvel and I shared several clients together,
 [22] and in addition, Mr. Marvel was my personal accountant.
 [23] Q: All right. Did you rely on Mr. Marvel for
 [24] personal tax matters and expertise?
 [25] A: Yes, I did.

[1] Q: And he would rely on you for technical questions
 [2] in the qualified pension plan area?
 [3] A: That's correct.
 [4] Q: Have you ever had any dealings with Phil Matz at
 [5] Greybush who was the head of the Tax Department?
 [6] A: Yes, I have.
 [7] Q: Were any of these tax issues pension-related?
 [8] A: During the course of our relationship, there have
 [9] been pen - pension issues that have come up.
 [10] Q: All right. Do you still have a relationship with
 [11] the accounting firm of Greybush Newman?
 [12] A: Yes, I do.
 [13] Q: In what way?
 [14] A: I still share clients with Greybush Newman and
 [15] Harvey Newman is my personal accountant.
 [16] Q: Now when Mr. Marvel contacted you about Mr. Shofer
 [17] in late 1986, you were asked to meet with Mr. Shofer?
 [18] A: I was asked to call Mr. Shofer.
 [19] Q: All right. Who prepared Mr. Shofer's original
 [20] 1984 and 1985 tax returns?
 [21] A: I believe they were prepared by Greybush Newman.
 [22] Q: With reference to the 1984 return, you would agree
 [23] that it did not accurately treat a portion of the monies
 [24] which Mr. Shofer had withdrawn in 1984 from the pension as
 [25] taxable income to him, correct?

[1] MS. WHELIHAN: Objection.
 [2] THE WITNESS: That's correct.
 [3] THE COURT: Basis?
 [4] MS. WHELIHAN: I do not think the issue is whether
 [5] the return is accurate. I think the question is misleading.
 [6] THE COURT: I cannot hear you.
 [7] MS. WHELIHAN: I do not think the issue is whether
 [8] the return is accurate.
 [9] THE COURT: Well, it may not be an ultimate issue,
 [10] but she is entitled to ask. Overruled.
 [11] BY MS. TRUHE:
 [12] Q: All right, and these monies should have been
 [13] reported on that return as taxable income, correct?
 [14] MS. WHELIHAN: Objection.
 [15] THE WITNESS: That's my opinion, correct.
 [16] THE COURT: Overruled.
 [17] BY MS. TRUHE:
 [18] Q: Now you never got involved in the issue of
 [19] advising Mr. Shofer whether he should amend his returns for
 [20] 1984, correct?
 [21] A: I did not participate in those conversations,
 [22] that's correct.
 [23] Q: All right, Mr. Shofer just announced to you or
 [24] advised you that he was going to amend those returns,
 [25] correct?

[1] A: He announced it, but I concurred with his
 [2] decision.
 [3] Q: All right. With respect to the 1985 return, the
 [4] original one prepared by Greybush Newman, is it not true
 [5] that that return also did not accurately reflect as taxable
 [6] income the monies which Mr. Shofer had withdrawn from his
 [7] pension in 1985?
 [8] A: Correct.
 [9] Q: Now did you actually participate in the
 [10] preparation of the amended 1984 or amended 1985 returns?
 [11] A: Just to the extent of my letter of April 30th -
 [12] Q: So -
 [13] A: - which -
 [14] Q: So Greybush handled the -
 [15] A: They prepared them.
 [16] Q: - preparation of those amended returns for both
 [17] of those years?
 [18] A: Yes, I believe so.
 [19] Q: Now with respect to this first meeting you had
 [20] with Mr. Shofer, were the accountants at Greybush Newman
 [21] involved with Mr. Shofer's account also present?
 [22] A: No.
 [23] Q: Did there come a time when you had a meeting with
 [24] Mr. Shofer and Ken Larash and Ken Marvel?
 [25] A: There were, you know, there were meetings. I've

[1] had meetings with Ken Larash. I had meetings with Alan.
 [2] I don't recall specifically whether both of them were there
 [3] or whether there were meetings.
 [4] Q: Well, with respect to, and I am talking about
 [5] your initial meeting with Mr. Shofer, Kenneth Larash, and
 [6] Alan Marvel. I believe you testified in your deposition
 [7] that it was a fairly long meeting -
 [8] A: Okay.
 [9] Q: - and that you did not recall expressing any
 [10] opinions about Mr. Hack at that first meeting, correct?
 [11] A: Correct.
 [12] Q: All right. Were you aware of Stuart Hack's
 [13] reputation in the Baltimore community in the mid-1980's?
 [14] A: Yes.
 [15] Q: His reputation was that he knew what he was doing,
 [16] correct?
 [17] A: Yes.
 [18] Q: Is it not true that at one point, Mr. Shofer asked
 [19] you to sue Mr. Hack for him, and you said no?
 [20] A: Yes.
 [21] Q: Now during the course of these various meetings
 [22] with Mr. Shofer's accountants at Greybush Newman, you
 [23] continued having discussions with Ken Larash and Alan Marvel
 [24] about how this situation should be dealt with because you
 [25] had concluded that the loans were, to some extent, taxable,

[1] correct?

[2] **A:** Correct.

[3] (Defendant's Exhibit No. 21, Giampietro

[4] 11/3/87 letter to Shofer, was marked for

[5] identification.)

[6]

BY MS. TRUHE:

[7] **Q:** I am showing you what has been marked as

[8] Defendant's Exhibit Number 21. This is a letter dated

[9] November 3, 1987, to Mr. Shofer from you, correct?

[10] **A:** This is a letter dated November 3, 1987, signed by

[11] me, directed to Mr. Shofer, with a carbon copy to

[12] Mr. Marvel.

[13] **Q:** All right. You wrote that letter?

[14] **A:** Yes.

[15] **Q:** All right. I believe, as you state on page 1 of

[16] that letter, that there were no adverse tax consequences to

[17] the extent that Mr. Shofer borrowed \$76,000, correct?

[18] **A:** Well, I'll read it to you. It says:

[19] "Approximate" - "you with" - "with" - "you withdrew

[20] \$200,000 in 1984. The approximate amount of \$76,000 which

[21] represents your basis in the voluntary account."

[22] There that's the amount that Mr. Shofer contributed with

[23] after-tax dollars.

[24] **Q:** Right.

[25] **A:** You can treat - he could withdraw that either as

[1] a loan or as a withdrawal. If it's treated as a loan,

[2] there's interest due on the loan. If you treated it you

[3] didn't treat it as a loan, if you treat it as a withdrawal,

[4] it is not taxable -

[5] **Q:** Right, so if it is treated as a withdrawal, not

[6] taxable; the first \$76,000, or approximately that, up to

[7] \$200,000, correct?

[8] **A:** (No audible response.)

[9] **Q:** Then the next \$50,000 - in paragraph 2 - is also

[10] not taxable, correct?

[11] **A:** The next \$50,000 would be treated as a loan, and

[12] it's not taxable, that's not taxable, either, correct.

[13] **Q:** All right, so with respect to 1984, is it fair to

[14] say then that Mr. Shofer could have borrowed up to \$126,000,

[15] roughly, from his pension without adverse tax consequences?

[16] **A:** Correct.

[17] **Q:** All right.

[18] **MS. TRUHE:** Your Honor, I would move for admission

[19] into evidence Defendant's Exhibit Number 21.

[20] **THE COURT:** Admitted.

[21] (Defendant's Exhibit No. 21, Giampietro

[22] 11/3/87 letter to Shofer, previously

[23] marked for identification, was received

[24] in evidence.)

[25] (Defendant's Exhibit No. 22, Giampietro

[1] 4/11/88 letter to Bowden, was marked for

[2] identification.)

[3]

BY MS. TRUHE:

[4] **Q:** Now, directing your attention to what has been

[5] marked as Defendant's Exhibit Number 22, this is a letter

[6] dated April 11, 1988, to Thomas Bowden, Mr. Shofer's first

[7] attorney in this case, from you, correct?

[8] **A:** Uh-huh.

[9] **Q:** You write on page 1 of this letter: "Dear Mr.

[10] Bowden, you have asked us to express an opinion regarding

[11] the contents of a letter dated August 9, 1984, by the Stuart

[12] Hack Company addressed to Richard Shofer and signed by

[13] Stuart Hack." Do you see that?

[14] **A:** Yes.

[15] **Q:** Would you go to page 2 at the top? You wrote, and

[16] I quote: "Loans in excess of non-taxable loans are not

[17] prohibited, merely taxable; and hence, their taxability does

[18] not excuse lack of repayment."

[19] **A:** Right.

[20] **Q:** Is it your testimony that loans from Mr. Shofer's

[21] pension which he took in 1984 and 1985 and 1986 that were in

[22] excess of that which he could withdraw were not prohibited,

[23] but merely taxable at some point, as you write in your

[24] letter?

[25] **A:** Well, the term pro - well, prohibited in the

[1] sense not allowed is not - I'm not using it in any legal

[2] sense. It's not prohibited.

[3] **Q:** He could do that; there were just going be -

[4] **A:** He could do it.

[5] **Q:** - tax consequences, correct?

[6] **A:** That's correct.

[7] **Q:** All right.

[8] **A:** And that, I think my point, though, is that

[9] there are tax - even though they're taxable, okay, you have

[10] to - and they're treated as tax - as withdrawals and

[11] distributions, you still have to pay them back.

[12] **Q:** Fine, but that goes to paying back the loans -

[13] **A:** Right.

[14] **Q:** - which has nothing to do with taxes for the

[15] moment, correct?

[16] **A:** Well, paying back loans has to do with taxes.

[17] **Q:** Well, ultimately, yes. But -

[18] **A:** When you pay money, when you pay money back,

[19] you're paying money back with after-tax dollars. So

[20] that's -

[21] **Q:** Fine. Okay.

[22] **MS. TRUHE:** Your Honor, I would move for admission

[23] into evidence Defendant's Exhibit Number 22.

[24] **MR. TAYLOR:** No objection.

[25] **THE COURT:** Admitted.

[1] (Defendant's Exhibit No. 22, Giampietro
[2] 4/11/88 letter to Thomas Bowden,
[3] previously marked for identification,
[4] was received in evidence.)

[5] (Defendant's Exhibit No. 23, Bowden
[6] 4/21/88 letter to Giampietro, was marked
[7] for identification.)

[8] **BY MS. TRUHE:**

[9] **Q:** Now two weeks later, on April 21, 1988, Mr. Bowden
[10] wrote you a letter. It has been marked as Defendant's
[11] Exhibit Number 23. Do you see that?

[12] **A:** Yes.

[13] **Q:** Do you recall receiving that letter? Please take
[14] a moment to look at that letter.

[15] **A:** Do you want me to read the highlighted portion of
[16] the letter?

[17] **Q:** No, I am going to ask you questions. For now, I
[18] just want to ask you whether you recall receiving that
[19] letter from Mr. Bowden.

[20] **A:** I don't specifically recall it, but I -

[21] **Q:** Do you presume you did?

[22] **A:** I presume I did.

[23] **Q:** Okay. It states: "Dear Mr. Giampietro, thank you
[24] for your letter dated April 11, 1988, concerning Stuart
[25] Hack's August 9, 1984, letter. It is clear from that letter

[1] that Hack's suggestion as to borrowing from Shofer's
[2] voluntary account had serious tax consequences that were not
[3] mentioned in Hack's letter." Skipping down to paragraph 4
[4] on page 1 of Mr. Bowden's letter to you, he writes, quote -
[5] well, actually right before that.

[6] He is asking you: "To the extent that you can do
[7] so, I would like you to opine as to the following," and then
[8] he lists a number of items including number 4 which states,
[9] and I quote: "Whether the omission in Hack's letter of any
[10] mention of tax consequences by either collateralizing or
[11] borrowing from voluntary accounts constituted a failure to
[12] observe the standard of care of a reasonably prudent and
[13] competent actuary and pension consultant." Do you see that?

[14] **A:** Yes, I do.

[15] **MS. TRUHE:** Your Honor, I would move for admission
[16] into evidence Defendant's Exhibit Number 23.

[17] **THE COURT:** It is admitted.

[18] (Defendant's Exhibit No. 23, Bowden
[19] 4/21/88 letter to Giampietro, previously
[20] marked for identification, was received
[21] in evidence.)

[22] (Defendant's Exhibit No. 24, Giampietro
[23] 6/16/88 letter to Bowden, was marked for
[24] identification.)

[25] **BY MS. TRUHE:**

[1] **Q:** Directing your attention to what has been marked
[2] as Defendant's Exhibit Number 24, it is a letter which I
[3] believe you wrote back to Mr. Bowden dated June 16 in
[4] response to his letter of April 21, correct?

[5] **A:** Uh-huh.

[6] **Q:** You state in the first part of this June 16
[7] letter: "Dear Mr. Bowden, the purpose of this letter is to
[8] respond to your letter dated April 21, 1988, whereby you
[9] asked me to clarify and expound upon certain facets of a
[10] letter received by Mr. Shofer from Stuart Hack on August 9,
[11] 1984." Do you see that?

[12] **A:** Yes.

[13] **Q:** Go to the last sentence on page 2 of your letter
[14] to Mr. Bowden.

[15] **A:** Right.

[16] **Q:** It states, and I quote: "The advice contained in
[17] Mr. Hack's letter and the omission from Mr. Hack's letter of
[18] the tax consequences of borrowing from the voluntary account
[19] in excess of one's after-tax employee contributions does not
[20] constitute an illegal act." Do you see that?

[21] **A:** Yes, I do.

[22] **Q:** Was that your opinion at the time?

[23] **A:** Yes, it was.

[24] **MS. TRUHE:** Your Honor, I would move for admission
[25] into evidence Defendant's Exhibit Number 24.

[1] **THE COURT:** Admitted.
[2] (Defendant's Exhibit No. 24, Giampietro
[3] 6/16/88 letter to Bowden, previously
[4] marked for identification, was received
[5] in evidence.)

[6] **BY MS. TRUHE:**

[7] **Q:** Mr. Giampietro, do you have any knowledge as to
[8] why Mr. Shofer was borrowing money from his pension in 1984?

[9] **A:** I believe it was - a little foggy; something
[10] about, I think, a home. I think it was for personal
[11] matters.

[12] **Q:** In fact, do you recall Mr. Shofer telling you that
[13] he was being pressured at the time by the Maryland National
[14] Bank to come up with money?

[15] **A:** He was involved in yes, in discussions with
[16] Maryland National Bank regarding the financing of his
[17] Catalina Enterprises automobile inventory.

[18] **Q:** Exactly. It was actually Mr. Shofer's business
[19] which owed money to the bank, and the bank was putting
[20] pressure on Shofer to have Crown Motors make some progress
[21] on its balance sheet, correct?

[22] **A:** Right.

[23] **Q:** Is it not also true that Mr. Shofer raised this
[24] situation or issue with you throughout your relationship
[25] with him?

[1] A: We discussed it on many occasions, correct.
 [2] Q: All right. Was it your understanding that the
 [3] bank, as you told me in your deposition, was apparently
 [4] pulling in their reins or putting pressure on him with
 [5] regard to making some progress on this balance sheet?
 [6] A: That's correct.
 [7] Q: And that Mr. Shofer's back was basically against
 [8] the wall on this issue?
 [9] A: Yes.
 [10] Q: Mr. Shofer was the trustee of the pension,
 [11] correct?
 [12] A: Yes.
 [13] Q: In your law practice and pension business, have
 [14] you dealt with clients who are also trustees of their
 [15] company's pension, like Mr. Shofer?
 [16] A: Yes.
 [17] Q: Do you believe it was prudent for Mr. Shofer to
 [18] continue borrowing money in 1984, 1985, and 1986 without
 [19] consulting further with Mr. Hack or any other professional?
 [20] A: I thought he did consult with Hack. He asked Hack
 [21] a question -
 [22] Q: No, after -
 [23] A: I understand.
 [24] Q: - his initial, I will rephrase. After his
 [25] initial consultation with Mr. Hack in 1984, is it not true

[1] that Mr. Shofer never told Mr. Hack that he was going to be
 [2] borrowing money repeatedly in 1984, 1985, and 1986?
 [3] A: I don't know what he told him.
 [4] Q: Assume for the purpose of my question that he did
 [5] not, do you believe it was prudent for him not to tell
 [6] Mr. Hack that he was going to repeatedly borrow from his
 [7] pension?
 [8] A: Well, the answer to your question is that the
 [9] letter would lead a reasonable person to conclude that he
 [10] could, without adversity, borrow from his voluntary account
 [11] as much money as he wished, and therefore, would be
 [12] permitted, and therefore, I don't see the need to go back
 [13] now and ask the question again.
 [14] Q: Do you recall telling me at your deposition
 [15] several years ago in response to that same question, I am
 [16] referring to page 130.
 [17] MR. TAYLOR: Let me give the witness a copy.
 [18] THE WITNESS: Page 130?
 [19] BY MS. TRUHE:
 [20] Q: Yes.
 [21] MR. TAYLOR: Is that the wrong one?
 [22] THE WITNESS: Okay, which question?
 [23] MR. TAYLOR: I am sorry.
 [24] MS. TRUHE: I think he has the right one.
 [25] MR. TAYLOR: I think he has the right one, yes. I

[1] think so.
 [2] BY MS. TRUHE:
 [3] Q: Do you see where it says, your answer: "I think
 [4] Mr. Shofer wanted that answer to the question to be what Mr.
 [5] Hack gave him, and perhaps that had an effect on his
 [6] willingness to continue to probe into the accuracy in
 [7] subsequent years"?
 [8] A: Yes, I said that.
 [9] Q: "Was it not your impression, based on your
 [10] dealings with Mr. Shofer, that Mr. Shofer had a vested
 [11] interest in clinging to the initial answer which Mr. Hack
 [12] gave him without any further scrutiny and without asking any
 [13] questions about possible consequences of borrowing such
 [14] large amounts of money from his pension?" Page 133.
 [15] A: Yes.
 [16] Q: Finally, Mr. Giampietro, as I understand it, your
 [17] work on behalf of Mr. Shofer consisted of negotiating with
 [18] the IRS for Mr. Shofer to pay on an installment basis the
 [19] additional taxes he owed for 1984, 1985, and 1986, correct?
 [20] A: Yes.
 [21] Q: Did you work not also consist of other problems
 [22] Mr. Shofer was having with both the IRS and the Department
 [23] of Labor with respect to issues affecting his personal tax
 [24] situation and the pension aside from the Hack loan problem?
 [25] A: Yes.

[1] MS. TRUHE: Your Honor, that is all I have. Oh, I
 [2] am sorry, one more question.
 [3] BY MS. TRUHE:
 [4] Q: Mr. Giampietro, is it not true that Mr. Shofer has
 [5] never personally paid any bill submitted by your firm?
 [6] A: Yes.
 [7] MS. TRUHE: That is all I have.
 [8] THE COURT: Ms. Whelihan?
 [9] MS. WHELIHAN: Could I have Plaintiff's Exhibit
 [10] Numbers 11, 12, and 13?
 [11] THE COURT: You just have to wait for redirect,
 [12] sir.
 [13] THE WITNESS: Okay.
 [14] BY MS. WHELIHAN:
 [15] Q: Mr. Giampietro, let me show you what has been
 [16] marked as Plaintiff's Exhibit Number 12, which is the 1985
 [17] tax return of Mr. Shofer. Can you tell me when that return
 [18] was prepared by Greybush Newman?
 [19] A: When it was prepared?
 [20] Q: Yes, look at the date next to the preparer's
 [21] signature.
 [22] A: Yeah, it was prepared 2/12/87.
 [23] Q: In response to one of Ms. Truhe's questions, you
 [24] testified that that return did not accurately reflect
 [25] pension income to Mr. Shofer. But at the time that that

[1] return was prepared, Mr. Shofer had not decided yet to amend
 [2] his 1984 and 1985 tax returns. Is that not right?
 [3] **A:** Presumably not.
 [4] **Q:** Does that return not actually accurately reflect
 [5] the fact that Mr. Shofer had borrowed \$80,000 and that he
 [6] was getting only tax -
 [7] **A:** You're talking, I'm sorry, I'm getting confused.
 [8] I'm sorry -
 [9] **Q:** In 19 -
 [10] **A:** This is -
 [11] **Q:** In 1985 -
 [12] **A:** This is an '85 return that was filed
 [13] February 12th, 1987, which means that it's late, right.
 [14] **Q:** Right.
 [15] **A:** Okay, and it includes, is there something in here
 [16] that includes a plan distribution?
 [17] **Q:** The additional income that Mr. Shofer reported
 [18] after his pension loans, was that not \$3,400 as reflected in
 [19] that return?
 [20] **A:** Thirty-four, yeah, fully taxable pensions, IRA
 [21] distributions, annuities (inaudible) \$3,400.
 [22] **Q:** Is that return not accurate insofar as it reflects
 [23] that Mr. Shofer borrowed \$80,000 from his pension and only
 [24] \$3,400 was taxable because of the voluntary withdrawal of
 [25] \$76,600?

[1] **A:** Yes, if that \$3,400 constitutes the - if I could
 [2] see my letter -
 [3] **Q:** The April 30th letter?
 [4] **A:** The April 12th letter, or whatever it was, so I
 [5] could just -
 [6] (Discussion off the record.)
 [7] **THE WITNESS:** Thank you.
 [8] **BY MS. WHELIHAN:**
 [9] **Q:** You are welcome.
 [10] **A:** I'm sorry, but I am confused. There - this
 [11] return reflects that there's been a distribution from a
 [12] retirement plan reported of \$3,400 for the calendar year
 [13] ending 12/31/95 on Mr. Shofer's return. That's what -
 [14] **Q:** And that -
 [15] **A:** - this reflects.
 [16] **Q:** Right, and that is accurate based upon when that
 [17] return was prepared, Mr. Shofer had not yet amended his 1984
 [18] or 1985 returns, and he was reporting \$80,000 of income from
 [19] the pension minus the \$76,600 of voluntary contributions.
 [20] **A:** That's what this - yeah, that's - that's
 [21] correct.
 [22] **Q:** So in fact the 1985 return, when it was prepared,
 [23] was accurate?
 [24] **A:** That's correct.
 [25] **Q:** All right. I show you what have been marked as

[1] Plaintiff's Exhibit Numbers 11 and 13, which are the amended
 [2] returns. Those returns were prepared some nine months later
 [3] after the original 1985 return was prepared?
 [4] **A:** These are dated 12/9/87, correct, by Mr. Larash,
 [5] signed by Mr. Larash.
 [6] **Q:** Right, and at that time, it was determined that
 [7] Mr. Shofer should apply his \$50,000 tax-free amount and his
 [8] \$76,600 voluntary contributions to the 1984 return because
 [9] that was the earlier taxable income, is that right?
 [10] **A:** That's correct.
 [11] **Q:** All right.
 [12] **A:** You're right.
 [13] **Q:** Then before he died, Mr. Marvel was your personal
 [14] accountant?
 [15] **A:** Yes, he was.
 [16] **Q:** You and he had a relationship where you shared
 [17] mutual clients?
 [18] **A:** Yes.
 [19] **Q:** You also, because of your business as a pension-
 [20] tax lawyer or a -
 [21] **A:** Right.
 [22] **Q:** - tax lawyer, have familiarity with CPA's?
 [23] **A:** Yes, I do.
 [24] **Q:** I believe you said in your deposition, and it is
 [25] still true based upon what you knew about Mr. Marvel, that

[1] he had actually a greater expertise in pension tax law than
 [2] most CPA's?
 [3] **A:** Yes, he did.
 [4] **MS. WHELIHAN:** I have no further questions, Your
 [5] Honor.
 [6] **THE COURT:** Excuse me for just a moment. I have
 [7] to take a call from Judge Kaplan. I will be right back.
 [8] (Brief recess.)
 [9] **THE COURT:** You all may be seated. Are we on
 [10] redirect?
 [11] **MR. TAYLOR:** Yes, Your Honor, we are.
 [12] **THE COURT:** Okay, you may proceed.
 [13] (Discussion off the record.)
 [14] **REDIRECT EXAMINATION**
 [15] **BY MR. TAYLOR:**
 [16] **Q:** Mr. Giampietro, let me hand you back
 [17] Defendant's 21. This is the letter you wrote to Mr. Shofer
 [18] on November 3, 1987, in which you discussed the taxability
 [19] of the loans of 1984 and 1985. I wanted to ask you if at
 [20] the time you wrote the letter, November 3, 1987, you had
 [21] reviewed the plan documents at all?
 [22] **A:** I believe I did. I may, well, you know, now that
 [23] I'm reading this letter, it appears that I didn't, I did not
 [24] read the plan documents.
 [25] **Q:** You did not -

[1] A: No -
 [2] Q: - read the plan documents?
 [3] A: No, I had not read the plan documents.
 [4] Q: So the focus of this letter was strictly on the
 [5] taxability -
 [6] A: That's correct.
 [7] Q: - aspects of the withdrawals and not whether or
 [8] not the withdrawals or the loans were in accordance with the
 [9] plan documents?
 [10] A: That's correct, because there's - I - and I
 [11] say - the reason I say that is because it says that you may
 [12] withdraw, and I caveat that - or qualify that and say if
 [13] the plan provides -
 [14] Q: Okay.
 [15] A: - in the letter.
 [16] (Discussion off the record.)
 [17] BY MR. TAYLOR:
 [18] Q: Mr. Giampietro, let me show you Defendant's
 [19] Exhibits 23 and 24. First of all, just to clarify the
 [20] record, was Exhibit 24 written in direct response to
 [21] Exhibit 23?
 [22] A: Yes.
 [23] Q: The portion of Exhibit 23 which Ms. Truhe had you
 [24] read was paragraph 4, or item 4. In Exhibit 24, you read
 [25] the next to the last sentence in the letter.

[1] A: Yeah.
 [2] Q: What you read was: "The advice contained in Mr.
 [3] Hack's letter and the omission from Mr. Hack's letter of the
 [4] tax consequences of borrowing from the voluntary account in
 [5] excess of one's after-tax employee contributions does not
 [6] constitute an illegal act." What did you mean by illegal
 [7] act?
 [8] A: What I meant was that it was not inconsistent with
 [9] the terms of the plan. It was - it was permitted; it just
 [10] had adverse tax consequences.
 [11] Q: Yet, the question that you were asked to respond
 [12] to in number 4 of Exhibit 23 is whether the omission in
 [13] Hack's letter of "any mention of tax consequences by either
 [14] collateralizing or borrowing from voluntary accounts
 [15] constituted a failure to observe the standard of care of a
 [16] reasonably prudent and competent actuary and pension
 [17] consultant." Is your answer responsive to the request that
 [18] was -
 [19] A: No.
 [20] Q: - made in number 4?
 [21] A: No, it's not.
 [22] Q: Did you ever express an opinion to Mr. Bowden
 [23] concerning the item number 4 and your letter of April 21,
 [24] 1988?
 [25] A: I - I - I don't - I don't recall.

[1] Q: Mr. Giampietro, I am going to hand you back your
 [2] deposition which Ms. Truhe asked you a couple of questions
 [3] on, and direct your attention to page 130. I would like to
 [4] have you read lines 2 through 18.
 [5] MR. TAYLOR: Your Honor, just for the record, the
 [6] answer that Ms. Truhe elicited from Mr. Giampietro did not
 [7] provide a complete answer to the question that was posed. I
 [8] would like to have the record reflect what Mr. Giampietro's
 [9] full answer to that question was.
 [10] BY MR. TAYLOR:
 [11] Q: Mr. Giampietro, would you read lines 2 through 18?
 [12] A: Question: "Is it your testimony that you don't
 [13] see any trouble with regard to Mr. Shofer's behavior as a
 [14] trustee when he borrowed in 1985 and 1986 without checking
 [15] in with somebody?" "Mr. Bornhorst: Objection." Question:
 [16] "You may answer." "I think Mr. Shofer was perhaps - Mr.
 [17] Shofer wanted that answer to the" - "to the question to be
 [18] what Mr. Hack gave him, and perhaps that had an effect on
 [19] his willingness to continue to probe into the accuracy in
 [20] subsequent years.
 [21] "But it's been my experience that clients in the
 [22] small plan market do not utilize the services of
 [23] institutional trustees. Now, albeit individual trustees
 [24] aren't freer to be" - "freer to be more cavalier in
 [25] exercising their fiduciary responsibilities as" - "as" -

[1] "as opposed to institutional trustees. It is prevalent that
 [2] they don't, and measuring Mr. Shofer's conduct against the
 [3] conduct of a fair cross-section of my clients or in fact
 [4] individual trustees, he did not act unreasonably under the
 [5] circumstances."
 [6] Q: Thank you very much. Mr. Giampietro, Ms. Truhe
 [7] asked you whether Mr. Shofer had asked you to file suit
 [8] against Mr. Hack.
 [9] A: Yes.
 [10] Q: Your answer to that was that you declined to do
 [11] so, is that correct?
 [12] A: That's correct.
 [13] Q: Do you do litigation work?
 [14] A: No, I don't.
 [15] Q: Did that fact play any role in your decision to
 [16] not file a suit on -
 [17] A: Yes.
 [18] Q: - behalf of Mr. Shofer?
 [19] A: Yes, it did.
 [20] Q: Finally, you responded to questions with regard to
 [21] Mr. Shofer's relationship to Maryland National Bank. Do you
 [22] know whether or not Mr. Shofer had a relationship with
 [23] Maryland National Bank at the time that he came to see you?
 [24] A: Yes, he did.
 [25] Q: Were you intimately acquainted with the

[1] relationship with Maryland National Bank that Mr. Shofer
[2] had?

[3] **A:** I was acquainted with the relationship.

[4] **Q:** How often during the course of your conversations
[5] with Mr. Shofer did the issue of Maryland National Bank
[6] arise?

[7] **A:** It came up intermittently.

[8] **Q:** Were you ever asked to perform any legal services
[9] in connection with anything that Mr. Shofer may have been
[10] doing with Maryland National Bank?

[11] **A:** I attended a meeting with Mr. Shofer and with a
[12] Mr. Dennick from the Bloom Lonquist firm with members of
[13] Maryland National Bank, and I was asked to express an
[14] opinion with regard to the application of ERISA to certain
[15] transactions that were caused by Maryland National Bank.

[16] **Q:** During the time that you were involved with Mr.
[17] Shofer in dealing with Maryland National Bank, how would you
[18] characterize Mr. Shofer's relationship with the bank? Was
[19] it satisfactory, unsatisfactory, or something else?

[20] **MS. WHELIHAN:** Objection. I do not know that the
[21] foundation has been laid for the answer to that question.

[22] **THE COURT:** Well, can you answer the question,
[23] sir? I mean, do you have enough basis to answer the
[24] question?

[25] **THE WITNESS:** All I know is there was trouble.

[1] **MR. TAYLOR:** All right, I do not have any other
[2] questions.

[3] **THE COURT:** Is there anything further of the
[4] witness?

[5] **MS. TRUHE:** Yes, Your Honor, just briefly

[6] RECROSS EXAMINATION

[7] BY MS. TRUHE:

[8] **Q:** Mr. Giampietro, Mr. Taylor had you read from
[9] page 130 of your deposition in which you were commenting on
[10] institutional trustees versus individual trustees, like Mr.
[11] Shofer, correct?

[12] **A:** Correct.

[13] **Q:** You said that, first of all, "individual trustees
[14] aren't freer to be more cavalier in exercising their
[15] fiduciary responsibilities as opposed to institutional
[16] trustees," correct?

[17] **A:** That's correct.

[18] **Q:** But that it has been your experience that
[19] individual trustees, like Mr. Shofer, are a little more lax,
[20] correct?

[21] **A:** That's correct.

[22] **Q:** I would like to continue reading with your
[23] testimony in that regard on page 131, line 2.

[24] **A:** Line 2?

[25] **Q:** Yes. Question: "Well, I understand that you

[1] don't think Mr. Shofer's behavior as an individual trustee
[2] was any better or worse than that of most persons in his
[3] category, is that correct?" Answer: "Correct." Question:
[4] "But what does that say, in other words, about the majority
[5] of people in this category? That doesn't necessarily
[6] absolve them of responsibility, does it?" Answer: "No, it
[7] does not absolve them of responsibility." Do you see that
[8] testimony?

[9] **A:** Yes, I do.

[10] **MS. TRUHE:** That is all I have.

[11] **THE COURT:** Anything further of the witness?

[12] **MS. WHELIHAN:** No, Your Honor.

[13] **MR. TAYLOR:** No, Your Honor.

[14] **THE COURT:** Okay. Thank you, Mr. Giampietro. You
[15] are excused.

[16] (The witness was excused.)

[17] **THE COURT:** Counsel, shall we stop here for the
[18] lunch recess?

[19] **MR. TAYLOR:** Yes. Your Honor, I would like to
[20] just take a few minutes, maybe over the lunch recess, just
[21] to see if there is anything that I would like to do before
[22] we close our case.

[23] **THE COURT:** That is fine. Let's come back at 2:00
[24] o'clock and you can take it up there.

[25] **MR. TAYLOR:** Thank you.

[1] **THE COURT:** All right.

[2] (At 12:22 p.m. a luncheon recess was taken.)

[3] **THE COURT:** Okay, we are back on the record in
[4] Shofer v. Hack, et al. Mr. Taylor, is there anything
[5] further from the Plaintiff?

[6] **MR. TAYLOR:** Your Honor, before we close, I had a
[7] couple of matters that I wanted to take up. The first was
[8] certain exhibits that had been identified but not introduced
[9] into the record. At this time, I would like to go over
[10] several of those exhibits.

[11] **THE COURT:** Okay.

[12] **MR. TAYLOR:** The first one is Plaintiff's Exhibit
[13] Number 25, which has been identified as a letter from
[14] Kenneth Larash to Richard Shofer on the subject matter of
[15] the fees that Greybush Newman charged for certain work. I
[16] would like to offer Plaintiff's Exhibit Number 25 into the
[17] record.

[18] **THE COURT:** Have you previously offered it?

[19] **MR. TAYLOR:** Well, I do not know whether it was
[20] offered, but apparently it is not in the record.

[21] **THE COURT:** Do you have it?

[22] **MR. TAYLOR:** Pardon me, I am sorry?

[23] **THE COURT:** May I see it?

[24] **MR. TAYLOR:** I have it.

[25] **MS. WHELIHAN:** I have it as only being marked, not

[1] offered.

[2] **THE CLERK:** 25 was offered.

[3] **THE COURT:** Is there an objection to it?

[4] **MS. TRUHE:** No, Your Honor.

[5] **THE COURT:** Okay, it is admitted.

[6] (Plaintiff's Exhibit No. 25, Larash

[7] 12/4/87 letter to Shofer, previously

[8] marked for identification, was received

[9] in evidence.)

[10] **MR. TAYLOR:** Your Honor, I would like to also

[11] offer at this time Plaintiff's Exhibit 30, which Mr. Shofer

[12] had identified as the summary of fees that he was

[13] responsible for in connection with work that was done for

[14] him in this matter.

[15] **MS. WHELIHAN:** We would have the same objection we

[16] had the last time it was offered for evidence: that it is

[17] not based upon any competent admissible evidence. It is

[18] estimates of taxes, interest, and penalties, with no

[19] testimony from anybody, no documents to back it up. The

[20] professional fees are all estimates. The professional fees

[21] are all paid by somebody other than Mr. Shofer. The

[22] interest calculations, as demonstrated by Mr. Rosenberg,

[23] frankly, are just simply incorrect. I mean, Mr. Rosenberg

[24] obviously did not take into account any payments that

[25] Mr. Shofer made toward his taxes, penalties, or interest. I

[1] mean, there is just no competent evidence upon which that

[2] exhibit is founded. More importantly, it is also excludable

[3] by this Court's order because it was not produced to us

[4] until after the May 16 discovery deadline.

[5] **THE COURT:** Is that the case?

[6] **MR. TAYLOR:** I am not sure that that was the case.

[7] **MS. TRUHE:** That came in the box.

[8] **THE COURT:** I will sustain the objection.

[9] **MR. TAYLOR:** All right.

[10] **MS. TRUHE:** Thank you, Your Honor.

[11] **MR. TAYLOR:** Your Honor, I had a request I wanted

[12] to make of the Court with respect to Plaintiff's Exhibit 31

[13] which I had previously offered and the Court sustained an

[14] objection to.

[15] **THE COURT:** What was it?

[16] **MR. TAYLOR:** This is the documentation relating to

[17] the cost of monies to Richard Shofer. What I would like to

[18] offer into the record would be a redacted version of

[19] Plaintiff's Exhibit 31 which would include those sections 2,

[20] 3, and 4 of this exhibit; section 2 relating to letters that

[21] were received by Mr. Shofer in connection with efforts he

[22] had made to obtain financing and credit for purposes of

[23] paying taxes and expenses in this matter. There are also in

[24] section 3, I think, unsolicited communications to him

[25] brought about as a result of matters on the public record

[1] which related to unpaid income taxes. Section 4 dealt with

[2] a summary of commercial credit that was granted to

[3] Mr. Shofer and his spouse after June 1989 when Maryland

[4] National Bank had turned down his loan application for a

[5] commercial loan.

[6] **THE COURT:** Of what issues is the exhibit

[7] probative?

[8] **MR. TAYLOR:** Well, the exhibit would be proffered

[9] for the purpose of well, two purposes. One would be to

[10] demonstrate Mr. Shofer's efforts in mitigating damages with

[11] respect to his attempts to get credit through normal means;

[12] that is, normal commercial and banking means. It would

[13] also, I submit, demonstrate, because of the inability to get

[14] the credit, why his effective interest rate on monies he

[15] borrowed was above the normal commercial rate. So it would

[16] be offered for those two purposes.

[17] **THE COURT:** Where does the latter get you?

[18] **MR. TAYLOR:** Well, of course, the -

[19] **THE COURT:** Are you talking about the evidence

[20] that he testified to that he was reduced to - the only

[21] source of income was -

[22] **MR. TAYLOR:** - income was his credit cards.

[23] **THE COURT:** - credit cards, and they were at much

[24] higher -

[25] **MR. TAYLOR:** It would corroborate that testimony.

[1] **THE COURT:** But where does that take you? I mean,

[2] what issue is that probative of?

[3] **MR. TAYLOR:** Well, it may not be probative of any

[4] issue before the Court in this matter. But with respect to

[5] any damages outside of the case which will certainly be part

[6] of any appeal, it would be a proffer on that point.

[7] **THE COURT:** Well, I let you proffer for the record

[8] that if the Court had not ruled that those damages were out

[9] the case that you would have introduced that evidence, and

[10] that you continue to contend that it ought to be on the

[11] record and it ought to be part of the case despite the sage

[12] rulings of more judges than I can count on my fingers. But

[13] if you would like to, you are welcome to do that.

[14] **MR. TAYLOR:** I would adopt that position.

[15] **THE COURT:** Okay.

[16] **MS. TRUHE:** Your Honor, there is another more

[17] fundamental problem. This compilation of materials was not

[18] produced to us until after the discovery cut-off. Given

[19] that it does not pertain to the case or any issue in the

[20] case at the moment, I do not know necessarily -

[21] **THE COURT:** Well, on the issue of mitigation where

[22] there are some efforts to obtain funding, I do not have

[23] those letters in front of me. Is there a way for Counsel to

[24] work out a redacted version of this that could be admitted?

[25] **MS. TRUHE:** Well, the problem is not so much with

[1] redaction as it is the fact that it was not produced to us
[2] after the discovery cut-off with absolutely no opportunity
[3] to rebut any of this. Mr. Shofer's financial life is
[4] complicated, to say the least, and there could have been
[5] multiple causes for these turn-downs. We just had no
[6] opportunity to, the first time I saw any of this was three
[7] weeks ago, well after the discovery cut-off. There has just
[8] been absolutely no opportunity to get to the bottom of any
[9] of it.

[10] **THE COURT:** Now, I do not know how much material
[11] there is on that issue. There are a lot of those letters?

[12] **MS. TRUHE:** Yes.

[13] **MS. WHELIHAN:** Well, in addition, I mean, you
[14] cannot even redact Exhibit Number 1 because that is just Mr.
[15] Shofer's self-serving statement about this case. It does
[16] not go to the proffer, you know. It is these little charts
[17] he has drawn up all about his taxes, interests, and
[18] penalties; and, you know, should he go to another credit
[19] card or continue to run his business. I mean, it is not
[20] probative of any issue in the case.

[21] On the mitigation of damage issue, if he is going
[22] to introduce evidence of the damages that have been
[23] excluded, that is one thing. There is no reason to have him
[24] then put in (inaudible) mitigation of damages because we are
[25] not at this juncture even contending he get those damages.

[1] So we would only need mitigation of damage, affirmative
[2] proof that you mitigated damages if you had the damages to
[3] begin with. So, I mean, I do not understand why that would
[4] be probative to whether he has the prohibited transaction
[5] damages, which is the damages I thought the proffer was
[6] going to.

[7] **THE COURT:** I am going to stick by my ruling that
[8] if it was not timely, it does not come in. But, Mr. Taylor,
[9] if you want to make a record for the purposes of some other
[10] court's review of the case, you are certainly entitled to do
[11] that.

[12] **MR. TAYLOR:** Your Honor, I will not add to what I
[13] have already said. There may be another opportunity before
[14] this case is finally closed to get into that issue
[15] (inaudible). Finally, Your Honor, I would like to move the
[16] admission of Plaintiff's Exhibit 32, which I understand was
[17] not in evidence. There has been some testimony about it.
[18] It is the 5500-C form with this attachment, which I think
[19] everybody agrees probably, well, everybody agrees it did not
[20] accompany the form when it was filed. I am really not sure
[21] why this was in fact attached to it.

[22] **THE COURT:** Is that form different from the
[23] Defendant's exhibit which is the 1984 5500-C?

[24] **MS. TRUHE:** Yes.

[25] **THE COURT:** Different other than it has the

[1] attachment?

[2] **MS. TRUHE:** No, just that it has the attachment.

[3] That last page is not on the actual 5500 that Defendants
[4] introduced.

[5] **MR. TAYLOR:** All right, I will (inaudible).

[6] **THE COURT:** I have not heard any testimony that
[7] the attachment was actually there. If you want to put it
[8] in. I will accept it, but I understand that it is
[9] identical.

[10] **MR. TAYLOR:** It is already in evidence?

[11] **THE COURT:** It is in evidence -

[12] **MR. TAYLOR:** All right.

[13] **THE COURT:** - by virtue of the Defendant's
[14] exhibit.

[15] **MS. WHELIHAN:** Twice, because it is also Third-
[16] Party Defendant's Exhibit Number 3.

[17] **MR. TAYLOR:** If it is in evidence, Your Honor, I
[18] do not need to have it.

[19] **THE COURT:** Okay. I just wanted to make sure that
[20] it was in the record, that is all.

[21] **MS. TRUHE:** Well, is there some way we can
[22] differentiate because I think - what is that, 32?

[23] **MR. TAYLOR:** 32.

[24] **MS. TRUHE:** If we could call the 5500 form 32-A
[25] and that attachment 32-B, perhaps, just so that the Court -

[1] **THE COURT:** I thought you were withdrawing it.

[2] **MR. TAYLOR:** I will withdraw it as long as it is
[3] in. I just wanted to make sure -

[4] **MS. TRUHE:** The 5500-C is definitely in.

[5] **THE COURT:** The 1984 Catalina Enterprises 5500-C
[6] is a Defendant's exhibit in the case.

[7] **MS. TRUHE:** Yes, Your Honor.

[8] **MR. TAYLOR:** All right.

[9] **THE COURT:** I am 99 percent certain.

[10] **MR. TAYLOR:** I am sorry.

[11] **MS. WHELIHAN:** And it is Third-Party Defendant's
[12] Exhibit Number 3.

[13] **MS. TRUHE:** So it is in twice.

[14] **THE COURT:** Now, Mr. Taylor, you did not mention
[15] Plaintiff's 34, maybe because I have been holding this.

[16] **MR. TAYLOR:** Well, yes, maybe.

[17] **THE COURT:** There were objections to it, but I
[18] frankly do not remember any of the - this is the
[19] December 16, 1986, letter to Mr. Marvel: "Enclosed please
[20] find memorandum of supporting information regarding a loan
[21] from the above-listed plan." It's a memo to Mr. Marvel -

[22] **MR. TAYLOR:** Is that the Judith Reed -

[23] **THE COURT:** - from Judith Reed with a table
[24] attached.

[25] **MR. TAYLOR:** Well, Your Honor, I do want that to

[1] go into the record. I will move it into evidence at this
[2] point. I think there is another way it can come in, but I
[3] will move it in at this time. I think there has been
[4] testimony about it. And it was used by one of the
[5] witnesses, I think, contemporaneously with its production as
[6] well as, I think, the issues (inaudible) I would offer it.

[7] **MS. TRUHE:** Your Honor, was that copied to
[8] Greybush Newman?

[9] **THE COURT:** I do not see any cc's.

[10] **MS. WHELIHAN:** I think the cover letter -

[11] **THE COURT:** The letter goes to Greybush Newman.

[12] **MS. WHELIHAN:** - goes to Greybush Newman.

[13] **THE COURT:** It goes to Mr. Marvel.

[14] **MS. TRUHE:** I think that was our problem. We did
[15] not have Mr. Marvel and we do not have Judith Reed.

[16] **MS. WHELIHAN:** Well, I think it was offered as a
[17] business record, and it is clearly not the foundation as a
[18] business record has not been laid so -

[19] **MS. TRUHE:** And I do not think Mr. Larash, through
[20] whom this exhibit came in, testified one way or another
[21] whether he had actually seen it or not. So I -

[22] **MS. WHELIHAN:** Well, no, that is not true. He did
[23] testify that he had seen it.

[24] **MS. TRUHE:** He did see it?

[25] **MS. WHELIHAN:** - but the foundation was not laid

[1] for it to come in as a business record exception to the
[2] hearsay rule. So my only problem with it is that it is
[3] hearsay. It also does not go to any of the probative issues
[4] in this case because, as far as I understand what the issues
[5] in this case are, we are dealing with, you know, Hack's
[6] liability as of August of 1984, if any, and the damages,
[7] taxes, penalties, and interest, and professional fees that
[8] flow from that advice. So what happens in December of 1984,
[9] who cares?

[10] **THE COURT:** Was this intended to represent
[11] someone's state of mind, or why was it -

[12] **MR. TAYLOR:** Well, it was being offered for
[13] purposes of showing what the Stuart Hack Company's response
[14] was to the inquiry concerning the taxability issue of these
[15] loans. I think the memorandum deals with research done on
[16] the taxability issue of loans. It was in direct response, I
[17] think, to inquiries made by Alan Marvel who was operating
[18] under instructions from Ken Larash to gain additional
[19] information from the Hack Company. That is what it has
[20] been -

[21] **THE COURT:** That clearly makes it hearsay.

[22] **MS. WHELIHAN:** But, I mean -

[23] **MS. TRUHE:** As well as after the fact, and that is
[24] the problem.

[25] **THE COURT:** Yes. I mean, I do not see how it is

[1] admissible. I think if Mr. Larash or somebody testifying in
[2] the case had relied on this at one time, then it might come
[3] in as evidence of his state of mind when he was doing
[4] certain work. But I do not know how else to get it in.

[5] **MR. TAYLOR:** Well, it might be admissible in
[6] another format, Your Honor, so I will -

[7] **THE COURT:** I will sustain the objection.

[8] **MR. TAYLOR:** All right. Your Honor, I have just
[9] one other issue. That is, I had issued a subpoena for Barry
[10] Berman, who had played a role in serving as an advisor to
[11] Mr. Hack. I was looking to have a certain letter that Mr.
[12] Berman wrote introduced into the record. Mr. Berman was
[13] served with the subpoena, but is not able to be here today.

[14] It is quite possible he would be an appropriate rebuttal
[15] witness. I would anticipate certain testimony that will -

[16] **THE COURT:** You have had discussions with him
[17] about his availability?

[18] **MR. TAYLOR:** Well, I talked with his attorney this
[19] morning. I had asked Ms. Truhe whether or not she might
[20] consider a stipulation on this letter coming into the record
[21] without actually having Mr. Berman here to testify. I do
[22] not know what her position would be on that point.

[23] **THE COURT:** What is his attorney's position with
[24] respect to why his client is not honoring the subpoena?

[25] **MR. TAYLOR:** Well, the subpoena was served just

[1] yesterday, Your Honor. Mr. Shofer had asked me to ensure
[2] that this letter, at least I make every attempt to have the
[3] letter included in the record, and so I have done that. It
[4] is possible, as I say, that Mr. Berman might be a rebuttal
[5] witness, and I would anticipate maybe his availability on
[6] Thursday. But I just wanted to alert the Court that -

[7] **THE COURT:** Okay, well -

[8] **MR. TAYLOR:** - that was what I was looking for.

[9] **THE COURT:** - we will wait. The Plaintiff rests
[10] now?

[11] **MR. TAYLOR:** The Plaintiff rests.

[12] **MS. TRUHE:** Your Honor -

[13] **MS. WHELIHAN:** Oh, after you.

[14] **MS. TRUHE:** All right.

[15] **THE COURT:** Yes?

[16] **MS. TRUHE:** Your Honor, at this time, on behalf of
[17] Defendant, Stuart Hack and the Stuart Hack Company, I would
[18] like to move for a directed verdict for several reasons.
[19] Primarily, there has been no testimony from Mr. Shofer that
[20] but for the fact that there were tax consequences of
[21] borrowing money from the pension, he would not have done so.
[22] So even assuming there was a duty owed by Mr. Hack to Mr.
[23] Shofer and that that duty was breached when Mr. Hack failed
[24] to mention or flag Mr. Shofer of potential tax issues, there
[25] is absolutely no evidence that that negligence proximately

[1] caused Mr. Shofer any damage.

[2] Now one might think that it is implicit in the

[3] fact that this case was ever brought in the first place.

[4] But I do not think implicit cuts it; it must be explicit and

[5] in evidence, and there was not one bit of testimony from Mr.

[6] Shofer that had he known that there were tax consequences to

[7] borrowing this money from the pension, he never would have

[8] borrowed from the pension. The second deficiency with

[9] respect to liability has to do with Mr. Kabala's testimony.

[10] Mr. Kabala was the Plaintiff's sole liability witness

[11] against Mr. Hack.

[12] He testified that while he believed Mr. Hack owed

[13] a duty to Mr. Shofer to advise him about tax consequences

[14] and that his failure to do so was negligence, nevertheless,

[15] Mr. Kabala did not testify - and I was very attentive

[16] because I kept waiting for the third and fourth elements -

[17] never testified that this breach proximately caused Mr.

[18] Shofer any damage. Nor did Mr. Kabala testify what damage

[19] Mr. Shofer was caused.

[20] With respect also to Mr. Kabala's testimony, he

[21] conceded on cross-examination that the Plaintiff failed to

[22] act as a prudent man - a prudent man is the standard

[23] applicable to the Plaintiff as a fiduciary to the plan and

[24] as trustee - in not getting back to Mr. Hack when he

[25] proceeded to withdraw monies from the pension in 1984, 1985,

[1] and 1986, after their initial consultation.

[2] **THE COURT:** Was he not really asked about

[3] continuing in the ensuing years?

[4] **MS. TRUHE:** No. He was also asked about 1984

[5] after the initial consultation, the two telephone

[6] conversations. And he testified that he thought Mr. Shofer

[7] did not behave as a prudent man. His is the sole testimony

[8] on that issue. We believe that testimony constitutes

[9] evidence of contributory negligence as a matter of law

[10] because it is undisputed and as well as assumption of the

[11] risk. If there is any damage which Mr. Shofer was caused

[12] thereby, he assumed the risk of in failing to get back to

[13] Mr. Hack.

[14] There is also, Your Honor, no evidence that Mr.

[15] Shofer sustained any damage by way of taxes, penalties, and

[16] interest except through hearsay. I believe the only

[17] evidence we have heard is Mr. Rosenberg testifying that he

[18] made a phone call to the IRS and was told certain things.

[19] There has been absolutely no competent evidence, however, as

[20] to what taxes, penalties, and interest were actually caused

[21] by the Hack loan problem because Mr. Shofer had other tax,

[22] penalty, and interest issues which had been excluded from

[23] this.

[24] There has been absolutely no differentiation

[25] between the two types of damage in terms of taxes,

[1] penalties, and interest. And again, just no evidence of

[2] those three types of damage in the first place. Then with

[3] respect to the second category of damage, which is

[4] professional fees, the evidence is undisputed that none of

[5] the professional fees for which Mr. Shofer is claiming

[6] damages in this case were paid by him personally. To a man,

[7] every single professional whose fees are being requested

[8] reimbursement of has said that they were billed to either

[9] the pension or the business and that Mr. Shofer never

[10] personally paid any of them. So I would move for a directed

[11] verdict at least as to that particular item of damages, Your

[12] Honor.

[13] **THE COURT:** I think that is a collateral source

[14] issue. I mean, if Plaintiff in a personal injury case who

[15] is entitled to have medical assistance, for example, pay for

[16] medical care, he is not barred from seeking the damages that

[17] they incur.

[18] **MS. TRUHE:** That is true, but in that case -

[19] **THE COURT:** If another entity pays his incurred

[20] liabilities, does it bar him from seeking them from the

[21] Defendants if he can establish their liability?

[22] **MS. TRUHE:** Sure, provided that other entity was

[23] legally obligated to pay those expenses in the first case.

[24] In your example, the insurance company would be obligated to

[25] pay those expenses and then is subrogated as against the

[1] tortfeasor. In this case, there was no legal obligation on

[2] the part of Crown Motors to pay any of these bills. I do

[3] not think we have thereby a subrogation interest arising on

[4] the part of Mr. Shofer just because he is the one who is

[5] ultimately responsible, or so he says, and will pay, so he

[6] says, Crown Motors back for all of these various fees. So I

[7] think the fact that they were paid gratuitously as a

[8] volunteer by Crown Motors on his behalf makes that much

[9] different from the situation which you described.

[10] **THE COURT:** Okay.

[11] **MS. TRUHE:** Thank you, Your Honor.

[12] **MS. WHELIHAN:** Well, Your Honor, I would adopt Ms.

[13] Truhe's arguments for Greybush's motion for judgment. I

[14] would add as to the damages on the taxes, interest, and

[15] penalties, Crown or Catalina Enterprises and Richard Shofer

[16] are two separate legal persons. I think the case law - and

[17] I would be happy to go get the case law for the Court -

[18] suggests that Mr. Shofer cannot claim injuries that are

[19] actually paid by his corporation. Mr. Shofer has not

[20] introduced any proof that he is in fact indebted to Crown.

[21] Moreover, his testimony was, as I recall, that when he got

[22] paid his salary, he would probably pay back Crown Motors,

[23] although it is a sort of vicious circle because he has not

[24] been his salary for years because Crown Motors has not had

[25] any money, and he himself is indebted to Crown. So I think

[1] the only - there is absolutely no evidence that -
[2] **THE COURT:** What about his testimony?
[3] **MS. WHELIHAN:** His testimony was when he gets paid
[4] his salary, he will pay back Crown Motors, but -
[5] **THE COURT:** But he did testify that he was
[6] indebted to the corporation.
[7] **MS. WHELIHAN:** He testified that he thought he was
[8] indebted to the corporation and that he would pay them back,
[9] but there is no - the only inference you can draw from that
[10] is he might possibly pay them back if the corporation does
[11] not forgive the debt. I think the problem with Mr. Shofer's
[12] financial relationship with his business is that one is
[13] always paying the other when the other has money. I do not
[14] think there is any probative evidence that Mr. Shofer has
[15] any intent to pay his corporation back, or that he will ever
[16] have the means to do it.
[17] So I think for that reason, even if he says he is
[18] going to pay back Crown, as long as he does not have the
[19] means to do it, it is a failure of proof. I think the
[20] evidence as to Greybush on Hack's claim for contribution as
[21] to Greybush has not shown any entitlement of Mr. Hack to
[22] contribution. There has been no evidence that there was any
[23] breach of duty. I realize (inaudible) were early in the
[24] Plaintiff's case as to Greybush, but it is pretty clear that
[25] the 1985 tax return was prepared properly. It is pretty

[1] clear that the amended returns would have been done by Mr.
[2] Shofer in any case.
[3] Finally, I would just echo Ms. Truhe that, I mean,
[4] the big problem I see, besides the fact that there is no
[5] proof of any kind of liability or proximate cause, is Mr.
[6] Shofer just has not proven his damages. The evidence thus
[7] far is that neither Greybush nor the Stuart Hack Company
[8] knew or had the ability to know that Mr. Shofer was actually
[9] borrowing. In fact, based upon the exhibits that are in
[10] evidence, the earliest that Greybush could have known about
[11] Mr. Shofer's borrowings would have been July 29, 1985.
[12] I do not know when Mr. Hack found out about the
[13] borrowings, but the inference certainly is not until late
[14] 1985, and by that time Mr. Shofer had already borrowed more
[15] than \$250,000. There is no way to separate out the damage
[16] evidence such as it is from what he borrowed before the
[17] Defendant or the Third-Party Defendants knew and what he
[18] borrowed subsequently. Plus, all of his damages came in -
[19] **THE COURT:** You may come to regret that argument.
[20] **MS. WHELIHAN:** Well, all of his damages came in as
[21] being linked to prohibited transactions, so there is no
[22] breakdown as to what was a prohibited transaction or what
[23] was in fact the actual borrowings at issue in this case. So
[24] there is no competent admissible evidence of these damages.
[25] For that reason alone, the Defendant's own Third-Party

[1] Defendants are entitled to judgment.
[2] **THE COURT:** Mr. Taylor, do you want to tell me
[3] what you have established with respect to the proximate
[4] cause?
[5] **MR. TAYLOR:** Well, I think with respect to the
[6] proximate cause, I think the testimony of Mr. Kabala,
[7] centering on whether or not the letter which Mr. Hack wrote
[8] in response to an inquiry as to whether it was advisable for
[9] Mr. Shofer to borrow money from his pension, that letter
[10] failed to address the taxability issue, the tax consequences
[11] of borrowing money from the pension account. Mr. Kabala has
[12] testified that, in his opinion, a letter responding to an
[13] inquiry with regard to pension loans falls below the
[14] ordinary standard of care of a pension consultant in failing
[15] to cover that particular issue.
[16] **THE COURT:** That may establish negligence. How
[17] does it establish proximate cause?
[18] **MR. TAYLOR:** Well, proximate cause follows, I
[19] think, from that when you issue a letter like that. Mr.
[20] Shofer, armed with that letter, proceeded to borrow funds
[21] from his pension. His testimony, as I recall it, was
[22] that -
[23] **THE COURT:** He borrowed money before he got the
[24] letter.
[25] **MR. TAYLOR:** He borrowed money only after he

[1] received the information by telephone from Mr. Hack. I
[2] think his testimony was -
[3] **THE COURT:** But Mr. Kabala did not say that that
[4] breached any standard of care.
[5] **MR. TAYLOR:** Well, I think the evidence is from
[6] Mr. Shofer that the information he received orally earlier
[7] and the information contained in the letter were the same.
[8] There is no -
[9] **THE COURT:** But that is not the expert's
[10] testimony.
[11] **MR. TAYLOR:** Well, the expert -
[12] **THE COURT:** Do you not have an obligation to
[13] establish the breach of the standard through expert
[14] testimony?
[15] **MR. TAYLOR:** I think that the expert has
[16] established that breach of the standard by analyzing the
[17] letter which was simply a written document, a written memo,
[18] of what -
[19] **THE COURT:** He clearly opined that the letter
[20] breached the standard of care, in his judgment. But I did
[21] not hear any evidence from him that the telephone
[22] conversation came into his consideration, and I certainly
[23] did not hear any evidence that the loans made prior to the
[24] letter then would fall within that.
[25] **MR. TAYLOR:** Well, as I recall, I think all of the

[1] loans except one were made after the letter was received.
[2] So if the issue is loans made prior to -
[3] **THE COURT:** The issue is proximate cause. I am
[4] trying to figure out how you get from this letter is bad and
[5] it is negligence to it caused injury.
[6] **MR. TAYLOR:** Well, I think you get the oral advice
[7] which is then reduced to writing. The person receiving the
[8] advice acts on the advice which happens to be erroneous. It
[9] is misleading with regard to the tax issue. The person acts
[10] on the advice, borrows money from the pension plan which
[11] results in additional taxes, interest, and penalties that
[12] the person would not have incurred had the advice not been
[13] given and the loans not made. I think there is a direct
[14] causal connection.
[15] **THE COURT:** How did you establish that he would
[16] not have incurred it if the advice had not been given?
[17] **MR. TAYLOR:** Well, he would not have borrowed
[18] money from his pension plan.
[19] **THE COURT:** Did he say that?
[20] **MR. TAYLOR:** He said he was considering options in
[21] terms of borrowing money, and the pension was one of the
[22] options.
[23] **THE COURT:** It is pretty thin. Let's keep going.
[24] How do you get around the contributory defense?
[25] **MR. TAYLOR:** Well, I think the -

[1] **THE COURT:** Your expert says he did not act as a
[2] reasonably prudent man. Your expert is an attorney. He
[3] knew what the words meant.
[4] **MR. TAYLOR:** Well, he indicated he thought it
[5] would have been probably better to have contacted the
[6] pension administrator after the initial letter was given.
[7] But actually, Mr. Giampietro, who is also an attorney, in
[8] commenting on the letter, testified just today that anyone
[9] reading that letter would feel very secure in the knowledge
[10] that one could proceed to borrow those funds without going
[11] back and asking additional questions about it. The letter
[12] itself is a complete statement with regard to a green light
[13] to borrow funds.
[14] There is nothing in the letter that would suggest
[15] that the person receiving the letter should come back and
[16] contact the administrator with respect to the loans that are
[17] being made. It is a blanket authorization to borrow money.
[18] There is an earlier letter which was the subject of some
[19] testimony in cross-examination from Mr. Omansky. I think it
[20] is either the 1976 letter or the 1981 letter in which Mr.
[21] Omansky clearly suggests that before taking the action
[22] contemplated, that the recipient of the letter contact his
[23] attorney or his accountant.
[24] There are no such warnings contained in the letter
[25] of August 9, 1984. It is a completely, as I said, blanket

[1] authorization to go forward and borrow funds. I think that
[2] Mr. Kabala's testimony certainly was not that it was
[3] contributory negligence to not go back and consult the -
[4] **THE COURT:** He was not asked that.
[5] **MR. TAYLOR:** Well, I know he was not. But he just
[6] simply was saying that, sure, if I had to do it over again
[7] or looking at it from the perspective I am now, it would
[8] have been better to go back and stay in touch with the
[9] person who initially gave him the advice. But the letter
[10] itself does not say anything like that. Mr. Shofer, I
[11] think, testified that he certainly wanted the advice reduced
[12] to writing because he wanted to show his bank that he was in
[13] fact able to borrow these funds.
[14] **THE COURT:** What direct evidence do you have of
[15] the damages?
[16] **MR. TAYLOR:** Well, the direct evidence of damages,
[17] I think, are with respect to the amended tax returns that
[18] Mr. Larash prepared. I think Mr. Larash was very clear with
[19] regard to his testimony that the amended 1984 and 1985
[20] returns reflect the additional tax generated by the
[21] borrowings from the pension. I think there is a direct
[22] causal relationship between these additional taxes and the
[23] loans that Mr. Shofer took from his pension. Mr. Rosenberg
[24] also testified that he used those figures and verified those
[25] figures with the Internal Revenue Services in doing the

[1] calculations which he did.
[2] **THE COURT:** Did Mr. Larash not say that he could
[3] testify as to the additional income, but that he could not
[4] cull from that the additional tax?
[5] **MR. TAYLOR:** I do not believe so. I asked him a
[6] direct question as to whether the -
[7] **THE COURT:** I would have to go back.
[8] **MR. TAYLOR:** Pardon me?
[9] **THE COURT:** I would have to go back.
[10] **MR. TAYLOR:** Yes. Well, I think his testimony was
[11] that the additional tax generated by the 1984 and 1985
[12] amended returns were a direct result of the loans. That was
[13] the only income that had not been reported in the 1984 and
[14] 1985 returns. The purpose of filing the amended returns was
[15] to report that income and pay the tax on that income. I
[16] think there is a direct causal relationship between those
[17] taxes, the interest, and penalties and the borrowings. I
[18] think the fees that were charged by Greybush Newman for that
[19] work and the fees charged by Mr. Giampietro were all
[20] directly related to the borrowings from the pension. I
[21] think there is a direct causal relationship between those
[22] damages, those costs, and the act of borrowing from the
[23] pension.
[24] **MS. WHELIHAN:** Your Honor, if I might, on the
[25] question about what Mr. Larash said. Mr. Larash did testify

[1] in 1986 that he did not know what the additional taxes were.
[2] But what his testimony was on the 1984 and 1985 returns, the
[3] amended returns, was that this is what the additional taxes
[4] should be, but he could not say for certain because he did
[5] not actually know what the taxes and penalties were that Mr.
[6] Shofer was charged because that was not determined with the
[7] filing of the amended returns. That was determined by the
[8] subsequent negotiations that Mr. Shofer had with the IRS.
[9] **THE COURT:** You never introduced into evidence the
[10] IRS notices of interest or penalties, did you?
[11] **MR. TAYLOR:** No, we did not, Your Honor, that is
[12] true. I am not going to go into perhaps the reason why not.
[13] It is not relevant. But we were trying to be careful to
[14] have the numbers that were directly attributable to these
[15] loans. If you look at the exhibits, the amended returns,
[16] you will find that the numbers are clearly stated there with
[17] regard to the additional tax that was due, and those were
[18] the figures that Mr. Rosenberg used in his calculations.
[19] **THE COURT:** Anything further?
[20] **MS. TRUHE:** Just briefly, Your Honor. Mr. Taylor
[21] is saying he thinks there is a direct causal link between
[22] all of this negligence on the part of Mr. Hack and all of
[23] these damages that we have heard so much about. It does not
[24] cut it. There has to be evidence that but for possible tax
[25] consequences, Mr. Shofer never would have borrowed from his

[1] pension. He never said that. I kept waiting to hear that.
[2] It is certainly implicit, but again, I do not think implicit
[3] does it. It has got to actually be in evidence. There was
[4] no positive testimony from Mr. Shofer at all on the issue of
[5] had I known, had I been warned, had I been told that there
[6] were going to be tax consequences to my going over a certain
[7] amount from my pension, I never would have done this; and
[8] because I did do this without knowing any of this, I
[9] incurred these tax damages.
[10] That testimony was never heard, nor did his
[11] expert - because there was another opportunity for it to
[12] come in - nor does his expert say that. Again, four
[13] elements: duty, breach, proximate cause of any damage. His
[14] expert talked a lot about duty and breach, but his expert
[15] never said that that breach of a duty thereby caused Mr.
[16] Shofer any damage whatsoever. So while Mr. Taylor in
[17] argument can try and link it all up, there is no evidence of
[18] that from either the Plaintiff or his expert.
[19] **THE COURT:** I understand your argument. In light
[20] of all that, however, I am going to deny the motion. I
[21] suspect we will revisit the motion, but I am prepared to
[22] hear from the Defendant, okay. Are you ready to go forward,
[23] Ms. Truhe?
[24] **MS. TRUHE:** Yes, Your Honor. I have to get Mr.
[25] Hack who is in the hall.

[1] (Discussion off the record.)
[2] **MS. TRUHE:** Your Honor, at this time, the
[3] Defendants will call Stuart Hack.
[4] **THE COURT:** Okay. Mr. Hack, if you will come
[5] forward, please.
[6] **STUART HACK,**
[7] a witness produced on call of the Defense, having first been
[8] duly sworn, was examined and testified as follows:
[9] **THE CLERK:** State your name and address for the
[10] record, please.
[11] **THE WITNESS:** Stuart Hack, 173 Lakeside Circle,
[12] Punta Vida Beach, Florida.
[13] **DIRECT EXAMINATION**
[14] **BY MS. TRUHE:**
[15] **Q:** Mr. Hack, you currently reside in Florida?
[16] **A:** That is correct.
[17] **Q:** Where are you from originally?
[18] **A:** From Baltimore.
[19] **Q:** Were you born in Baltimore?
[20] **A:** Born here, raised here, yes, ma'am.
[21] **Q:** All right. Do you still have family in the
[22] Baltimore area?
[23] **A:** Yes. My children, my mother, and my sister are
[24] here.
[25] **Q:** All right. When did you leave the Baltimore area

[1] to go to Florida?
[2] **A:** March of 1994.
[3] **Q:** What is your occupation?
[4] **A:** I'm an independent consultant.
[5] **Q:** In what field?
[6] **A:** Providing consulting services on 401-K plan, daily
[7] record-keeping systems.
[8] **Q:** Would you describe for us, please, your
[9] educational background?
[10] **A:** I graduated University of Maryland, Bachelor of
[11] Science degree; and graduated University of Maryland Law
[12] School, J.D. degree.
[13] **Q:** All right. Were you working while you were in law
[14] school?
[15] **A:** Yes, I went to law school at night. I worked
[16] during the day.
[17] **Q:** All right, and in what field were you working
[18] during the day?
[19] **A:** Initially, I had started working at my father's
[20] insurance agency. And then we decided it was a good idea to
[21] specialize in pension services, so I started with him a
[22] pension firm.
[23] **Q:** All right, and what was the name of that firm at
[24] the time?
[25] **A:** That was called Hack Pension Services, Inc.

[1] Q: How did you go from the insurance field to the
[2] pension field?
[3] A: It was pretty common in those days for defined
[4] benefit plans to be adopted as opposed to defined
[5] contribution plans. And it was pretty common in those days
[6] for insurance to be an element of those plans.
[7] Q: Now after you graduated from law school, did you
[8] ever practice law?
[9] A: No.
[10] Q: Do you have to practice law in order to be a
[11] pension consultant?
[12] A: No.
[13] Q: In your pension business, did you ever hold
[14] yourself out as an attorney?
[15] A: No.
[16] Q: Did you ever enter into an attorney-client
[17] relationship with any client of the Stuart Hack Company?
[18] A: No, I didn't.
[19] Q: Is the Stuart Hack Company still in existence?
[20] A: It is still in existence. The corporation exists.
[21] Q: Is it operating in -
[22] A: No, it is -
[23] Q: - Baltimore?
[24] A: No, it's - it is not operating. It's still
[25] registered in Maryland.

[1] Q: All right. Now when did you first have any
[2] contact with Richard Shofer?
[3] A: Early 1970's, around 1974 or so.
[4] Q: Do you know how he came to be referred to the Hack
[5] Company?
[6] A: He was referred to me by Harvey Newman at Greybush
[7] Newman Company.
[8] Q: Did you know Mr. Newman at the time?
[9] A: Yes.
[10] Q: How did you know him?
[11] A: Well, we had been in the Army together. We knew
[12] each other personally.
[13] Q: Did you refer clients to one another?
[14] A: More likely, he referred clients to me.
[15] Q: All right. Now was Mr. Shofer a personal client
[16] of the Greybush Newman accounting firm at the time he was
[17] referred to the Hack Company?
[18] A: Yes, at the time, I understand he was. He - both
[19] he and his corporation were clients of the Greybush Newman
[20] company.
[21] Q: What was your understanding of the types of
[22] services which the accounting firm of Greybush Newman was
[23] performing for Mr. Shofer and his business at the time he
[24] was referred to you?
[25] A: Tax advice and preparation of tax returns.

[1] Q: When did it cease to do business in Baltimore?
[2] A: The assets of that business were sold
[3] approximately March of 1994.
[4] Q: When you moved to Florida?
[5] A: Yes.
[6] Q: So all together, how long was the Stuart Hack
[7] Company doing business in the Baltimore area?
[8] A: 1960 through 1994, about 34 years.
[9] Q: Who were the typical clients of the Stuart Hack
[10] Company?
[11] A: We had businesses that ranged from a couple
[12] employees up to hundreds of employees.
[13] Q: Now going back to the time when the Stuart Hack
[14] Company was in existence, what position or title did you
[15] hold?
[16] A: Initially, I was vice president. My father was
[17] the president of the - of the business. And then I became
[18] the president, and ultimately changed the name to the Stuart
[19] Hack Company.
[20] Q: So you went from what to what?
[21] A: Vice president to president.
[22] Q: And the name of the company went from what to
[23] what?
[24] A: Hack Pension Services, Inc. to the Stuart Hack
[25] Company.

[1] Q: Did Greybush Newman do anything for the pension
[2] specifically by way of preparation of returns?
[3] A: They prepared the 990-T form which was necessary
[4] because there was real property that had loans against it,
[5] producing some taxable - potential taxable income.
[6] Q: Did Mr. Shofer already have a pension? Or, I
[7] should say, did his business already have a pension when Mr.
[8] Shofer came to you in the mid-1970's?
[9] A: Yes. He had a qualified pension plan at the time.
[10] Q: All right, and what business was Mr. Shofer
[11] otherwise in?
[12] A: He was in the used car business.
[13] Q: What was the name of his business at the time he
[14] was referred to you?
[15] A: Crown Motors. It's Catalina Enterprises titled as
[16] Crown Motors.
[17] Q: All right.
[18] MS. TRUHE: May I have Defendant's Exhibit
[19] Number 1?
[20] BY MS. TRUHE:
[21] Q: Mr. Hack, showing you what has been previously
[22] admitted into evidence as Defendant's Exhibit Number 1.
[23] Would you please identify that document?
[24] A: This is a letter dated December 22nd, 1983, to Ms.
[25] Pam Summers from Alan Vanderdresche.

[1] Q: All right, and what generally is that document
[2] concerning?

[3] A: This is a - an annual engagement letter that we
[4] would send to our clients spelling out the services we would
[5] be providing for the ensuing year and - and what the fees
[6] would be and what was regular work and what was special
[7] work.

[8] Q: Now, who was the client which the Hack Company had
[9] agreed to perform certain pension services for?

[10] A: It was Catalina Enterprises.

[11] Q: Was Defendant's Exhibit Number 1 typical of the
[12] fee agreements which the Hack Company would send each year
[13] to Crown Motors?

[14] A: Yes, it was.

[15] Q: Again, with reference to the entire time period
[16] during which the Hack Company was performing pension
[17] services for Catalina, who was the Hack Company's client?

[18] A: Catalina Enterprises.

[19] Q: Who did the Hack Company have a contractual
[20] relationship with in working on the Catalina Enterprises
[21] pension plan?

[22] A: It was with Catalina Enterprises.

[23] MS. TRUHE: May I have Exhibit Number 2 -
[24] Defendant's Exhibit 2?

[25] BY MS. TRUHE:

[1] Q: Mr. Hack, showing you what has been admitted into
[2] evidence as Defendant's Exhibit Number 2. This is an
[3] invoice, I believe, from the Hack Company. Do you recognize
[4] it?

[5] A: Yes, I do.

[6] Q: Who did the Hack Company bill for the pension
[7] services it rendered to the Catalina Enterprises pension
[8] plan?

[9] A: It was billed to Ms. Pam Summers, Catalina
[10] Enterprises, and it was titled Catalina Enterprises.

[11] Q: All right. Now at any time during the Hack
[12] Company's relationship with Catalina Enterprises, was Mr.
[13] Shofer ever personally a client of the Hack Company?

[14] A: No, he was not.

[15] Q: Were any other participants in the employees of
[16] Crown Motors personally clients -

[17] A: No, they -

[18] Q: - of the Hack Company?

[19] A: No, they were not.

[20] Q: Now what was the first thing the Hack Company did
[21] for Catalina Enterprises when Mr. Shofer came to you in the
[22] mid-1970's?

[23] A: We restated the plan document for the law changes
[24] that had occurred around 1974, ERISA.

[25] MS. TRUHE: Your Honor, I would like to pass up to

[1] the Court the documents that I will be referring to during
[2] the course of Mr. Hack's examination.
[3] (Defendant's Exhibit No. 25, Catalina
[4] pension plan/trust agreement, was marked
[5] for identification.)

[6] BY MS. TRUHE:

[7] Q: Mr. Hack, showing you what has been marked for
[8] identification as Defendant's Exhibit Number 25. Is the
[9] document which you just referred to?

[10] A: Yes, ma'am.

[11] Q: All right. Would you please identify that
[12] document for the record?

[13] A: It is the Catalina Enterprises, Inc. pension plan
[14] and trust agreement.

[15] Q: That was prepared by the Hack Company?

[16] A: Yes.

[17] MS. TRUHE: Your Honor, I would move for admission
[18] into evidence Defendant's Exhibit Number 25. It is,
[19] however, duplicative of - I forget which number
[20] Plaintiff -

[21] MS. WHELIHAN: Two?

[22] MS. TRUHE: - offered this as - but I think we
[23] are accepting this is a joint exhibit.

[24] MS. WHELIHAN: Is it 2?

[25] MS. TRUHE: I believe it is Plaintiff's 2.

[1] THE COURT: It is the same as Plaintiff's 2?

[2] MS. TRUHE: Yes.

[3] THE COURT: I will admit it.

[4] (Defendant's Exhibit No. 25, Catalina
[5] pension plan/trust agreement, previously
[6] marked for identification, was received
[7] in evidence.)

[8] BY MS. TRUHE:

[9] Q: Mr. Hack, could you tell us just briefly what type
[10] of information is contained in the plan document which your
[11] company prepared?

[12] A: These are the provisions and rules under which the
[13] plan operates and determines the benefits and rights of plan
[14] participants.

[15] Q: Did this particular plan document have a loan
[16] provision in it?

[17] A: Yes, it did.

[18] Q: Can you tell us what page that loan provision
[19] appears on?

[20] A: I don't remember the page. It is, I believe, in
[21] miscellaneous which is in the back. If you'll give me a
[22] moment. I'm not finding it, so bear with me, please.

[23] Q: I think it is around the 40's, early 40's.

[24] A: It's in the Section 12, the trust fund investment.
[25] It's page 44, subsection M.

[1] Q: Now what was the effective date of this revised
[2] pension plan document which your company drafted for
[3] Catalina?

[4] A: It was entered into on the 18th of October, 1976,
[5] and the effective date was January 1, 1977.

[6] Q: Now after your company prepared that document,
[7] what types of services did the Hack Company provide to
[8] Catalina Enterprises after that?

[9] A: We provided record-keeping, administration, aid in
[10] preparation of the government reporting forms, statements to
[11] plan participants, determination of eligibility, determining
[12] the allocate share of each participant under the plan.

[13] Q: Who was the trustee of this pension?

[14] A: Richard Shofer.

[15] Q: What was his role as trustee?

[16] A: Well, his role as trustee was as a fiduciary,
[17] being responsible for carrying out the terms of the plan
[18] solely for the benefit of the plan participants.

[19] Q: Now what were his responsibilities, if any,
[20] concerning record-keeping?

[21] A: He had the initial primary responsibility for
[22] keeping all records on the plan. He would provide records
[23] to us which we would use to calculate eligibility and
[24] allocate contributions, prepare reports.

[25] Q: How about with respect to the Hack Company's

[1] preparation of, I believe you mentioned, government forms?
[2] Would that include the 5500 -

[3] A: Yes.

[4] Q: - C?

[5] A: Yes. Yes, the -

[6] Q: To what extent was the Hack Company dependent upon
[7] Mr. Shofer to provide any data with respect to that?

[8] A: Well, we were totally dependent. We had no other
[9] source of data to do our work.

[10] Q: Would that data which the Hack Company needed to
[11] complete the 5500-C for a given plan year include
[12] information regarding plan loans?

[13] A: Yes, it would specifically do that.

[14] (Defendant's Exhibit No. 26, Molino
[15] 8/14/80 letter to Shofer, was marked for
[16] identification.)

[17] Q: Mr. Hack, directing your attention to what has
[18] been marked as Defendant's Exhibit Number 26. Would you
[19] please identify this document?

[20] A: This is a letter dated August 14, 1980, to Mr.
[21] Richard Shofer at Catalina Enterprises, and signed by
[22] John W. Molino, who was manager of plan administration at
[23] that time, with a copy to Harvey Newman.

[24] Q: Can you tell us just briefly the gist of what Mr.
[25] Molino is corresponding with Mr. Shofer on in that letter?

[1] A: There were - Mr. Shofer had two plans: a money-
[2] purchase pension plan and a profit-sharing plan, and there
[3] was inter-plan borrowing going on. And Mr. Molino was
[4] suggesting to Mr. Shofer that that may be a prohibited
[5] transaction, that he should talk with his accountants to
[6] make sure - his tax counsel.

[7] Q: Now how did the Hack Company come to find out that
[8] there were these inter-plan loans going on?

[9] A: That came from the data that we received from
[10] Catalina Enterprises.

[11] Q: Again, what was the -

[12] A: That was the asset data - the asset data.

[13] Q: The asset data?

[14] A: Yeah.

[15] Q: At that time, did the Hack Company know
[16] specifically how much had been borrowed by one plan from the
[17] other?

[18] A: Yes, we did. It was specified in the letter.

[19] Q: All right, and directing your attention to page 2,
[20] the highlighted paragraph, I believe you testified a few
[21] moments ago that Mr. Molino recommended that Mr. Shofer
[22] contact his accountant for additional information on how to
[23] compute the tax on this particular transaction?

[24] A: Yes, that's correct.

[25] Q: Why was the Hack Company recommending that Mr.

[1] Shofer do that?

[2] A: Well, that was not within our purview to determine
[3] that. That was their - the job of the CPA's and tax
[4] advisors.

[5] Q: Again, who was copied on this letter?

[6] A: Harvey Newman.

[7] Q: At Greybush Newman?

[8] A: Yes.

[9] MS. TRUHE: Your Honor, I would move for admission
[10] into evidence Defendant's Exhibit Number 26.

[11] THE COURT: It is admitted.

[12] (Defendant's Exhibit No. 26, Molino
[13] 8/14/80 letter to Shofer, previously
[14] marked for identification, was received
[15] in evidence.)

BY MS. TRUHE:

[17] Q: How often did you, Mr. Hack, personally have
[18] contact with Mr. Shofer after the Hack Company started
[19] performing administrative services for the pension?

[20] A: It was not often. At most, it was once or twice a
[21] year.

[22] Q: Do you recall any time period when your frequency
[23] of contact increased?

[24] A: Yes. It increased sometime around, I think it
[25] was, 1982 when Mr. Shofer was interested in utilizing a -

[1] an exemption to prohibited transaction rules to finance the
 [2] sale of automobiles through the retirement plan.
 [3] **Q:** Was he in touch with any other professional other
 [4] than yourself?
 [5] **A:** Yes, he was in touch with the Greybush Newman
 [6] Company.
 [7] **Q:** All right. Was he in touch with you more than
 [8] once about this idea?
 [9] **A:** He was in touch with me a lot about that idea.
 [10] **Q:** All right. Do you recall being contacted by Mr.
 [11] Shofer in August of 1984, two years later?
 [12] **A:** Yes.
 [13] **Q:** How did he contact you?
 [14] **A:** He called me on the telephone.
 [15] (Defendant's Exhibit No. 27, Hack 8/3/84
 [16] client telephone contact sheet, was
 [17] marked for identification.)
 [18] **Q:** Directing your attention to Defendant's Exhibit
 [19] Number 27, I would like to show this to you and ask you to
 [20] identify that document.
 [21] **A:** This is a client telephone contact sheet dated
 [22] 8/3/84 recording the conversation, or the gist of it, that I
 [23] had with Mr. Shofer.
 [24] **Q:** All right, whose handwriting appears on that
 [25] document?

[1] **A:** No.
 [2] **Q:** Did he ask you anything about how to take a loan
 [3] from the pension in the event he decided to go ahead and do
 [4] that?
 [5] **A:** No, he only asked me what I said.
 [6] **Q:** All right. Did you ask you anything at all about
 [7] possible tax consequences from borrowing from the pension?
 [8] **A:** No, he did not.
 [9] **Q:** So is it your testimony that the only thing you
 [10] can recall Mr. Shofer asking you with reference to this idea
 [11] of his to borrow from the pension was whether he could do
 [12] that, correct?
 [13] **A:** Whether he could borrow from the plan or use his
 [14] account as collateral for a loan.
 [15] **Q:** All right. So he actually bounced two ideas off
 [16] of you, correct?
 [17] **A:** That's correct.
 [18] **Q:** Now has any other participant in a pension for
 [19] which the Hack Company is performing services, or did
 [20] perform services, consulted you about borrowing from their
 [21] pension?
 [22] **A:** Yes.
 [23] **Q:** In the course of those consultations with you, did
 [24] you ever tell those participants about potential tax issues?
 [25] **MR. TAYLOR:** Objection.

[1] **A:** It's mine.
 [2] **Q:** All right. What is written in the blank next to
 [3] client name?
 [4] **A:** Crown Motors, and in paren Catalina Enterprises.
 [5] **Q:** What is written next to the category party
 [6] calling?
 [7] **A:** Dick Shofer.
 [8] **Q:** Do you recall how long that particular
 [9] conversation on August 3, 1984, lasted?
 [10] **A:** Probably 5 or 10 minutes.
 [11] **Q:** Tell us as best you can recall - and please feel
 [12] free to refer to that contact sheet - what Mr. Shofer said
 [13] to you during that telephone conversation.
 [14] **A:** He asked me whether he could borrow against his
 [15] voluntary account or use it as collateral for a loan.
 [16] **Q:** In the course of your conversation, did Mr. Shofer
 [17] ever tell you how much he was planning to borrow from his
 [18] voluntary account?
 [19] **A:** Never.
 [20] **Q:** Did he ever tell you why he was thinking of
 [21] borrowing from his voluntary account or wanting to put his
 [22] pension up as collateral for a loan?
 [23] **A:** No, never.
 [24] **Q:** Did he tell you that he was thinking of borrowing
 [25] from his pension more than once?

[1] **THE COURT:** Basis?
 [2] **MR. TAYLOR:** I do not think that what the witness
 [3] may have done in other cases is necessarily relevant as to
 [4] what happened here. We are talking about what actually
 [5] happened here.
 [6] **THE COURT:** I do not think it is directly
 [7] relevant, but I will allow it.
 [8] **THE WITNESS:** I - I'm sorry, say that question.
 [9] **BY MS. TRUHE:**
 [10] **Q:** Let me repeat the question. Mr. Hack, did you, in
 [11] the course of those consultations with other participants
 [12] who were asking you about borrowing from their pensions, did
 [13] you ever tell them or discuss with them potential tax
 [14] consequences?
 [15] **A:** Yes, I did.
 [16] **Q:** Why did you do that on those occasions?
 [17] **A:** Oh, they asked specifically for that information.
 [18] They gave me specific information about what they were
 [19] doing, why they were doing it, and wanted to know whether
 [20] their - whether it was something they could do and what the
 [21] tax consequences would be.
 [22] **Q:** Now there has been testimony in this case from the
 [23] Plaintiff's witnesses that he could have borrowed up to
 [24] \$126,600 from his voluntary account without any potential
 [25] adverse tax consequences. Did you receive any indication

[1] from Mr. Shofer that he was going to be borrowing anything
 [2] close to that kind of money during the course of your
 [3] August 3 telephone conversation?
 [4] **A:** I had no idea what he was going to borrow.
 [5] **Q:** Again, please feel free to refer to the exhibit in
 [6] front of you. What did you do after Mr. Shofer called you,
 [7] if anything?
 [8] **A:** I - according to the memo, I called Barry Berman
 [9] at Weinberg and Green to get, just to pass by him, you know,
 [10] the questions that had been asked me to make sure I was not
 [11] way off on the wrong track.
 [12] **Q:** All right. Sitting here today, do you actually
 [13] remember your conversation with Barry Berman?
 [14] **A:** I don't.
 [15] **Q:** Did Mr. Berman confirm the advice you had given
 [16] Mr. Shofer?
 [17] **A:** According to the memo, it says: "Yes, no written
 [18] authority; must agree not to withdraw voluntary accounts."
 [19] And my - my - from this, I conclude that he had commented
 [20] on the - putting up an account as collateral, that it
 [21] was - it would not work.
 [22] **Q:** All right, but with respect to your advice to Mr.
 [23] Shofer that it was proper for him to borrow from his
 [24] pension, did Mr. Berman, as best you can recall or referring
 [25] to that exhibit, comment at all on that issue?

[1] **A:** Yeah, and my notes say: "Request the loans be
 [2] collateralized in voluntary account: can be the
 [3] collateral."
 [4] **Q:** All right. Mr. Hack, did there come a time when
 [5] you had another contact with Mr. Shofer in August of 1984?
 [6] **A:** Yes.
 [7] **MS. TRUHE:** By the way, Your Honor, I do not
 [8] recall if I moved for admission into evidence Defendant's -
 [9] **THE COURT:** You did not.
 [10] **MS. TRUHE:** - 27. I would like to do so at this
 [11] time.
 [12] **THE COURT:** It is admitted.
 [13] (Defendant's Exhibit No. 27, Hack 8/3/84
 [14] client telephone contact sheet,
 [15] previously marked for identification,
 [16] was received in evidence.)
 [17] (Defendant's Exhibit No. 28, Hack 8/7/84
 [18] client telephone contact sheet, was
 [19] marked for identification.)
 [20] **BY MS. TRUHE:**
 [21] **Q:** Mr. Hack, showing you what has been marked as
 [22] Defendant's Exhibit Number 28. Would you please identify
 [23] that document?
 [24] **A:** It's a client telephone contact sheet dated August
 [25] the 7th, 1984, and the -

[1] **Q:** By the way, these client telephone contact sheets,
 [2] they appear to be standards forms. Were these standard
 [3] forms utilized by the Hack Company during this time period?
 [4] **A:** Everybody kept memorandum of their conversations
 [5] with clients.
 [6] **Q:** Okay. Let me ask you, first of all, does your
 [7] handwriting appear on that document?
 [8] **A:** Yes, that's my handwriting.
 [9] **Q:** Now next to the category marked client name, what
 [10] is indicated by you on that document?
 [11] **A:** Catalina Enterprises; in paren, Crown Motors.
 [12] **Q:** What is indicated next to party calling?
 [13] **A:** Dick Shofer.
 [14] **MS. TRUHE:** Your Honor, I would move for admission
 [15] into evidence Defendant's Exhibit Number 28.
 [16] **THE COURT:** It is admitted.
 [17] (Defendant's Exhibit No. 28, Hack 8/7/84
 [18] client telephone contact sheet,
 [19] previously marked for identification,
 [20] was received in evidence.)
 [21] **BY MS. TRUHE:**
 [22] **Q:** Now do I understand you correctly that Mr. Shofer
 [23] called you on this occasion?
 [24] **A:** That is correct.
 [25] **Q:** Tell us as best you can recall - and again,

[1] please feel free to refer to the client contact sheet -
 [2] what Mr. Shofer said to you.
 [3] **A:** He asked me to give him a letter saying that he
 [4] could borrow from his voluntary account, up to 100 percent
 [5] of that account.
 [6] **Q:** All right, so he specifically asked you for a
 [7] letter memorializing that advice, correct?
 [8] **A:** That's correct.
 [9] **Q:** How long was your conversation on that occasion,
 [10] if you can -
 [11] **A:** Only a few minutes.
 [12] **Q:** Now what did you do in response to that request by
 [13] Mr. Shofer?
 [14] **A:** I prepared the letter you are about to show me,
 [15] yeah.
 [16] (Defendant's Exhibit No. 29, Hack 8/9/84
 [17] letter to Shofer, was marked for
 [18] identification.)
 [19] **MS. TRUHE:** Your Honor, this has been marked for
 [20] identification Defendant's Exhibit Number 29. It is a copy
 [21] of the August 9, 1984, letter which is already in evidence,
 [22] but I would like to -
 [23] **THE WITNESS:** Could I have a glass of water? Is
 [24] that possible?
 [25] **MS. TRUHE:** Sure?

[1] (Discussion off the record.)
[2] **THE WITNESS:** I - I mean, keep going on. I
[3] just -
[4] **MS. TRUHE:** Oh, okay.
[5] **THE WITNESS:** - want to have a glass of water,
[6] that's all.
[7] **MS. TRUHE:** I was not sure how urgent the matter
[8] was.
[9] **THE COURT:** The city of Baltimore is very
[10] parsimonious in allowing us water cups.
[11] **BY MS. TRUHE:**
[12] **Q:** Now, in response to Mr. Shofer's request, you
[13] prepared what has been marked as Defendant's Exhibit
[14] Number 29, correct?
[15] **A:** That is correct.
[16] **Q:** Now, I would like to ask you about a statement in
[17] that letter, which is highlighted on my Exhibit Number 29:
[18] "In my opinion, you can use your voluntary account as
[19] collateral for a loan, or you can borrow up to 100 percent
[20] of your voluntary" -
[21] **A:** No -
[22] **Q:** - "account."
[23] **A:** No it's for - yeah, for; yes, ma'am.
[24] **Q:** For - with reference to the issue of borrowing
[25] from the pension, your advice: "in my opinion, you can

[1] borrow up to 100 percent of your voluntary account," was
[2] that advice correct?
[3] **A:** Yes, it was correct.
[4] **Q:** So Mr. Shofer was legally permitted to borrow up
[5] to 100 percent from his voluntary account at that time,
[6] correct?
[7] **A:** That is correct.
[8] **Q:** As you know, Mr. Hack, the allegation in this case
[9] is that your letter should have also mentioned possible tax
[10] consequences to Mr. Shofer if he should borrow up to 100
[11] percent or something over \$126,600. Do you believe this
[12] letter should have mentioned tax issues?
[13] **A:** If he had given me facts and - and asked me that
[14] specific, then perhaps; but, no, I answered - this letter
[15] responded to the question that he asked me.
[16] **Q:** Now, after your second telephone conversation with
[17] Mr. Shofer on, I believe it was, August 7, 1984, as
[18] indicated by Defendant's Exhibit Number 28, did Mr. Shofer
[19] ever contact you again about either of these ideas of either
[20] borrowing from his pension or putting his pension up as
[21] collateral for a loan?
[22] **A:** No.
[23] **Q:** So he never contacted you at all again in 1984?
[24] **A:** No.
[25] **Q:** Did he contact you at all about either of those

[1] ideas in 1985?
[2] **A:** No, he did not.
[3] **Q:** How about in 1986, did Mr. Shofer contact you at
[4] all about either of those ideas?
[5] **A:** No.
[6] **Q:** Well, when your company went to prepare the 5500-C
[7] for plan year 1984, did Mr. Shofer not respond to your
[8] company's request for data and reveal the \$200,000 he had
[9] taken in 1984?
[10] **A:** We did not get that data until a long time
[11] afterwards.
[12] **Q:** Well, what did the Hack Company do when it did not
[13] have sufficient data to complete the 5500-C for 1984?
[14] **A:** Well, we went through a - a process that was in
[15] our company to remind and request the data several times,
[16] and then ultimately completed the form to the best of our
[17] knowledge, and then sent him the form to - with
[18] instructions for him to complete it and file it.
[19] **MS. TRUHE:** May I have Defendant's Exhibit
[20] Number 8?
[21] (Discussion off the record.)
[22] **BY MS. TRUHE:**
[23] **Q:** Mr. Hack, showing you what has been admitted as
[24] Defendant's Exhibit Number 8. This is a memorandum from
[25] Janelle Hardy at the Hack Company, dated October 11, 1985.

[1] Is this what you were referring to when you said that you
[2] filled it in as best that you could, or that the Hack
[3] Company did the 5500-C for 1984 and mailed it to Mr. -
[4] **A:** That is correct.
[5] **Q:** - Shofer for his signature?
[6] **A:** Yes.
[7] **Q:** Had the Hack Company received any of the asset
[8] data it was requesting from Mr. Shofer -
[9] **A:** No.
[10] **Q:** - for 1984?
[11] **A:** No, we had none of it.
[12] **Q:** Was Mr. Shofer required, as a trustee, to furnish
[13] the Hack Company with timely and accurate asset data for the
[14] purpose of preparing 5500-C's?
[15] **A:** Specifically, yes.
[16] **Q:** Now, did you ever get a copy of the 5500-C - and
[17] by you, I mean the Hack Company - which Mr. Shofer
[18] ultimately filed with the IRS after the Hack Company sent
[19] him the form?
[20] **A:** Yes, we did.
[21] (Defendant's Exhibit No. 39, Shofer 1984
[22] 5500-C, was marked for identification.)
[23] **BY MS. TRUHE:**
[24] **Q:** Directing your attention to what has been marked
[25] as well, this is my number, Defendant's Exhibit Number 39.

[1] It may not be where we are at in the order. Would you
 [2] please identify this document?
 [3] **A:** This is a copy of the 1984 5500-C form.
 [4] **Q:** Now is this the actual 5500-C form which the Hack
 [5] Company received from Mr. Shofer?
 [6] **A:** Yes, it is.
 [7] **Q:** All right. Now I note that at the top - well,
 [8] first of all, there are two holes punched at the top - but
 [9] at the top it states: "Mailed to Hack 10/18/85." We have
 [10] heard testimony from Mr. Shofer that that is his
 [11] handwriting. Can you tell us when the Hack Company actually
 [12] received this 5500-C?
 [13] **A:** Well, we stamped our mail when it came in, and
 [14] this was received December 9th, 1985.
 [15] **MS. TRUHE:** Your Honor, I would move for admission
 [16] into evidence Defendant's Exhibit Number 39.
 [17] **THE COURT:** It is admitted. My guess is it is in
 [18] several times.
 [19] **MS. TRUHE:** It is in, but this is the actual one
 [20] the Hack Company received.
 [21] **THE COURT:** Okay.
 [22] (Defendant's Exhibit No. 39, Shofer 1984
 [23] 5500-C, previously marked for
 [24] identification, was received in
 [25] evidence.)

[1] **MS. WHELIHAN:** Well, it is in as Defendant's
 [2] Exhibit Number 9.
 [3] **MS. TRUHE:** A copy of that 5500-C. But again, the
 [4] significance of that document is it shows the date-stamp by
 [5] the Stuart Hack Company as to when it was received. It also
 [6] indicates exactly what was received by the Stuart Hack
 [7] Company in terms of numbers, pages, and information
 [8] appearing thereon.
 [9] **BY MS. TRUHE:**
 [10] **Q:** Mr. Hack, when did you first learn that Mr. Shofer
 [11] had borrowed any money from his pension in 1984, 1985, or
 [12] 1986?
 [13] **A:** Late in 1986 when I got a phone call from the
 [14] Greybush Newman company.
 [15] **MS. TRUHE:** Your Honor, that is all I have.
 [16] **THE COURT:** Cross-examination?
 [17] **MR. TAYLOR:** Thank you.
 [18] (Discussion off the record.)
 [19] **CROSS-EXAMINATION**
 [20] **BY MR. TAYLOR:**
 [21] **Q:** Mr. Hack, as I understand your testimony, the
 [22] initial contact with Mr. Shofer concerning the advisability
 [23] of loans from his pension account in 1984 occurred on
 [24] August 3, 1984. Is that right?
 [25] **A:** I'd have to look at the memo, but that sounds

[1] about - if that's the same date as on that telephone memo,
 [2] then I agree to that.
 [3] **Q:** Do you remember precisely what Mr. Shofer asked
 [4] you at this point?
 [5] **A:** No.
 [6] **Q:** Your advice was that he could borrow up to 100
 [7] percent of his voluntary account. Is that correct?
 [8] **A:** Well, reading that memo, his - his question to me
 [9] was whether he could - in that telephone conversation that
 [10] you are referring to right now, he asked me whether he
 [11] could.
 [12] **Q:** Your advice was that he could. Is that correct?
 [13] **A:** I don't know that I gave him that advice in that
 [14] telephone conversation.
 [15] **Q:** That is the advice that was contained ultimately
 [16] in the letter that you wrote for him, is that correct?
 [17] **A:** That is correct.
 [18] **Q:** You have testified here today that that statement
 [19] is correct as far as the law is concerned, is that right?
 [20] **A:** That was the - the answer I gave him was correct.
 [21] **Q:** There would, however, be tax consequences if he
 [22] were to borrow up to 100 percent of his voluntary account,
 [23] would there not?
 [24] **A:** Well, there may or may not be depending upon a lot
 [25] of circumstances.

[1] **Q:** Do you feel that you had any responsibility to ask
 [2] some questions of Mr. Shofer when he asked you if he could
 [3] borrow up to 100 percent of his voluntary account?
 [4] **A:** No.
 [5] **Q:** In other words, it is your position that an
 [6] individual who inquires about the advisability of borrowing
 [7] money from his pension account should ask you all the
 [8] questions about that?
 [9] **A:** I'm not a seer.
 [10] **Q:** Now your memo - I believe, the memo of the
 [11] August 3, 1984, telephone call - indicated that you
 [12] contacted Barry Berman. Is that correct?
 [13] **A:** If that's the same memorandum, yes.
 [14] **Q:** Do you know whether or not you had contacted Barry
 [15] Berman before or after you gave Mr. Shofer the advice that
 [16] he could borrow up to 100 percent of his voluntary account?
 [17] **A:** Did I - did I ever speak to him about anything,
 [18] is that -
 [19] **Q:** Yes.
 [20] **A:** - your question?
 [21] **Q:** Well, the question is did you give Mr. Shofer the
 [22] answer to the question he asked you before or after you
 [23] consulted with Barry Berman?
 [24] **A:** The - the letter that I wrote to Mr. Shofer was
 [25] dated after I spoke to Barry Berman.

[1] Q: But you had not spoken to Barry Berman before you
 [2] gave Mr. Shofer the oral advice over the telephone that you
 [3] thought he could borrow 100 percent of his voluntary
 [4] account. Is that correct?
 [5] A: That's correct.
 [6] Q: Your testimony is that you first learned that
 [7] there were loans in 1986. Is that correct?
 [8] A: That's correct.
 [9] Q: The information came to you by virtue of a
 [10] telephone call from Greybush Newman?
 [11] A: That's correct.
 [12] Q: What action did you taken - or what action did
 [13] the Hack Company take when you learned that there were loans
 [14] from the pension account?
 [15] A: I -
 [16] MS. TRUHE: Objection, Your Honor. This is beyond
 [17] the scope of direct.
 [18] THE COURT: Well, it is. Where are we going?
 [19] MR. TAYLOR: Actually, Your Honor, I want to ask
 [20] Mr. Hack some questions with respect to an exhibit that has,
 [21] I think, been admitted, the Judith Reed exhibit.
 [22] MS. TRUHE: Which is beyond the scope of direct.
 [23] THE COURT: It does go beyond the scope.
 [24] MR. TAYLOR: Well, but I believe Mr. Hack
 [25] testified with respect to his communications with Greybush

[1] Newman in 1986 as to the fact that there were loans. It
 [2] seems to me it is expanding on that.
 [3] THE COURT: I thought that I sustained an
 [4] objection to that exhibit. Is that one of the ones that we
 [5] were discussing at the -
 [6] MS. TRUHE: Yes, Your Honor.
 [7] THE COURT: - beginning of the afternoon?
 [8] MS. WHELIHAN: Yes.
 [9] THE COURT: I do not think it came in, Mr. Taylor.
 [10] MR. TAYLOR: All right.
 [11] THE COURT: I will sustain the objection.
 [12] BY MR. TAYLOR:
 [13] Q: What was the nature of the inquiry from Greybush
 [14] Newman in 1986?
 [15] A: I -
 [16] MS. TRUHE: Objection, Your Honor; inquiry or
 [17] advice to Mr. Hack or information conveyed to Mr. Hack?
 [18] BY MR. TAYLOR:
 [19] Q: Well, I am asking what was the purpose, why did
 [20] Greybush Newman call you in 1986?
 [21] A: They called me to tell me that Mr. Shofer had made
 [22] loans from his retirement plan.
 [23] Q: Was there a particular issue with regard to why
 [24] they were calling you on that subject?
 [25] A: Yes.

[1] Q: What was that issue?
 [2] MS. TRUHE: Objection; assuming that was
 [3] communicated to him during that telephone conversation.
 [4] Because he is now - as I interpret the question, he is
 [5] being asked to read the mind of the person calling him.
 [6] THE COURT: Well, why don't you tell the Court
 [7] about that conversation, Mr. Hack; what you recall of it?
 [8] THE WITNESS: That's - yeah. My recollection is
 [9] that the - that - in that phone conversation, I was told
 [10] that Mr. Shofer had borrowed money from the plan and that -
 [11] and that they were concerned because of the tax
 [12] consequences.
 [13] BY MR. TAYLOR:
 [14] Q: What was your reaction to that statement?
 [15] A: Shock.
 [16] Q: Were you shocked at the fact that loans were
 [17] taken, or that there would be tax consequences to those
 [18] loans?
 [19] A: I was shocked that - that the loans were taken
 [20] and the amount of the loans.
 [21] Q: Did you express an opinion at that time as to
 [22] whether or not you believed those loans were taxable?
 [23] A: I don't know.
 [24] Q: Did you yourself do any research on the issue of
 [25] the taxability of those loans after you had communicated

[1] with Greybush Newman?
 [2] MS. TRUHE: Objection; beyond the scope of direct.
 [3] This is now after the telephone conversation.
 [4] THE COURT: I will overrule. You may answer.
 [5] THE WITNESS: I am sorry, then. What was said?
 [6] BY MR. TAYLOR:
 [7] Q: The question is did you do any research on the
 [8] issue of the taxability of those loans after you had had
 [9] this initial contact from Greybush Newman?
 [10] A: What I could remember is that I looked at the
 [11] file, tried to find out what we knew about the loans, and
 [12] whatever we had in our files that had occurred.
 [13] Q: Did you ever express an opinion as to whether or
 [14] not you believed those loans could be taxable or not after
 [15] you had had this initial contact with Greybush Newman?
 [16] MS. TRUHE: Objection. Now we are definitely
 [17] beyond the scope of direct and getting, frankly, to an issue
 [18] which is after the fact. How this was all sorted out and
 [19] what the various opinions were, especially by persons who
 [20] are not tax experts and are not involved in preparation of
 [21] tax returns, I think, is irrelevant.
 [22] THE COURT: Why are you entitled to go down this
 [23] road, Mr. Taylor?
 [24] MR. TAYLOR: Well, Your Honor, I think the issue
 [25] of Mr. Hack's knowledge of whether or not these loans were

[1] taxable, I think, goes to this question of the advice that
[2] he included in his letter of August 9, 1984. It seems to
[3] me -

[4] **THE COURT:** But you did not ask him about what he
[5] did in preparation of the letter for August 9, 1984. you
[6] are free to do that. I think we are past that now, so I am
[7] going to sustain the objection.

[8] **BY MR. TAYLOR:**

[9] **Q:** Mr. Hack, in writing your letter of August 9,
[10] 1984, did you do any research other than contact Barry
[11] Berman?

[12] **A:** I do not remember this at all.

[13] (Discussion off the record.)

[14] **MS. TRUHE:** Counsel?

[15] **MR. TAYLOR:** Yes?

[16] **MS. TRUHE:** Just tell me what page and line number
[17] you are referring to.

[18] **MR. TAYLOR:** All right, I was going to make the
[19] copy available to Mr. Hack.

[20] **MS. TRUHE:** Well, I assume as part of your
[21] question, you were going to read in the testimony and get
[22] his comment.

[23] **MR. TAYLOR:** I am.

[24] **BY MR. TAYLOR:**

[25] **Q:** Mr. Hack, you recall that you were deposed on

[1] March 16, 1989, in this case, do you not?

[2] **A:** Yes.

[3] **Q:** In that deposition, you were asked about your
[4] membership in the American Society of Pension Actuaries, is
[5] that not correct?

[6] **A:** I don't remember, but I'll assume it's correct.

[7] **Q:** Well, let me read you this question and answer
[8] beginning at line 12 on page 33.

[9] **MS. TRUHE:** I would object, Your Honor, because I
[10] do not think this is really impeachment. If he wants to ask
[11] Mr. Hack about his membership, that is one thing. But to
[12] simply have a contest as to what he remembered in his
[13] deposition, I think, is -

[14] **THE COURT:** Are you using the deposition for -

[15] **MS. TRUHE:** - out of order.

[16] **THE COURT:** - impeachment purposes?

[17] **MR. TAYLOR:** Well, Your Honor, I wanted to ask Mr.
[18] Hack some questions with respect to his professional
[19] memberships and the fact that he is an attorney.

[20] **THE COURT:** Well, you can do that, but you do not
[21] need to use the deposition. Ask away.

[22] **MR. TAYLOR:** Thank you.

[23] **THE COURT:** I mean, I do not mean to be glib, but
[24] the rules require you to use the deposition for impeachment.

[25] **BY MR. TAYLOR:**

[1] **Q:** Mr. Hack, are you a member of the American Bar
[2] Association?

[3] **A:** Yes, I am.

[4] **Q:** Are you a member of the Employee Benefits
[5] Committee of the American Bar Association?

[6] **A:** I think I still am.

[7] **Q:** How long have you been a member of the Employee
[8] Benefit Committee of the ABA?

[9] **A:** I'm guessing 10 years or more.

[10] **Q:** Are you a member of the Baltimore Association of
[11] Tax Counsel?

[12] **A:** No, I'm not.

[13] **Q:** Have you ever been?

[14] **A:** Yes.

[15] **Q:** When were you a member?

[16] **A:** I was a member for lots of years. I don't know
[17] the exact years, but when I was active in Baltimore, I was a
[18] member.

[19] **Q:** You maintain that you have never practiced law
[20] during the period of time that you were employed by the
[21] Stuart Hack Company, is that correct?

[22] **A:** That's correct.

[23] **Q:** I think in response to a question that Ms. Truhe
[24] asked you, you indicated that you have never represented any
[25] clients of the Stuart Hack Company as an attorney. Is that

[1] what you said?

[2] **A:** That's what I said.

[3] **Q:** You have, however, represented clients of the
[4] Stuart Hack Company before the Internal Revenue Service,
[5] have you not?

[6] **A:** I, on behalf of my firm, has to obtain approval of
[7] plan documents that we submitted.

[8] **Q:** When you appeared before the IRS, you indicated to
[9] the IRS that you were a licensed attorney and you were there
[10] representing the individual or individuals whose case was
[11] being considered by the IRS, were you not?

[12] **MS. TRUHE:** Objection; represented as what?

[13] **BY MR. TAYLOR:**

[14] **Q:** Did you appear as an attorney representing clients
[15] before the Internal Revenue Service?

[16] **A:** Never did.

[17] **Q:** Well, I would ask you to - let me read you
[18] from -

[19] **MS. TRUHE:** Counsel, page and line?

[20] **MR. TAYLOR:** Page - I am getting to that, Ms.
[21] Truhe, if you will just give me a chance. Looking at Mr.
[22] Hack's deposition of March 21, 1997, at page 37, line 12.

[23] **MS. TRUHE:** All right, just a moment.

[24] **BY MR. TAYLOR:**

[25] **Q:** Question -

[1] MS. TRUHE: Excuse me, just a moment. Let me -
[2] what line again?

[3] MR. TAYLOR: Line 12.

[4] MS. TRUHE: Okay.

[5] BY MR. TAYLOR:

[6] Q: Question: "Did your clients know that you were an
[7] attorney before you undertook their representation before
[8] the Internal Revenue Service?" Ms. Truhe: "Objection."

[9] "You may answer." Answer: "I am sure they did, and
[10] typically, they - it also was with the agreement of their
[11] own counsel I was there." Question: "Was the IRS aware of
[12] the fact that you were a licensed attorney when you
[13] appeared?" "Objection." "You can answer." "Yes."

[14] Question: "Have you ever written to the Internal
[15] Revenue Service on behalf of your clients?" Ms. Truhe:

[16] "Objection." "You can answer." Answer: "Yes." Question:

[17] "How often would you say that has happened during the time
[18] that you were affiliated with the Stuart Hack Company?" Ms.

[19] Truhe: "Objection." "You may answer." Answer: "Certainly
[20] more than a couple dozen times." Does that refresh your
[21] recollection?

[22] A: I answered - I was answering the question that
[23] you asked me. I never appeared before the Internal Revenue
[24] Service.

[25] MS. TRUHE: And, Your Honor, in fairness, if I

[1] could keep reading the next question and the next answer.

[2] MR. TAYLOR: Well, I think that would come, would
[3] it not, Your Honor, on redirect examination?

[4] THE COURT: You can wait.

[5] BY MR. TAYLOR:

[6] Q: I am going to look at the same deposition,
[7] page 38, line 20. Question: "Typically, the Internal
[8] Revenue Service will require you to execute a power of
[9] attorney or your client to execute a power of attorney so
[10] you can appear before the Internal Revenue Service. Is that
[11] correct?" Answer: "That's correct." Question: "Does that
[12] form carry a designation that the representative may or may
[13] not be an attorney? Isn't there a separate block that you
[14] check?" Answer: "Yes." Question: "So typically, when you
[15] would execute or have your client execute a power of
[16] attorney for the IRS, you would indicate to the IRS that you
[17] were an attorney?" Answer: "Yes." Does that refresh your
[18] recollection, Mr. Hack?

[19] A: I agree to that.

[20] Q: In the same deposition, on page 40, line 8, the
[21] question is: "But you were acting under a power of attorney
[22] which designated you as an attorney, were you not?" Answer:

[23] "Yes." Question: "And the Internal Revenue Service knew
[24] you were an attorney?" Answer: "Yes." "And you charged
[25] fees for those services, did you not?" Answer: "When you

[1] say you, are you saying me or the corporation?" Question:
[2] "I am going to ask you, I guess, to clarify that. Who got
[3] the fees for your services?" Answer: "The corporation. It
[4] was corporation services that were offered. I was an
[5] employee, contractually, of the corporation." Does that
[6] refresh your recollection?

[7] A: Yes.

[8] Q: So you were acting as an attorney for clients of
[9] the Stuart Hack Company, were you not?

[10] MS. TRUHE: Objection.

[11] THE COURT: Overruled. You may answer.

[12] THE WITNESS: I was representing - defending
[13] the - these documents to the Internal Revenue Service for
[14] approval. And the power of attorney was so that they could
[15] respond to me, and I could respond to them.

[16] BY MR. TAYLOR:

[17] Q: You have represented yourself to be an attorney
[18] when you have appeared as a speaker at seminars or other
[19] such functions, have you not, in the past?

[20] A: I can't tell you specifically whether I said I was
[21] an attorney. I certainly have represented myself to have a
[22] juris - a J.D. degree.

[23] Q: Looking at the same deposition, March 21, 1997,
[24] page 41, line 17. Question: "You have, however,
[25] represented yourself to be an attorney when you have

[1] appeared as a speaker at a seminar or something, haven't
[2] you?" Ms. Truhe: "Objection. By that question, do you
[3] mean has he ever told any group that he is an attorney?"

[4] Mr. Taylor: "Yes." Answer: "Yeah, I have." Question:

[5] "Why would you do that?" Ms. Truhe: "Objection." "You may
[6] answer." Answer: "To give my background qualifications so
[7] they understood." Question: "Qualification as an
[8] attorney?" Answer: "Qualifications as somebody who's
[9] giving information, where I'm coming from, or what my
[10] historical background is." Is that an accurate rendition of
[11] your testimony?

[12] A: Yes, it is.

[13] Q: You are a member of the American Society of
[14] Pension Actuaries, is that not true?

[15] A: I'm an associate member.

[16] Q: How is it that you are an associate member?

[17] A: CPA's, charter life underwriters, and attorneys
[18] can be associate members.

[19] Q: Is it that you are a member by virtue of the fact
[20] that you are an attorney?

[21] A: Yes.

[22] Q: As a part of your work, Mr. Hack, as a pension
[23] consultant, do you give tax advice with respect to matters
[24] involving pensions?

[25] A: I certainly have. Upon occasion, when given a set

[1] of facts and asked for the advice, I've given such advice.
 [2] **Q:** You have testified that in this particular case,
 [3] you gave no tax advice to Mr. Shofer when he called you. Is
 [4] that correct?
 [5] **A:** That is correct.
 [6] **Q:** Again, what would be the set of circumstances in
 [7] which you would give tax advice -
 [8] **A:** Well, if Mr. Shofer -
 [9] **MS. TRUHE:** Objection; to Mr. Shofer?
 [10] **BY MR. TAYLOR:**
 [11] **Q:** - to Mr. Shofer?
 [12] **A:** If Mr. Shofer had said to me not only do I want to
 [13] know whether I can borrow, but I would like you to tell me
 [14] what the tax effects would be. And then we would've begun a
 [15] discourse which would've taken quite a period of time to
 [16] obtain information. And then I would have probably prepared
 [17] a memorandum and would've copied his accountants and would
 [18] have recommended that he get advice from his accountants in
 [19] addition to what I was telling him.
 [20] **Q:** Would it not have been more prudent to have
 [21] suggested in the letter, Mr. Hack, that Mr. Shofer consult
 [22] with his attorney or with his tax advisor about the
 [23] taxability of these loans -
 [24] **A:** No.
 [25] **Q:** - any loans?

[1] **A:** No.
 [2] **Q:** Why not?
 [3] **A:** That would've taken me into the whole issue of -
 [4] of taxation gratuitously.
 [5] **Q:** When you say gratuitously, what do you mean by
 [6] that?
 [7] **A:** I - I would've entered the - the area of talking
 [8] about taxes without the opportunity of having been asked and
 [9] out - without the opportunity of having the facts, and
 [10] without the opportunity of preparing a full memorandum.
 [11] (Discussion off the record.)
 [12] **MR. TAYLOR:** Your Honor, I was looking for an
 [13] exhibit I thought had been marked but not introduced. I am
 [14] wondering if I might ask the Court to maybe just take a
 [15] brief break while I try to see if I can -
 [16] **THE COURT:** Yes, I will be happy to do that. I am
 [17] probably going to have to conduct a bail review in a moment
 [18] or two. We are waiting on a defendant to come up. It is
 [19] only going to take a few moments, so I will break, and then
 [20] I will probably come back and do the bail review, and then
 [21] we will take this up again, okay? Mr. Hack, you are under
 [22] oath, so you cannot discuss your testimony. Thank you. We
 [23] will take a brief recess.
 [24] (Brief recess.)
 [25] (Intervening matters.)

[1] **THE COURT:** Did you have enough time to find your
 [2] paper, Mr. Taylor?
 [3] **MR. TAYLOR:** Yes, I did find the exhibit, Your
 [4] Honor. Thank you.
 [5] **THE COURT:** Are we ready to resume?
 [6] **MR. TAYLOR:** Yes, Your Honor, thank you.
 [7] **BY MR. TAYLOR:**
 [8] **Q:** Mr. Hack, with reference to the letter of
 [9] August 9, 1984, is it your opinion today, as you have
 [10] testified, that that letter is an accurate statement of what
 [11] the law was in 1984?
 [12] **MS. TRUHE:** Objection with respect to what?
 [13] **MR. TAYLOR:** Specifically, that it complied with
 [14] the law as it was in 1984.
 [15] **MS. TRUHE:** With respect to borrowing from the
 [16] pension?
 [17] **MR. TAYLOR:** Borrowing from the pension.
 [18] **THE WITNESS:** Yes.
 [19] **BY MR. TAYLOR:**
 [20] **Q:** Let me call your attention to your deposition of
 [21] March 21, 1997, at page 31, beginning at line 19. Question:
 [22] "Is it your opinion today that your letter of August 9,
 [23] 1984, is an accurate rendition of the state of the law at
 [24] the time you wrote the letter?" Ms. Truhe: "Objection."
 [25] "You may answer." Answer: "The answer is it was not a

[1] complete statement of the law." Question: "And do you -
 [2] can you tell me what areas - in what areas you feel the
 [3] letter was incomplete?" Answer: "It did not point out the
 [4] tax or prohibited transaction issues." Was that your
 [5] testimony in that deposition?
 [6] **A:** Yes, it was.
 [7] **Q:** Okay.
 [8] **MS. TRUHE:** And, Your Honor, I do not think that
 [9] is impeachment. This goes to the issue of completeness, not
 [10] accuracy. I do not see how that impeaches or even
 [11] contradicts the answer which was just given by the witness.
 [12] **THE COURT:** Well, in somebody's view, it
 [13] apparently does, so overruled.
 [14] **BY MR. TAYLOR:**
 [15] **Q:** Mr. Hack, is it your position that Mr. Shofer was
 [16] not a client of yours or the Hack Company's at the time that
 [17] you were performing services for Catalina Enterprises and
 [18] its pension trust?
 [19] **A:** That's correct.
 [20] **Q:** Is it your position that you owed Mr. Shofer no
 [21] duty with respect to any obligation to be accurate with
 [22] respect to any information you may have given him?
 [23] **MS. WHELIHAN:** Objection.
 [24] **MS. TRUHE:** Objection.
 [25] **THE COURT:** Why can the witness not respond to

[1] that question?

[2] **MS. TRUHE:** Well, it is rather broad: any
[3] information at any time on any issue? Is this just a
[4] theoretical, or is he relating it to the information
[5] conveyed in 1984?

[6] **MR. TAYLOR:** I will narrow the question, Your
[7] Honor.

[8] **BY MR. TAYLOR:**

[9] **Q:** Mr. Hack, within the context of Mr. Shofer's
[10] relationship with Catalina Enterprises, did you feel that
[11] you would have any duty to give him accurate information
[12] with respect to any inquiries he might make with regard to
[13] his pension account?

[14] **A:** Yes.

[15] **Q:** What would create that duty, in your mind? What
[16] would be the relationship that would create the duty?

[17] **A:** I don't know how to respond to that.

[18] **Q:** Well, you say that you would owe a duty to Mr.
[19] Shofer. On what basis would you feel that you had a duty to
[20] Mr. Shofer?

[21] **A:** Well, if Mr. Shofer called me as - you know, as
[22] my client representing - as - as the president of the
[23] company and asked me a question, I should give him an answer
[24] and it should be a correct answer.

[25] **Q:** Would you feel that there would be any

[1] consequences to you if you gave him an incorrect answer?

[2] **MS. WHELIHAN:** Objection. I do not see how this
[3] witness can possibly answer that question, and I think it is
[4] totally improper.

[5] **THE COURT:** Well, I am not sure where it gets Mr.
[6] Taylor. I mean, it sounds like a legal issue of liability.

[7] **BY MR. TAYLOR:**

[8] **Q:** Have you ever referred to Mr. Shofer as your
[9] client?

[10] **A:** I don't think so.

[11] **Q:** Did you ever consider Mr. Shofer to be your
[12] client?

[13] **A:** No, I considered the corporation and the plan to
[14] be my client.

[15] **Q:** Did you apply any different standard with regard
[16] to the work that you performed in responding to Mr. Shofer's
[17] inquiry and writing the letter of August 9, 1984, as
[18] compared to any other work you might do for a client of the
[19] Stuart Hack Company?

[20] **A:** No.

[21] **Q:** It was the same quality of work?

[22] **A:** Yes.

[23] **Q:** The same care that you would give a client of the
[24] Stuart Hack Company?

[25] **A:** Yes.

[1] **Q:** Mr. Hack, I want to read you a series of questions
[2] and answers which you gave in a deposition on March 14,
[3] 1989. I want to then ask you a question about the answers
[4] that you supplied as they relate to this question of how you
[5] viewed Mr. Shofer in the services that you performed for his
[6] corporation. Looking at page 80 of the deposition of
[7] March 14, 1989, line 17. "Did you personally serve as the
[8] accountant at that point?" Answer: "Well, work that I had
[9] done for Dick, and this was true for virtually all my
[10] clients, is that I do the consulting work, and the
[11] administrative work was done by staff."

[12] **MS. TRUHE:** I am sorry, Counsel, what page?

[13] **MR. TAYLOR:** I am reading from page 80.

[14] **MS. TRUHE:** Is that from Volume 1 of the March 16,
[15] 1989, deposition?

[16] **MR. TAYLOR:** Yes, it is Volume 1. I am sorry.

[17] **MS. TRUHE:** That is not what it says on page 80.

[18] **MR. MAY:** He said March 14.

[19] **MS. WHELIHAN:** Your Honor, I was confused, too.
[20] It is March 16, 1989, at page 80.

[21] **MR. TAYLOR:** I am sorry; March 16. I beg your
[22] pardon.

[23] (Discussion off the record.)

[24] **MR. TAYLOR:** Have you located it?

[25] **MS. TRUHE:** Yes, I have, and I am just wondering

[1] why my line is different. I might have a different volume
[2] here, but I have got it.

[3] **MR. TAYLOR:** Thank you.

[4] **BY MR. TAYLOR:**

[5] **Q:** Line 17: Question: "Did you personally serve as
[6] the accountant at that point?" Answer: "Well, work that I
[7] had done for Dick, and this was true for virtually all my
[8] clients, is that I do the consulting work, and the
[9] administrative work was done by staff." Question: "You
[10] would have had initial contact when he first came to you?"

[11] **Answer:** "Yes." Question: "And you would consult on
[12] special problems?" Answer: "That's correct. Our
[13] relationship was that Dick would typically call with
[14] problems needing a solution, and a creative one.

[15] "And my job was to try to figure out how to say
[16] yes within the law as to why he was trying to acc" - "or as
[17] to what he was trying to accomplish. I think that was my
[18] particular value to them." Question: "Did you say creative
[19] solutions?" Answer: "That's correct; come up with an
[20] answer that permits him within the law to do what he wants
[21] to do." Question: "Is it fair to say that you sold
[22] yourself and your company as a creative - as a source of
[23] creative advice then?" Answer: "Absolutely true."

[24] **Question:** "But always within the law?" Answer: "That's
[25] absolutely true." My question, Mr. Hack, is if Mr. Shofer

[1] was not a client of yours, why would you put into - why
[2] would you go to the trouble of trying to create creative
[3] solutions for problems that he might have had?
[4] **A:** I think, you know, going through all the testimony
[5] and probably the rest of this afternoon, there's going to be
[6] confusion as to Stuart Hack, Stuart Hack Company, Richard
[7] Shofer, Catalina Enterprises. And I believe the context of
[8] that was we were talking about Mr. Shofer as president of
[9] Catalina Enterprises.

[10] **Q:** But even in the opening part of your answer, you
[11] say: "Well, work that I had done for Dick, and this was
[12] true for virtually all my clients." Were you including Mr.
[13] Shofer as one of your clients in that answer?

[14] **A:** As president of his company, yes.

[15] **Q:** That is what you meant with that answer -

[16] **A:** That's correct.

[17] **Q:** - not Mr. Shofer personally?

[18] **A:** That's correct.

[19] **Q:** When you - well, let me ask you another question.
[20] When you gave Mr. Shofer the advice orally and in writing in
[21] August of 1984 with respect to the advisability of loans
[22] from his pension account, did you at that time - that is,
[23] the time that you gave the advice and wrote the letter -
[24] did you in fact know that loans from the voluntary account
[25] were taxable?

[1] **A:** Depends how much and - and under what
[2] circumstances and when.

[3] **Q:** Let me read several questions and several answers
[4] to you. I want to ask you a followup question with respect
[5] to your answers. This is from deposition of September 20,
[6] 1990, at page 177, beginning at line 11. Question -

[7] **MS. TRUHE:** Excuse me, Counsel, what page again?

[8] **MR. TAYLOR:** Page 177 -

[9] **MS. TRUHE:** I have got it.

[10] **MR. TAYLOR:** - line 11.

[11] **BY MR. TAYLOR:**

[12] **Q:** Question: "Had you known in 1984 that loans from
[13] the voluntary account were taxable, you would have told Mr.

[14] Shofer that, is that correct?" Ms. Truhe: Objection. "You
[15] may answer." Answer: "I think I would have." Question:

[16] "You think there is a possibility that you would not have?"

[17] **Answer:** "It depends upon what he asks me, how he asked me,
[18] and that is why I am qualifying my answer." Continuing onto
[19] 178, line 1: "Based upon your knowledge today about what
[20] happened in 1984 in terms of Mr. Shofer calling you up and
[21] asking you about loans in the plan, would you have told him
[22] about the taxability of the loans had you known they were
[23] taxable?"

[24] "Objection." Answer: "Well, the reason why I
[25] have qualified my answer is I don't exactly recollect how he

[1] asked me, and in reading back through my notes, though, my
[2] notes of the conversations, it's quite that he said to me I
[3] don't care whether they're taxable or not; I want to know
[4] whether I can get the money. I don't remember. I can't say
[5] that he didn't say that." Question: "You can't say that he
[6] didn't that either?" Answer: "No, there's a total lack of
[7] that issue from his side." The question I wanted to ask you
[8] was whether or not the state of your knowledge in August of
[9] 1985, did that have anything to do with the advice that you
[10] gave over the telephone and in writing to Mr. Shofer?

[11] **A:** I don't think so.

[12] (Discussion off the record.)

[13] **BY MR. TAYLOR:**

[14] **Q:** Mr. Hack, you indicated that part of the services
[15] that your company provided to Catalina was to gather data
[16] with respect to the pension and then complete the necessary
[17] forms that had to be filed with the government, such as the
[18] 5500's. Is that correct?

[19] **A:** No, it's not correct. We did not gather data.

[20] Dat - data was provided to us.

[21] **Q:** Mr. Hack, let me show you what has been marked as
[22] Plaintiff's Exhibit 33 for identification. Have you ever
[23] seen that document before?

[24] **A:** I can't specifically say yes, but I wouldn't say
[25] no. It looks like something that was done in my - in my

[1] shop, my business.

[2] **Q:** Is that a form that data would be recorded on in
[3] the Hack Company?

[4] **A:** This page, this first -

[5] **Q:** Yes, the first -

[6] **A:** - page is what you're asking me about?

[7] **Q:** - page, yes. Yes.

[8] **A:** That - this looks to me like it was a summary of
[9] data that we received. In fact, I'm certain it's a summary
[10] of data we received.

[11] **Q:** All right. If you flip to the last four pages of
[12] the exhibit, you see handwritten notes and numbers, do you
[13] not?

[14] **A:** Yes.

[15] **Q:** Do you -

[16] **A:** I can't read this, I'll tell you that. Well, I
[17] can't read this page. I can read the - it looks like it's
[18] fourth page in if that's what you're talking about.

[19] **Q:** Yes, these - the last four pages of the exhibit
[20] are handwritten notes and numbers, are they not?

[21] **A:** Yes, they are.

[22] **Q:** Do you recognize the handwriting?

[23] **A:** No, I do not.

[24] **Q:** Do you know what information is contained on those
[25] last four pages?

[1] A: Well, it looks like a summarized breakdown of
[2] income and of expenses. No, some of it's summary, and some
[3] of it looks specific. Now that I keep looking at it, I
[4] think it's all specific, but I'm not sure. I - I don't
[5] have any amount of detail, whether any of this has been
[6] summarized or not, but it's a lot of information.

[7] Q: Do you know for what purpose these last four pages
[8] would have been prepared?

[9] MS. TRUHE: Objection. Mr. Hack has already
[10] testified he does not even recognize the handwriting on
[11] those pages, so he would not know who prepared them. I
[12] think that gets beyond the scope of any knowledge he might
[13] have.

[14] THE COURT: Well, he can answer it if he knows.
[15] Do you know the purpose?

[16] THE WITNESS: I - I - I can't answer you. I
[17] don't know. I don't know who prepared it.

[18] BY MR. TAYLOR:

[19] Q: If I could take the exhibits back. I was just
[20] going to point your attention to the second page of the
[21] exhibit and ask you if recognize that handwriting at all?

[22] A: I don't recognize the handwriting. I recognize
[23] the name.

[24] Q: What is the name that appears thereon?

[25] A: It looks like it's addressed to Joe and signed by

[1] A: TES? I don't see a TES. Yeah, okay, the fourth
[2] line down, yes.

[3] Q: There is an entry there, is there not?

[4] A: Yes.

[5] Q: What numbers appear on the line across from that
[6] reference to TES?

[7] A: \$200,000.

[8] Q: That is under the 12/31/84?

[9] A: Yes.

[10] Q: What is the number that appears under 12/31/83?

[11] A: Zero.

[12] Q: Can you read the line as to the letters of the
[13] words that appear directly across from those numerical
[14] entries?

[15] A: It looks like TES REC participant.

[16] Q: Do you know what that means?

[17] A: Well, I'm going to guess it's notes receivable
[18] participant. In fact, it - I can't even tell whether
[19] that's what it - it's TARTIC. I can't tell whether it's
[20] singular or plural on there, but that's clo - that's as
[21] close as I can get.

[22] Q: Notes receivable participant: would that be a
[23] loan to a participant in -

[24] A: Okay, now -

[25] Q: - a pension plan?

[1] Janelle.

[2] Q: Who would Janelle be?

[3] A: I think Janelle Hardy. I think that's her last
[4] name.

[5] Q: Was Janelle Hardy an employee of yours?

[6] A: Yes.

[7] Q: Who is Joe?

[8] A: I don't know. I don't know. It could've - I
[9] can't tell you.

[10] Q: What does the note say? Could you read the note
[11] into the record?

[12] A: "Here are Catalina's assets interpreted by me. I
[13] couldn't get a hold of the woman to send another copy. If
[14] any questions, see me."

[15] Q: If you would turn to the third to the last page of
[16] the exhibit.

[17] A: Okay.

[18] Q: There should be a column in the upper left-hand
[19] corner which says fixed assets, does it not?

[20] A: Yes.

[21] Q: Going across that line, there are two dates, are
[22] there not: 12/31/83 and 12/31/84?

[23] A: Yes.

[24] Q: If you go down to the fifth line, you see letters
[25] there, do you not, starting with what appears to be TES?

[1] A: Yeah, it - it's - it looks like it's E'D partic.
[2] loan - l-o-a-n.

[3] Q: Would that be a reference to a loan from the -

[4] A: Oh, that's the one below that, I'm sorry. The -
[5] the - I was reading the loan - the one, but it - what it
[6] says here is TES REC, participant. That's the line you
[7] wanted me to focus on?

[8] Q: Yes.

[9] A: Okay, that's what I see.

[10] Q: Could that be notes receivable participant,
[11] referring to a loan from the pension account?

[12] A: Could be.

[13] Q: If you turn to the cover sheet, the first page, is
[14] there a date that appears in the lower right-hand corner of
[15] that document?

[16] A: 12/18/85.

[17] Q: Does this document contain the kind of
[18] information, the kind of data, that you would typically get
[19] from a client in order to do the necessary government forms
[20] and other record-keeping with respect to the pension that
[21] you might be administering?

[22] A: It - it contains some of the data, yes.

[23] Q: Is that what this cover sheet is designed to do,
[24] to collect or to summarize data with respect to pensions
[25] that you may be administering?

[1] **A:** The cover sheet is a summary of the receipts and
[2] disbursements.
[3] **Q:** The first entry on that document, opening market
[4] value, \$1,040,018.03. Do you have any information as to
[5] what that number represents?
[6] **A:** It - it probably is the amount of money that was
[7] in the plan the last day of the prior year.
[8] **Q:** If you would turn again to the fourth page - next
[9] to the last fourth page, the - let me change that around,
[10] Mr. Hack. If you turn to the fourth page of the exhibit,
[11] you will come upon the same schedule that we - I am sorry.
[12] You will come to a different schedule than we were looking
[13] at. But it is headed Income, and it contains the same dates
[14] that are on the next page. Do you see that?
[15] **A:** Yes.
[16] **Q:** Under the column 12/31/84, there is a number which
[17] is identified as contributions, is that correct?
[18] **A:** Yes.
[19] **Q:** Is that number, contributions, \$43,603.05, carried
[20] over to the cover sheet, the summary statement?
[21] **A:** Yes.
[22] **Q:** There is also a figure for earnings on the summary
[23] statement, is there not?
[24] **A:** Yes.
[25] **Q:** Do you know what that number represents?

[1] **A:** It'd probably be an accumulation of the investment
[2] earnings of the plan for the period beginning 1/1/84 through
[3] 12/31/84.
[4] **Q:** There is also a number there of unrealized gain/
[5] loss in the marketplace of \$72,000, is that correct?
[6] **A:** Yes.
[7] **Q:** Does that number appear anywhere on the fourth
[8] page headed by Incomes?
[9] **A:** I don't see it.
[10] **Q:** There is a - if you go down to the next to the -
[11] **A:** Oh, the next to the last?
[12] **Q:** Yes.
[13] **A:** Okay.
[14] **Q:** Is that the entry that is carried over onto the
[15] cover sheet?
[16] **A:** Yes.
[17] **Q:** The caption on the cover sheet says Catalina
[18] Enterprises, Inc. Pension Plan, does it not?
[19] **A:** Yes.
[20] **Q:** For what period of time does this information
[21] cover?
[22] **A:** It says 1/1/84 through 12/31/84.
[23] **MR. TAYLOR:** Your Honor, I would like to offer
[24] this exhibit into the record.
[25] **MS. TRUHE:** I thought it was in.

[1] **MR. TAYLOR:** I do not think it is. It has not
[2] been admitted.
[3] **MS. WHELIHAN:** What exhibit was it?
[4] **MR. TAYLOR:** Plaintiff's Exhibit 33.
[5] **THE COURT:** It is admitted.
[6] **MR. TAYLOR:** Thank you.
[7] (Plaintiff's Exhibit No. 33, trust fund
[8] statement, previously marked for
[9] identification, was received in
[10] evidence.)
[11] (Discussion off the record.)
[12] **MR. TAYLOR:** Your Honor, I wonder if I might just
[13] ask for just a brief break to just confer with Mr. Shofer
[14] before I conclude, I think my examination.
[15] **THE COURT:** Do you think you are going to be able
[16] to wrap up the witness today?
[17] **MR. TAYLOR:** I think we will, yes.
[18] **THE COURT:** Okay. Take a few minutes.
[19] (Brief recess.)
[20] **THE COURT:** Please be seated.
[21] **MR. TAYLOR:** Thank you, Your Honor.
[22] **THE COURT:** Yes.
[23] **BY MR. TAYLOR:**
[24] **Q:** Mr. Hack, when you were contacted by Greybush
[25] Newman in 1986, your firm was still working for Catalina

[1] Enterprises, Inc., is that correct? Catalina was still a
[2] client of your company?
[3] **A:** Yes.
[4] **Q:** When you were questioned or engaged in
[5] conversation with Greybush Newman about the taxability issue
[6] of these loans which Mr. Shofer had taken, did you and the
[7] Stuart Hack Company or the Stuart Hack Company have any
[8] responsibility with regard to assisting in resolving the
[9] issue of the taxability of the pension loans?
[10] **MS. WHELIHAN:** Objection.
[11] **MS. TRUHE:** Objection.
[12] **THE COURT:** Basis?
[13] **MS. TRUHE:** Your Honor, we are beyond the scope of
[14] direct again. We are at that point where I think we are
[15] beyond the initial telephone conversation where Mr. Marvel
[16] advised Mr. Hack of the fact that Mr. Shofer had borrowed
[17] from his pension during the years in question. We are now
[18] getting into the work-out phase, and there were no questions
[19] about that.
[20] **MR. TAYLOR:** Well, Your Honor, let -
[21] **MS. WHELIHAN:** Also, I think the question -
[22] **MR. TAYLOR:** - me just say that this business of
[23] the scope of direct, I understand the rule perfectly well.
[24] However, Defendant's counsel actually raised this question
[25] about the telephone call with Greybush Newman. This was

[1] something that was covered on direct.

[2] **THE COURT:** But she went to the issue of whether

[3] he learned of the -

[4] **MR. TAYLOR:** Of how he learned about it.

[5] **THE COURT:** - problem, right.

[6] **MR. TAYLOR:** It seems to me that in order to have

[7] the complete picture with regard to his relations with the

[8] person who called him about that, some additional testimony

[9] relative to what to do about the problem, this all relates

[10] back to the advice he gave back in 1984. We are not -

[11] **THE COURT:** But it does not make it more or less

[12] culpable, does it?

[13] **MR. TAYLOR:** More or less culpable?

[14] **THE COURT:** I mean, if Mr. Hack has liability for

[15] the advice he gave in August of 1984, it is neither enhanced

[16] nor detracted from by virtue of what he did thereafter, is

[17] it?

[18] **MR. TAYLOR:** Well, I think what he may have done

[19] after may impact on this question of whether he felt that he

[20] owed Mr. Shofer a duty. That may have some, I realize that

[21] is a legal question, but there may be a factual underpinning

[22] to make that determination as to whether there was a duty

[23] here. That has been one of the defenses in this case.

[24] **MS. WHELIHAN:** That gets to my objection, Your

[25] Honor. I mean, I do not see how asking this witness whether

[1] or not he had any responsibility for determining whether the

[2] loans were taxable has anything to do with what we are

[3] actually trying between these two parties. I mean, that is

[4] a question, a legal question, to be directed at the experts,

[5] not this particular witness, which he has testified -

[6] **THE COURT:** I do not think you want to be guided

[7] by his feelings about his obligations, do you?

[8] **MR. TAYLOR:** I would like to get really what his

[9] actions were, rather than what his feelings were.

[10] **THE COURT:** I understand, and as I said earlier,

[11] you can ask him anything you want about his actions during

[12] the relevant time period. But I do think we are beyond it.

[13] **MR. TAYLOR:** Let me approach it another way, Your

[14] Honor.

[15] **THE COURT:** Okay.

[16] **BY MR. TAYLOR:**

[17] **Q:** Mr. Hack, do you believe that Mr. Shofer took the

[18] loans from his pension account in 1984, 1985, and 1986 in

[19] reliance on your advice?

[20] **MS. TRUHE:** Objection. How could this witness

[21] know what Mr. Shofer was thinking when he took the money?

[22] **MS. WHELIHAN:** And in fact, you sustained an

[23] earlier objection to that same question, not 40 minutes ago.

[24] **THE COURT:** Now you are really tempting me to be

[25] inconsistent. It does seem to call for speculation as to

[1] someone else's thought process.

[2] **MR. TAYLOR:** Well, let me approach it this way,

[3] Your Honor.

[4] **BY MR. TAYLOR:**

[5] **Q:** Mr. Hack, back on August 18, 1989, you were

[6] deposed. At page 409 of that deposition, beginning at

[7] line 2, the question is: "Now in explaining your reasoning

[8] and recommending that he try to wait out the statute of

[9] limitations, you used the phrase that he relied on expert

[10] advice. Were you referring to your advice?" Answer:

[11] "Yes." Question: "Well, does that mean that you then

[12] believed that Shofer had relied on your advice in making the

[13] loan transactions?" Answer: "Well, I think that he had

[14] relied, at least on the first loan, that he made on my

[15] advice." Is that the testimony that you gave in response to

[16] those questions back on August 18, 1989?

[17] **MS. TRUHE:** Well, Your Honor, if anything, that

[18] testimony proves that Mr. Hack would be speculating as to

[19] what Mr. Shofer would be thinking or relying on in

[20] borrowing. Again, the words used were I think; he has no

[21] idea.

[22] **THE COURT:** Well, the question, though, is -

[23] **MS. WHELIHAN:** Well, and it is not -

[24] **THE COURT:** - did he testify that way at

[25] deposition?

[1] **MS. WHELIHAN:** But it is not a proper question.

[2] It is not proper impeachment.

[3] **THE COURT:** I agree with that. I will sustain the

[4] objection.

[5] **BY MR. TAYLOR:**

[6] **Q:** After you received this telephone call from

[7] Greybush Newman n 1986, Mr. Hack, did there come some time

[8] when you agreed that these loans were taxable?

[9] **MS. TRUHE:** Objection. Again, beyond the scope of

[10] direct. The issue to be tried in the case is whether Mr.

[11] Hack had a duty to give any advice regarding tax

[12] consequences of borrowing from a pension in 1984. What

[13] happened after the fact and what Mr. Hack's thoughts on

[14] that, in terms of what to do, are completely irrelevant.

[15] **THE COURT:** Sustained.

[16] **BY MR. TAYLOR:**

[17] **Q:** In 1986, Mr. Hack, did the Stuart Hack Company

[18] have a legal department?

[19] **A:** I don't, I can't tell you. We probably during

[20] some - probably the answer to that is yes, but I can't tell

[21] you. I don't remember at all.

[22] **Q:** Did you have a legal department in 1984?

[23] **A:** We did. We have a legal department most of the

[24] time that I had my business.

[25] **Q:** If you had a legal department in 1984, why did you

[1] not rely on your own legal department to solicit advice with
[2] regard to the question Mr. Shofer posed to you in August of
[3] 1984?

[4] **A:** My recollection is that the person who was
[5] employed in the legal department had left me at that point
[6] in time, and I had not replaced him.

[7] **Q:** That is in 1984?

[8] **A:** 1984.

[9] **Q:** In 1986, had you replaced that person?

[10] **A:** I think so.

[11] **Q:** Did there come a time when the Stuart Hack Company
[12] elected to give up the legal department?

[13] **A:** I'm not sure. I'm, trying to remember for how -
[14] at what point in time we no longer had attorneys working for
[15] us. And I just, I can't give you, I don't know.

[16] **Q:** Now in the case of Mr. Shofer and his inquiry of
[17] August of 1984, you consulted with Mr. Berman and billed
[18] Mr. Hack for the time that you talked to Mr. Berman about
[19] the question posed by Mr. Shofer? Is that correct, sir?

[20] **THE COURT:** Do you mean he billed Mr. Shofer?

[21] **BY MR. TAYLOR:**

[22] **Q:** I mean billed Mr. Shofer for the time that you
[23] spoke with Mr. Berman, is that correct?

[24] **A:** I -

[25] **MS. WHELIHAN:** Objection. I mean, I do not think

[1] that is his testimony. His testimony was he billed
[2] Catalina, so with that my objection is to the form of Mr.
[3] Taylor's question.

[4] **THE COURT:** Well, I will sustain the question as
[5] to form.

[6] **BY MR. TAYLOR:**

[7] **Q:** You know Barry Berman?

[8] **A:** Yes.

[9] **Q:** Barry Berman is an attorney, is that right?

[10] **A:** Yes.

[11] **Q:** He is an attorney with Weinberg and Green?

[12] **A:** Yes.

[13] **Q:** He was an attorney with Weinberg and Green in
[14] 1984?

[15] **A:** Yes.

[16] **Q:** Did you utilize Mr. Berman as a resource in doing
[17] work for the Stuart Hack Company?

[18] **A:** From time to time, yes.

[19] **Q:** In 1989, had your legal department at the Stuart
[20] Hack Company been dissolved?

[21] **A:** I don't remember.

[22] **Q:** Let me reference a deposition that was taken in
[23] March, March 16, 1989, Mr. Hack -

[24] **MS. TRUHE:** What page?

[25] **BY MR. TAYLOR:**

[1] **Q:** - beginning at page 105, line 19. Question:

[2] "What is your relationship with Barry Berman?" Answer:

[3] "Well, Barry and I are close personal friends. We went to
[4] law school together." Question: "Same class?" Answer:

[5] "Same class, yes, and we lived near each other. And
[6] currently, his firm does all the legal research for us. We
[7] have turned all of our legal work over to Weinberg and

[8] Green." Question: "Does that explain why you no longer
[9] have a legal department?" Answer: "Yes.

[10] "We came to the conclusion that we could not make
[11] money out of the department, and the quality of work that we
[12] were getting out of the department was not up to my
[13] standards. And we also felt that in terms of our own
[14] liability, we would be far better served to have a major law
[15] firm do the work and stand behind it." Is that an accurate
[16] rendition of your testimony in March of 1989?

[17] **MS. TRUHE:** Objection, Your Honor. The basis for
[18] that objection is relevance. Mr. Hack has already testified
[19] that at the time of the events in question here, August of
[20] 1984, that he was between attorneys and had no legal
[21] department. So what he did eventually in terms of
[22] satisfying the Hack Company's legal needs is not really
[23] relevant.

[24] **MS. WHELIHAN:** And it is improper impeachment.

[25] **THE COURT:** Well, it is all of those things, but I

[1] am going to allow it.

[2] **MS. WHELIHAN:** All right.

[3] **BY MR. TAYLOR:**

[4] **Q:** Is that accurate?

[5] **A:** Yes.

[6] **Q:** Does that refresh your recollection as to when you
[7] may have eliminated the legal department at the Stuart Hack
[8] Company?

[9] **A:** Yes, it does.

[10] **Q:** When would that have happened?

[11] **A:** Well, I - 1989, I guess.

[12] **Q:** Do you know whether or not 1989 or some period
[13] earlier Weinberg and Green would have been doing all the
[14] legal work for the Stuart Hack Company?

[15] **A:** I'm doing the best I can. I just don't have any
[16] recollection of this. It sounds like from 19 - some time
[17] in 1989 on, they were doing all of our legal work.

[18] (Discussion off the record.)

[19] **BY MR. TAYLOR:**

[20] **Q:** Did you employ an attorney by the name of Judith
[21] Reed?

[22] **A:** Yes, I did.

[23] **Q:** Do you remember what period of time Ms. Reed
[24] worked for you?

[25] **A:** I don't.

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- [1] Q: Do you recall whether or not you were satisfied
[2] with the quality of her work?
[3] MS. TRUHE: Objection; relevance.
[4] THE COURT: Sustained.
[5] MR. TAYLOR: I do not have any other questions,
[6] Your Honor.
[7] THE COURT: Are there any further questions?
[8] MS. WHELIHAN: No, sir.
[9] THE COURT: Redirect?
[10] MS. TRUHE: No, Your Honor.
[11] THE COURT: Okay, thank you, Mr. Hack. You are
[12] excused.
[13] (The witness was excused.)
[14] THE COURT: Counsel, I guess we are going to stop
[15] here for today. I have to meet with somebody in about five
[16] minutes. Do you want to talk about scheduling for tomorrow?
[17] MS. TRUHE: Yes, Your Honor. Tomorrow, I would
[18] like to call Mr. Burrows, who is the liability expert on
[19] behalf of the Defendants; David Lane, who is the accountant
[20] who prepared the 1984 return, the original one; and then,
[21] the liability expert, the accounting liability expert on
[22] behalf of Mr. Hack against Greybush Newman. So I have three
[23] more witnesses, and I anticipate altogether they will take a
[24] half-day.
[25] MS. WHELIHAN: Can we do Lane first -

This is to certify that the proceedings in the
matter of Richard Shofer v. Stuart Hack, et al., heard on
July 1, 1997, were recorded by means of videotape.

I do hereby certify that the foregoing pages
constitute the official transcript of said videotaped
proceedings to the best of my ability in a complete and
accurate manner.

In Witness Whereof, I have hereunto subscribed
my name this 9th day of March 1998.

Connie Jones
Transcriber

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- [1] MS. TRUHE: Sure, we can do Lane first.
[2] MS. WHELIHAN: - at 9:30 tomorrow?
[3] THE COURT: Okay, 9:30 tomorrow then, everyone?
[4] MR. TAYLOR: That is fine.
[5] THE COURT: Thank you very much.
[6] MR. TAYLOR: Thank you.
[7] MS. WHELIHAN: Thank you, Your Honor.
[8] (The trial was recessed at 4:58 p.m.)
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TRANSCRIBER'S CERTIFICATE

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This is to certify that the proceedings in the matter of Richard Shofer v. Stuart Hack, et al., heard on July 1, 1997, were recorded by means of videotape.

I do hereby certify that the foregoing pages constitute the official transcript of said videotaped proceedings to the best of my ability in a complete and accurate manner.

In Witness Whereof, I have hereunto subscribed my name this 9th day of March 1998.



Connie Jones
Transcriber

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IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND
RICHARD SHOFER,
Plaintiff,
v. Case No. 88102069/CL79993
STUART HACK, et al.,
Defendants.

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OFFICIAL TRANSCRIPT OF PROCEEDINGS
Baltimore, Maryland
July 2, 1997

BEFORE:
HONORABLE JUDGE ALBERT J. MATRICCIANI, JR.
APPEARANCES:

For the Plaintiff:
DOUGLAS TAYLOR, ESQUIRE
For Defendants, Stuart Hack and the
Stuart Hack Company:
JANET TRUHE, ESQUIRE
For the Defendant, Greybush Newman:
DEBORAH WHELIHAN, ESQUIRE
JOHN MAY, ESQUIRE

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CIRCUIT COURT FOR
BALTIMORE CITY

[3] THE COURT: Okay, we are back on the record in
 [4] Shofer v. Hack, et al. Ms. Truhe, are you ready to proceed?
 [5] MS. TRUHE: Yes, Your Honor. At this time, the
 [6] Defendants would like to call Edward Burroughs.
 [7] EDWARD BURROUGHS,
 [8] a witness produced on call of the Defense, having first been
 [9] duly sworn, was examined and testified as follows:
 [10] THE CLERK: State your name and address for the
 [11] record, please.
 [12] THE WITNESS: Edward Burroughs, 151 Tremont
 [13] Street, Boston, Massachusetts.
 [14] VOIR DIRE EXAMINATION OF EDWARD BURROUGHS
 [15] BY MS. TRUHE:
 [16] Q: Mr. Burroughs, what is our occupation?
 [17] A: I'm a pension actuary and pension consultant.
 [18] Q: How long have you been working in the pension
 [19] consulting and actuarial field?
 [20] A: Since 1954.
 [21] Q: All right. Directing your attention to what has
 [22] been marked as Defendant's Exhibit Number 31, would you
 [23] please identify this document?
 [24] A: Yes, this is a recent resume of my experience.
 [25] MS. TRUHE: Your Honor, for the Court's benefit, I

[1] am passing up a copy of Defendant's Exhibit -
 [2] THE COURT: Thank you.
 [3] MS. TRUHE: - 31.
 [4] BY MS. TRUHE:
 [5] Q: Mr. Burroughs, would you please describe for us
 [6] briefly your professional career in the pension field?
 [7] A: Well, I started in 1954 with The Traveler's
 [8] Insurance Company. Initially, my work was principally in
 [9] group insurance, but over a 6-year period it gradually
 [10] evolved into almost exclusively pension work.
 [11] Q: Where did you go after The Travelers?
 [12] A: I went to work for a very small consulting firm,
 [13] the David C. Rothman Company. I spent two years there. My
 [14] work there was to run the entire internal activities of the
 [15] office. There were two principals there. I was the inside
 [16] person, and the other individual was the outside person.
 [17] Q: What types -
 [18] A: But I -
 [19] Q: What types of services did that company perform?
 [20] A: We provided all of the services one would normally
 [21] expect to be provided of pension consultants and
 [22] administrators. We established plans. We helped clients
 [23] establish plans. And we administered the plans once
 [24] established.
 [25] Q: All right. Where did you go after that?

[1] A: I went to work for a firm which at the end of my
[2] period with it, was named the Cannell Company. I spent from
[3] 1962 to 1974 there. It was a pension consulting firm. I
[4] was responsible there for all aspects of design,
[5] implementation, and administration of retirement plans,
[6] principally. When I left there I was, I think, the number
[7] two person in the firm.

[8] Q: All right, and where did you go after that?

[9] A: I left the Cannell Company to form my own firm,
[10] the PenTed Corporation which I served until I retired from
[11] the firm in 1993. Throughout the entire period, I was
[12] President of the firm. That, too, was a pension consulting
[13] and actuarial firm. Our work there was essentially the same
[14] as the work that I had done at the Cannell Company. We
[15] assisted clients in establishing, redesigning retirement
[16] plans and administering retirement plans.

[17] Q: Where did you go after PenTed?

[18] A: Since 1993, I've been principally an independent
[19] consultant devoting most of my time to consulting with other
[20] consultants. During that period, I did spend one year as an
[21] employee of a large Boston law firm in the same field. I
[22] was working pension plan design, implementation, and
[23] administration.

[24] Q: All right. Can you tell us what positions or
[25] memberships you have had in any professional pension

[1] organization which has been noteworthy?

[2] A: Well, the first two listed on my resume are
[3] probably the most noteworthy. I served a term as President
[4] of the American Society of Pension Actuaries, which is a
[5] professional organization of actuaries, consultants, and
[6] plan administrators. I believe that members of ASPA are
[7] responsible for the care and guidance of probably about a
[8] third of the qualified retirements plans in the country. I
[9] also served two terms as a member of the Actuarial Standards
[10] Board. That's a board which is established on behalf of the
[11] profession. It involves nine actuaries from all the various
[12] disciplines that an actuary would be required in. The board
[13] establishes practice standards which govern the behavior of
[14] all actuaries in practice in the United States who are
[15] affiliates of any one of the professional societies.

[16] Q: Are there any activities in which you are
[17] currently engaged that are not listed on your C.V.?

[18] A: Yes, there is one, I think, that's worthy of note.
[19] Very recently, I was asked by the American Society of
[20] Pension Actuaries to co-chair a committee which has as its
[21] objective the design and implementation of practice
[22] standards which would apply to all members of the American
[23] Society of Pension Actuaries: consultants and
[24] administrators, as well as actuaries.

[25] Q: Have you ever taught or lectured in the employee

[1] benefits field?

[2] A: Extensively. Principally, before professional
[3] organizations, but I have also lectured from time in time at
[4] universities. My professional organization lectures include
[5] such things as closed-circuit telecasts.

[6] Q: All right. Are there any activities in the
[7] employee benefits field that you have been engaged in
[8] recently that are noteworthy?

[9] A: There's one that, at least to me, is quite
[10] noteworthy. I spent some time in Poland assisting some
[11] recently privatized corporations in addressing the problem
[12] of employee retirement plans that we've been addressing in
[13] this country for some time.

[14] Q: Mr. Burroughs, do you know Stuart Hack?

[15] A: I do.

[16] Q: How long have you known Mr. Hack?

[17] A: Since about 1984.

[18] Q: All right, and how do you know Mr. Hack?

[19] A: Principally, because we have both been involved in
[20] leadership position at the American Society of Pension
[21] Actuaries.

[22] Q: All right. Is Mr. Hack an actuary?

[23] A: He is not.

[24] Q: In what way would your expertise differ from Mr.
[25] Hack's?

[1] A: Well, in the pension field, the main difference
[2] between consultants who are actuaries and consultants who
[3] are not actuaries involves defined benefit plans. There are
[4] funding standards that apply to all qualified defined
[5] benefit plans. An actuary has uniquely the mathematical
[6] knowledge and the knowledge of those standards necessary to
[7] make periodic certifications plan by plan as to whether the
[8] plan has satisfied those standards. In the defined
[9] contribution area, there's very little that an actuary can
[10] bring to the table that a consultant who is not an actuary
[11] wouldn't also be able to bring to the table.

[12] Q: So would it be fair to say that the only
[13] difference between you and a Stuart Hack would be the extent
[14] to which you also have an actuarial aspect to your practice?

[15] A: I think that's a fair generalization.

[16] Q: Were you familiar with the Stuart Hack Company and
[17] the kinds of services it provided to its pension clients
[18] during its existence in Baltimore?

[19] A: Yes, in a general way; not intimately familiar.

[20] Q: All right. Do any of the services which the Hack
[21] Company provided while it was in existence compare, and if
[22] so, how, to any of the companies you have been at?

[23] A: The services that the Hack Company provided
[24] compare almost one on one with the services which the PenTed
[25] and the Cannell Company provided.

[1] MS. TRUHE: Your Honor, at this time I would like
[2] to offer Mr. Burroughs as an expert in the field of pension
[3] consulting.

[4] THE COURT: Would you like to voir dire the
[5] witness?

[6] MR. TAYLOR: I have no questions, Your Honor.

[7] THE COURT: Okay. The Court will accept
[8] Mr. Burroughs as an expert in those areas.

[9] MS. TRUHE: Thank you, Your Honor.

[10] DIRECT EXAMINATION OF EDWARD BURROUGHS
[11] BY MS. TRUHE:

[12] Q: Mr. Burroughs, when were you first contacted with
[13] reference to testifying as an expert on behalf of Mr. Hack
[14] in this case?

[15] A: I think it was the early '90's; perhaps 1990.

[16] Q: All right, and what were you asked to do?

[17] A: I was given quite a raft of testimony transcripts
[18] and related papers. I was asked to review them with
[19] particular reference to two communications that Mr. Hack had
[20] with Mr. Shofer in August 1984 relative to participant
[21] loans. I was asked whether I would be able to give an
[22] opinion as to whether Mr. Hack had satisfied his duty of
[23] care in connection with those communications.

[24] Q: Now you mentioned that you were given a raft of
[25] documents to review. Can you tell us briefly what types of

[1] documents you reviewed?

[2] A: Deposition transcripts involving the depositions
[3] of Mr. Hack, Mr. Shofer, and many of the other professionals
[4] who were involved either relative to the corporation of
[5] which Mr. Shofer was president or the plan itself.

[6] Q: Did you also review the deposition transcript of
[7] Edward Kabala who has testified as a liability expert on
[8] behalf of the Plaintiff?

[9] A: I did.

[10] Q: Now in the course of your pension consulting and
[11] administrative work, have you ever had the occasion to work
[12] with your clients' attorneys?

[13] A: Oh, yes.

[14] Q: Do you regard yourself as engaged in the practice
[15] of law in performing pension consulting and administrative
[16] services for your clients?

[17] A: I do not.

[18] Q: Would Stuart Hack be doing that insofar as his
[19] work on behalf of the Hack Company was concerned?

[20] A: Based on my understanding of his activities, he is
[21] not a practicing attorney.

[22] Q: Based on your years of experience in the pension
[23] business, do you believe there is a distinction between one
[24] who practices as an attorney in the pension area and one who
[25] practices as a pension consultant?

[1] A: Yes, I do.

[2] Q: Which was the Stuart Hack Company, and Mr. Hack in
[3] particular, practicing as in the work which the Hack Company
[4] had contracted to provide to Catalina Enterprises?

[5] A: Based on everything I know and have read, the Hack
[6] Company was functioning as an administrator, as a record-
[7] keeper, for the plans.

[8] Q: All right.

[9] MS. TRUHE: May I have Defendant's Exhibit
[10] Number 1?

[11] BY MS. TRUHE:

[12] Q: Mr. Burroughs, showing you what has been
[13] previously admitted into evidence as Defendant's Exhibit
[14] Number 1. This was a fee agreement letter or sample one,
[15] actually. It was for the year December 22, 1983, between
[16] the Stuart Hack Company and Catalina Enterprises. Would you
[17] please turn to the page entitled Regular Administrative
[18] Work? I would like to ask you about the services which are
[19] listed under that heading. Are these the tasks which a
[20] pension consulting would typically render to pension
[21] clients?

[22] A: Yes, they are.

[23] Q: Did the PenTed Corporation, while you were there,
[24] render those kinds of services?

[25] A: Each one of them.

[1] Q: All right, how about the tasks listed on the next
[2] page under Special Work Items? How would you characterize
[3] the services listed on that page?

[4] A: Each of these services is a service which a firm
[5] such as the PenTed Corporation would provide in some of
[6] their relationships with clients, probably not all of them.
[7] It would be a - on demand.

[8] Q: All right. Now what is your understanding as to
[9] how Mr. Hack's firm came to do consulting work for the
[10] Catalina Enterprises pension plan?

[11] A: I understand that Mr. Shofer's firm was referred
[12] to Mr. Hack's firm by Mr. Shofer's accountants, Greybush
[13] Newman.

[14] Q: Turning your attention to the events of August of
[15] 1984, what is your understanding of the questions which Mr.
[16] Shofer posed to Mr. Hack during his first communication with
[17] Mr. Hack on August 3, 1984?

[18] A: They involved, the relevant question involved the
[19] limits on participant loans, the extent to which Mr. Shofer,
[20] as a participant, could take a participant loan from the
[21] plans of which he was a participant.

[22] Q: Was this the only question Mr. Shofer posed to Mr.
[23] Hack during that conversation?

[24] A: There were also questions regarding assignability
[25] of accounts in the involved plans.

[1] **Q:** Putting the pension up as collateral for a loan?
 [2] **A:** Yes.
 [3] **MS. TRUHE:** May I have Defendant's Exhibit
 [4] Number 29?
 [5] **BY MS. TRUHE:**
 [6] **Q:** Mr. Burroughs, showing you what has been admitted
 [7] into evidence as Defendant's Exhibit Number 29. This is
 [8] Mr. Hack's letter to Mr. Shofer dated August 9, 1984. Have
 [9] you seen that document before?
 [10] **A:** I have.
 [11] **Q:** All right. I would like to ask you about some
 [12] information which Mr. Hack writes at the very bottom of that
 [13] letter: "In my opinion," skipping to the portion that is
 [14] relevant to this case, "you can borrow up to 100 percent of
 [15] your voluntary account." Do you see that?
 [16] **A:** I do.
 [17] **Q:** Did Mr. Hack answer Mr. Shofer's question
 [18] correctly?
 [19] **A:** He did.
 [20] **MS. TRUHE:** May I have Defendant's Exhibit
 [21] Number 2?
 [22] **BY MS. TRUHE:**
 [23] **Q:** Mr. Burroughs, directing your attention to what
 [24] has been previously admitted as Plaintiff's Exhibit
 [25] Number 2. This is the Catalina Enterprises, Inc. Pension

[1] Plan and Trust Agreement. Have you reviewed that document?
 [2] **A:** I have.
 [3] **Q:** Can you refer us, first of all, to the pertinent
 [4] provision in that plan document dealing with loans?
 [5] **A:** It's one of the listed trust powers. It's at
 [6] Section 12.02(m).
 [7] **Q:** All right. Would you read for us into the record
 [8] what it states?
 [9] **A:** "If elected in Section 1.1.6.a to make loans to
 [10] participants and beneficiaries so long as such loans are
 [11] available to all such participants and beneficiaries on a
 [12] reasonably equivalent basis; such loans are not made
 [13] available to highly compensated employees, officers, or
 [14] shareholders of the employer in an amount greater than the
 [15] amount made available to other employees; such loans bear a
 [16] reasonable rate of interest; and such loans are adequately
 [17] secured."
 [18] **Q:** Again, is Mr. Hack's advice as conveyed to Mr.
 [19] Shofer in that August 9 letter that he can borrow up to 100
 [20] percent of his voluntary account in conflict with any of the
 [21] provisions which you just read?
 [22] **A:** It is not.
 [23] **Q:** To your knowledge, did Mr. Shofer ask Mr. Hack for
 [24] any personal tax advice during their August 3 telephone
 [25] conversation?

[1] **A:** Not to my knowledge.
 [2] **Q:** Did Mr. Hack's August 9 letter contain any tax
 [3] advice to Mr. Shofer?
 [4] **A:** It did not.
 [5] **Q:** In your opinion, did Mr. Hack have an obligation
 [6] as a matter of professional standards to provide some tax
 [7] advice to Mr. Shofer?
 [8] **A:** In my opinion, he did not.
 [9] **Q:** Why not?
 [10] **A:** Well, this gets back to some fundamental
 [11] differences between people who are retirement plan
 [12] consultants and administrators on one hand, and people who
 [13] are tax advisors to individuals on the other. In training
 [14] consultants, one of my most important challenges over the
 [15] years has been to remind them that they are not tax advisors
 [16] to participants in the plans that those consultants consult
 [17] on and administer.
 [18] To attempt to provide tax advice would be a great
 [19] mistake in most cases. First of all, we don't, as
 [20] consultants, know enough of the background of covered
 [21] participants to be able to render good advice. Second, most
 [22] of us aren't that familiar with those provisions of the tax
 [23] code other than the very narrow provisions that apply to the
 [24] qualification requirements of a retirement plan.
 [25] **Q:** Did Mr. Shofer have other professionals available

[1] to him for advice in the tax area?
 [2] **A:** He did.
 [3] **MS. TRUHE:** May I have Defendant's Exhibit
 [4] Number 20?
 [5] **BY MS. TRUHE:**
 [6] **Q:** To your knowledge, did Mr. Hack know at the time
 [7] his firm was rendering services to Catalina Enterprises, did
 [8] he know that Mr. Shofer had access to Greybush Newman?
 [9] **A:** To my knowledge, he did.
 [10] **Q:** Mr. Burroughs, directing your attention to what
 [11] has been admitted into evidence as Defendant's Exhibit
 [12] Number 20. This is a memorandum which Mr. Kabala, the
 [13] Plaintiff's liability expert, testified he wrote to a
 [14] colleague of his at his law firm on July 12, 1988, that was
 [15] a memorialization of the preliminary thoughts after speaking
 [16] with Mr. Shofer's first attorney in the case. Have you seen
 [17] that document before?
 [18] **A:** Yes, I have.
 [19] **Q:** All right. Have you reviewed it?
 [20] **A:** I have.
 [21] **Q:** All right. Is there anything in that document
 [22] which you believe is in accord with any of the opinions
 [23] which you have expressed today?
 [24] **A:** Yes. Yes, very definitely.
 [25] **Q:** All right. What would that be?

[1] A: Well, there's a sentence that reads: "I told him
[2] I didn't think that most of the actuaries I know would
[3] specifically give tax advice."
[4] MS. TRUHE: May I have Exhibit 24?
[5] BY MS. TRUHE:
[6] Q: Mr. Burroughs, directing your attention to what
[7] has been previously admitted as Defendant's Exhibit 24.
[8] This is a letter which Plaintiff's current pension attorney,
[9] Nicholas Giampietro, wrote to Mr. Shofer's first attorney,
[10] Tom Bowden, on June 16, 1988. First of all, have you seen
[11] that document before?
[12] A: Yes, I have.
[13] Q: Have you reviewed it?
[14] A: I have.
[15] Q: Is there anything in that document which you
[16] believe is in accord with any opinion that you have
[17] expressed today?
[18] A: Yes, I think so.
[19] Q: All right. Would you please identify what that
[20] is?
[21] A: Yes. There is a sentence, the last sentence or
[22] the next to the paragraph in the letter which - shall I
[23] read it?
[24] Q: Yes.
[25] A: It says: "The advice contained in Mr. Hack's

[1] letter and the omission from Mr. Hack's letter of the tax
[2] consequences of borrowing from the voluntary account in
[3] excess of one's after-tax employee contributions does not
[4] constitute an illegal act."
[5] Q: How do you interpret that statement?
[6] A: I think that the writer is coming very close to
[7] making the same statement -
[8] MR. TAYLOR: Well, let me object to the answer,
[9] Your Honor. I think the witness is simply speculating at
[10] this point with regard to what might have been in the
[11] writer's mind. I think the term illegal act might have
[12] different meanings for different people. I do not think
[13] this witness is qualified to render an opinion with regard
[14] to what another person may have meant when he wrote the
[15] phrase illegal act.
[16] THE COURT: Well, it does get very close to
[17] conjecture.
[18] MS. TRUHE: Well, Your Honor, the only problem I
[19] have with that is both Mr. Burroughs and Mr. Giampietro are
[20] in the pension business, speaking presumably the same
[21] language, and -
[22] THE COURT: But if the term is a term of art, you
[23] need to lay some foundation for that, okay?
[24] MS. TRUHE: All right.
[25] BY MS. TRUHE:

[1] Q: Mr. Burroughs, do you understand the term illegal
[2] act?
[3] A: I do.
[4] Q: Do you believe you understand what Mr. Giampietro
[5] was trying to convey in that sentence with reference to Mr.
[6] Hack's omission from his letter of any tax advice?
[7] A: In the context of the issue, I believe I do.
[8] Q: All right, and would you please explain your
[9] understanding?
[10] A: I believe that he's saying that Mr. Hack did not
[11] violate his duty of care.
[12] MR. TAYLOR: Well, Your Honor, again, I would
[13] renew my objection and move to strike. I do not think that
[14] has anything to do with an illegal act.
[15] MS. TRUHE: Unlawful. The same thing: unlawful,
[16] illegal; all the same thing.
[17] MR. TAYLOR: I do not think they are, Your Honor.
[18] THE COURT: I am going to overrule the objection.
[19] But I will, if it is any comfort to you, tell you that I do
[20] not find that dispositive of the issue.
[21] MS. TRUHE: Thank you, Your Honor.
[22] BY MS. TRUHE:
[23] Q: Mr. Burroughs, have you worked with your clients'
[24] accounting firms in the course of your work on their
[25] pensions?

[1] A: I have.
[2] Q: Are you aware of other situations where the issue
[3] of whether to amend a participant's tax return has come up
[4] where there has been a discovery that an error was made?
[5] A: I am.
[6] Q: Were you involved in discussions with the client
[7] and their accountants in deciding what should be done in
[8] those situations?
[9] A: As a listener, yes.
[10] Q: In terms of what should be done about the
[11] situation, do you have knowledge of any occasion where one
[12] of your clients has decided not to amend the return to
[13] correct the error?
[14] MR. TAYLOR: Well, Your Honor, I am going to
[15] object. Again, I do not think that the witness' experience
[16] with other clients, unless a foundation is laid that makes
[17] that situation identical to this situation probably -
[18] THE COURT: I think you need to draw it closer to
[19] this in order to go down that road.
[20] MS. TRUHE: All right.
[21] BY MS. TRUHE:
[22] Q: Mr. Burroughs, you testified that you have been
[23] involved in other situations where clients of yours have
[24] discovered errors on their tax returns, correct?
[25] A: Yes.

[1] Q: Have these errors dealt with issues involving
 [2] pension transactions?
 [3] A: Yes.
 [4] Q: Have you been involved in discussions with both
 [5] your client and your clients' attorneys as to what to do
 [6] about correcting, if at all, the error on the return with
 [7] respect to the taxability of that pension transaction?
 [8] A: Yes.
 [9] Q: Have those situations been analogous to the one
 [10] which occurred in this case involving Mr. Shofer and the
 [11] errors on his 1984 and 1985 tax returns?
 [12] A: I believe so.
 [13] Q: Now in any of those situations where you have been
 [14] involved in discussions with your clients and their
 [15] accountants, has any one of your clients ever opted not to
 [16] amend their tax returns?
 [17] MR. TAYLOR: I would object, Your Honor. Again, I
 [18] do not think that is an adequate foundation for this witness
 [19] to express an opinion about what should be done with his
 [20] client. He has already testified that he does not give tax
 [21] advice. It seems to me that this issue is very much one of
 [22] tax advice, and I think he has basically, by his prior
 [23] testimony, indicated he is unqualified to express an opinion
 [24] on that point.
 [25] THE COURT: But he has not been asked to offer an

[1] opinion on that point yet, so it is premature. Overruled.
 [2] BY MS. TRUHE:
 [3] Q: Mr. Burroughs, have you been in those situations?
 [4] A: I have.
 [5] Q: All right. In those situations, the client has
 [6] opted not to amend the tax return?
 [7] A: In some of them, yes.
 [8] MS. TRUHE: That is all I have.
 [9] THE COURT: Cross-examination?
 [10] CROSS-EXAMINATION
 [11] BY MR. TAYLOR:
 [12] Q: Mr. Burroughs, is it not an essential
 [13] qualification of a pension consultant who is designing
 [14] pension plans to have a solid understanding of the tax law
 [15] as it relates to pensions?
 [16] A: As it relates to the design, installation, and
 [17] administration of retirement plans, yes, it is.
 [18] Q: I mean, you cannot actually design a plan, can
 [19] you, unless you understand the tax law as it relates to the
 [20] pension that you are designing?
 [21] A: As it relates to the design, installation, and
 [22] administration, you cannot.
 [23] Q: The particular area of the tax code that a pension
 [24] consultant needs to be familiar with is that portion that
 [25] applies to pensions, is that not true?

[1] A: Again, as it relates to design, installation, and
 [2] administration.
 [3] Q: I wanted to -
 [4] MR. TAYLOR: Do you have Mr. Hack's letter there
 [5] of April 9, 1984?
 [6] MS. TRUHE: August?
 [7] MR. TAYLOR: I am sorry, August 9, 1984?
 [8] THE COURT: Defendant's 29.
 [9] BY MR. TAYLOR:
 [10] Q: There is no reference in that letter to tax
 [11] advice, is that correct?
 [12] A: That's right.
 [13] Q: The question posed to Mr. Hack by Mr. Shofer was
 [14] whether or not it was advisable to borrow money from his
 [15] voluntary account. Was that not the question posed?
 [16] A: Was the word advisable part of the question?
 [17] Q: Well, you do not know exactly what the question
 [18] was, do you?
 [19] A: I am not intimately familiar with the telephone
 [20] conversation that preceded this letter.
 [21] Q: The paragraph that Ms. Truhe asked you to look at
 [22] and read is in the next to the last sentence on the first
 [23] page of the letter. Is that correct?
 [24] A: Yes.
 [25] Q: Are there tax consequences associated with the

[1] advice given in that letter?
 [2] A: Are there tax consequences to a participant who
 [3] might do what was described here, is that the -
 [4] Q: Yes.
 [5] A: - question?
 [6] Q: Yes.
 [7] A: Yes, there are.
 [8] Q: The letter does not mention anything about tax
 [9] consequences. We have established that, is that not true?
 [10] A: That's correct.
 [11] Q: The letter also does not conform to the provisions
 [12] of the plan which you were asked to read into the record,
 [13] either, does it not? You read from Section 12.02.m of the
 [14] plan which Mr. Hack designed for Mr. Shofer in which there
 [15] is a discussion of what the conditions or provisions would
 [16] be of loans from the plan. Is that not true?
 [17] A: The plan itself is somewhat more expansive than
 [18] the letter might suggest.
 [19] Q: For instance, you mentioned that the ability to
 [20] borrow from the pension account of one of the principals in
 [21] the plan, the same opportunity would have to be afforded to
 [22] other participants on the same basis. Is that not true? Is
 [23] that not what the plans itself says?
 [24] A: That is correct.
 [25] MS. TRUHE: Objection, Your Honor. There is no

[1] evidence that it was not. Again, we are getting into the
[2] issue of prohibited transaction, which would be the only
[3] implication if indeed that term was violated.

[4] **THE COURT:** I will overrule. You may answer.

[5] **BY MR. TAYLOR:**

[6] **Q:** The point I want to make, Mr. Burroughs, is there
[7] are certain conditions associated with the borrowing of
[8] money from the pension plan. Is that not true?

[9] **A:** If loans are to comply with the plan document,
[10] there are certain conditions applicable to those loans.

[11] **Q:** Mr. Hack's letter of August 9 does not set forth
[12] any of those conditions, does it?

[13] **A:** It does not.

[14] **Q:** I would like to have you look at Plaintiff's
[15] Exhibit 3. Mr. Burroughs. Have you ever seen Plaintiff's
[16] Exhibit 3?

[17] **A:** I don't recall that I have. I can't be certain.

[18] **Q:** Well, would you take just a moment to read
[19] Plaintiff's Exhibit 3?

[20] (Pause.)

[21] **THE WITNESS:** All right.

[22] **BY MR. TAYLOR:**

[23] **Q:** Mr. Burroughs, I think, if I can direct your
[24] attention to page 2 of that letter, well, before I do that,
[25] what is the general subject matter of Plaintiff's Exhibit 3?

[1] **A:** Well, it involves a proposed financing
[2] transaction.

[3] **Q:** There is advice given by the writer with regard to
[4] that transaction, is that not correct?

[5] **A:** Yes, that is correct.

[6] **Q:** And if you turn to the next to the last paragraph
[7] of that letter, what is written there? Could you read that
[8] into the record?

[9] **A:** Yes. "There is one area" where you certainly
[10] would be wise to discuss the matter with your legal counsel
[11] before going ahead."

[12] **Q:** Mr. Hack's letter of August 9 does not contain any
[13] such advice, does it?

[14] **A:** It does not.

[15] **Q:** Which of those two letters do you think provides a
[16] better example of the standard of care that a pension
[17] consultant ought to exercise?

[18] **A:** I'm not familiar with the surroundings leading up
[19] to the October 1, 1974, '76 letter. I am somewhat more
[20] familiar with the surroundings leading up to the August 1984
[21] letter. It's not clear to me whether, at the time Mr. Hack
[22] wrote the 1976 letter, he was as aware as he was when he
[23] wrote the 1984 letter that Mr. Shofer has other sources of
[24] legal advice. If Mr. Hack was not aware that Mr. Shofer had
[25] other sources of legal advice, it was very kind of him to

[1] suggest that he contact those sources in the context of his
[2] 1976 letter.

[3] **Q:** Well, what difference would it make if a
[4] consultant knew that a participant in a plan had other
[5] sources of legal advice? Are you suggesting that any
[6] deficiencies in advice given by the consultant could be
[7] remedied by consulting other professionals?

[8] **A:** Not at all. What I'm suggesting is that
[9] in neither letter, neither the 1976 letter or the 1984
[10] letter, would Mr. Hack properly be giving tax or legal
[11] advice to Mr. Shofer in Mr. Shofer's capacity as a
[12] participant. It was not a requirement for duty of care in
[13] either letter.

[14] **Q:** Well, the whole purpose of a pension and a
[15] participant's participation in the pension is to shelter
[16] income from taxes, is it not?

[17] **A:** No.

[18] **Q:** What are the purposes of a pension?

[19] **A:** Well, there are a number of purposes of a pension.
[20] It depends to a great extent on the objective of a plan's
[21] sponsor. Certainly, sheltering income is one purpose to a
[22] great many small entrepreneurs.

[23] **Q:** Is that not the most important purpose for most
[24] people who are involved in pensions, is to shelter income?

[25] **A:** Most people who are involved in pensions is a very

[1] expansive description. I would not be prepared to say that
[2] I agree with you.

[3] **Q:** You do not agree that most people who go into
[4] pension plans do so with a desire to shelter a portion of
[5] their income for use at a later time?

[6] **A:** If you could restrict the nature of the question
[7] so that we're talking about certain classes of people, I
[8] think perhaps I could give you a more definitive answer.

[9] **Q:** Well, classes of people who, you know, work for
[10] companies, work for organizations that pay them a salary or
[11] an income that they want to set aside for retirement?

[12] **MS. TRUHE:** Objection, Your Honor. I have not
[13] been objecting to this series of questions. But I think now
[14] is the appropriate time. I just do not understand the
[15] relevance of what most people do.

[16] **THE COURT:** Well, I think that Mr. Taylor is
[17] exploring some general purposes behind pension plans. So I
[18] will allow him to do that.

[19] **BY MR. TAYLOR:**

[20] **Q:** Mr. Burroughs, isn't the taxability of money
[21] either going into or coming out of a pension of utmost
[22] importance to anyone who is involved with the pension?

[23] **A:** The tax treatment of money going into a plan is of
[24] utmost importance to the sponsor. The tax treatment of
[25] money coming out of the plan is of utmost importance to the

[1] participant.

[2] **Q:** Was Mr. Shofer a participant in this particular

[3] transaction that Mr. Hack rendered the advice on?

[4] **A:** He was.

[5] **Q:** The money coming out of his voluntary account up

[6] to 100 percent could have been a taxable event to Mr.

[7] Shofer, could it not?

[8] **A:** It could have.

[9] **Q:** Mr. Hack's letter does not address that issue,

[10] does he?

[11] **A:** It -

[12] **MS. TRUHE:** Objection; asked and answered.

[13] **THE COURT:** Overruled.

[14] **THE WITNESS:** It does not.

[15] **BY MR. TAYLOR:**

[16] **Q:** Let's assume that Mr. Hack believed that Mr.

[17] Shofer did not have access to tax advisors. If we assumed

[18] that particular precondition, would your opinion with regard

[19] to the way in which Mr. Hack responded to Mr. Shofer's

[20] inquiry be different?

[21] **MS. TRUHE:** Objection. Why are we assuming

[22] something that is definitely not a fact in this case?

[23] Indeed, the opposite is true.

[24] **THE COURT:** Well, why do you not rephrase your

[25] question? The witness testified that he did not know what

[1] Mr. Hack knew about Mr. Shofer's situation in 1976. Why do

[2] you not relate it to that period?

[3] **BY MR. TAYLOR:**

[4] **Q:** Mr. Burroughs, what is the basis of your

[5] understanding that Mr. Shofer had professional tax advisors?

[6] **A:** The material that I was asked to review included a

[7] good deal of reference to the accountants, Greybush Newman.

[8] And it is my understanding the accountants assisted Mr.

[9] Shofer's corporation and Mr. Shofer in the preparation of

[10] tax returns.

[11] **Q:** Was there any information in the materials that

[12] you looked at that would indicate that Mr. Shofer consulted

[13] his accountants on pension matters?

[14] **A:** I'm hard pressed at this point to give a

[15] definitive answer to that question.

[16] **Q:** Well, that does mean you do not have any

[17] information that would indicate that Mr. Shofer consulted

[18] his accountants on pension matters?

[19] **A:** I'm going to guess that I -

[20] **MS. TRUHE:** Objection, Your Honor.

[21] **MR. TAYLOR:** Well, I would object.

[22] **BY MR. TAYLOR:**

[23] **Q:** I do not want you to guess. I just want you to

[24] tell me whether there was anything in the materials you

[25] looked at that you base your opinion that Mr. Shofer had

[1] access to his tax advisors on pension matters.

[2] **A:** I can say with assurance that material I reviewed

[3] made it clear to me that Greybush Newman was assisting Mr.

[4] Shofer's corporation and Mr. Shofer in the preparation of

[5] tax returns.

[6] **Q:** Was there anything in that material you reviewed

[7] that indicated that Greybush Newman did advise Mr. Shofer

[8] with respect to any pension tax issues?

[9] **A:** At this point, I can't say definitively whether I

[10] saw any such thing or whether I did not.

[11] **Q:** The issue of the taxability of loans from a

[12] pension plan involves that area of the tax code that a

[13] pension consultant should be familiar with. Is that not

[14] true, Mr. Burroughs?

[15] **A:** Yes, it is.

[16] **Q:** So we have a situation here where we would assume

[17] that Mr. Hack knew what the tax law was and what the

[18] taxability consequences would be of loans that Mr. Shofer

[19] was interested in making. Is that not true?

[20] **A:** I think it's true to say that Mr. Hack was

[21] probably, or should've been, familiar with Section 72-P of

[22] the tax code.

[23] **Q:** Do you think it would be prudent for a pension

[24] consultant to review or consult Section 72-P prior to

[25] responding to the inquiry that was made by Mr. Shofer in

[1] this case?

[2] **A:** I think it would be prudent for the consultant who

[3] is functioning as a consultant to the plan and the

[4] corporation not to render tax advice to a participant.

[5] **Q:** Well, if it is prudent not to render tax advice to

[6] a participant, do you not think it is also prudent for that

[7] pension consultant to affirmatively advise the person making

[8] the inquiry that he should consult his own tax advisors?

[9] **A:** If the practitioner doesn't have knowledge that

[10] the participant has sources and constantly uses

[11] sources, outside sources, other sources of tax advice, it

[12] would be very gracious of the practitioner to advise the

[13] participant to go seek that other source. I'm not sure that

[14] failure to advise the participant would constitute a breach

[15] of duty of care.

[16] **Q:** What is the evidence that you rely on for your

[17] assumption that Mr. Shofer constantly relied on Greybush

[18] Newman for tax advice?

[19] **A:** The transcripts I reviewed strongly suggest that

[20] he did.

[21] **Q:** Do you have an opinion, Mr. Burroughs, as to

[22] whether or not Mr. Shofer was a client of Mr. Hack's firm

[23] when he made the inquiry in August of 1984?

[24] **MS. TRUHE:** Objection. I think that goes to a

[25] legal issue.

[1] **THE COURT:** Well, don't all of his opinions go to
 [2] legal issues?
 [3] **MS. TRUHE:** Well, in this case, I think it is
 [4] strictly a question of law as to who is the client. Now
 [5] this trial certainly has involved evidence involving facts
 [6] which pertain to that issue. But I think for an expert to
 [7] express an opinion as to what those facts add up to, I think
 [8] that will be for the Court to decide.
 [9] **THE COURT:** Well, maybe. But I think that if
 [10] there is a practice in this field that is particular to the
 [11] field, he is entitled to express his opinion with respect to
 [12] what that is. It is overruled.
 [13] **MR. TAYLOR:** Thank you.
 [14] **BY MR. TAYLOR:**
 [15] **Q:** Do you understand the question, Mr. Burroughs?
 [16] Was Mr. Shofer a client of Mr. Hack's firm in August of 1984
 [17] based on the information that you have reviewed?
 [18] **A:** Based on the information I reviewed, he was not.
 [19] **Q:** He was not?
 [20] **A:** That's correct.
 [21] **Q:** What was he?
 [22] **A:** He was the president of a corporation sponsoring a
 [23] plan that the Hack organization was, which the Hack
 [24] organization was keeping records.
 [25] **Q:** So do I understand it then that your opinion is

[1] that Mr. Hack or the Hack Company owed Mr. Shofer no duty to
 [2] be accurate with respect to any inquiries Mr. Shofer might
 [3] have made in this particular case?
 [4] **A:** No, I would not say that that would be my opinion.
 [5] **Q:** All right.
 [6] **A:** The word accurate bothers me a great deal.
 [7] **Q:** The word accurate bothers you?
 [8] **A:** Yes.
 [9] **Q:** Not the word duty?
 [10] **A:** No, the word duty both, why don't you rephrase -
 [11] **Q:** All right.
 [12] **A:** - the question?
 [13] **Q:** Do you believe that Mr. Hack or the Stuart Hack
 [14] Company owed any kind of duty to Mr. Shofer at the time of
 [15] the inquiry in August of 1984?
 [16] **MS. TRUHE:** Objection; duty with respect to what?
 [17] **MR. TAYLOR:** Well, that is the question I am
 [18] asking. I said any kind of duty with respect to the inquiry
 [19] made in August of 1984.
 [20] **THE COURT:** I will overrule. You may answer.
 [21] **THE WITNESS:** Mr. Shofer was functioning as
 [22] president of a corporation sponsoring retirement plans. Mr.
 [23] Hack's firm owed a duty to the corporation as sponsor and to
 [24] the plan itself. To that extent, to the extent that Mr.
 [25] Shofer was acting as president of his corporation, Mr. Hack

[1] had a duty. To the extent that Mr. Shofer was acting as a
 [2] participant, I don't see the duty.
 [3] **BY MR. TAYLOR:**
 [4] **Q:** Well, did you not in your deposition of March 31,
 [5] 1993, state that you believed Mr. Shofer was a client of
 [6] Mr. Hack's?
 [7] **MS. TRUHE:** Objection, Your Honor. If we could
 [8] have a page and a line reference.
 [9] **MR. TAYLOR:** Yes. Let me call your attention to
 [10] page 55 of that deposition, line 4.
 [11] **MS. TRUHE:** Okay.
 [12] **MR. TAYLOR:** The question actually begins at
 [13] line 1.
 [14] **BY MR. TAYLOR:**
 [15] **Q:** The question is: "Well, what is different about
 [16] the relationship between this plan and this pension
 [17] consultant and the accountants in this case that stands out
 [18] in your mind?" The answer: "Mr. Hack's knowledge that his
 [19] client was a sophisticated individual in tax matters, and
 [20] that he was being guided by a sophisticated, competent
 [21] accounting firm." Was that your answer to the question and
 [22] answer that you responded to?
 [23] **A:** I would say that in the context of who is whose
 [24] client and in what capacity, my answer was a bit sloppy.
 [25] **Q:** Well, are you changing your answer today?

[1] **A:** I would make it more definitive.
 [2] **Q:** By definitive, you mean not referring to
 [3] Mr. Shofer as Mr. Hack's client?
 [4] **A:** Mr. Shofer was functioning as president of a
 [5] corporation that was Mr. Hack, it was Mr. Hack's client.
 [6] **Q:** But would you not agree, Mr. Burroughs, that the
 [7] inquiry that was being made here was one that was being made
 [8] by Mr. Shofer personally and individually and not in his
 [9] capacity as the trustee of the pension plan?
 [10] **A:** Or not in his capacity as president of the
 [11] sponsoring company of the plan?
 [12] **Q:** Yes.
 [13] **A:** I see no evidence that that was the case.
 [14] **Q:** Well, the inquiry was with regard to Mr. Shofer's
 [15] voluntary account, was it not?
 [16] **A:** The inquiry was with respect to what would be
 [17] permissible and what would not be permissible.
 [18] **Q:** But it related to Mr. Shofer's voluntary account.
 [19] Was that not the question?
 [20] **A:** I believe it was a hypothetical question.
 [21] **Q:** What evidence do you have that it is a
 [22] hypothetical question?
 [23] **A:** I see no evidence that Mr. Shofer stated in so
 [24] many words I want to borrow from my account; what will
 [25] happen?

[1] Q: Well, of course, you were not there and the
 [2] inquiries were made verbally, were they not?
 [3] A: This is correct.
 [4] Q: Is it your experience that participants in pension
 [5] loans generally contact a pension consultant with
 [6] hypothetical questions or questions that they actually want
 [7] answers to so that they can take action on?
 [8] A: Participants in pension plans don't usually
 [9] contact the consultant.
 [10] Q: Well, who would -
 [11] A: Is that -
 [12] Q: Who would a participant in a pension plan consult
 [13] if not the pension plan consultant?
 [14] A: The sponsor of the plan.
 [15] Q: Is the sponsor of the plan someone who is normally
 [16] knowledgeable in pension administration or pension law?
 [17] A: Sometimes, yes; sometimes, no.
 [18] Q: What about this case? In this particular case,
 [19] was the plan sponsor knowledgeable in pension law and tax
 [20] matters?
 [21] A: Although the plan sponsor, in my reading of the
 [22] material I was given, was quite sophisticated in tax
 [23] matters, I do not think that he was intimately familiar with
 [24] the tax laws as it applies to pension plans.
 [25] Q: He was sophisticated in pension matters?

[1] A: No, tax matters.
 [2] Q: Tax matters, what do you base that conclusion on?
 [3] A: My reading of the transcripts.
 [4] Q: But he was not intimately acquainted with pension
 [5] tax matters, is that what the information reflected?
 [6] A: I have no indication that he was intimately
 [7] acquainted with pension tax matters.
 [8] Q: In this particular case, Mr. Burroughs, Mr. Hack,
 [9] in addition to being a pension consultant, is also an
 [10] attorney. Is that not true?
 [11] A: Yes, that is.
 [12] Q: Would you not expect an individual who receives a
 [13] letter such as the one of August 9, 1984, to carry greater
 [14] weight when the author of that letter is an attorney as
 [15] opposed to a pension consultant?
 [16] A: It is my belief, at least it's my hope, that the
 [17] clients of pension consultants and administrators recognize
 [18] the distinction between whether they have a client-
 [19] practitioner relationship with an attorney, or whether they
 [20] have a relationship with a consultant and administrator.
 [21] Q: Well, it is true, is it not, that some pension
 [22] consultants can actually do all of the necessary work with
 [23] respect to not only designing and setting up the pension,
 [24] but also administering it and doing all those functions that
 [25] one would get from an attorney or accountant or a tax

[1] advisor? Is that not true?
 [2] A: Yes. What you say is true, I'm not sure I
 [3] understand the gist of the question.
 [4] Q: Well, the question may be a little elongated. Let
 [5] me just rephrase it this way. Pension administration,
 [6] pension design, pension work can be done by a pension
 [7] consultant, or you can have a pension consulting working in
 [8] cooperation with other advisors: lawyers, accountants, tax
 [9] advisors. My question to you is this. In some situations,
 [10] all of those functions the legal advice, the tax advice can
 [11] be handled by a pension consultant. Is that not true?
 [12] A: So are you asking whether a pension consultant can
 [13] also be a practicing attorney with respect to the same
 [14] client?
 [15] Q: Well, not a practicing attorney, but just an
 [16] attorney, an attorney who is familiar with the pension law.
 [17] A: Well, in your question, is the pension consultant,
 [18] who I assume is an attorney, is that individual functioning
 [19] as a practicing attorney?
 [20] Q: Well, does it matter?
 [21] A: I think it does.
 [22] Q: How would it matter if the pension consultant is
 [23] designing, establishing, and maintaining a pension? How is
 [24] that the practice of law, Mr. Burroughs?
 [25] A: If a pension consultant designs, installs, and

[1] administers a plan and it is clear to the consultant and his
 [2] client that the consultant is not rendering advice as a
 [3] practicing attorney, then the consultant is not rendering
 [4] advice as a practicing attorney. In some instances, the
 [5] consultant will do all of the things I just described. In
 [6] addition, the consultant will be functioning as a practicing
 [7] attorney to the client.
 [8] Q: Let me direct your attention to your deposition,
 [9] the same deposition of March 31, 1993, at page 18, beginning
 [10] at line 8 where you answered a question. The question, I
 [11] think, was let's see, maybe we can go back. Actually, in
 [12] this portion of your deposition, you were describing what a
 [13] pension consultant does, or what is entailed in pension
 [14] consulting work.
 [15] MS. TRUHE: Your Honor, I believe the question
 [16] started out on page 16, line 20. Question: "I would
 [17] certainly like to know what you think is entailed in pension
 [18] consulting work, and whether that is narrow or broad, and
 [19] how it works as one of the subjects we're here to discuss.
 [20] I'm trying to find out more about the inside of the business
 [21] strictly from your standpoint because I'm not familiar with
 [22] what actuaries do, except that I know that they make
 [23] projections of some sort and it involves mathematics of some
 [24] sort, and that this has something to do with pension
 [25] consulting. And what I'd like you to do is explain to me

[1] the relationship." And then he is doing that still on
[2] page 18.

[3] **BY MR. TAYLOR:**

[4] **Q:** That was the question, and on page 18, line 8,
[5] Mr. Burroughs, your further answer was: "It can be done
[6] almost entirely by a pension consultant, or it can be done
[7] in cooperation with the client's other professional
[8] advisors; namely, his legal advisors and his accounting and
[9] tax advisors." My question to you is that it seems like in
[10] that answer when you are discussing this process that
[11] pension consultants go through, some pension consultants can
[12] provide the legal and the tax advice without the sponsor or
[13] the client going directly to lawyers or accountants. Is
[14] that what you were saying?

[15] **A:** Well, if I fully understand the context in which
[16] the question was asked and answered, I think my answer ran
[17] to the question of the design and implementation phase.
[18] Where the number one objective in design is to determine
[19] what the sponsor's needs and objectives are and to design a
[20] plan that satisfies those needs and objectives, that
[21] exercise, none of which is ordinarily the practice of law,
[22] can be done independently by the consultant or in
[23] conjunction with the other advisors of the sponsor.
[24] Does that answer your question?

[25] **Q:** Well, the question I had for you was in some

[1] situations, at least as I read your deposition, it seems
[2] that you were saying that some pension consultants can in
[3] fact do all of the necessary work to design, establish, and
[4] maintain a pension.

[5] **A:** Without any services from any other practitioner?

[6] **Q:** Yes.

[7] **A:** If the context indicated that that was the
[8] question I was answering, my question was not correct my
[9] answer was not correct.

[10] **Q:** So your answer is different. If my understanding
[11] of what you were saying back then is what I just stated,
[12] then that is not the answer you were giving. Is that
[13] correct?

[14] **A:** If your understanding of the context in which the
[15] question was asked, the answer was not correct.

[16] **Q:** Most pension consultants are not attorneys. Is
[17] that a fair statement?

[18] **A:** On its face, it is; however, most pension
[19] consulting firms, or a great many pension consulting firms,
[20] have on their staffs attorneys.

[21] **Q:** If there is a distribution from a pension plan and
[22] that distribution has to be reported as income to the
[23] Internal Revenue Service, it is put on a 1099 form. Is that
[24] not true?

[25] **A:** That is correct -

[1] **Q:** And -

[2] **A:** - or a WP; some form of that source information
[3] form.

[4] **Q:** And is it not true that the pension consultant
[5] would be the organization or entity that would prepare and
[6] submit the 1099 or whatever other form it is to the plan
[7] sponsor for filing with the Internal Revenue Service?

[8] **A:** That very often is true. It is not always true.

[9] **Q:** Do you know from your review of the materials that
[10] you looked at in this case whether or not the Stuart Hack
[11] Company normally, as part of its service to its clients,
[12] prepared 1099's when there were distributions that had to be
[13] reported as income?

[14] **A:** It's my understanding that they did.

[15] **Q:** Would the kind of work that involves the
[16] preparation of a 1099 be, in your opinion, providing tax
[17] advice?

[18] **A:** No. It would require a knowledge of tax law,
[19] a certain specific aspect of tax law.

[20] **MR. TAYLOR:** I do not have any other questions,
[21] Your Honor.

[22] **THE COURT:** Does Ms. Whelihan have any questions
[23] for the witness?

[24] **MS. WHELIHAN:** No.

[25] **THE COURT:** Is there any redirect?

[1] **MS. TRUHE:** Yes, Your Honor, just briefly.

[2] **REDIRECT EXAMINATION**

[3] **BY MS. TRUHE:**

[4] **Q:** Mr. Burroughs, Mr. Taylor just asked you about the
[5] Hack Company's preparation of 1099's. What information
[6] would Mr. Hack have to know about Mr. Shofer's loans in 1984
[7] in order to prepare a 1099?

[8] **A:** Assuming that a 1099 was necessary in connection
[9] with a loan, Mr. Hack would need to know, first of all, that
[10] loans were taken out. And second, Mr. Hack would need to
[11] know the amounts of the loans and the amounts of and history
[12] of other loans that might've been taken out.

[13] **Q:** With reference to the services being rendered to
[14] Mr. Shofer by the accounting firm of Greybush Newman, did
[15] you have any understanding as to whether Greybush was
[16] preparing the 990-T for the pension?

[17] **A:** It's my understanding they were.

[18] **Q:** All right, so Greybush was involved in at least
[19] certain pension matters for Mr. Shofer?

[20] **A:** That's correct.

[21] **Q:** Mr. Taylor also asked you about other aspects of
[22] that letter as they related to the loan provision which you
[23] read from the plan document. I would like to ask you a
[24] question about the mechanics of borrowing from a pension.
[25] Should Mr. Hack have also advised Mr. Shofer in his letter

[1] of August 9, 1984, about the issue of how to borrow money
 [2] from a pension, given the nature of the inquiry?
 [3] **A:** Based on what I knew of the facts at that point,
 [4] it would've been quite inappropriate for Mr. Hack to discuss
 [5] in great detail the mechanics of borrowing a loan. It
 [6] probably would've involved a much longer letter than Mr.
 [7] Hack wrote, and the recipient probably would've said I
 [8] didn't ask any of this; I hope you're not going to ask me to
 [9] pay for it.
 [10] **Q:** To your knowledge, did Mr. Shofer ever tell Mr.
 [11] Hack during their 1984 telephone conversations how much he
 [12] was planning to borrow from his pension?
 [13] **A:** To my knowledge, he did not.
 [14] **Q:** Did he give Mr. Hack any details as to the type of
 [15] transactions he was considering in the event he decided to
 [16] borrow from his pension?
 [17] **A:** To my knowledge, he did not.
 [18] **Q:** Mr. Taylor asked you about Plaintiff's Exhibit
 [19] Number 3, which was a letter actually authored by Louis
 [20] Omansky from the Stuart Hack Company in response to a
 [21] conversation which Mr. Shofer had with Stuart Hack about
 [22] borrowing from the pension in 1976. Do you see that?
 [23] **A:** Uh-huh.
 [24] **Q:** All right. You have got the original of -
 [25] **A:** Yes.

[1] **Q:** - the letter which is Plaintiff's Exhibit
 [2] Number 3. Now in that instance, is it not true that Mr.
 [3] Shofer told Mr. Hack how much he was intending to borrow and
 [4] what for?
 [5] **A:** That's correct.
 [6] **Q:** I believe you testified that the gist of this
 [7] letter had to do with - the fourth paragraph prohibited
 [8] transactions?
 [9] **A:** That's correct.
 [10] **Q:** So this letter did not specifically deal with tax
 [11] consequences or accounting advice, correct?
 [12] **A:** It did not.
 [13] **MS. TRUHE:** Your Honor, that is all I have.
 [14] **THE COURT:** Is there anything further?
 [15] **MR. TAYLOR:** I would like to ask a few questions,
 [16] Your Honor. Ms. Truhe opened one door that was not opened
 [17] on direct.
 [18] **REXCROSS EXAMINATION**
 [19] **BY MR. TAYLOR:**
 [20] **Q:** Mr. Burroughs, you responded to a question of Ms.
 [21] Truhe with respect to Greybush Newman preparing 990-T forms.
 [22] Do you consider the preparation of a 990-T form to be
 [23] providing tax advice?
 [24] **A:** Is preparation of any tax information form the
 [25] providing of tax advice?

[1] **Q:** Well, I think you just testified and I may be
 [2] wrong but I thought you said the preparation of a 1099 does
 [3] not constitute tax advice.
 [4] **MS. TRUHE:** Objection. That was not his prior
 [5] testimony. He simply stated that it was his understanding
 [6] that Greybush Newman also prepared the 990-T.
 [7] **THE COURT:** But he did testify, in my
 [8] recollection, that the preparation of a 1099 was not per se
 [9] the provision of tax advice, but it required knowledge of
 [10] tax law. Was that not your testimony, Mr. Burroughs?
 [11] **THE WITNESS:** That was correct.
 [12] **MS. TRUHE:** The 990-T?
 [13] **MS. WHELIHAN:** No, the 1099.
 [14] **THE COURT:** No, the 1099.
 [15] **MS. TRUHE:** I thought we were asking about the
 [16] 990-T.
 [17] **MS. WHELIHAN:** No, he was asking about 1099's.
 [18] **THE COURT:** Now he is asking the same question -
 [19] **MS. TRUHE:** All right.
 [20] **THE COURT:** - or a similar question about the
 [21] other form.
 [22] **MS. TRUHE:** Okay.
 [23] **THE COURT:** It is overruled.
 [24] **MR. TAYLOR:** Thank you, Your Honor.
 [25] **BY MR. TAYLOR:**

[1] **Q:** Is the preparation of a 990-T providing tax
 [2] advice, in your opinion, Mr. Burroughs?
 [3] **A:** That's the first time I was ever asked that
 [4] question. The 990-T is a form which was not to be signed by
 [5] Greybush Newman. It was to be signed by the trustee. Is
 [6] that not correct?
 [7] **Q:** The 1099 was to be signed by the trustee, is that
 [8] your understanding?
 [9] **A:** No, the 990-T.
 [10] **MS. TRUHE:** Objection, Your Honor. Now we are
 [11] talking 1099. I would like for Counsel to clarify whether
 [12] we are talking about a 990-T or a 1099. He just switched.
 [13] **BY MR. TAYLOR:**
 [14] **Q:** Well, my question dealt with the 990-T, Mr.
 [15] Burroughs, whether, in your opinion, that was providing tax
 [16] advice. It is a simple question.
 [17] **A:** All right. My answer at first blush, that is that
 [18] if the preparer of the form wasn't the person responsible
 [19] for submitting the form, that it probably was tax advice.
 [20] The preparer of the form gave the form to whoever had to
 [21] sign and submit that form and said or implied here it is;
 [22] it's completed, and it's correct.
 [23] **Q:** That is tax advice?
 [24] **A:** This is my first impression, yes. I've never been
 [25] asked that question before.

[1] Q: So if a preparer of a 1099 prepared the 1099,
[2] signed it, and gave it to or, did not sign it, but gave it
[3] to the plan sponsor to sign, is that tax advice?

[4] A: The preparer of the 1099 is preparing a form that
[5] is a report to the Internal Revenue Service regarding
[6] certain distributions. If we're suggesting that that's tax
[7] advice to the recipient of the distributions, I'm not
[8] prepared to say that that's tax advice to the recipient.

[9] Q: What about the 990-T, would the same rationale
[10] apply to that as well?

[11] A: I'm not sure it does. The preparer of the 990-T
[12] in this case, Greybush, prepared it and gave it to the
[13] trustee and said it's correct; sign it, and send it in. And
[14] I believe that it would be reasonable to interpret that as
[15] tax advice being given by Greybush to the trustee.

[16] Q: How is that different from the situation where the
[17] pension consultant would prepare a 1099 and give it to the
[18] participant?

[19] A: The pension consultant is preparing a form which
[20] the payor must send to the Internal Revenue Service. You
[21] might suggest that the pension consultant is giving tax
[22] advice to the payor. It's not clear to me that he's giving
[23] tax advice to the recipient of the distribution.

[24] Q: But your position is that the pension consultant
[25] should not give tax advice at all. Is that not what your

[1] testimony was?

[2] A: My testimony was, or should've been, that the
[3] consultant should not give tax advice to a participant who
[4] is not a client.

[5] Q: I see. So if the person is a client, then the
[6] pension consultant can give tax advice?

[7] A: If the pension consultant were in a relationship
[8] with the participant where the participant is a client of
[9] the pension consultant, yes, indeed.

[10] Q: All right, so it is not the question of whether
[11] the pension consultant, by virtue of training or background,
[12] should not give tax advice. It is the relationship between
[13] the pension consultant and the person who is seeking the
[14] advice?

[15] A: There are some pension consultants who have the
[16] training and background in tax law, tax law beyond the
[17] establishment and administration of a retirement plan.
[18] There are some practitioners who have sufficient training to
[19] provide good tax advice to a participant. Where there is a
[20] client relationship between a consultant of that type and
[21] the participant, I would say that's fine. And with respect
[22] to that relationship, the consultant has a duty to the
[23] participant.

[24] Q: Do you know the extent of Mr. Hack's knowledge of
[25] the tax law?

[1] A: Not the complete extent, no.

[2] Q: You, in response to Ms. Truhe's question with
[3] regard to the amount of money Mr. Shofer was interesting in
[4] borrowing from his pension plan, indicated that to provide
[5] instructions on how to borrow money would have involved a
[6] longer letter. Is that what you said basically?

[7] A: Indeed, it would have.

[8] Q: Do you not think that if the participant did not
[9] mention an amount that the participant was interested in
[10] borrowing, that the pension consultant had a duty to ask
[11] some questions himself about the type of loan that the
[12] participant was interested in making?

[13] A: I think that the question in August of 1984 was a
[14] hypothetical question on what could be done. I think the
[15] question was asked, and it was answered.

[16] Q: Well, a hypothetical question would still require
[17] an accurate answer, would it not?

[18] A: It should, yes.

[19] Q: I mean, the fact that it might have been
[20] hypothetical would not have been a reason for not giving an
[21] accurate or complete answer, would it not?

[22] A: When you use the word complete, are you suggesting
[23] that the answer should go beyond the scope of the question?

[24] Q: Well, no, I am not suggesting that. I am just
[25] suggesting that it should address the issues raised by the

[1] question, and should be accurate with respect to the
[2] information.

[3] A: I agree.

[4] Q: With respect to the question of addressing the
[5] issue of how to make a loan from the pension, would Mr. Hack
[6] not be in the superior position of providing that
[7] information to anyone who was inquiring about a loan because
[8] he drafted the loan documents?

[9] MS. WHELIHAN: Objection to the form of the
[10] question. I do not think there has ever been any testimony
[11] that there were any loan documents drafted by the Stuart
[12] Hack Company. I believe the question is inappropriate.

[13] MS. TRUHE: Unless Mr. Taylor is referring to -

[14] MS. WHELIHAN: Unless he is referring to the
[15] plan -

[16] MS. WHELIHAN: - when he says plan documents, to
[17] the plan.

[18] MS. WHELIHAN: - but he said loan documents.

[19] THE COURT: You lost me. Do you want to try
[20] again?

[21] MR. TAYLOR: Yes, I will.

[22] BY MR. TAYLOR:

[23] Q: Mr. Burroughs, Mr. Hack prepared the plan
[24] documents in this case, is that not true?

[25] A: That's my understanding.

[1] Q: The plan documents which he prepared, and from
 [2] which you have referred today, particularly Section
 [3] 12.02(m), deal with what the necessary conditions are for
 [4] making a loan from the plan, do they not?
 [5] A: 12.02(m) is an almost complete paraphrase of the
 [6] Title 1 ERISA rules on how to avoid a prohibited transaction
 [7] with a participant loan.
 [8] Q: Well, could we not say that that is the proper way
 [9] to make a loan from the pension. Forgetting about the ERISA
 [10] statute, but the plan itself sets forth the basis on the
 [11] proper procedure for making a loan, does it not?
 [12] A: I would be hard pressed to find a situation where
 [13] it's appropriate to have a loan which does not satisfy the
 [14] conditions for exemption from prohibited transactions.
 [15] Q: Well, Mr. Hack drafted 12.02(m), did he not?
 [16] A: Yes.
 [17] Q: Do you not think it would have been appropriate
 [18] for him to have made reference to the particular provisions
 [19] of the plan in responding to a question with respect to
 [20] making a loan from the plan?
 [21] MS. TRUHE: Objection; appropriate is not the
 [22] applicable legal standard here. If Mr. Taylor would
 [23] rephrase the question to include would that meet the
 [24] standard of care or be a breach of the standard of care if
 [25] he did not make reference, then I would have no objection.

[1] MR. TAYLOR: I will rephrase it, Your Honor.
 [2] BY MR. TAYLOR:
 [3] Q: Mr. Burroughs, is there anyone who would have
 [4] greater knowledge of the contents of the plan with respect
 [5] to how to make a loan than Mr. Hack?
 [6] A: I would think not.
 [7] Q: When a pension consultant is responding to an
 [8] inquiry concerning the advisability of borrowing money from
 [9] a pension plan that that plan sponsor crafted, do you not
 [10] think it falls below the standard of care not to include
 [11] information on how properly to make such a loan?
 [12] A: In the context of the questions that were asked in
 [13] August of 1984, a hypothetical question, I don't think that
 [14] that's a correct conclusion.
 [15] Q: Well, even with a hypothetical question, the
 [16] answer is incomplete unless you include the methodology for
 [17] making the loan. Is that not a fair assumption?
 [18] A: I don't think that this answer to this question
 [19] was incomplete.
 [20] MR. TAYLOR: I do not have any other questions,
 [21] Your Honor.
 [22] THE COURT: Anything further of the witness?
 [23] MS. TRUHE: Just a few, Your Honor.
 [24] FURTHER REDIRECT EXAMINATION
 [25] BY MS. TRUHE:

[1] Q: Mr. Burroughs, did you read the deposition
 [2] transcript of Nicholas Giampietro, Mr. Shofer's current
 [3] pension attorney and whose firm currently handles all of Mr.
 [4] Shofer's pension administrative work?
 [5] A: Yes, I think I did.
 [6] Q: Would Mr. Giampietro be an example of the kind of
 [7] pension consultant who is very knowledgeable about tax law
 [8] and would, therefore, be in a position to advise his client,
 [9] Mr. Shofer, about tax law and, in particular, tax
 [10] implications of transactions involving the pension?
 [11] MR. TAYLOR: Objection. Your Honor, Mr.
 [12] Giampietro did not come into this case until 1986. We are
 [13] talking about events that occurred in 1984 and before that.
 [14] I think any reference to Mr. Giampietro is irrelevant.
 [15] MS. WHELIHAN: Well, I think -
 [16] MS. TRUHE: Well, I think the problem here is I am
 [17] just trying to differentiate, given that Mr. Taylor spent a
 [18] lot of time on the kinds of professionals who advised -
 [19] THE COURT: I think I understand. Overruled.
 [20] MS. TRUHE: Sure.
 [21] BY MS. TRUHE:
 [22] Q: Would Mr. Giampietro be an example of the kind of
 [23] pension consultant you were referring to earlier who would
 [24] have greater knowledge of tax law than most pension
 [25] consultants -

[1] A: Yes, I think so.
 [2] Q: - and be in a position to advise his clients?
 [3] A: I think so.
 [4] MS. TRUHE: That is all I have.
 [5] THE COURT: Anything further?
 [6] MR. TAYLOR: No, Your Honor.
 [7] THE COURT: I have one or two questions for Mr.
 [8] Burroughs. When you testify, sir, that a pension consultant
 [9] has to have knowledge of the tax law as it relates to the
 [10] design, installation, and administration of pensions, who
 [11] draws that line?
 [12] THE WITNESS: Who draws the line between -
 [13] THE COURT: What they are required to know of the
 [14] tax law and what they are not required. More specifically,
 [15] have any of the organizations of which you have been a
 [16] member promulgated any guidelines or any kind of directives
 [17] with respect to that sort of thing?
 [18] THE WITNESS: No. I think, though, that the line
 [19] is fairly easy to define. The tax law spells out what you
 [20] need to do to have a qualified plan. And a consultant needs
 [21] to be fully familiar with that aspect of the tax law. It's
 [22] the objective of the consultant to end up with a qualified
 [23] plan, if that was the nature of the exercise. The tax law
 [24] also spells out, in the case of defined benefit plans, what
 [25] funding requirements exist. It's a clear requirement that

[1] the consulting actuary in that point understand that aspect
[2] of the tax law.
[3] Most consultants go beyond that and have a very
[4] good understanding of deduction rules applicable to
[5] contributions that plan sponsors will make to the plan.
[6] That's pretty much the definition of the aspects of the tax
[7] law that the practitioner should have if the practitioner's
[8] going to represent him- or herself as a pension consultant.

[9] **THE COURT:** All right, thank you. Anything
[10] further of the witness?

[11] **MR. TAYLOR:** No, Your Honor.

[12] **MS. TRUHE:** No, Your Honor.

[13] **THE COURT:** All right. Thank you, Mr. Burroughs.
[14] You are excused.

[15] (The witness was excused.)

[16] **THE COURT:** Let's take a brief recess and come
[17] back in a few moments.

[18] (Brief recess.)

[19] **THE COURT:** Good morning, everyone. Please be
[20] seated. Are we ready to continue?

[21] **MS. TRUHE:** Yes, Your Honor. At this time, the
[22] Defendants would like to call David Lane.

[23] **DAVID LANE,**
[24] a witness produced on call of the Defense, having first been
[25] duly sworn, was examined and testified as follows:

[1] **THE CLERK:** State your name and address for the
[2] record, please.
[3] **THE WITNESS:** It's David Lane. The business
[4] address is Wolpert, Smiley, and Blumenthal; 29 West
[5] Susquehanna Avenue, Fourth Floor, Towson, 21204. the Defense?

[6] **THE CLERK:** Thank you.

[7] **DIRECT EXAMINATION**

[8] **BY MS. TRUHE:**

[9] **Q:** Mr. Lane, what is your occupation?

[10] **A:** I'm a Certified Public Accountant.

[11] **Q:** When did you become a licensed Certified Public
[12] Accountant in the State of Maryland?

[13] **A:** August of 1980.

[14] **Q:** Did there come a time when you were employed by
[15] the accounting firm of Greybush Newman?

[16] **A:** Yes. I was employed by Greybush Newman from July
[17] 19, July or August 1981 to July 1988.

[18] **Q:** What position did you hold when you were employed
[19] by Greybush Newman?

[20] **A:** I was a staff accountant.

[21] **Q:** Were you a staff accountant in any particular
[22] department?

[23] **A:** Yes. I worked for Phil Matz, a tax partner in the
[24] Tax Department.

[25] **Q:** Are you currently a member of the AICPA, the

[1] American Institute of Certified Public Accountants?

[2] **A:** Yes. I've been a member since July of 1981.

[3] **Q:** Now in the course of your work at Greybush Newman
[4] in the Tax Department, did you prepare individual tax
[5] returns?

[6] **A:** Yes, I did.

[7] **Q:** Did you also review individual tax returns that
[8] had been prepared by others?

[9] **A:** Yes, I did.

[10] **Q:** Was your supervisor also Phil Matz?

[11] **A:** Yes. For the entire duration of my employment, my
[12] supervisor was Phil Matz.

[13] **Q:** When you were reviewing returns that had been
[14] prepared by others in the Tax Department or elsewhere in
[15] Greybush, what was the purpose of your review?

[16] **A:** The purpose of the review was to catch errors that
[17] may've been made in the preparation of those returns and to
[18] a sense of quality control before the returns were sent to
[19] the various partners or whatever partner held the account
[20] for a final review. And then it would go out to the client.

[21] So it was an interim step. There were multiple tiers of
[22] review, and this was one of the tiers.

[23] **Q:** When you say the purpose was to catch errors and
[24] ensure -

[25] **A:** It was to provide quality control.

[1] **Q:** - and to provide quality control, in what kinds
[2] of areas of errors?

[3] **A:** Well, the firm had no established checklists or
[4] any sort of tickler system or anything like that. So it was
[5] really left to what Phil Matz would direct his people to
[6] look for in particular instances on a return. Or if it was
[7] a more routine return, that might be left to the partner in
[8] charge to direct the reviewer to look for particular items
[9] beyond just a detail check or a math check, to go beyond a
[10] clerical check. That would usually be something that would
[11] be initiated by the partner in charge of the account.

[12] **Q:** Did part of your review of someone else's return
[13] include any kind of comparison or check of the tax law so as
[14] to ensure compliance with the applicable tax laws?

[15] **A:** Could you say that again, I'm sorry?

[16] **Q:** Well, in the course of your review of someone
[17] else's return that had been prepared, again, by someone
[18] else you are simply reviewing you mentioned that it was to
[19] find errors and to ensure quality control.

[20] **A:** Yes.

[21] **Q:** Would one aspect of quality control be compliance
[22] with the tax law?

[23] **A:** Well, that was the objective the general
[24] objective, yes.

[25] **Q:** Now, as I understand it, the first and only work

[1] you did for Richard Shofer was to prepare his 1984 federal
 [2] and state income tax returns?
 [3] **A:** I can't say that it was the first and only work.
 [4] I don't remember what work I might've done for him at any
 [5] time during my employment. All I can tell you is that prior
 [6] to giving my deposition in 1993, Ken Larash of Greybush
 [7] Newman sent over to me, to have some background for the
 [8] deposition, a copy of the entire - what Ken termed were the
 [9] entire contents of Shofer's 1984 individual tax file for me
 [10] to look at to prepare to talk to you back in 1993. Had I
 [11] not had that at hand before giving my deposition, I would
 [12] have literally had to say I do not recall anything about
 [13] that work or any other work for Shofer during my tenure at
 [14] Greybush Newman. I just had a general recollection of
 [15] Shofer as a client and Catalina as a client. But I don't
 [16] recall that it - my work might've been limited to that one
 [17] return. It might have; it might not've been.
 [18] **Q:** But, as I understand it, in 1993 when I took your
 [19] deposition after you had reviewed the materials sent to you
 [20] by Mr. Larash -
 [21] **A:** Yes.
 [22] **Q:** - you confirmed for me that in fact the only work
 [23] you did for Mr. Shofer while he was a client for Greybush
 [24] was to prepare his individual returns for 1984.
 [25] **A:** Well, if that's what I said, I apologize for

[1] saying that definitively. That may've been true, but I'm
 [2] trying to clarify, then, that I only know that I did work
 [3] for Shofer in mid-'95 for his '84 return because I was given
 [4] the file to look at and we had a process control sheet that
 [5] had my initials and a date on it. There was some - my
 [6] handwriting on the return because it was manually prepared.
 [7] And some more handwriting of mine and other members' of the
 [8] firm. So I didn't mean to say that that would tell me in
 [9] any way that that was the only thing I had done for him.
 [10] I don't know, so I'm trying to clarify that.
 [11] **Q:** Well, sitting here today, do you recognize what
 [12] has been admitted into evidence as Plaintiff's Exhibit
 [13] Number 10, the income tax return of Richard Shofer for the
 [14] year 1984?
 [15] **A:** Yes. This looks like the return I was given to
 [16] review before the deposition.
 [17] **Q:** Did you prepare that return?
 [18] **A:** I entered the numbers on the return. I think,
 [19] again, that maybe to clarify and maybe to explain this
 [20] clarification, this set of documents is the, I believe, the
 [21] set of documents that go to the government. What Ken Larash
 [22] had given to me included the process cover sheet that's an
 [23] internal document of Greybush Newman's. And it would also
 [24] include Ken's notes that I used to scribe the numbers on the
 [25] return. And it would also - that information I was given

[1] also included some preliminary tax calculations that were
 [2] done by Phil Matz, the tax partner. I believe, based on the
 [3] way they were layered in the file to help Mr. Shofer make an
 [4] accurate April 15 estimated liability payment for 1994.
 [5] **Q:** Mr. Lane, I am not asking you what Mr. Larash gave
 [6] you in preparation for your -
 [7] **A:** Well, without -
 [8] **Q:** - 1993 -
 [9] **MS. WHELIHAN:** No, I think -
 [10] **BY MS. TRUHE:**
 [11] **Q:** Excuse me, Mr. Lane; if I may finish my question.
 [12] **A:** Okay.
 [13] **MS. WHELIHAN:** Well, I do not think he is finished
 [14] his answer. That is the problem -
 [15] **MS. TRUHE:** I thought he had.
 [16] **MS. WHELIHAN:** Well, no. You asked him whether or
 [17] not he prepared the return, and I think what he is trying -
 [18] **MS. TRUHE:** And I am getting a different answer to
 [19] a different question.
 [20] **MS. WHELIHAN:** Well, no. He is actually -
 [21] this -
 [22] **THE WITNESS:** I am trying to -
 [23] **MS. WHELIHAN:** He is trying -
 [24] **THE WITNESS:** I am trying to - what I was saying,
 [25] I was trying to lay a background for -

[1] **MS. WHELIHAN:** He was trying to explain what it
 [2] means to be the preparer, I think, is what he is trying to
 [3] do. I mean, can he finish his answer?
 [4] **THE COURT:** Are you finished your answer?
 [5] **THE WITNESS:** No, I'm not.
 [6] **THE COURT:** Okay, you may continue.
 [7] **THE WITNESS:** If I could, I'm trying to clarify, I
 [8] think, what you might be referring to in my deposition when
 [9] I said that I prepared the return. I took it in the
 [10] internal sense that Greybush Newman has, as most accounting
 [11] firms, I believe do, has an internal control sheet where the
 [12] term prepared by would have my initials on it. Then it
 [13] would have math check or tax review and/or tax review line.
 [14] Someone else would initial that. In this return, it was
 [15] Richard Newman, one of my coworkers. It would have signed
 [16] by, and that person would be the paid preparer in the eyes
 [17] of anyone externally looking at this return.
 [18] Harvey Newman, the partner of the firm, signs this
 [19] return. Staff people don't sign returns. Harvey New -
 [20] what I'm trying to say is that preparation of a return is an
 [21] entire process, and I was a component of that process, and
 [22] this set of documents doesn't explain it. So in order to
 [23] fully give you the picture, we can go from mid-April 1985.
 [24] The earliest documents in the tax file were Phil Matz's
 [25] calculating an estimated tax amount for Shofer to pay with

[1] his extension form 4868. We can go from there. We can see
 [2] that the extension itself was prepared in the handwriting of
 [3] Harvey Newman, another partner in the firm.
 [4] Then we can go forward and see Ken Larash's notes
 [5] from late July of '85 where he makes detailed notes and
 [6] instructions to me to scribe out the return, and as such,
 [7] I'm the preparer of the return and I prepared it based on
 [8] that background, gave it to Richard Newman. It was
 [9] reviewed. Harvey Newman signed it August 5th, whatever.
 [10] And that's the end of the process. So I can't, without
 [11] making that explanation, really tell you that I'm a
 [12] preparer. I'm a part of the process of preparing the
 [13] return, and I'm not the paid preparer who signed the return,
 [14] so I have to clarify that. And again, if it's not something
 [15] that I made clear in the deposition, I'm trying to make it
 [16] clear now.
 [17] **Q:** All right. Mr. Lane, I would like to then focus
 [18] now on your particular phase of this return's preparation.
 [19] **A:** Okay.
 [20] **Q:** Okay. As I understand it, Mr. Larash actually met
 [21] with Mr. Shofer to gather certain information, correct?
 [22] **A:** I don't know that because the file doesn't tell me
 [23] that. It has Ken's initials and a date, and it has
 [24] information that I guess, it infers that he got it from the
 [25] client and wrote it down because, again, I don't have

[1] any direct recollection of having done this work. All I can
 [2] do is look at a file and it's not reviving any memory of
 [3] having done the return. It's just telling me that
 [4] documentation was done, and I can recognize the handwriting
 [5] of various people even as many years later.
 [6] **Q:** I understand that, Mr. Lane. You did not at any
 [7] time ever personally meet with Mr. Shofer for the purpose of
 [8] gathering information, correct?
 [9] **A:** I don't know what he - I don't know Mr. Shofer at
 [10] all. I don't believe I've ever met him. And if he's here,
 [11] I don't know who he is if he's here. I've never met the
 [12] man. I don't believe -
 [13] **Q:** All right.
 [14] **A:** - I've ever talked to him over the telephone,
 [15] either.
 [16] **Q:** Okay.
 [17] **A:** I just don't, I've never dealt with this person.
 [18] **Q:** Now at some point in the process of your putting
 [19] certain information on the 1984 return, did Mr. Larash give
 [20] you anything so that you could do that?
 [21] **A:** Well, again, I have to assume that the file
 [22] contents would allow me to say that what he had given me
 [23] were - was what was in the file that I just tried to
 [24] describe in some kind of a summary fashion. If he had given
 [25] me anything else or said anything else to me that didn't

[1] make it into Greybush's file, I wouldn't have a recollection
 [2] of it because, obviously, I don't keep my own file. It's
 [3] Greybush's file, and I don't have a direct recollection of
 [4] having done this work. So I'm referring again to the file
 [5] that Ken gave me in order to answer your questions. And the
 [6] file shows that Ken took notes that were used in the return
 [7] and -
 [8] **Q:** Gave those notes to you, correct?
 [9] **A:** - going, well, I would assume he did because I
 [10] did the return, and I the notes are tied to the return, and
 [11] I have tick marks on the notes showing where I'm picking up
 [12] the items. And then going further back again, there would
 [13] be other preliminary work besides what Ken did back in
 [14] April.
 [15] **Q:** I understand that.
 [16] **A:** It's in the file.
 [17] **Q:** But you would agree that at some point, Mr. Larash
 [18] gave you items of income and deduction -
 [19] **A:** Yes.
 [20] **Q:** - for you to put on that 1984 return, correct?
 [21] **A:** Yes, and I think that they're the items that were
 [22] in the file that he had given me because I could see my own
 [23] handwriting on those notes.
 [24] **Q:** Okay.
 [25] **MS. WHELIHAN:** Do you want -

[1] **THE WITNESS:** Summarizing, tick-marking them -
 [2] the file.
 [3] **BY MS. TRUHE:**
 [4] **Q:** Do you recall how long this process took you of
 [5] entering information on Mr. Shofer's 1984 return?
 [6] **A:** I believe at the deposition, I said it was a
 [7] fraction of a day, and I would have to stay with that.
 [8] That's a guess, but it's maybe a little more than a guess
 [9] because having done this kind of work over a long period of
 [10] time, I would doubt that it took me more than a day to do
 [11] it. But, again, the timesheets that I would've used were
 [12] not my property, and I don't have them to refer to. So I
 [13] would guess it's a fraction of a day.
 [14] **Q:** Now in taking any information which Mr. Larash had
 [15] gotten from Mr. Shofer and entering it on the 1984 return,
 [16] did you personally exercise any judgment or professional
 [17] expertise on the issue of whether the items Mr. Larash was
 [18] giving you were proper deductions and proper taxable income?
 [19] **MS. WHELIHAN:** Objection. I do not think that is
 [20] an appropriate question for this witness to answer.
 [21] **THE COURT:** Why not?
 [22] **MS. WHELIHAN:** Because whether he exercised
 [23] professional judgment is not relevant to an issue in this
 [24] case. He has testified he was the scribe for putting on the
 [25] numbers on the tax return, and what professional judgment he

[1] exercised or did not exercise does not go to the issues as
[2] to Greybush.

[3] **THE COURT:** Why not?

[4] **MS. WHELIHAN:** Because Mr. Larash has already, I
[5] think, supplied that information as the collector of data.
[6] I mean, his professional judgment, and that is almost a
[7] quasi-legal question as opposed to a question -

[8] **MS. TRUHE:** Well, Your Honor, all I am trying to
[9] find out is whether he -

[10] **THE COURT:** Overruled.

[11] **MS. TRUHE:** - was more than a scribe.

[12] **THE COURT:** You may answer.

[13] **THE WITNESS:** State the question again, I'm sorry.

[14] **BY MS. TRUHE:**

[15] **Q:** Mr. Lane, were you any more than a scribe in
[16] entering the numbers which Mr. Larash gave you on the 1984
[17] tax return?

[18] **A:** Well, that would require recollection on my part,
[19] and I can't say that I recall any thought process I had in
[20] doing the work because I don't recall doing the work.

[21] **Q:** I understand you do not recall actually doing the
[22] work.

[23] **A:** Well, then I would have to go back to what I said
[24] in the - I think I tried to convey in the deposition, that
[25] I'm having trouble understanding the term judgment or

[1] independent judgment because I could go from one end - what
[2] I perceive as one end of the scale, which is simply taking
[3] Ken's numbers, and grouping them, identifying what form I
[4] would put them on prior to putting them on the form, maybe
[5] some difference in treatment where there was an obvious
[6] option as to where to place a number for the benefit of the
[7] taxpayer. But all of that would have to be taken in light
[8] of looking on an overall reasonableness basis at Phil
[9] Matz's, the tax partner's, initial, preliminary tax
[10] calculation that was done back in April of '85 where Phil
[11] listed in the file on a grouping basis items of income and
[12] deduction. Not as explicit or precise as what Ken
[13] apparently gathered - in the summer for me to do a precise
[14] return. But it would be, if I'm exercising judgment, it
[15] would be in light of those file contents, and I can't
[16] comment further because I don't have anything else at hand.

[17] **Q:** Well, let's make this specific.

[18] **A:** Okay.

[19] **Q:** Do you see on the return where it shows in the
[20] category "Interest You Paid" an amount: \$12,750, Catalina
[21] Pension Plan. Do you see that?

[22] **A:** Yes, I do.

[23] **Q:** Is that your handwriting?

[24] **A:** Yes, it is.

[25] **Q:** You wrote that -

[1] **A:** Yes.

[2] **Q:** - correct? Did you get that off of Mr. Larash's
[3] list?

[4] **A:** I can recall in reviewing that list in order to
[5] come here today that I did get it off the list. And I
[6] believe it was a combination of two numbers on the list:
[7] \$11,000-something and another \$1,000 or so.

[8] **Q:** Okay. Here is my question. In the course of
[9] transferring that information from Mr. Larash's list onto
[10] Mr. Shofer's tax return, did you do anything more than take
[11] the number off of one form and put it on another?

[12] **A:** Well, again, I'm trying to say that I can't
[13] remember what thought process I might or might not have gone
[14] through in transferring the number. You're asking me to
[15] make an answer something that I can't recall.

[16] **Q:** Let me try it another way.

[17] **A:** Okay.

[18] **Q:** Assuming you were being asked to well -

[19] **A:** It's hard to go back in time 13 years because I'm
[20] a different, I'm in a different -

[21] **Q:** Let me ask it this way then.

[22] **A:** - vantage point than I would've been back then.

[23] **Q:** At the time you were transferring that particular
[24] item of information from Mr. Larash's sheet onto the tax
[25] return, do you believe you should have exercised any

[1] judgment about the propriety of that item as an interest
[2] deduction?

[3] **MS. WHELIHAN:** Objection.

[4] **THE COURT:** Basis?

[5] **MS. WHELIHAN:** It is a legal question to this one.

[6] It is a should. It is a hypothetical. I mean, his
[7] testimony has been that he has - all he can remember is
[8] that he transferred the data. He cannot remember what his
[9] thought process was when he transferred the data. So to ask
[10] him whether or not he should have exercised any kind of
[11] judgment when transferring the data is an inappropriate
[12] question to ask this witness who is here as a fact witness
[13] to testify as to what he did in 1984, and not what he thinks
[14] now he should have done in 1984.

[15] **MS. TRUHE:** Your Honor, this is not a fact
[16] witness. This is an accountant who is held to a standard of
[17] care in the preparation, at least with respect to the phase
[18] that he was involved in, of a tax return. Mr. Larash
[19] testified that everyone in the chain, including himself, Mr.
[20] Lane, and Harvey Newman who ultimately signed the return,
[21] was involved in the preparation of the return and had a
[22] responsibility to see to it that it was prepared accurately.
[23] I am simply trying to find out whether Mr. Lane even saw his
[24] role as being one of ensuring that any of the information
[25] was accurate from a professional standpoint, or whether he

[1] simply was a scribe.

[2] **MS. WHELIHAN:** Well, I think that Ms. Truhe has

[3] sort of enhanced Mr. Larash's testimony as to what she

[4] thinks it is, not as to what it is. But I do not that her

[5] explanation as to why she is asking the question changes the

[6] question which is a should question asking this witness to

[7] look back on what he did that he has absolutely no

[8] recollection of.

[9] **THE COURT:** Well, whether he has a recollection of

[10] what his thought process was when he transferred the numbers

[11] does not necessarily mean he does not have a recollection of

[12] what his thought process was about his duties during when he

[13] was performing the functions.

[14] **MS. WHELIHAN:** But that is not the question that

[15] she asked, number one. Number two, what exercise of

[16] professional judgment he thinks he should have had in

[17] transferring the data to the form is a question that should

[18] be more appropriately presented to the expert witnesses. I

[19] mean, Mr. Lane is not an expert witness. The fact that he

[20] is a CPA does not give him enhanced standing for the

[21] purposes of Ms. Truhe to ask a question which more

[22] appropriately should be addressed to an expert.

[23] **THE COURT:** Well, I disagree. I am going to

[24] overrule. You may answer.

[25] **THE WITNESS:** State the question again -

[1] **BY MS. TRUHE:**

[2] **Q:** I understand, Mr. Lane, that you do not actually

[3] recall transferring the \$12,750 item off of Mr. Larash's

[4] sheet onto that exhibit, correct -

[5] **A:** That's correct.

[6] **Q:** - and what thought processes you exercised in

[7] doing that, correct?

[8] **A:** That's correct.

[9] **Q:** Do you believe you had a duty to exercise any

[10] professional judgment about the proprietary of showing that

[11] information as an interest deduction?

[12] **MS. WHELIHAN:** Objection.

[13] **THE WITNESS:** Well, since you're using -

[14] **MS. WHELIHAN:** Well, objection, because that is a

[15] different question. Now she is asking whether or not this

[16] witness thinks he had a duty.

[17] **MS. TRUHE:** Well, that is exactly what the Court

[18] said he was interested in.

[19] **THE COURT:** Well, I am not necessarily interested

[20] in any of it, but I am allowing you to ask the witness the

[21] question.

[22] **MS. TRUHE:** Thank you.

[23] **THE COURT:** Overruled.

[24] **THE WITNESS:** Well, using the word any is an

[25] absolute term, as I'm understanding it, so I'd have to say,

[1] I'd have to agree with you. It would be almost an obvious

[2] answer.

[3] **BY MS. TRUHE:**

[4] **Q:** What was it, again, your answer?

[5] **A:** That I have any duty to ensure that I have

[6] accurate numbers on this return.

[7] **Q:** Not just accurate numbers, but whether that was a

[8] proper deduction in terms of compliance with the tax law.

[9] Did you exercise - and again, I understand you do not

[10] remember -

[11] **A:** Okay.

[12] **Q:** - exercising any judgment about that -

[13] **A:** I -

[14] **Q:** - but do you believe you had a duty to exercise

[15] any judgment about that?

[16] **A:** Well, I would think that the file would indicate

[17] that based on the firm's tax partner having made a

[18] preliminary calculation back in April of '85 showing a

[19] grouping of non-business interest deductions in admittedly,

[20] in total, not in detail, that resulted in a tax calculation

[21] that did not vary too much from the final product. If I had

[22] that at hand, that would provide me a great deal of comfort

[23] in doing this work as a scribe, even as a scribe inclined to

[24] try to go beyond that and do an evaluation of what I'm

[25] putting on the return because I'm relying on a top-level

[1] professional who's done preliminary work and I'm building on

[2] that.

[3] **Q:** Okay.

[4] **A:** And it's his as well as Ken's work.

[5] **Q:** Okay, let me see if I understand that. I

[6] understand that others had made a determination about the

[7] propriety of that item as an interest deduction, correct,

[8] that you thought?

[9] **A:** I can't say that that's what I thought, again, but

[10] that would be a reasonable guess based on the file contents.

[11] If I had that at hand, then I could look at that and say

[12] okay, Phil said this is what the items of income and

[13] deduction are going to be as grouped on the return. That

[14] pretty much conforms to Ken's detail, put in on the return,

[15] and it looks good.

[16] **Q:** Okay, that is what I want to focus on. Did you

[17] just put it on the return? Or did you, after Phil and Ken

[18] had classified it that way, simply rely on them? Or did you

[19] exercise any of your own judgment about that?

[20] **A:** Well, you use the term any. I'd have to agree

[21] with you. I'd have to exercise some degree of judgment.

[22] But it's talking about a spectrum judgment, and I can't tell

[23] you what was exercised and what band of the spectrum I was

[24] on at that time.

[25] **Q:** Okay. Let me ask you this. You show that as

[1] interest on a loan from a pension, correct?

[2] **A:** I abbreviated pension p-e-n-s, but I guess it

[3] could be read as pension because Ken's detailed statement

[4] wrote it out as pension.

[5] **Q:** All right. So was it your understanding at the

[6] time that this was interest on a loan which Mr. Shofer had

[7] taken from his pension?

[8] **A:** That would be a reasonable assumption, yeah.

[9] **Q:** Did you know in 1985 that there might a tax issue

[10] regarding monies Mr. Shofer had borrowed from his pension in

[11] 1984?

[12] **A:** Well, I can't speak for what I might have known or

[13] not known in 1985. I can only tell you what I know today.

[14] **Q:** Can you tell us whether you think you should have

[15] known that there might at least be a tax issue regardless of

[16] what the answer was that there might at least be a tax issue

[17] regarding monies which Mr. Shofer had borrowed from his

[18] pension in 1984?

[19] **A:** Well, that -

[20] **MS. WHELIHAN:** Objection.

[21] **THE WITNESS:** That ques - okay.

[22] **MS. WHELIHAN:** Well, objection, Your Honor.

[23] **THE COURT:** Basis for the objection?

[24] **MS. WHELIHAN:** Totally hypothetical. He has

[25] already testified he has absolutely no recollection of what

[1] he thought back in 1985 when he was preparing the return.

[2] She is now asking him whether or not he can go back and now

[3] apply some thought process to come up with some conclusion

[4] as to whether or not he has -

[5] **THE COURT:** I do not think this question requires.

[6] Overruled.

[7] **THE WITNESS:** Say, please say the question again.

[8] I'm sorry, I can't remember.

[9] **MS. TRUHE:** This is when I wish we had a live

[10] court reporter.

[11] **BY MS. TRUHE:**

[12] **Q:** But, Mr. Lane, please try to follow the question.

[13] **A:** Well, I am trying, I assure you -

[14] **Q:** I understand.

[15] **A:** - of that.

[16] **Q:** I appreciate that. Do you believe that you should

[17] have had a duty to at least spot the issue of the possible

[18] tax consequences of monies which Mr. Shofer borrowed from

[19] his pension in 1984?

[20] **MS. WHELIHAN:** Objection.

[21] **THE COURT:** Overruled.

[22] **THE WITNESS:** The problem with that is that you're

[23] talking about an interest deduction. This is an interest

[24] deduction, and you're talking about a principal sum drawn

[25] out of a pension plan. They're distinct issue.

BY MS. TRUHE:

[1]

[2] **Q:** Yes.

[3] **A:** I don't know when any money might've been borrowed

[4] from the pension plan by looking at an interest deduction.

[5] And I believe that the law was not absolute that you

[6] couldn't take a loan from a pension plan.

[7] **Q:** I am not asking about whether you can take a loan

[8] from a pension. I am focusing on now on the tax or -

[9] **A:** Well, that's what I'm trying to -

[10] **Q:** - possible tax cons, excuse me -

[11] **A:** I am, too.

[12] **Q:** - possible tax consequences of borrowing from a

[13] pension. You show \$12,750 in interest -

[14] **A:** Sure.

[15] **Q:** - as a deduction on that return, correct?

[16] **A:** Okay, on a cash basis, yes.

[17] **Q:** All right. So presumably, Mr. Shofer had borrowed

[18] monies from his pension on which he had to pay that interest

[19] in 1984?

[20] **A:** But I don't know in what tax period he borrowed

[21] those monies based on this deduction. This deduction is a

[22] cash basis deduction. I can reasonably assume that because

[23] when the client would be asked the client would know he's on

[24] the cash basis. He would have a cash basis payment of

[25] whatever it is, \$11,000 or \$12,000. That doesn't tell me or

[1] lead me to think necessarily that a loan was taken out in

[2] 1984. It could've been taken out in a prior year. So I

[3] can't answer the question as to the loan proceeds.

[4] **Q:** Let me ask you this. When you transferred that

[5] interest deduction from Mr. Larash's information onto the

[6] tax return, did you have any thought whatsoever as to the

[7] issue of whether some of the monies which Mr. Shofer had

[8] borrowed from his pension in 1984 might be taxable?

[9] **A:** Well, again, I can't recall my thought process.

[10] **Q:** Do you think you should have had some thought

[11] about that?

[12] **A:** Well -

[13] **MS. WHELIHAN:** Objection.

[14] **THE COURT:** Overruled.

[15] **THE WITNESS:** Well, again, the thought would not

[16] necessarily go to a principal sum having been borrowed in a

[17] particular year. This number could have been interest in

[18] arrears. I don't know. And I don't know if that would be

[19] deductible. On a cash basis, I would assume that it would

[20] be, and I think that might be reasonable. Again, I'm

[21] supposing. That's all I can do.

[22] **BY MS. TRUHE:**

[23] **Q:** Do you know Stuart Hack?

[24] **A:** I don't know Stuart Hack. I know of him. I know

[25] his - I can recognize his name as I recognized it in '93

[1] when I was deposed.

[2] **Q:** Did you have any conversation with Stuart Hack at

[3] any time you were involved in the preparation of the 1984

[4] tax return?

[5] **A:** I don't recall. I do not recall any conversation

[6] with Stuart Hack that I have ever had. I just know of his

[7] name, and I know that I know it now. I don't know if I knew

[8] of his name then, or if I've ever talked to him in '85 or

[9] any other time at Greybush.

[10] **Q:** At the time you were involved in the preparation

[11] of Mr. Shofer's 1984 tax return, did you ever see anything

[12] in writing from Stuart Hack?

[13] **A:** I don't recall seeing anything because, again,

[14] I tried at the beginning of this to explain that any

[15] recollection I have is not a true recollection.

[16] It's reading a file that was given to me by Greybush Newman

[17] in '93 in anticipation of being deposed. And without that

[18] file, I would have to say I do not recall to every question

[19] because I don't.

[20] **Q:** Do you remember seeing a letter from Stuart Hack

[21] in that file?

[22] **A:** I do not, no.

[23] **Q:** What, if anything, Mr. Lane, do you know about

[24] Alan Marvel's discovery in the fall of 1986 or actually,

[25] late fall of 1986 of the tax consequences of loans taken by

[1] Mr. Shofer in 1984?

[2] **A:** I knew nothing of it until I was deposed, or

[3] getting ready to be deposed, and Ken called me to tell me

[4] that I had to come to your office to see you. Prior to

[5] that, I had no recollection of anyone talking to me about

[6] this return or anything to do with Shofer and his loans

[7] or during my entire tenure at Greybush which ended in '88,

[8] or after I left Greybush. No one, I cannot recall anyone

[9] talking to me about this issue at all.

[10] **Q:** You left Greybush in 1988?

[11] **A:** July '88, I believe it was -

[12] **Q:** All right.

[13] **A:** - yes.

[14] **Q:** And no one at any time during your tenure at

[15] Greybush came to you and had any discussion with you or gave

[16] you any information about how the original 1984 tax return

[17] from Mr. Shofer had been prepared -

[18] **A:** Well, a -

[19] **Q:** - correct?

[20] **A:** Again, I do not recall that they did. Someone

[21] might have and I would, I might have forgotten it. But I

[22] have had no recollection in '93 when you asked me the

[23] question. I have no recollection today.

[24] **MS. TRUHE:** Your Honor, that is all I have.

[25] **THE COURT:** Is there any cross-examination of this

[1] witness - be easier.

[2] **MS. WHELIHAN:** Right, and I think you may think

[3] that it would be a good thing to try, at least on an

[4] experimental basis for the appeal -

[5] **THE COURT:** Thank you. Is there cross-examination

[6] of the witness?

[7] **MR. TAYLOR:** I just had a couple of questions,

[8] Your Honor.

[9] **CROSS-EXAMINATION**

[10] **BY MR. TAYLOR:**

[11] **Q:** Mr. Lane, I understood you to indicate that you

[12] were part of the process that produced this 1984 tax return.

[13] Is that correct?

[14] **A:** Yes.

[15] **Q:** Were you the biggest part of the process in terms

[16] of producing the final product?

[17] **A:** I can't say that that would be true.

[18] **Q:** After the numbers were placed on the return by

[19] you, where did it go next?

[20] **A:** According to the process control sheet that I was

[21] given as part of that file copy by Greybush Newman, the

[22] return would've gone to Richard Newman, who was a coworker

[23] of mine in the Tax Department, for detail check and tax

[24] review.

[25] **Q:** Was that the last step it would make before it

[1] was -

[2] **A:** No. No, again the process starts before I prepare

[3] the return for internal purposes. The process starts when

[4] the extension is prepared back in April. Phil works on the

[5] return. Harvey prepares a handwritten extension. Ken is in

[6] the process gathering information, apparently. The process

[7] control sheet, however, doesn't start until those steps have

[8] been completed. It starts with a so-called "Prepared by"

[9] line, which is to be initialed by the person who filled the

[10] role that I did in this return, which is to put the numbers

[11] literally on the return.

[12] Then it's tracked from that point forward through,

[13] as I said, Richard Newman's detail and tax review to Peggy

[14] Vogel collating the return and photocopying it, to Harvey

[15] Newman giving a final review and signing the return as paid

[16] preparer. And then there may even be a line for the person

[17] in the mail room who handled it to send it out if it was

[18] mailed. And that would be the listing of steps that would

[19] be documented on that process control sheet.

[20] **Q:** Do I understand that the information you used to

[21] prepare the return was in a file that was given to you?

[22] **A:** It was a photocopy of papers that were identified

[23] to me as the entire contents or as the contents, I should

[24] say, of Shofer's 1984 individual income tax file.

[25] **Q:** And that photocopy was given to you by Mr. Larash?

[1] A: Yes. Ken Larash gave it to me as a followup to
[2] his phone conversation with me introducing me to Janet Truhe
[3] for the purposes of the deposition that I was to attend.
[4] And I think John May actually may've been part of that
[5] initial contact or whatever.

[6] Q: Well, I was speaking of back in 1985. That is
[7] when you prepared this return, is that right?

[8] A: Oh, in 198 - again, I have no direct recollection
[9] of what I had in 1985. I'm only able to tell you what I can
[10] read from a copy of the file I was given in 1993 by Greybush
[11] Newman so that I could look at it to have something to say
[12] at the deposition other than I don't, otherwise, as I've
[13] tried to say again here repeatedly, I would've had to
[14] literally say I just don't recall having done this work. So
[15] I wouldn't have had anything to lend to the discussion.

[16] Q: You do not have any recollection as to whether
[17] there might have been some kind of a document or piece of
[18] paper that would have backed-up or supported this interest
[19] figure that shows that you reported it on the return?

[20] A: By backed up -

[21] Q: Well, some kind of a document that would reflect
[22] the interest?

[23] A: Well, as far as I'm aware, I think the form 1098
[24] came into requirement in maybe in '84, but that's for
[25] mortgage interest. And I'm not sure that there's an

[1] interest expense reporting form that's prescribed by the IRS
[2] to be given to the payor by the payee. So that if
[3] the lender is this pension plan I didn't see that in the
[4] file, and I'm just trying to elaborate a little bit just to
[5] say that I'm not sure that there was a government-
[6] prescribed form because this would be personal-type
[7] interest. And I believe that only mortgage interest was
[8] required maybe starting at around '84 to be on a 1098. And
[9] there was no other type of form like a 1099 or other type of
[10] form.

[11] Q: Are you aware that Greybush amended the 1984
[12] return some time later?

[13] A: I'm only aware of it as part of the process of
[14] being deposed. Prior to that, again, I had no recollection
[15] of anything being done to amend this work or anything else
[16] that was done with Alan Marvel or anything else. But of
[17] course, since then, I've learned about it just by hearing
[18] the discussions and being deposed.

[19] Q: You did not have anything to do with the
[20] preparation of the amended 1984 -

[21] A: Well, if I did, I do not recall it because my
[22] only - again, I have no direct recollection. I only have
[23] that file to review that told me by the process sheet and by
[24] recognition of my own handwriting that I was a part of
[25] preparing the original '84 return. Beyond that, I haven't

[1] been told or given any in - other information that would
[2] lead to know or to be able to recall that I did anything
[3] else.

[4] Q: You mentioned that this \$12,750 interest figure
[5] was a deduction which was on a cash basis. Does that mean
[6] that it was to be taken in 1984? I mean, does it have any
[7] relationship to the time period as to how it was treated?

[8] A: I guess what I'm saying is that this is a cash
[9] basis taxpayer, and that, unless he had something like a
[10] flow-through entity that was on other than a cash basis, all
[11] of his items of income and deduction would generally be on
[12] the cash basis. So a reasonable assumption is that an
[13] itemized deduction for personal interest such as this would
[14] represent an actual outlay of funds during calendar 1984.

[15] Q: So the deduction was taken in the year in which it
[16] was entitled - in which it was earned, or paid?

[17] A: Well, paid; not -

[18] Q: - or paid?

[19] A: - not incurred, but paid, I would say.

[20] Q: Okay.

[21] MR. TAYLOR: All right, I do not have any other
[22] questions.

[23] THE COURT: Anything further of the witness?

[24] MS. TRUHE: No, Your Honor.

[25] THE COURT: Thank you, Mr. Lane. You are excused.

[1] (The witness was excused.)

[2] MS. WHELIHAN: Your Honor, may I show Mr. Lane to
[3] the door?

[4] THE COURT: Sure. Do you have another witness?

[5] MS. TRUHE: Yes, Your Honor. The next witness is
[6] Richard Intner, our accounting liability expert. I do not
[7] know how we can do this in terms of lunch.

[8] THE COURT: Is he here?

[9] MS. TRUHE: Yes, he is.

[10] THE COURT: We could about a half an hour.

[11] MS. TRUHE: Okay. I can certainly get my direct
[12] done in that amount of time.

[13] THE COURT: Okay. Mr. Intner?

[14] RICHARD INTNER,
[15] a witness produced on call of the Defense, having first been
[16] duly sworn, was examined and testified as follows:

[17] THE CLERK: State your name and address for the
[18] record, please.

[19] THE WITNESS: Richard A. Intner, 117 Water Street,
[20] Baltimore, 21202.

[21] THE CLERK: Thank you.

[22] MS. TRUHE: Your Honor, I would like to pass up
[23] copies of the exhibits to which I will be referring during
[24] my direct examination of Mr. Intner.

[25] THE COURT: Okay.

[1] MS. WHELIHAN: Just so we know, what exhibit
 [2] numbers are they?
 [3] MS. TRUHE: 32 to -
 [4] MS. WHELIHAN: To 38?
 [5] MS. TRUHE: - to 38.
 [6] MS. WHELIHAN: Okay.
 [7] VOIR DIRE EXAMINATION OF RICHARD INTNER
 [8] BY MS. TRUHE:
 [9] Q: Mr. Intner, directing your attention to what has
 [10] been marked for identification as Defendant's Exhibit
 [11] Number 32, would you please identify this document?
 [12] A: Yes, that's my curriculum vitae.
 [13] Q: What is your occupation, Mr. Intner?
 [14] A: I'm a Certified Public Accountant.
 [15] Q: In what states are you licensed as a CPA?
 [16] A: New York and Maryland.
 [17] Q: All right. When did you become licensed in
 [18] Maryland?
 [19] A: 1976.
 [20] Q: Would you describe for us, please, briefly your
 [21] educational background?
 [22] A: Yes. I have undergraduate degrees from the
 [23] Wharton School and the University of Pennsylvania in
 [24] Business Administration, and a Bachelor of Science in
 [25] Accounting from Adelphi University.

[1] Q: When did you receive the accounting degree?
 [2] A: In 1972.
 [3] Q: Could you tell us, please, briefly about your
 [4] professional career as an accountant, your employment
 [5] history?
 [6] A: I started working for Price Waterhouse, the New
 [7] York office, in 1969. In 1972, and I was on the audit staff
 [8] there as a staff accountant. In 1972, I left and went into
 [9] corporate accounting for the R.H. Macy Company. In 1975, I
 [10] moved to Maryland and was employed by a man who had his own
 [11] accounting practice. We later became partners in 1981.
 [12] Then I went out on my own in 1985.
 [13] Q: Where are you currently employed?
 [14] A: I'm self-employed in my own accounting firm a few
 [15] blocks from here.
 [16] Q: All right. Now as an accountant, have you ever
 [17] been sued for malpractice?
 [18] A: No.
 [19] Q: Have you ever been the subject of a complaint by
 [20] anyone, including a client?
 [21] A: No.
 [22] Q: In your accounting practice, who typically are
 [23] your clients?
 [24] A: My clients are people that own closely-held
 [25] businesses or individuals who need tax return services.

[1] Q: Are any of your clients trustees of their
 [2] company's pensions?
 [3] A: Yes.
 [4] Q: Now in the course of your career, have you ever
 [5] had an occasion to prepare an individual state or federal
 [6] tax return?
 [7] A: Yes.
 [8] Q: On average, how many such returns would you say
 [9] you prepare in the course of a year?
 [10] A: If by preparation, you mean the entire process
 [11] such as Mr. Lane described, or sometimes I would review or
 [12] sometimes do it, I would say a couple to a few hundred a
 [13] year minimum.
 [14] Q: In the course of your accounting work, do you
 [15] render general tax advice to your clients?
 [16] A: Yes, I do.
 [17] MS. TRUHE: Your Honor, at this time I would like
 [18] to offer Mr. Intner as an expert in the field of accounting,
 [19] and in particular, the area of tax preparation.
 [20] THE COURT: Do you wish to ask questions on voir
 [21] dire?
 [22] MR. TAYLOR: I have no questions, Your Honor.
 [23] THE COURT: Okay. The Court will accept Mr.
 [24] Intner then as an expert, I am sorry, do you have a
 [25] question?

[1] MS. WHELIHAN: Well, I can wait and do mine. I
 [2] will wait and do mine. That is all right.
 [3] THE COURT: Okay. The Court will then accept Mr.
 [4] Intner as an expert in the area of public accounting and the
 [5] preparation of tax returns.
 [6] DIRECT EXAMINATION
 [7] BY MS. TRUHE:
 [8] Q: Mr. Intner, do you recall when you were first
 [9] contacted with reference to this case?
 [10] A: Yes.
 [11] Q: When was that?
 [12] A: In the summer of 1990.
 [13] Q: All right. Can you tell us, please, first of all,
 [14] what documents or other materials you have reviewed in
 [15] connection with the opinions you will be expressing?
 [16] A: I have reviewed, I think, virtually every single
 [17] deposition transcript in this case, many of Mr. Shofer's tax
 [18] returns and amended tax returns, the AICPA Code of Ethics
 [19] and Set of Professional Standards, the Catalina
 [20] retirement pension plan, and probably a whole slew of
 [21] others. It's been many years.
 [22] Q: All right. As part of your review of documents in
 [23] this case, did you also review a deposition transcript of
 [24] Bennett Goldstein, the accounting liability expert, for
 [25] Greybush Newman?

[1] A: Yes, I did.
[2] Q: Mr. Intner, are you familiar with the Baltimore
[3] accounting firm of Greybush Newman and Company?
[4] A: Yes, I am.
[5] Q: Do you know how large Greybush Newman was in the
[6] mid-1980's?
[7] A: I read in a deposition transcript that it was
[8] approximately 40 or 50 people.
[9] Q: All right, and did it have more than one
[10] department?
[11] A: Yes.
[12] Q: What departments did it have?
[13] A: It had an accounting and auditing department, and
[14] a tax department.
[15] Q: What is your understanding of the tasks or
[16] services which the accounting firm of Greybush Newman was
[17] performing for Mr. Shofer, his pension, and his business
[18] each year?
[19] A: On a repetitive basis they would, for the
[20] retirement plan, take the transactional information and put
[21] it in some form of order, whether through a trial balance or
[22] general ledger, to report the elements of receipts and
[23] disbursements. And extracting from that, the information
[24] for the activity within that plan that needed to be reported
[25] on a tax return of taxable income, the 990-T that's been

[1] referred to.
[2] With respect to the business, similarly, they
[3] would review the transactional information in whatever form
[4] it was kept, prepare their own work papers, do whatever
[5] analyses or other work they felt was necessary, come up with
[6] a trial balance and/or a general ledger, and prepare any tax
[7] returns and/or financial statements from that. They would
[8] also, obviously, get Mr. Shofer's personal tax information,
[9] prepare their file, their work papers again, and prepare Mr.
[10] Shofer's tax return. In addition, they would answer
[11] questions that were raised from time to time regarding tax
[12] or any other business accounting matter.
[13] Q: With reference to tax advice on pension matters,
[14] based on your review of the testimony in this case, was
[15] there ever a time when Greybush Newman rendered tax advice
[16] to Mr. Shofer on a pension matter?
[17] A: Yes.
[18] Q: When was that?
[19] A: I saw documents from 1982, I believe.
[20] Q: What was that in connection with?
[21] A: Mr. Shofer apparently needed to, or desired to use
[22] the assets of the pension plan as a financing vehicle for
[23] his regular business. And a related party transaction of
[24] that nature is generally prohibited and needs special
[25] approval from the governmental authorities. And Greybush

[1] Newman was involved and instrumental in assisting Mr. Shofer
[2] to obtain that approval.
[3] Q: Did the scope of Greybush's services to Mr. Shofer
[4] during that time period include any tax advice with
[5] reference to that transaction?
[6] A: Yes, it did.
[7] Q: Are you familiar with the standard of care which
[8] was applicable to accountants in Maryland who held
[9] themselves out as tax preparers and advisors in the mid-
[10] 1980's?
[11] A: Yes, I am.
[12] Q: Can you articulate for us what that standard was,
[13] specifically as it related to the preparation of an
[14] individual's state and federal tax returns?
[15] A: Anyone who was a licensed Certified Public
[16] Accountant and the license is granted by the states; not by
[17] the federal government has a standard of care to be
[18] independent, objective, professional, and professionally
[19] competent which includes technical competence in accepting
[20] any task or providing any service including tax service.
[21] Q: Do you believe that standard was breached by
[22] anyone at Greybush with respect to the preparation of Mr.
[23] Shofer's 1984 federal and state income tax returns?
[24] A: Yes.
[25] Q: Who?

[1] A: Everyone involved in the preparation.
[2] Q: All right. Now in what way did these accountants
[3] at Greybush who were involved in the preparation of Mr.
[4] Shofer's 1984 return, the original return, breach the
[5] standard of care?
[6] A: They obviously did not have the technical
[7] knowledge they should've had to recognize the tax issues to
[8] prepare the return properly.
[9] Q: They noted on that return the interest deduction
[10] on loans for 1984, on loans that Mr. Shofer had made from
[11] the plan in 1984. Should they have done anything else?
[12] A: Yes.
[13] Q: What?
[14] A: They should have obviously recognized that this
[15] was a new item on the 1984 return that was not on the 1983
[16] return. And they should have at that point questioned what
[17] these loans or what this interest was all about, why it came
[18] up as a deduction in 1984, and gone further on learning the
[19] base information that monies had been borrowed from the
[20] retirement plan in 1984.
[21] Q: Greybush Newman's expert witness in this case,
[22] Bennett Goldstein, has previously expressed the opinion in
[23] deposition that no accountant in the mid-1980's would have
[24] spotted that tax issue if they had known, like Greybush,
[25] that Mr. Shofer had borrowed \$200,000 from his pension in

[1] 1984 because this area was and I am quoting: "so
[2] specialized and obscure and infrequent at that time." Do
[3] you agree?

[4] **A:** I disagree.

[5] **Q:** Why?

[6] **A:** Retirement plans are a unique plan in the United
[7] States in terms of tax laws and special rules and
[8] regulations. And we have a government that issues tax laws,
[9] and sometimes major tax laws, virtually almost every single
[10] year, but certainly in the 25-plus years that I have been
[11] practicing. When these things happen, and particularly
[12] larger and more massive tax laws, there is a usually a
[13] proliferation of newsletters coming from all of the major
[14] law firms and accounting firms to their clients. And there
[15] are typically articles even in the local newspapers pointing
[16] out items like this. In addition, all of the tax
[17] services and virtually every accounting firm subscribes to
[18] at least one, if not more, tax service comes out with
[19] special bulletins and special publications pointing out
[20] highlights and changes in the various tax laws.

[21] **Q:** Mr. Intner, I am directing your attention to what
[22] has been marked for identification as Defendant's Exhibit
[23] Number 33. Would you please identify that document and what
[24] it is about?

[25] **A:** Yes. This is a photocopy of certain pages from

[1] one of these publications that I just mentioned. In this
[2] case, it's the Tax Equity and Fiscal Responsibility Act of
[3] 1982 published by Commerce Clearing House, one of the tax
[4] services, on this TEFRA act which had major changes
[5] especially with respect to retirement plans.

[6] **Q:** When was that law passed, TEFRA?

[7] **A:** In 1982.

[8] **Q:** Do you believe the standard of care was breached
[9] by anyone at Greybush with respect to the preparation of Mr.
[10] Shofer's original 1985 return?

[11] **A:** Yes.

[12] **Q:** Why do you believe that standard of care was
[13] breached?

[14] **A:** Well, for one thing at the time the 1985 tax
[15] return was prepared, Greybush Newman was already aware of
[16] these withdrawals from the retirement plan and was still
[17] doing their research and inferring on it, and obviously had
[18] not yet come to any kind of professional determination or
[19] conclusion with respect to these withdrawals that appeared
[20] to have at the time a tax consequence. And yet, they went
[21] ahead and, knowing that they didn't have the answers to the
[22] total transactions, still issued a tax return even without
[23] noting on it that it was an estimate or subject to change or
[24] something like that.

[25] In addition, they did show on that 1985 original

[1] tax return \$3,400 of taxable income from the withdrawals.
[2] And looking at a work paper which was one of the deposition
[3] exhibits, I don't remember which one, the calculation that
[4] was done there was inappropriate, in my opinion, because it
[5] didn't take into account all of the facts that they knew
[6] from their own work papers at the time.

[7] **Q:** Mr. Intner, do you believe anyone at Greybush
[8] Newman breached the standard of care with respect to the
[9] advice they rendered to Mr. Shofer on the issue of whether
[10] he should amend either his 1984 or his 1985 tax return?

[11] **A:** Yes, I do.

[12] **MS. TRUHE:** May I have Defendant's Exhibit
[13] Number 17?

[14] **BY MS. TRUHE:**

[15] **Q:** Mr. Intner, your attention to what has been
[16] admitted into evidence as Defendant's Exhibit Number 17, do
[17] you recognize that document?

[18] **A:** Yes.

[19] **Q:** Is that a document which you reviewed in the
[20] course of preparing for this case?

[21] **A:** Yes.

[22] **Q:** Is there anything in this letter and just for the
[23] record, this is Mr. Larash's letter to Mr. Shofer of
[24] February 20, 1987, in which Mr. Larash advises that the 1984
[25] return should be amended. Is there anything in this letter

[1] which you believe fell below the standard of care?

[2] **A:** Yes.

[3] **Q:** What is that?

[4] **A:** Actually, it's that sentence that you just
[5] paraphrased. The accountant's standard of care in a case
[6] like this is to advise a client of all possible options or
[7] courses of actions as well as the accountant's opinion with
[8] respect to possible ramifications of each and any of them.

[9] **Q:** Assuming the accountants at that time period at
[10] Greybush were exercising reasonable care, what should they
[11] have advised Mr. Shofer on this issue of amending his 1984
[12] return once the issue of the taxability of the loans was
[13] discovered?

[14] **A:** They should've advised him that this was one of
[15] his options, and what the costs and possible risks or
[16] rewards would be.

[17] **Q:** When you say that this was one of his options,
[18] that he should amend was one option?

[19] **A:** Yes.

[20] **Q:** Were there any other options that Greybush should
[21] have advised Mr. Shofer of?

[22] **A:** Certainly. There's always the option to choose
[23] not to amend.

[24] **Q:** Is the CPA legally obligated to inform the IRS of
[25] a mistake on the previous year's return?

[1] **A:** To the contrary, a CPA is prohibited.

[2] **Q:** Whose responsibility is it ultimately to decide

[3] whether to correct an error by filing an amended return?

[4] **A:** A taxpayer's.

[5] **Q:** Directing your attention to what has been marked

[6] as Defendant's Exhibit Number 34, Mr. Intner, would you

[7] please identify that document?

[8] **A:** This is a photocopy out of one of the Commerce

[9] Clearing House tax service publications showing the

[10] explanation of various items, including amended returns,

[11] under the general requirements of tax returns.

[12] **Q:** All right. Are you relying on any specific tax

[13] regulations or authorities for your opinion that there is no

[14] legal obligation to file an amended return?

[15] **A:** Yes.

[16] **Q:** All right, and what would they be?

[17] **A:** Well, aside from what the tax code section, this

[18] case, 60.11-1(d) which states there's no statutory authority

[19] for filing amended returns.

[20] **Q:** All right.

[21] **MS. TRUHE:** Your Honor, I would at this time move

[22] for admission of Defendant's Exhibit Number 34 which

[23] contains that regulation.

[24] **MS. WHELIHAN:** Your Honor, my only problem with

[25] that is I do not have any problem with this witness

[1] testifying from the regulation. But it is a 1989 Commerce

[2] Clearing House blurb; it is not the entire blurb, and I do

[3] not think it is a proper exhibit for admission.

[4] **THE COURT:** Is there a reason why it is from 1989,

[5] Mr. Intner? You do not -

[6] **THE WITNESS:** Simply because this is what I had in

[7] my library at the time that this subject came up for me, and

[8] I can state that, from my own knowledge as a practicing CPA

[9] for this entire time period, that this part of the law has

[10] never changed.

[11] **THE COURT:** Ms. Whelihan, I will admit it. But if

[12] you want to supplement this exhibit with something more

[13] complete, I will allow you to do that.

[14] **MS. WHELIHAN:** All right.

[15] **MR. TAYLOR:** Your Honor, I would just like to have

[16] an objection for the record, too. I do not think it is the

[17] best evidence. I think the best evidence is the statute or

[18] the regulation issued by the federal government, so I would

[19] object.

[20] **THE COURT:** Okay.

[21] (Defendant's Exhibit No. 34, copy from

[22] CCC of tax return requirements,

[23] previously marked for identification,

[24] was received in evidence.)

[25] **MS. TRUHE:** By the way, Your Honor, I do not think

[1] I moved for the admission of -

[2] **THE COURT:** 33.

[3] **MS. TRUHE:** - Defendant's Exhibit Number 33.

[4] **THE COURT:** You did not.

[5] **THE CLERK:** Defendant's 31, 32, and 33.

[6] **MS. TRUHE:** - 31, 32, and 33.

[7] **THE COURT:** Is there any objection?

[8] **MS. WHELIHAN:** No.

[9] **THE COURT:** They are admitted.

[10] (Defendant's Exhibit Nos. 31, Burroughs'

[11] C.V.; 32, Intner's C.V.; and 33, CCC

[12] copy of TEFRA, previously marked for

[13] identification, were received in

[14] evidence.)

[15] **BY MS. TRUHE:**

[16] **Q:** Mr. Intner, directing your attention to what has

[17] been marked as Defendant's Exhibit Number 35, would you

[18] please identify that document?

[19] **A:** This is a photocopy of an American Institute of

[20] Certified Public Accountants publication entitled

[21] "Statements on Responsibilities in Tax Practice."

[22] **Q:** What is the AICPA?

[23] **A:** It is a voluntary membership organization which

[24] promulgates standards of practice and ethics

[25] and professionalism, as well as audit standards or tax

[1] standards for the practice for its members. It also

[2] provides educational courses and that type of thing,

[3] program.

[4] **Q:** Were any accountants at Greybush Newman members of

[5] the AICPA?

[6] **A:** Yes.

[7] **Q:** With reference to Defendant's Exhibit Number 35,

[8] are you relying on any standard contained therein regarding

[9] this issue of how to advise a client about correcting an

[10] error on a return?

[11] **MS. WHELIHAN:** Objection. Your Honor, the AICPA

[12] guidelines are just like the guidelines that we follow for

[13] lawyers. That question that she has asked, besides being

[14] leading, is also inappropriate because -

[15] **THE COURT:** Why

[16] **MS. WHELIHAN:** - because those guidelines cannot

[17] be used to establish an affirmative to civil duty for

[18] litigation purposes just exactly like the rules of

[19] professional conduct in Maryland.

[20] **THE COURT:** Do you have any authority for that?

[21] **MS. WHELIHAN:** Yes, I do, actually. So that is my

[22] objection. I can get the, I do not want to hold this up,

[23] but I have those, which is right out of his deposition

[24] exhibit for the AICPA stuff.

[25] **MS. TRUHE:** Well, that does not -

[1] **MS. WHELIHAN:** Well, it does actually say -
 [2] **MS. TRUHE:** Well, address the Court.
 [3] **MS. WHELIHAN:** Well, I have this which is part of
 [4] Mr. Intner's deposition exhibits that came from his original
 [5] deposition. He talks about the AICPA code of conduct and
 [6] about how it is an ethical, and that it is a technical
 [7] standard but not an enforceable technical standard. So I
 [8] have this. I mean, you know -
 [9] **THE COURT:** May I see it?
 [10] **MS. WHELIHAN:** She can ask the question she is
 [11] asking, just not the way she asked it.
 [12] **THE COURT:** Tell me again what your specific
 [13] objection is to the question.
 [14] **MS. WHELIHAN:** Well, besides the fact that it is
 [15] leading, my specific objection is that she is sort of using
 [16] the standard as a violation of duty as opposed to using this
 [17] witness' opinion.
 [18] **THE COURT:** Well, I will allow Ms. Truhe to tell
 [19] me what the question is. What was the question?
 [20] **MS. TRUHE:** If I can remember. I am asking Mr.
 [21] Intner if there are any standards contained in that document
 [22] published by the AICPA on which he is relying in expressing
 [23] his opinions that Greybush Newman violated the standard of
 [24] care in its advice to Mr. Shofer about amending his tax
 [25] returns.

[1] **MS. WHELIHAN:** My problem with the question is
 [2] that the questions basically suggests that the violations of
 [3] the AICPA Code of Ethics gives rise to the duty, and it is
 [4] not the -
 [5] **THE COURT:** I do not think that is not my
 [6] understanding of the question.
 [7] **MS. WHELIHAN:** All right.
 [8] **THE COURT:** My understanding of the question is he
 [9] has testified that they have breached a standard of care,
 [10] and she is asking him whether this forms one of the bases
 [11] for that opinion.
 [12] **MS. WHELIHAN:** Okay.
 [13] **THE COURT:** Is that what you are asking?
 [14] **MS. TRUHE:** Yes, Your Honor.
 [15] **THE COURT:** Do you object to that question?
 [16] **MS. WHELIHAN:** Well, I do object to that question
 [17] because, you know, he is supposed to actually supply the
 [18] basis for his opinion, and I am not sure that telling him
 [19] that that is the basis for his opinion is exactly
 [20] appropriate.
 [21] **THE COURT:** Don't lawyers always put documents in
 [22] front of experts and ask them if this was one of the bases
 [23] of their opinion?
 [24] **MS. WHELIHAN:** Yes, but other lawyers object
 [25] and -

[1] **THE COURT:** And in fact, we have an evidentiary
 [2] rule that deals with that, with limiting instructions and
 [3] everything else. In any event, I will overrule. The
 [4] witness may answer the question, if he recalls it.
 [5] **THE WITNESS:** Yes.
 [6] **BY MS. TRUHE:**
 [7] **Q:** What would those standards be?
 [8] **A:** Well, when you have knowledge of an error in a
 [9] prior year return, you're supposed to followup before
 [10] issuing the next year's return and satisfy yourself that
 [11] things like the error won't be repeated. So, as I was just
 [12] explaining on the '85 situation, with the '85 return was
 [13] prepared, when they were still looking at the issue for
 [14] amending 1984 according to these standards to which that
 [15] accounting firm and my accounting firm and myself subscribe,
 [16] that should not have been done at that time and in that way.
 [17] For one, I mean, I could this is not obviously the entire
 [18] statements on responsibilities. This is certain pages out
 [19] of it, and there are things covered there.
 [20] **Q:** Specifically, with reference to the issue of how
 [21] to advise a client about amending a tax return that has an
 [22] error on it, are there any provisions or standards, I should
 [23] say, contained on that document on which you rely -
 [24] **A:** Well, the advice -
 [25] **Q:** - for your opinions expressed, that Greybush did

[1] not -
 [2] **A:** The advice is preferably given in a written form,
 [3] although that's not required. And it should include a
 [4] recommendation of the measures to be taken. And in other
 [5] parts of this, as well as the Code of Ethics, it goes into a
 [6] little greater depth in that area to where the accountant
 [7] is obligated to advise the client because the client can
 [8] expect to rely on the accountant's advice.
 [9] **Q:** Do the standards say anything about whose decision
 [10] it is ultimately to decide whether a return should be
 [11] corrected?
 [12] **A:** Yes.
 [13] **Q:** Where?
 [14] **A:** Under, I guess, the third page here or fourth page
 [15] here. It's Section III.05(B)(1) -
 [16] **Q:** Only an accountant could do that.
 [17] **A:** Well, I had to read that.
 [18] **Q:** Okay.
 [19] **A:** "It is the client's responsibility to decide
 [20] whether to correct the error."
 [21] **Q:** Assuming a client decides not to correct the error
 [22] and not to file an amended return, may the CPA continue
 [23] representing that client in subsequent years in preparing
 [24] returns for that client?
 [25] **A:** Yes.

[1] Q: Under what circumstances?
 [2] A: If the CPA has satisfied him- or herself that the
 [3] error was not one that was intentional, that it would not be
 [4] repeated in the future, that there would be no impact on
 [5] other tax years, and that it really stood alone. And if a
 [6] taxpayer wishes to take a risk of something happening under
 [7] audit or the Internal Revenue Service even selecting a
 [8] return for audit, that is the taxpayer's privilege.

[9] Q: Mr. Intner, direction your attention -
 [10] MS. TRUHE: By the way, Your Honor, I would move
 [11] for admission into evidence Defendant's Exhibit Number 35.

[12] THE COURT: It is admitted.
 [13] (Defendant's Exhibit No. 35, AICPA on
 [14] tax practices, previously marked for
 [15] identification, was received in
 [16] evidence.)

BY MS. TRUHE:

[17] Q: Mr. Intner, directing your attention to
 [18] Defendant's Exhibit Number 36, would you please identify
 [19] that document?

[20] A: This is a photocopy of an article that was
 [21] published in 1990 in the Journal of Taxation entitled "What
 [22] Obligations Do Taxpayers and Preparers Have to Correct
 [23] Errors on Returns," written by Sheldon Pollock and edited by
 [24] Martin Lahrer and L. Page Marvel - he's a Baltimore
 [25] attorney I know.

[2] Q: With reference to that document, is there anything
 [3] in that article on which you are relying for your opinion as
 [4] expressed that there is no duty to amend -

[5] A: Well, I -

[6] Q: - a tax return?

[7] A: I don't recall the article directly myself. But
 [8] it certainly agrees with what I just said, that no
 [9] requirement to amend is in the code or regulations.

[10] MS. TRUHE: Your Honor, I would move for the
 [11] admission of Defendant's Exhibit Number 37.

[12] MS. WHELIHAN: Your Honor, and I would -

[13] MS. TRUHE: I am sorry, 36.

[14] MS. WHELIHAN: It is 36, and I would object to
 [15] that because, first of all, this witness has actually said
 [16] he does not recall relying on it, number one. It is dated
 [17] 1990, number two. So I do not know that it has any effect
 [18] on what the law was in 1985 or the standard of care in 1985.
 [19] Finally, it was produced to me except as a trial exhibit by
 [20] Ms. Truhe. It was not anywhere in the discovery process, so
 [21] I do not see any reason for it to come in for its probative
 [22] value because it enhances the witness' testimony. He did
 [23] not rely upon it, it is the wrong date, and it did not come
 [24] to me timely.

[25] MS. TRUHE: Well, Your Honor, if I may respond to

[1] that. First of all, perhaps I can clarify with the witness.

BY MS. TRUHE:

[2] Q: Mr. Intner, did you supply that article to me?

[3] A: I probably did since I subscribe to the Journal of
 [4] Taxation, and I'm sure you don't. And - and I was involved
 [5] in this at the time. But I don't recall that.

[6] Q: All right. Does that article contain a discussion
 [7] of the law as it existed in the mid-1980's?

[8] A: Yes.

[9] Q: All right.

[10] MS. TRUHE: Now with reference to when I produced
 [11] this, I believe this was one of Mr. Intner's deposition
 [12] exhibits. But at least it was furnished to Ms. Whelihan in
 [13] a timely fashion with the pretrial order and itemized on the
 [14] list.

[15] THE COURT: Well, let's do this. Let me reserve
 [16] because I want to stop you here. I have got a meeting.

[17] MS. TRUHE: Okay.

[18] THE COURT: You can see if you can ferret that out
 [19] during the lunch break, and then we will come back to it
 [20] when we return at 2:00 o'clock. Mr. Intner, you are under
 [21] oath and you cannot discuss your testimony during the lunch
 [22] recess. Counsel, we will see you all at 2:00 o'clock.

[23] (At 12:34 p.m. a luncheon recess was taken.)

[24] MS. TRUHE: Your Honor, where last we left it, I
 [25] was talking about Defendant's Exhibit Number 36, which was

[2] an article relied on by the witness. Ms. Whelihan has
 [3] assured me that she did not receive a copy of this, and that
 [4] that it was not in any of the file materials which she
 [5] reviewed. There was another law firm in the case prior to
 [6] hers. I am confident I furnished a copy of this; however,
 [7] it is somewhat beating a dead horse. So while it has been
 [8] marked for identification, I do not need to move it into
 [9] evidence.

[10] THE COURT: Okay, thank you.

[11] MS. TRUHE: All right. In lieu of what I was
 [12] going to introduce into evidence is Defendant's Exhibit
 [13] Number 37, which Your Honor has a copy of. I have got a new
 [14] Defendant's Exhibit 37 which I would like to show the
 [15] witness and have him identify.

BY MS. TRUHE:

[16] Q: Mr. Intner, could you please identify that
 [17] document?

[18] A: This is known as Treasury Department Circular 230,
 [19] which -

[20] Q: Very briefly, what does that document contain,
 [21] what information?

[22] A: This is part of the federal tax regulations that
 [23] deal with the recognition of professionals who represent
 [24] clients in terms of - in front of the Internal Revenue
 [25] clients in terms of - in front of the Internal Revenue

[1] Service.

[2] **Q:** All right. Does that document speak at all to the

[3] issue of what an accountant should do in the event he comes

[4] into possession of information which reveals an error on a

[5] prior year's return?

[6] **A:** Yes.

[7] **Q:** What section would that be?

[8] **A:** Section 10.21.

[9] **Q:** All right. Would you please read that into the

[10] record?

[11] **A:** Yes. It's entitled "Knowledge of Client's

[12] Omission. Each attorney, certified public accountant,

[13] enrolled agent, or enrolled actuary who having been retained

[14] by a client with respect to a matter administered by the

[15] Internal Revenue Service knows that the client has not

[16] complied with the revenue laws of the United States, or has

[17] made an error in or omission from any return, document,

[18] affidavit, or other paper which the client is required by

[19] the revenue laws of the United States to execute, shall

[20] advise the client promptly of the fact of such non-

[21] compliance, error, or omission."

[22] **Q:** Does this document say anything else about the

[23] duty to amend in the event of an error?

[24] **A:** I would need to review the entire table of

[25] contents to refresh myself. I've not looked at this in a

[1] very long time. But if you give me a second, from the table

[2] of contents there is no indication on the table of contents

[3] about any duty to amend or anything about amended returns.

[4] **Q:** All right. Mr. Intner, going back again to -

[5] **MS. TRUHE:** Oh, I am sorry. Your Honor, I would

[6] move for admission into evidence Defendant's Exhibit

[7] Number 37.

[8] **MS. WHELIHAN:** No objection.

[9] **THE COURT:** It is admitted.

[10] (Defendant's Exhibit No. 37, Treasury

[11] Department Circular 230, previously

[12] marked for identification, was received

[13] in evidence.)

[14] **BY MS. TRUHE:**

[15] **Q:** Mr. Intner, returning for a moment to the issue of

[16] Greybush's and, I believe, you testified negligent

[17] preparation of Mr. Shofer's 1984 and 1985 tax returns, in

[18] your opinion, did such negligence proximately cause Mr.

[19] Shofer any damage?

[20] **MS. WHELIHAN:** Objection.

[21] **THE COURT:** Basis?

[22] **MS. WHELIHAN:** There is no evidence in the record

[23] for this expert to competently opine.

[24] **THE COURT:** I cannot hear you, I am sorry.

[25] **MS. WHELIHAN:** Oh, I am sorry. There is no

[1] evidence in the record for this expert to competently opine

[2] as to any damages as to my client because there had been no

[3] testimony, competent or otherwise, of Mr. Shofer's damages.

[4] **THE COURT:** Well, I do not think he was asked, you

[5] mean -

[6] **MS. WHELIHAN:** Under -

[7] **THE COURT:** The question was whether or not the

[8] negligence of the accountants had proximately caused damage

[9] to the Plaintiff?

[10] **MS. TRUHE:** Yes, Your Honor.

[11] **MS. WHELIHAN:** Since there are no damages in the

[12] evidence for this expert to opine upon, there cannot be any

[13] proximate cause or damage from this expert as to Greybush.

[14] **MS. TRUHE:** I think I can rephrase to cure that

[15] objection.

[16] **THE COURT:** All right, take a shot.

[17] **BY MS. TRUHE:**

[18] **Q:** Mr. Intner, do you believe that Greybush's

[19] negligent preparation of Mr. Shofer's 1984 and 1985 tax

[20] returns proximately caused any damages claimed by him in

[21] this case?

[22] **A:** Yes.

[23] **Q:** What would they be, what types?

[24] **A:** Oh, there would be the penalties associated with

[25] the untimely payment of taxes that were not shown on the

[1] original return; any interest charges on that, as well as on

[2] the late payment of taxes; and if there were any other

[3] penalties or charges associated with the particular problems

[4] with the retirement plan transactions. I'm not fully

[5] familiar with the damages claimed in this case.

[6] **Q:** In the pension area?

[7] **A:** In the pension area.

[8] **Q:** All right. Do you believe that Greybush's failure

[9] to advise Mr. Shofer that he had the option legally of doing

[10] nothing when the errors on the 1984 and 1985 tax returns

[11] were discovered, proximately caused any damage which he is

[12] claiming in this case?

[13] **A:** Yes.

[14] **Q:** What would that be?

[15] **A:** It is possible, had Mr. Shofer not amended his tax

[16] returns at all and gone past the 3-year statute of

[17] limitations for an error in a return, that there would be no

[18] additional tax whatsoever.

[19] **Q:** Mr. Intner, finally, I would like to show you what

[20] has been marked as Defendant's Exhibit Number 38, and ask

[21] you to please identify that document.

[22] **A:** This document is a letter I wrote to you on

[23] June 2nd, 1997, one month ago.

[24] **Q:** All right. Could you tell us just briefly, first,

[25] the subject matter of that letter?

[1] **A:** The subject matter of this letter is some
[2] calculations which I did comparing the tax liabilities
[3] claimed by Mr. Shofer as damages with what I consider the
[4] discounted, or current, present, value of those taxes would
[5] have been because the taxes themselves on the income would
[6] have been paid. The real question from that point of view
[7] is when and what the value of that dollar is worth.

[8] **Q:** All right. What was the total amount of
[9] additional taxes which Mr. Shofer should have paid in 1984
[10] and 1985 and 1986?

[11] **MR. TAYLOR:** Your Honor, I am going to object to
[12] questions relating to this document. The document, of
[13] course, is not in evidence. But this is a report that is
[14] dated June 2, 1997. It came in after the cut-off for
[15] discovery. This was not supplied to me until June 6. Since
[16] the Court has already excluded Mr. Rosenberg's updated
[17] figures, I am going to object on the same basis.

[18] **MS. TRUHE:** Your Honor, this June 2 report is
[19] identical to an October 1994, report which Mr. Intner
[20] prepared. It is, as I said, identical to the June 2 report.
[21] The only difference is the tax law did change such that the
[22] amount which could be withdrawn, at this point when the case
[23] went to trial in 1997, is slightly different than what it
[24] was in 1995 when the case was scheduled to go to trial.

[25] **THE COURT:** Where is the old report?

[1] **MS. TRUHE:** The old report, let's see. Your
[2] Honor, if I may have a moment to get that.
[3] (Pause.)

[4] **MS. TRUHE:** Actually, Your Honor, I can save time.
[5] Mr. Taylor oh, do you have at?

[6] **MS. WHELIHAN:** No, John did.

[7] **MS. TRUHE:** Oh, John did.

[8] **THE COURT:** Why don't we mark it?

[9] **MR. MAY:** Janet, make sure that -

[10] **MS. WHELIHAN:** Janet, make sure that it is
[11] the right one.

[12] **MS. TRUHE:** Yes, it is.

[13] **MS. WHELIHAN:** Okay.

[14] **MS. TRUHE:** Thank you.

[15] (Discussion off the record.)

[16] **THE CLERK:** Do you want us to mark that exhibit?

[17] **THE COURT:** For identification. It is 39?

[18] **MS. TRUHE:** This one is 38.

[19] **THE CLERK:** That one is 38.

[20] **MS. TRUHE:** That would be 39.

[21] **THE CLERK:** You have 39.

[22] **MS. TRUHE:** Oh, 40, I am sorry.

[23] (Defendant's Exhibit No. 40, Intner
[24] 6/2/97 letter to Truhe, was marked for
[25] identification.)

[1] **THE COURT:** All right, before you start, I want to
[2] be fair because I had held the Plaintiff's to a certain
[3] standard. I believe, correct me if I am wrong, that I let
[4] Mr. Rosenberg testify to some extent about his calculations
[5] before -

[6] **MR. TAYLOR:** Right.

[7] **THE COURT:** - but I did not admit his document
[8] into evidence.

[9] **MR. TAYLOR:** No. Let me just -

[10] **THE COURT:** Okay, take your time.

[11] **MR. TAYLOR:** - give you my reference on this,
[12] Your Honor. I think Mr. Rosenberg was confined to the
[13] earlier report. He had figures through March -

[14] **THE COURT:** Okay, and I did not let them in?

[15] **MR. TAYLOR:** - of 1995. What his exhibit that we
[16] offered at that time was simply an updating of those
[17] figures. Now Mr. Shofer has indicated to me that, you know,
[18] he would not object to Mr. Intner's latest report if Mr.
[19] Rosenberg's report would come in. Actually, I thought Mr.
[20] Intner's June 2, 1997, report was based on Mr. Rosenberg's
[21] report.

[22] **THE COURT:** Why don't you take -

[23] **MS. TRUHE:** Actually, that is the wrong one, Your
[24] Honor.

[25] **THE COURT:** - a moment.

[1] **MS. TRUHE:** That is the wrong report.

[2] **THE COURT:** Okay.

[3] **MS. TRUHE:** Mr. Taylor, do you have the October -

[4] **MR. TAYLOR:** No, I do not think I have seen the
[5] October report.

[6] **MS. TRUHE:** I faxed it to you at the same time I
[7] faxed the other one.

[8] **MR. TAYLOR:** The only one I have is this one from
[9] June 2.

[10] **MS. WHELIHAN:** Well, we have got -

[11] **THE COURT:** Is it possible the witness has a copy?

[12] **THE WITNESS:** Yes, I do.

[13] **THE COURT:** With you?

[14] **THE WITNESS:** Yes, I do.

[15] **THE COURT:** Why don't you get it?

[16] **THE WITNESS:** Excuse me.

[17] **THE COURT:** Ms. Truhe, Mr. Taylor suggesting a
[18] stipulation of sorts where he would agree to allow the
[19] witness to use his updated version if you would allow the
[20] Court to accept Mr. Rosenberg's updated version.

[21] **MS. TRUHE:** Well, here is the problem I have with
[22] that. First of all, if you have seen Mr. Intner's earlier
[23] version, you will see that the only difference between the
[24] two is with respect to what an individual in 1997 can take
[25] out from his pension, the maximum without going into another

[1] bracket. That is the only difference.

[2] **THE COURT:** Well, if you do not want to enter into
[3] a stipulation, fine. I will hold you both to the same
[4] standard.

[5] **MS. TRUHE:** Well, no, and the other difference is
[6] the reason why Mr. Intner had not updated with respect to
[7] that is because Mr. Taylor promised me actual documents from
[8] the IRS documenting what the additional taxes, penalties,
[9] and interest were going to be.

[10] **MR. TAYLOR:** Well, I do not think -

[11] **MS. TRUHE:** As far as evidence, well, excuse me,
[12] if I may finish, I never got them. So in total
[13] exasperation, I just said to Mr. Intner go with the old data
[14] you have and then go with the new tax law changes. I also
[15] told Mr. Taylor well before the discovery cut-off that this
[16] is what Mr. Intner was going to do, and that if he wanted to
[17] depose Mr. Intner at any time about this, he was available
[18] for that purpose. And my offer was never accepted.

[19] **MR. TAYLOR:** Well, let me just respond. I do not
[20] want the record to be a gap here. Ms. Truhe and I had
[21] discussions about our efforts to update the discovery. She
[22] knew that I was awaiting on a report from Mr. Rosenberg, and
[23] also that the report Mr. Rosenberg was developing was simply
[24] an update on his earlier report. There is no prejudice at
[25] all, I think, actually to either party with respect to these

[1] documents.

[2] **THE COURT:** I am going to hold everybody to the
[3] same standard, so I will not admit 38. I will admit 40, if
[4] it is offered.

[5] **MS. TRUHE:** Well, okay. I guess Mr. May is not
[6] going to, I believe Mr. May pointed out in his argument as
[7] to why Mr. Rosenberg's earlier - oh, I should say later
[8] report produced after the discovery cut-off should not be
[9] admitted was because it contained new material in addition
[10] to updated figures. If the Court is not going to make a
[11] distinction between the reports, I am fine with Mr.
[12] Rosenberg's latest report coming in because I think it is
[13] important that we have the after-tax law applicable to when
[14] this occurred - damages.

[15] **THE COURT:** Well, let's go off the record for a
[16] second. Counsel, come on up to the bench.
[17] (Discussion off the record.)

[18] **MS. TRUHE:** Defendants will go with what has been
[19] marked and identified as Defendant's Exhibit Number 40,
[20] which is the report which Mr. Intner rendered on October 28,
[21] 1994. That, of course, was timely produced to the
[22] Plaintiff. Again, conceptually, there is no difference
[23] between that and his updated report. There has simply been
[24] a law change as to how much can be withdrawn from the
[25] pension without going into another tax bracket. We are only

[1] talking a few thousand dollars in difference.

[2] **THE COURT:** All right, let's proceed.

[3] **MS. TRUHE:** So the same analysis applies.

[4] **BY MS. TRUHE:**

[5] **Q:** Okay, Mr. Intner, do you have after all of that a
[6] copy of the October 1994 report?

[7] **A:** Yes.

[8] **Q:** All right. First of all, how much in additional
[9] taxes did Mr. Shofer have to pay in 1984, 1985, and 1986 as
[10] a result of the monies which he withdrew from the pension?

[11] **A:** \$79,553.25.

[12] **Q:** All right. Now where did you get those numbers?

[13] **A:** That number is a component of both federal and
[14] state taxes on something that I received through you from
[15] Mr. Bornhorst.

[16] **Q:** The Plaintiff's second attorney in this
[17] litigation?

[18] **A:** One of the attorneys.

[19] **Q:** All right. Now I note that you have not included
[20] in the additional taxes which the Plaintiff had to pay for
[21] 1984, 1985, and 1986 as a result of monies he withdrew from
[22] the pension penalties or interest. Why not?

[23] **A:** I don't believe either of those are elements of
[24] damages as it relates to the work, the calculations, I was
[25] doing.

[1] **Q:** All right. Now you have Mr. Shofer making
[2] withdrawals from his pension in the ordinary course
[3] beginning in the year 2004?

[4] **A:** Correct.

[5] **Q:** All right, why 2004?

[6] **A:** Because the laws require that distributions from
[7] retirement plans commence no later than the year after the
[8] participant achieves age 70-1/2. And in other documents I
[9] had, I had Mr. Shofer's birthdate, and 2004, I believe was
[10] the first year that withdrawals were mandatory -

[11] **Q:** All right.

[12] **A:** - for Mr. Shofer.

[13] **Q:** In what year do you stop?

[14] **A:** I stopped in the year 2008, I believe. I don't
[15] have the chart attached to this letter that was part of my
[16] report.

[17] **Q:** All right.

[18] (Discussion off the record.)

[19] **MS. WHELIHAN:** One moment, Your Honor. We are
[20] just getting the chart for the letter.

[21] **THE COURT:** The chart that is attached? Because I
[22] have the original exhibit if you would like to have it.

[23] **MS. TRUHE:** Let's use that. Thank you, Your
[24] Honor.

[25] **THE COURT:** I was going to give it to you.

BY MS. TRUHE:

[1] Q: Let's refer to the original.
 [2] A: Okay.
 [3] Q: In what year do you stop?
 [4] A: 2008?
 [5] Q: Okay, why do you stop in the year 2008?
 [6] A: Well, I used the premise that most taxpayers would
 [7] want to withdraw funds at a maximum rate that they could so
 [8] they would have the liquidity and use of the funds, but
 [9] still not exceed the minimum tax bracket in order to
 [10] minimize the total cost of taxes. And based on the tax laws
 [11] at the time I did these calculations, the lowest limit was
 [12] \$38,000 per year to stay in what I believe at the time was
 [13] the 15 percent federal bracket. The state bracket has not
 [14] changed. The piggyback tax has changed by a very nominal
 [15] amount in the state calculations. And withdrawing at the
 [16] rate of \$38,000 per year, the amount of these extra taxes
 [17] that we're talking that will be claimed damages would be
 [18] totally used up in that few-year period.
 [19] Q: All right. Now had Mr. Shofer begun to withdraw
 [20] money from his pension in the year 2004, which you state is
 [21] when the law requires he begin doing that, instead of
 [22] withdrawing it first in 1984, 1985, and 1986, how much would
 [23] he have paid on those monies beginning in the year 2004?
 [24] A: Using the minimum tax brackets and that withdrawal

[1] level, the taxes that would have been paid, total federal
 [2] and state, are \$40,275.
 [3] Q: Instead, how much was Mr. Shofer assessed again in
 [4] taxes for 1984, 1985, and 1986?
 [5] A: \$79,553.25.
 [6] Q: Now I note that you have taken the future tax
 [7] liability of \$38,000-how-much?
 [8] A: \$40,275.
 [9] Q: All right and discounted it back to the present.
 [10] Why did you do that?
 [11] A: Because the value of a dollar today is greater or
 [12] less, rather, than the value of a cost down the road. Money
 [13] earns money, if you will.
 [14] Q: Okay. So what is the actual difference between
 [15] what Mr. Shofer paid prematurely in taxes on the monies he
 [16] withdrew from his pension in 1984, 1985, and 1986, and what
 [17] his future tax liability would have been had he taken the
 [18] monies out in regular course beginning in the year 2004?
 [19] A: The difference is \$61,255.55.
 [20] MS. TRUHE: Your Honor, that is all I have.
 [21] THE COURT: Do you have questions for the witness,
 [22] Ms. Whelihan?
 [23] MS. WHELIHAN: Just a few.
 [24] CROSS-EXAMINATION
 [25] BY MS. WHELIHAN:

[1] Q: You have never been a member of any CPA review
 [2] board, is that right; a CPA peer review board?
 [3] A: A member of the board?
 [4] Q: Right.
 [5] A: There is no board. There's a division of the
 [6] American Institute of Certified Public Accountants that -
 [7] Q: Right.
 [8] A: - deals with peer reviews. There's sections: an
 [9] SEC section, and a private company practice section. I'm a
 [10] member of the private company practice section, and I
 [11] undergo peer reviews. But I've never -
 [12] Q: You have not been on a peer review? You have
 [13] been -
 [14] A: Never done a peer review, correct.
 [15] Q: Right, you have participated in peer reviews, but
 [16] you have not actually done one yourself. Is that correct?
 [17] A: That's correct.
 [18] Q: Okay. The professional affiliations that I see
 [19] listed on what has been marked as Deposition Exhibit
 [20] Number 32, which is your curriculum vitae, you have never
 [21] been an officer in any of those professional societies, have
 [22] you?
 [23] A: I have.
 [24] Q: You have? Okay, in 1993, when your deposition was
 [25] taken, you had not been an officer in any of those

[1] professional societies. Is that right?
 [2] A: That is correct.
 [3] Q: Okay. All right now, have you published anything,
 [4] because in 1993, when your deposition was taken, you had not
 [5] published anything. Is that still correct or has that
 [6] changed?
 [7] A: That is still correct.
 [8] Q: Okay. The firm that you have is a firm of one, is
 [9] that right?
 [10] A: I have employees.
 [11] Q: Right, but you are the CPA.
 [12] A: I am one of the CPA's. I am the sole shareholder.
 [13] Q: Okay, and you are the final arbitrator of the
 [14] issues for your CPA firm. You are the tax and the auditing
 [15] department. Is that right?
 [16] A: I do not do certified audits in my firm.
 [17] Q: In fact, your firm actually is a, in part,
 [18] valuation company? You have a separate valuation company
 [19] that is part of your practice?
 [20] A: Well, the valuation company is a totally separate
 [21] company. I own 50 percent of the stock, and a colleague and
 [22] friend of mine owns the other 50 percent and heads up an
 [23] office in Pittsburgh area.
 [24] Q: All right, but you yourself, besides the
 [25] accounting services that you provide through your accounting

[1] firm, you also render valuation services and hold yourself
 [2] out as a valuation expert -
 [3] **A:** That's correct.
 [4] **Q:** - is that right? Your company is actually called
 [5] Valuation and Litigation Support Service, Inc. Is that
 [6] right?
 [7] **A:** Yes.
 [8] **Q:** All right, and you also perform litigation
 [9] services for people like us, attorneys in courtrooms. Is
 [10] that right?
 [11] **A:** Yes.
 [12] **Q:** All right. As I understood your testimony in
 [13] 1993, you yourself do not do any ERISA work. Is that right?
 [14] **A:** Yes.
 [15] **Q:** You also do not prepare 5500's or 990-T's at
 [16] least, that was what you testified to in 1993?
 [17] **A:** That is correct.
 [18] **Q:** All right. In fact, in your practice as a CPA, if
 [19] your clients have pension questions and you feel that they
 [20] go beyond your expertise, you refer them to a pension
 [21] specialist. Is that right?
 [22] **A:** I usually -
 [23] **Q:** Like Mark Pushkin.
 [24] **A:** - bring in someone like Mark Pushkin or Louis
 [25] Kaplan or any one of a number and confer with that. I don't

[1] usually just tell a client go confer with someone else and
 [2] leave me out of it.
 [3] **Q:** All right. Well, at page 22 of your deposition,
 [4] what you said was if you have questions that you cannot
 [5] answer, you refer clients to someone who can, usually their
 [6] retirement plan consultant. Is that fair?
 [7] **A:** If that's what the transcription was, yes.
 [8] **Q:** Okay. You have testified as an expert in court
 [9] before, is that right?
 [10] **A:** Yes.
 [11] **Q:** How many times?
 [12] **A:** In court, probably 10, maybe 15.
 [13] **Q:** All right, and when your deposition was taken, you
 [14] thought maybe in the last 5 years, you had given about 12
 [15] depositions. Is that right?
 [16] **A:** If that's what I said.
 [17] **Q:** All right. You have given more depositions since
 [18] 1993, right?
 [19] **A:** Yes.
 [20] **Q:** Okay. Have you ever qualified as an expert in
 [21] this court?
 [22] **A:** In Baltimore City?
 [23] **Q:** Yes, in Baltimore City Circuit Court.
 [24] **A:** I think there was one case where I did in
 [25] Baltimore City. Very few of my cases happen to be in

[1] Baltimore City.
 [2] **Q:** Okay. That would have been after 1993?
 [3] **A:** Yeah.
 [4] **Q:** Okay.
 [5] **A:** Yes.
 [6] **Q:** When you charge your fee for services, you charge
 [7] a higher rate as an expert witness for litigation cases than
 [8] you do when you perform services as a CPA. Is that right?
 [9] **A:** Yes.
 [10] **Q:** Okay. Turning the actual litigation issues in
 [11] this case, is it your understanding that the pension plan
 [12] administrator typically prepares the 1099 when there is
 [13] income to a plan participant? Is that right?
 [14] **A:** I can't say that's typical. Certainly, pension
 [15] plan specialists, whether they're actuaries or lawyers or
 [16] just consultants or whatever their title is, will take on
 [17] that role. I also have some clients in my accounting
 [18] practice that handle those administrative functions
 [19] themselves.
 [20] **Q:** Well, looking at page 43 of your deposition, the
 [21] question asked to you by my predecessor, Mr. Gilday, was:
 [22] "Okay, when an individual takes a loan or takes money out of
 [23] his pension plan, whose job is it to prepare a 1099?" I
 [24] think your answer was: "The plan administrator." Is that
 [25] fair?

[1] **A:** Yes.
 [2] **Q:** Okay, and you know that Greybush Newman and
 [3] Company did not prepare any of the 5500's for Mr. Shofer's
 [4] pension plan. Is that right?
 [5] **A:** I've read that, yes.
 [6] **Q:** All right, and the 990-T that Greybush Newman and
 [7] Company did prepare, that is a specialized form that shows
 [8] income to the plan, is that right?
 [9] **A:** Yes.
 [10] **Q:** The 990-T does not show income to the individual
 [11] participants, is that right?
 [12] **A:** Yes.
 [13] **Q:** Okay. In fact, the return that does show that is
 [14] the 5500, is that right?
 [15] **A:** No, the 5500, I do not believe, shows the income
 [16] to the participant. It shows the income to the plan.
 [17] **Q:** The 5500, let me try it again. The 5500 tax
 [18] return does show loans made by the plan to participants, is
 [19] that right?
 [20] **A:** The full-blown one, yes.
 [21] **Q:** Okay. As an accountant, you do not believe that
 [22] accountants have a duty to render gratuitous pension tax
 [23] advice when their clients to not ask them a question or pay
 [24] for the service. Is that right?
 [25] **A:** I can't answer that question in that form because,

[1] as a practicing accountant, I believe if something comes to
 [2] my attention that affects one of my clients, I have an
 [3] obligation to notify that client.
 [4] **Q:** Okay. But you yourself do not do any ERISA work,
 [5] right?
 [6] **A:** Correct.
 [7] **Q:** That is true of most tax accountants, is it not?
 [8] **A:** I can't -
 [9] **MS. TRUHE:** Objection, Your Honor. Could we have
 [10] some clarification of what is meant in the question by ERISA
 [11] work?
 [12] **MS. WHELIHAN:** I will rephrase the question.
 [13] **BY MS. WHELIHAN:**
 [14] **Q:** Most accountants are not ERISA specialists, is
 [15] that right?
 [16] **A:** I believe that's right, but I can't speak for most
 [17] accountants.
 [18] **Q:** All right, and you are aware that Greybush Newman
 [19] and Company did not hold itself out as an ERISA specialist.
 [20] Is that not right?
 [21] **A:** I'm not aware of that at all.
 [22] **Q:** Okay, not aware that they did not hold themselves
 [23] out?
 [24] **A:** Correct.
 [25] **Q:** All right, you do not know anything about that

[1] Greybush Newman and Company to have relied upon the Stuart
 [2] Hack Company for services that the Stuart Hack Company held
 [3] itself out as performing?
 [4] **MS. TRUHE:** Objection, Your Honor. There is no
 [5] evidence in this case that Greybush Newman was relying on
 [6] any pension services provided by the Stuart Hack Company.
 [7] **MS. WHELIHAN:** Well, I do not think that is -
 [8] **THE COURT:** I think you have to be more specific
 [9] in your question.
 [10] **MS. WHELIHAN:** All right.
 [11] **BY MS. WHELIHAN:**
 [12] **Q:** One of your opinions is that Greybush should have
 [13] noted Mr. Shofer's pension loans as income on his 1984
 [14] return. Is that right?
 [15] **A:** Yes.
 [16] **Q:** Okay. Let's assume for purposes of my question
 [17] the following facts, all right? Assume that when Mr. Larash
 [18] in 1985 is preparing Mr. Shofer's 1984 tax return, he has a
 [19] discussion with Mr. Shofer. And assume that Mr. Larash
 [20] questions Mr. Shofer about the pension loans, and that Mr.
 [21] Shofer tells Mr. Larash that he has inquired of Mr. Hack as
 [22] to whether or not the pension loans were allowable and that
 [23] Mr. Hack has told him that it was.
 [24] And assume further that Mr. Larash does not get a
 [25] 1099 from Mr. Shofer that would confirm that there was an

[1] then?
 [2] **A:** That's correct.
 [3] **Q:** All right. Okay. For pension matters, when you
 [4] have had a question you cannot answer, you testified that
 [5] you rely on Mark Pushkin. You think it is acceptable within
 [6] the standard of care for accountants to rely on other
 [7] professionals when you do not have that specialized
 [8] knowledge. Is that right?
 [9] **A:** Yes.
 [10] **Q:** Okay. In fact, if the Stuart Hack Company was the
 [11] pension administrator for Mr. Shofer's plan, it is
 [12] reasonable for Greybush to rely on pension matters handled
 [13] by the Stuart Hack Company. Is that right?
 [14] **MS. TRUHE:** Objection, Your Honor. Could we have
 [15] clarification as to what is meant by the term pension
 [16] matters? That is very broad?
 [17] **BY MS. WHELIHAN:**
 [18] **Q:** All right. Well, you have read all of the
 [19] depositions given by all the parties in this case, is that
 [20] right?
 [21] **A:** Yes.
 [22] **Q:** And you are well aware of what Mr. Hack's company
 [23] provided in terms of pension services generally?
 [24] **A:** Yes.
 [25] **Q:** Okay. Do you not think it is reasonable for

[1] income-generated issue for Mr. Shofer by the plan
 [2] administrator. Do you think it is reasonable for Mr. Larash
 [3] to rely upon his client's statements that he relied upon the
 [4] Stuart Hack Company?
 [5] **A:** The assumptions that you just stated, while I
 [6] follow them, are inappropriate. For example, it's my
 [7] understanding from reading the deposition transcripts that
 [8] procedurally, Greybush Newman would get the retirement plan
 [9] transactional data; compile, as I said, their trial balance
 [10] or general ledger. They did not communicate that directly
 [11] to Mr. Hack. They gave that back in summary form or
 [12] whatever form to Mr. Shofer, who then -
 [13] **Q:** Right.
 [14] **A:** - added on other information, such as the census
 [15] data or employee data, and forwarded the whole package to
 [16] Mr. Hack. In the real world timing of this situation,
 [17] Greybush Newman could not have expected a 1099 because
 [18] 1099's have to be issued very early in the year immediately
 [19] following the year in question, and we're dealing already
 [20] several months later. So no accountant could expect a 1099
 [21] from anyone but the plan. And in my deposition, you pointed
 [22] out, I used the word administrator. If I can clarify
 [23] something on that regard, in many cases someone like Mr.
 [24] Shofer may very well be the plan administrator of a plan and
 [25] merely delegate or assign certain chores to a pension

[1] consultant. In other cases, a pension consultant could be a
[2] plan administrator.

[3] Q: All right.

[4] A: It's the administrator under the law that has the
[5] responsibility to issue the 1099.

[6] Q: All right, but the question I want to ask you
[7] about is not what you gleaned from reading the deposition
[8] testimony, but just a strict hypothetical based upon certain
[9] assumed facts. The facts that I want you to assume are that
[10] Mr. Larash questioned the pension loans in 1985 and had a
[11] discussion with Mr. Shofer. That Mr. Shofer told him that
[12] he had checked out whether or not the pension loans were
[13] allowable. And that the Stuart Hack Company, whom Mr.
[14] Larash knew to be Mr. Shofer's pension consultant, had
[15] apparently told Mr. Shofer that the loans were allowable.
[16] And that Mr. Shofer did not give to Mr. Larash, as the
[17] pension administrator or as the income recipient, a 1099.
[18] Does that change your opinion as to whether or not Greybush
[19] met the applicable standard of care?

[20] A: No.

[21] Q: Okay. So your opinion is not that Greybush had a
[22] duty to question pension loans, but that Greybush had an
[23] absolute duty to identify the taxable income on Mr. Shofer's
[24] 1984 tax returns even in my hypothetical?

[25] A: Yes.

[1] Q: Okay. Now does it change your opinion that the
[2] pension tax lawyer that Mr. Shofer hired, Mr. Giampietro,
[3] felt that that was beyond the standard of care for an
[4] accountant?

[5] MS. TRUHE: Oh, I am sorry.

[6] BY MS. WHELIHAN:

[7] Q: Well, you have read Mr. Giampietro's deposition,
[8] correct.

[9] A: Correct.

[10] Q: And you are aware that Mr. Giampietro, in his
[11] deposition, concluded that Greybush did not have a duty
[12] under the standard of care applicable to accountants that
[13] Mr. Giampietro was aware of because of his interaction with
[14] accountants to identify the pension loans as income?

[15] MS. TRUHE: Objection, Your Honor. This is way
[16] out of line for several reasons. Number one, Mr. Giampietro
[17] is not an accountant, has not been qualified as an
[18] accountant. What he may think an accountant's standard of
[19] care is irrelevant. It was also identified during Mr.
[20] Giampietro's first deposition, in which Ms. Whelihan was not
[21] present, that he would not be offering any opinions as to
[22] whether the accountants may have breached any standard of
[23] care. So I do not see how this witness can be cross-
[24] examined or impeached on anything Mr. Giampietro thinks
[25] about an accountant's standard of care.

[1] MS. WHELIHAN: All I am asking is whether or not
[2] the information you read in Mr. Giampietro's deposition,
[3] where Mr. Giampietro concluded that it was beyond the
[4] standard of care of an accountant as Mr. Giampietro
[5] understood it as a pension tax attorney, influenced or in
[6] any way changed his opinion.

[7] MS. TRUHE: Your Honor, that is ridiculous. Who
[8] cares what Mr. Giampietro says about an accountant's
[9] standard of care? She might as well ask -

[10] THE COURT: That is what she is asking the
[11] witness: whether he cares.

[12] MS. TRUHE: Well, okay, if we can find out that.

[13] THE COURT: I will allow him to tell us.

[14] MS. TRUHE: Okay.

[15] THE WITNESS: It does not affect me in any way.

[16] BY MS. WHELIHAN:

[17] Q: All right, and it does not affect you that
[18] Mr. Goldstein - you have read Mr. Goldstein's deposition,
[19] and he, as a practicing CPA, also shares a different opinion
[20] than yours. Is that right? That does not affect you
[21] either?

[22] A: That is correct.

[23] Q: All right, okay. Now you would agree with me with
[24] the proposition that loans generally are not taxable income.
[25] Is that right?

[1] A: That's too broad a statement because there are too
[2] many different types of loans.

[3] Q: All right, okay. Now as I understand your second
[4] opinion, your second opinion is that the 1040 tax return for
[5] 1985 was incorrectly prepared. Is that right?

[6] A: Yes.

[7] Q: All right, well, can we agree that the math on the
[8] 1985 tax return is correct; that is, if Mr. Shofer borrowed
[9] \$80,000 in 1985, then if he had borrowed \$76,600 from his
[10] voluntary account in 1985, that that return would be in fact
[11] correct. Is that right?

[12] A: If I follow you, yes.

[13] Q: Okay. In fact, the \$3,400 that shows up as
[14] taxable income on Mr. Shofer's 1985 tax return is a correct
[15] computation if Mr. Shofer's \$80,000 borrowings included
[16] \$76,600 from his voluntary account. Is that right?

[17] MS. TRUHE: Objection, and what had occurred in
[18] 1984 had never happened?

[19] MS. WHELIHAN: No. I am just asking an isolated
[20] question.

[21] THE COURT: Can you repeat the question -

[22] MS. WHELIHAN: Sure.

[23] THE COURT: - because I missed it?

[24] BY MS. WHELIHAN:

[25] Q: The 1985 tax return prepared by Greybush in

[1] February of 1987 reflects pension loan income to Mr. Shofer
 [2] of \$3,400.
 [3] **A:** Pension distribution income.
 [4] **Q:** Pension distribution of \$3,400, which is taxable
 [5] income?
 [6] **A:** Correct.
 [7] **Q:** All right. You would agree with me that that
 [8] return would be prepared correctly, that the return would be
 [9] in fact correct, if Mr. Shofer had borrowed \$80,000 in the
 [10] tax year 1985 and that that \$80,000 loan had come from, in
 [11] part, \$76,600 of his voluntary account?
 [12] **MS. TRUHE:** Well, you also have to assume as part
 [13] of that hypothetical question that the \$76,000 in his
 [14] voluntary account had not been exhausted by what he did in
 [15] 1984.
 [16] **THE COURT:** Well, that is why we have redirect.
 [17] **MS. TRUHE:** All right.
 [18] **MS. WHELIHAN:** Well, let me try it this way.
 [19] **BY MS. WHELIHAN:**
 [20] **Q:** In 1985, are you aware of any deposition testimony
 [21] in this case that demonstrates that Mr. Shofer's loans
 [22] included well, let me try this again. In any deposition
 [23] testimony in this case, there was no evidence from those
 [24] deposition of where Mr. Shofer's loans came from. Is that
 [25] right?

[1] **MS. TRUHE:** Objection, Your Honor. Counsel is now
 [2] saying what the evidence in the case was -
 [3] **MS. WHELIHAN:** I am trying to ask -
 [4] **MS. TRUHE:** - in a deposition not even at trial.
 [5] **BY MS. WHELIHAN:**
 [6] **Q:** In the depositions that you read -
 [7] **THE COURT:** The question is is there anything in
 [8] the material he reviewed that explained that?
 [9] **MS. WHELIHAN:** Right.
 [10] **BY MS. WHELIHAN:**
 [11] **Q:** In any of the materials that you read that
 [12] included the deposition transcripts given by the witnesses
 [13] in this case, it is true, is it not, that there is no
 [14] allocation of where Mr. Shofer borrowed his monies from? Is
 [15] that right?
 [16] **MS. TRUHE:** I am sorry, I do not understand what
 [17] allocation of where he borrowed his monies from. He
 [18] borrowed them from the pension, and it is in evidence as to
 [19] what he borrowed when.
 [20] **BY MS. WHELIHAN:**
 [21] **Q:** Do you understand my question?
 [22] **MS. TRUHE:** Well, I do not understand your
 [23] question. And more importantly -
 [24] **MS. WHELIHAN:** Are you objecting?
 [25] **MS. TRUHE:** Yes, I am.

[1] **MS. WHELIHAN:** Okay.
 [2] **MS. TRUHE:** I do not understand what you mean by
 [3] allocation.
 [4] **THE COURT:** Let me ask the witness. Do you
 [5] understand the question?
 [6] **THE WITNESS:** I think I do.
 [7] **THE COURT:** Well, why don't you restate it for the
 [8] Court what question you think you are answering.
 [9] **THE WITNESS:** Under the assumption that all of the
 [10] withdrawals in 1984 were taxable and none of them came from
 [11] the voluntary account, if such an allocation could be made,
 [12] which I do not know because I am not a pension expert, and I
 [13] do not know if there's a requirement that monies come from
 [14] one part or the other or how they should be done. But if
 [15] I'm understanding your question: if there had been no
 [16] previous withdrawals from the voluntary account, and the
 [17] voluntary account was \$80,000, and \$76,600 had already been
 [18] withdrawn from that, then the \$3,400 would be correct.
 [19] **BY MS. WHELIHAN:**
 [20] **Q:** That was my question, and that is the answer. All
 [21] right.
 [22] **MS. TRUHE:** Then I withdraw my objection to that
 [23] question.
 [24] **BY MS. WHELIHAN:**
 [25] **Q:** You are aware that when the 1985 tax return was

[1] prepared, Mr. Shofer had not yet decided whether he was
 [2] going to amend his 1984 return. Is that right?
 [3] **A:** I do not remember the exact timing. I know that
 [4] no amended return had been filed at that point -
 [5] **Q:** All right.
 [6] **A:** - or prepared.
 [7] **Q:** If Mr. Shofer had decided not to amend the 1984
 [8] return when Greybush was preparing the 1985 return, Greybush
 [9] could not in fact prepare that return, is that right?
 [10] **A:** I don't know that that's an absolute statement.
 [11] Were it me, I would call in an attorney who specialized in
 [12] these matters.
 [13] **Q:** All right. And in fact, you are aware that Mr.
 [14] Shofer did hire Nicholas Giampietro, a pension tax expert,
 [15] in late December of 1986?
 [16] **A:** I don't know the date that he was hired. I know
 [17] from testimony that he was hired.
 [18] **Q:** Well, you are aware from the deposition testimony
 [19] that Mr. Giampietro was involved in Mr. Shofer's pension
 [20] issue as of late in 1986, beginning of 1987? Is that right?
 [21] **MS. TRUHE:** Well, Your Honor, I object to that
 [22] question. Involved in Mr. Shofer's pension issue is
 [23] extremely broad. There in fact has been testimony by Mr.
 [24] Giampietro that he did not advise Mr. Shofer in any way on
 [25] the issue of whether he should amend his returns.

[1] MS. WHELIHAN: I do not think that is -
 [2] THE COURT: The question -
 [3] MS. WHELIHAN: I do not think that is -
 [4] THE COURT: - for the witness is what?
 [5] MS. WHELIHAN: The question before the witness was
 [6] whether or not he was aware from reading the deposition
 [7] testimony of everybody in the case whether or not Mr.
 [8] Giampietro was involved in representing Mr. Shofer in late
 [9] 1986 or 1987?
 [10] THE WITNESS: Mr. Giampietro was hired by Mr.
 [11] Shofer at that time.

BY MS. WHELIHAN:

[12] Q: Okay. If Mr. Shofer's testimony in this case was
 [13] that he would, under any circumstances and regardless of the
 [14] advice from his accountants, have amended his tax returns,
 [15] would you agree with me that there are no consequences to
 [16] Greybush's advice to amend?
 [17] Greybush's advice to amend?

[18] MS. TRUHE: Objection, Your Honor. That was not
 [19] his testimony. I mean, that is a hypothetical that is not
 [20] even worth asking if it is not the testimony and could never
 [21] be. Those were not the facts, and that was not the
 [22] Plaintiff's testimony.

[23] MS. WHELIHAN: Mr. Shofer did testify from the
 [24] stand the very first day on direct, and Mr. Shofer said and
 [25] I believe Mr. Intner was here to hear it that he would have

[1] amended his tax returns regardless of the advice given to
 [2] him by his accountants. I think he reiterated that on cross
 [3] on Friday.

[4] THE COURT: The question for the witness now is?

BY MS. WHELIHAN:

[5] Q: The question before the witness is if Mr. Shofer's
 [6] testimony is that he would have filed an amended return
 [7] regardless of his accountant's advice, would you agree with
 [8] me that the accountant's advice to amend had no economic
 [9] consequences to Mr. Shofer?
 [10] consequences to Mr. Shofer?

[11] A: I did not hear Mr. Shofer's testimony. I was out
 [12] of town last week. And if I understand your question, you
 [13] are asking that if Mr. Shofer is stating that he would amend
 [14] regardless of the accountant's advice, whether or not the
 [15] accountants would be liable for any damages?

[16] Q: Well, proximate cause; the same question that you
 [17] responded to on questions by Ms. Truhe. Would you agree
 [18] with me that there is no proximate cause or damages from
 [19] Greybush's advice if Mr. Shofer's testimony is that under
 [20] any circumstances, he would have amended his tax returns
 [21] regardless of what his accountant's advice was?

[22] A: No, I do not agree with you.

[23] Q: All right. Is it your testimony that the IRS
 [24] would not have discovered the pension loans if the amended
 [25] returns had not been filed?

[1] A: No, it is not.
 [2] Q: Okay. So it is possible the IRS would have
 [3] discovered the pension loans from other sources other than
 [4] the filing of the amended returns. Is that right?

[5] A: It's possible.

[6] Q: All right. In fact, a trigger for the IRS might
 [7] have been another source like the 5500's, is that right, if
 [8] the 5500's had contained information regarding loans to
 [9] participants?

[10] A: That, I don't know because I believe 5500's,
 [11] although they are an Internal Revenue Service form, are not
 [12] filed with the Internal Revenue Service. They are filed
 [13] with the Department of Labor. And I don't believe the
 [14] Internal Revenue Service even gets them within a reasonable
 [15] length of time with which to look at them, understand them,
 [16] match them up with other returns filed, and commence an
 [17] audit, all within the 3-year statute of limitations.

[18] Q: Okay. How about a 1099. If the pension plan had
 [19] issued a 1099 to Mr. Shofer for any of the tax years in
 [20] question, 1984 or 1985 or 1986, do you agree that could
 [21] trigger an audit, or trigger the IRS to look at Mr. Shofer's
 [22] pension loans?

[23] A: There is currently a computer matching program for
 [24] things such as 1099's and W-2's. I'm not sure if that
 [25] matching program was in effect back in the early or mid

[1] 1980's. But, yes, the two documents do get filed with the
 [2] Internal Revenue Service and could, theoretically, be
 [3] matched.

[4] Q: All right. If Greybush had recommended to Mr.
 [5] Shofer that he not file amended tax returns, and if Mr.
 [6] Shofer had followed that advice, and if the IRS had
 [7] discovered those pension loans, you would agree with me that
 [8] whatever the tax consequences to Mr. Shofer were, they would
 [9] be much greater, if the IRS discovered the pension loans
 [10] prior to the statute of limitations?

[11] A: Could you repeat that, please?

[12] Q: Yes. Assume for a minute that Greybush
 [13] recommended to Mr. Shofer that he not amend his tax returns.

[14] A: Okay.

[15] Q: All right, and assume that the IRS discovers that
 [16] Mr. Shofer has pension loans prior to the 3-year statute of
 [17] limitations. You would agree with me that the economic
 [18] consequences to Mr. Shofer would have been greater than
 [19] whatever they were?

[20] A: In that hypothetical scenario, yes.

[21] Q: Okay. Do you practice before the IRS?

[22] A: Yes.

[23] Q: All right. Can you be disbarred from practice
 [24] before the IRS if you are involved in misstating or
 [25] misleading the IRS about your client's income?

[1] **MS. TRUHE:** Objection. Do you mean disbarred as
 [2] an attorney?
 [3] **MS. WHELIHAN:** Disbarred as practice before the
 [4] IRS.
 [5] **MS. TRUHE:** Okay.
 [6] **THE WITNESS:** Can an accountant be -
 [7] **BY MS. WHELIHAN:**
 [8] **Q:** Can a CPA be disbarred or suspended from practice
 [9] before the IRS for providing false or misleading information
 [10] from its clients?
 [11] **A:** I believe so, yes.
 [12] **Q:** Okay. I take it if Greybush had given Mr. Shofer
 [13] the advice not to amend his tax returns, this is the
 [14] hypothetical we are now working under -
 [15] **A:** Another hypothetical, okay.
 [16] **Q:** Right you are not suggesting that Greybush should
 [17] have then participated in preparing returns like the 1985
 [18] return, right?
 [19] **A:** I'm merely stating that Greybush should've advised
 [20] Mr. Shofer of all of his options and their opinion with
 [21] respect to possible ramifications.
 [22] **Q:** All right. That opinion is based upon the
 [23] February 20, 1987, letter in its totality, right?
 [24] **A:** The February, 1987, letter.
 [25] **Q:** Right, the February 20, 1987, letter where Mr. -

[1] **MS. WHELIHAN:** I have no further questions, Your
 [2] Honor.
 [3] **THE COURT:** Mr. Taylor, do you have questions for
 [4] the witness?
 [5] **MR. TAYLOR:** Just a few questions, Your Honor.
 [6] **CROSS-EXAMINATION**
 [7] **BY MR. TAYLOR:**
 [8] **Q:** Mr. Intner, I think you testified earlier that the
 [9] pension area is a very specialized area, and it has special
 [10] rules and regulations. Is that true?
 [11] **A:** Yes.
 [12] **Q:** You do not do any pension work yourself, is that
 [13] correct?
 [14] **A:** Correct.
 [15] **Q:** Is it your experience that pension consultants and
 [16] administrators are people who are very knowledgeable about
 [17] this very specialized area of the law?
 [18] **A:** With respect to things as formulating a plan and
 [19] getting it to pass muster in terms of the governmental
 [20] authorities and plan administration, yes.
 [21] **Q:** They would be familiar with the plans that they
 [22] craft and design for a sponsor or for participants, would
 [23] they not?
 [24] **A:** I would hope so.
 [25] **Q:** If they have provided in their plans provisions

[1] **A:** Yes.
 [2] **Q:** - Larash writes to Mr. Shofer? In fact, you do
 [3] not actually know what discussions Mr. Shofer had with
 [4] Greybush about the alternatives available because that was
 [5] not in the deposition testimony, was it?
 [6] **A:** The deposition was silent on that issue.
 [7] **Q:** All right, so in fact if Greybush had laid out all
 [8] of the alternatives: amending, not amending, and the
 [9] consequences that flowed from those two alternatives, you
 [10] would conclude that Greybush met the applicable standard of
 [11] care. Is that right?
 [12] **A:** With respect to that issue, yes.
 [13] **Q:** Right, I am just talking about that opinion;
 [14] right, okay. You are aware that when Greybush prepared Mr.
 [15] Shofer's 1984 tax return, Mr. Shofer had already borrowed a
 [16] considerable sum of money. Is that right?
 [17] **A:** Yes.
 [18] **Q:** In fact, he had already borrowed so much money, he
 [19] had well exceeded the allowable limits, whatever they are?
 [20] **MS. TRUHE:** Objection. What do you mean by
 [21] allowable, in terms of taxes?
 [22] **BY MS. WHELIHAN:**
 [23] **Q:** In terms of taxes; the tax-allowable limit?
 [24] **A:** Yes.
 [25] **Q:** Okay.

[1] for loans and the requirements for making loans from
 [2] pensions, you would expect them to be familiar with those
 [3] provisions, would you not?
 [4] **MS. TRUHE:** Objection, Your Honor. I think this
 [5] is getting into the realm of expert testimony as it pertains
 [6] to pension consultants. This is an accountant and has not
 [7] been offered in this area at all.
 [8] **THE COURT:** What question did you ask the witness,
 [9] Mr. Taylor?
 [10] **MR. TAYLOR:** I just asked the witness whether he
 [11] would expect a pension consultant to be familiar with the
 [12] plan with respect to what requirements would be there for
 [13] making loans to participants. In other words, what
 [14] requirements would have to be met in order to make a loan?
 [15] **THE COURT:** Why? We have already had a pension
 [16] expert testify that he would expect that.
 [17] **MR. TAYLOR:** I will ask another question, Your
 [18] Honor.
 [19] **BY MR. TAYLOR:**
 [20] **Q:** Mr. Intner, you testified with respect to the
 [21] TEFRA act which was passed in 1982. Did that law affect the
 [22] taxability of loans from pensions?
 [23] **A:** I'm not sure that it affected the taxability so
 [24] much as it changed the loans that could be taken out without
 [25] tax consequence, and it changed the rules for determining

[1] those amounts.

[2] **THE COURT:** Excuse me one minute.

[3] (Discussion off the record.)

[4] **THE COURT:** I am sorry; you may proceed.

[5] **BY MR. TAYLOR:**

[6] **Q:** Mr. Intner, would you expect a pension
[7] administrator who is competently acting in that capacity as
[8] a pension administrator to be familiar with the provisions
[9] of the TEFRA act as it relates to pension loans?

[10] **MS. TRUHE:** Objection, Your Honor. This is not an
[11] expert on -

[12] **THE COURT:** I will sustain the objection.

[13] **MS. TRUHE:** Okay.

[14] **BY MR. TAYLOR:**

[15] **Q:** Mr. Intner, I wanted to ask you about your 1994
[16] report with respect to the calculations which you made.
[17] You, in that report, or at least in describing the methods
[18] or the premises that you used in your calculations,
[19] indicated that one of those premises was that an individual
[20] would take out money from the pension at the maximum rate
[21] that they could without getting into a higher tax bracket.
[22] Is that what you said?

[23] **A:** Yes.

[24] **Q:** Would there not be situations where individuals
[25] might wish to take out the minimum amount in order to

[1] continue the tax sheltered effects of the pension?

[2] **A:** Certainly, there could be situations depending on
[3] any individual's estate planning.

[4] **Q:** Did you calculate or consider whether or not Mr.
[5] Shofer and his wife had any additional or outside sources of
[6] income when you made your calculations which you have
[7] testified to?

[8] **A:** I thought about including that and decided it was
[9] not appropriate in this situation.

[10] **Q:** But would that not make a major difference with
[11] respect to whether they might take the maximum or minimum
[12] amount if they were being taxed on other income?

[13] **A:** It would affect the calculation if I felt it were
[14] relevant. But, as I said, I did not feel it was relevant.

[15] **Q:** Why did you not feel it was relevant?

[16] **A:** Because we're dealing with an isolated tax of
[17] three years 1984, 1985, and 1986 at a maximum bracket for
[18] those years. And to factor in estate planning, other
[19] assets, taxable and non-taxable income, and a variety of
[20] other factors winds up in a generalization that ignores the
[21] calculation of the tax now versus the tax later which should
[22] stand alone.

[23] **Q:** I think your report assumed a discount rate of
[24] 7 percent in your calculations. Is that correct?

[25] **A:** Yes.

[1] **Q:** Why did you select 7 percent?

[2] **A:** I don't remember specifically at this late date
[3] why I chose that at the time. I am sure I did some
[4] research. I always do when I use a discount rate to find
[5] what is appropriate at the time.

[6] **Q:** Well, was the IRS rate not 9 percent?

[7] **A:** It might've been then; I don't recall.

[8] **Q:** I mean, would it not have been more realistic to
[9] at least use the IRS rate rather than just another number
[10] that you selected?

[11] **A:** Not necessarily.

[12] **Q:** Well, is there any basis at all that you can
[13] recall as to why you might have picked 7 percent?

[14] **A:** No.

[15] **Q:** As I understand, your testimony with respect to
[16] the conclusion that Greybush Newman was negligent with
[17] respect to its advice concerning the filing of amended
[18] returns was that the advice was incomplete, that it did not
[19] include other options. Is that right?

[20] **A:** Yes.

[21] **Q:** You are not saying that it would be negligent to
[22] go forward and simply amend returns, or improper to file
[23] amended returns in this situation?

[24] **MS. TRUHE:** Objection; negligent on the part of
[25] whom?

[1] **MR. TAYLOR:** Well, let me rephrase the question.

[2] **BY MR. TAYLOR:**

[3] **Q:** The act of filing an amended return is not
[4] improper under the circumstances of this case. Is that fair
[5] to say?

[6] **MS. TRUHE:** Objection. Could Counsel define what
[7] is meant by improper? For example, there is no legal right
[8] to file an amended return beyond limitation. The IRS does
[9] not have to accept it. So I do not understand what is meant
[10] by improper.

[11] **THE COURT:** Well, does the witness understand the
[12] question

[13] **THE WITNESS:** No.

[14] **THE COURT:** Can you try to clarify it for the
[15] witness, please?

[16] **BY MR. TAYLOR:**

[17] **Q:** Do you find any fault with Mr. Shofer's election
[18] to file amended returns for 1984 and 1985 under the facts of
[19] the case as you know it?

[20] **MS. TRUHE:** Objection. This is beyond the scope
[21] of direct. Mr. Intner has not been retained, nor did he
[22] express any opinion about the appropriateness of Mr.
[23] Shofer's conduct in actually filing an amended return. His
[24] opinion has been confined solely to the matter of Greybush
[25] advising Mr. Shofer that that was an option.

[1] THE COURT: I have to agree, Mr. Taylor.
[2] MR. TAYLOR: I do not have any other questions,
[3] Your Honor.

[4] THE COURT: Anything further? Redirect?

[5] MS. TRUHE: Just a few, Your Honor.

[6] REDIRECT EXAMINATION

[7] BY MS. TRUHE:

[8] Q: Mr. Intner, you testified, first of all, that you
[9] do not do ERISA work, correct?

[10] A: Correct.

[11] Q: All right, does an accountant have to do ERISA
[12] work in order to prepare a tax return?

[13] A: No.

[14] Q: Does an accountant have to do ERISA work in order
[15] to prepare a tax return for an individual who has borrowed
[16] money from his pension?

[17] A: No.

[18] Q: Ms. Whelihan asked you about an opinion that has
[19] been previously expressed by Mr. Goldstein in his deposition
[20] on the issue of what discussion, assuming there was one,
[21] between Mr. Larash and Mr. Shofer when Mr. Larash sat down
[22] to prepare Mr. Shofer's 1984 tax return. Assuming Mr.
[23] Shofer had said to Mr. Larash that he had talked to Mr. Hack
[24] and that the loans were appropriate and that there was
[25] nothing more to be concerned about, do you believe an

[1] and I said I have additional taxable income but I do not
[2] have a 1099, would you rely upon me for the truth of what I
[3] told you, that I had additional income? And would you
[4] report that income on my tax return?

[5] A: In that particular situation, I would certainly
[6] ask a few questions. But, yes, I would rely on that
[7] situation because that's increasing taxable income without
[8] documentation, and that's why I would ask questions to make
[9] sure my client would not be paying too much in tax.

[10] Q: All right, if I came to you and I said I have a
[11] got a car loan that I financed with my house and it is
[12] included within the deductible limit because it is a home
[13] equity loan and it does not exceed my basis in my house. If
[14] I told you that I had that deduction but I did not have a
[15] 1098 from the bank, would you take my word for it and put
[16] that information on the return?

[17] A: That's two parts. I would take your word for it,
[18] and I would not necessarily put that information on the
[19] return without questioning you further.

[20] Q: Okay. Now as I understand your third opinion
[21] about giving Mr. Shofer the advice to amend the return, your
[22] opinion is that Greybush should have given Mr. Shofer the
[23] alternatives of not amending and of amending. Is that
[24] right?

[25] A: I couldn't hear the last part of your question.

[1] accounting exercising reasonable care in the mid-1980's
[2] should rely on his client for the tax treatment -

[3] A: No.

[4] Q: - of a particular matter?

[5] A: Absolutely not.

[6] Q: Why not?

[7] A: Because clients may have some knowledge of tax
[8] ramifications or rules, but they are not the tax return
[9] preparers, and that's why they come to accountants. It is
[10] the accountants that are supposed to know how to recognize
[11] the real questions in order to prepare the returns properly.

[12] MS. TRUHE: I have no further questions.

[13] THE COURT: Is there anything else of the witness?

[14] MS. WHELIHAN: I have some brief recross.

[15] RECROSS EXAMINATION

[16] BY MS. WHELIHAN:

[17] Q: Do you rely upon your clients for information in
[18] preparing their tax returns?

[19] MS. TRUHE: Objection; information in general?

[20] MS. WHELIHAN: Yes, information in general?

[21] THE COURT: Overruled. You may answer.

[22] BY MS. WHELIHAN:

[23] Q: Information for their tax returns?

[24] A: Yes.

[25] Q: Okay. If I were your client and I came to you,

[1] Q: Oh, I am sorry. Your opinion, your third opinion,
[2] is that Greybush should have given two options to Mr.
[3] Shofer: the option of amending, and the option of not
[4] amending. And they should have explained the risks and
[5] benefits of those alternatives, is that right?

[6] A: I would actually go further than that, but
[7] certainly two options that are there are on the surface.
[8] There are times and it depends on timing. And again, I'm
[9] not the pension expert. But as an accountant dealing with
[10] clients who have a variety of different types of retirement
[11] plans, there are times loans can be repaid, or withdrawals
[12] can be repaid and treated as if they never existed. There
[13] is research my problem here is the question should have been
[14] recognized. And once recognized, even if not initially,
[15] they were not properly followed up.

[16] Q: Okay. It is not your opinion that after giving
[17] that advice of the options to Mr. Shofer, that Greybush
[18] should have then told Mr. Shofer that he should not amend
[19] his tax returns?

[20] A: I think there's a double negative, but that is not
[21] my opinion. The advice should have been client or taxpayer,
[22] here are your options. You choose; we'll be glad to discuss
[23] and explain and even tell you what we recommend of the
[24] options.

[25] Q: In fact, it would be an ethical violation for a

[1] CPA to tell a client to not amend their tax returns as the
 [2] chosen option of preference in your situation where you give
 [3] options to your client. Is that right?
 [4] **A:** I would have to reread the ethics rulings to see
 [5] if that's a straight violation of that.
 [6] **Q:** Okay.
 [7] **MS. WHELIHAN:** I have no further questions, Your
 [8] Honor.
 [9] **THE COURT:** Anything else of the witness?
 [10] **MR. TAYLOR:** May I just ask one question, Your
 [11] Honor.
 [12] **THE COURT:** You certainly may.
 [13] **RECROSS EXAMINATION**
 [14] **BY MR. TAYLOR:**
 [15] **Q:** Mr. Intner, in your review of the depositions and
 [16] other materials, do you recall whether or not Mr. Hack
 [17] expressed an opinion to Mr. Shofer or Greybush Newman as to
 [18] whether or not Mr. Shofer should or should not amend his tax
 [19] returns?
 [20] **MS. TRUHE:** Objection.
 [21] **THE COURT:** Overruled.
 [22] **THE WITNESS:** I believe I read something to that
 [23] effect. But I'm not sure if it was out of Mr. Hack's
 [24] deposition or another one referring to something Mr. Hack
 [25] said.

[1] **BY MR. TAYLOR:**
 [2] **Q:** Do you remember what Mr. Hack's position was on
 [3] that issue?
 [4] **A:** No, because I don't recall the specifics of each
 [5] person saying each thing. As I just said, I don't know if
 [6] Mr. - I read that in Mr. Hack's deposition or in someone
 [7] else's referring to Mr. Hack.
 [8] **MR. TAYLOR:** All right, I do not have any other
 [9] questions.
 [10] **THE COURT:** Anything else?
 [11] **MS. TRUHE:** Nothing further, Your Honor.
 [12] **THE COURT:** Thank you, Mr. Intner. You are
 [13] excused.
 [14] **THE WITNESS:** Thank you, Your Honor.
 [15] (The witness was excused.)
 [16] **THE COURT:** Ms. Truhe, do you have another
 [17] witness?
 [18] **MS. TRUHE:** No, Your Honor. That would conclude
 [19] the Defendant's case. However, I would like to hand up to
 [20] the Court a memorandum of law because in addition to expert
 [21] testimony, there is also case law on the issue of amending
 [22] tax returns which have been prepared incorrectly as a result
 [23] of negligence as opposed to fraud.
 [24] **THE COURT:** You have served this on Counsel?
 [25] **MS. TRUHE:** Yes.

[1] **MS. WHELIHAN:** Just now.
 [2] **THE COURT:** Oh, you have not read it?
 [3] **MS. WHELIHAN:** No, I just got it.
 [4] **THE COURT:** Are you prepared to go forward, Ms.
 [5] Whelihan?
 [6] **MS. WHELIHAN:** I am.
 [7] **THE COURT:** Can you give me just a moment? I
 [8] apparently have some things I have got to attend to. Give
 [9] me about 5 minutes and I will come back.
 [10] **MS. WHELIHAN:** Yes, and can I move for judgment at
 [11] the close of her case when you come back as a preliminary
 [12] matter?
 [13] **THE COURT:** If you think that is advisable.
 [14] **MS. WHELIHAN:** Sure for two of the opinions,
 [15] possibly, and maybe all three.
 [16] **THE COURT:** Okay, I will be back in a few moments.
 [17] (Brief recess.)
 [18] **THE COURT:** Madam Clerk, this is one of the
 [19] exhibits that was not admitted.
 [20] **THE CLERK:** Okay.
 [21] (Discussion off the record.)
 [22] **MS. TRUHE:** Sorry, Your Honor.
 [23] **THE COURT:** It is okay. We all have the same
 [24] urges from time to time. Ms. Whelihan, are you ready?
 [25] **MS. WHELIHAN:** Yes. At this time, Your Honor, I

[1] would like to move for judgment as to the Third-Party
 [2] Plaintiff/Defendant case. I do not think there has been any
 [3] testimony from Mr. Intner about the actual damages
 [4] applicable to Greybush for any one of his three opinions,
 [5] and I do not think there is any testimony at all about the
 [6] proximate cause. As to the first of his opinions, perhaps
 [7] that survives because he believes that Greybush should have
 [8] picked up the taxable income on the 19 -
 [9] **THE COURT:** Could you speak up just a bit?
 [10] **MS. WHELIHAN:** Oh, I am sorry.
 [11] **THE COURT:** I have got buses and trucks.
 [12] **MS. WHELIHAN:** The first opinion is that he thinks
 [13] that Greybush should have picked up the taxable income on
 [14] the 1984 return. That may survive. But the last two
 [15] opinions the second opinion, which is that the 1984 tax
 [16] return was incorrect, he himself has admitted that based
 [17] upon the facts that are in evidence, the return is in fact
 [18] correct. I mean, there is -
 [19] **THE COURT:** Is that 1984 or 1985?
 [20] **MS. WHELIHAN:** I am talking about 1985. The 1985
 [21] return not the amended 1985 return, but the 1985 return the
 [22] testimony has been that no one knows what the voluntary
 [23] contributions were that Mr. Shofer took in 1985. But the
 [24] \$76,600 could have been applied to the \$80,000, and there is
 [25] nothing wrong with the 1985 return. That is on liability.

[1] There was clearly no testimony from Mr. Intner that that
[2] breach if there was one, because he actually testified that
[3] there was not causes any damages to Mr. Shofer or that Mr.
[4] Hack can recover from Greybush.

[5] Then on the third opinion, as I see that he has
[6] against Greybush, his opinion is that Greybush should have
[7] given Mr. Shofer the various options and explained the
[8] rewards and benefits to those options. But he conceded that
[9] there is no testimony in evidence or from the depositions
[10] that Greybush did not do that. His opinions are solely
[11] predicated on that February 20, 1987, letter which he
[12] himself testified in response to Ms. Truhe's questions, is
[13] not necessarily confirmation that the advice to Mr. Shofer
[14] was -

[15] **THE COURT:** But is there evidence in the record at
[16] this point that options were provided to Mr. Shofer by
[17] Greybush?

[18] **MS. WHELIHAN:** I think that it is a complete
[19] negative. I mean, there is no evidence one way or the
[20] other. So there is no - his opinion, if it is a breach of
[21] duty, has no factual predicate. So it is meaningless -

[22] **THE COURT:** Wait a minute. If the evidence is
[23] silent except for the letter, then that is the only evidence
[24] I have.

[25] **MS. WHELIHAN:** But all the letter says is that you

[1] expert opinion is that accountants have an affirmative duty
[2] to lay it out in that fashion, and that is all I have in
[3] front of me at the moment for purposes of the motion. Now
[4] you may present me with something different, if you could
[5] put on your case.

[6] **MS. WHELIHAN:** Right. But I think the, I guess
[7] the point is Mr. Intner did not say that Greybush should
[8] have told Mr. Shofer not to amend.

[9] **THE COURT:** Right, he did not say that.

[10] **MS. WHELIHAN:** Right, it is the negative so there
[11] are no damages. I mean, if Greybush had told Mr. Shofer not
[12] to amend, he does not even know if a CPA could do that. So
[13] it is kind of like it is an opinion that does not have any
[14] consequences that flow from it. In particular, the
[15] evidence, the only evidence before you, is that Mr. Shofer
[16] would have amended. So, I guess, as to that opinion and
[17] that part of the claim for contribution, it fails. I mean,
[18] you know, there is no proximate causation, and there are no
[19] damages that flow from failing to give the alternatives if
[20] the ultimate decision that is made is to amend and would
[21] have been to amend. Do you see what I am saying?

[22] **THE COURT:** Well, I think I see what you are
[23] saying, except that, and I do not know that Mr. Intner also
[24] indicated that he thought there may have been other options
[25] but he was not certain of those -

[1] should amend. It does not say what the alternatives are,
[2] period. I mean, there is no evidence anywhere that Mr.
[3] Shofer was not given the advice to not do nothing.

[4] **THE COURT:** -

[5] **MS. WHELIHAN:** In any case, Mr. Shofer's testimony
[6] is that he would have amended anyway, and in fact, he did
[7] amend. So there are not any damages that flow from the
[8] amended tax returns.

[9] **THE COURT:** Well, is the claim not - let's come
[10] back to this. It seems to me that if the options were
[11] provided to Mr. Shofer verbally or in some other written
[12] form, then I am not going to learn that unless it comes out
[13] as you put on testimony because it did not come out in Mr.
[14] Larash's testimony, who is the only person from your
[15] client's firm who has testified. So I do not see how I can
[16] presume that happened based on the evidence I have before
[17] me.

[18] **MS. WHELIHAN:** But -

[19] **THE COURT:** The - go ahead.

[20] **MS. WHELIHAN:** Well, but I think that if you are
[21] just looking at the letter, the letter delegates the duty to
[22] Mr. Shofer. Mr. Shofer is the ultimate decision-maker for
[23] amending, and he decides to amend, and his testimony was
[24] that he did amend.

[25] **THE COURT:** I understand that, but Mr. Intner's

[1] **MS. WHELIHAN:** Right, but we do not even know what
[2] they are because that did not come in on direct or cross.

[3] **THE COURT:** Your view is that Mr. Shofer had not
[4] amended -

[5] **MS. WHELIHAN:** My view is if Mr. Shofer had been
[6] told by Greybush to amend, his testimony is I would have
[7] amended anyway.

[8] **THE COURT:** Well, he did amend is what you are
[9] saying.

[10] **MS. WHELIHAN:** Right, but he said regardless of
[11] what my accountants told me, I was going to amend. That was
[12] his testimony. So if Greybush - there is no evidence that
[13] if Greybush had told him not to amend that he would have
[14] chosen that option.

[15] **THE COURT:** Of course, I could find that not
[16] credible.

[17] **MS. WHELIHAN:** But the testimony you could find it
[18] not credible that he would say that.

[19] **THE COURT:** There are very few people who ask
[20] their accountants about amending and say oh, I really did
[21] not want to know your opinion; I had already decided. But
[22] go ahead.

[23] **MS. WHELIHAN:** Yes, but what I am saying is there
[24] is no causation or damages that flow from Greybush's advice
[25] whether it was to amend or not amend based upon his

[1] testimony.

[2] **THE COURT:** Well, the position of the two
[3] Defendants in this case is that there are no damages that
[4] flow from any advice. But if there are -

[5] **MS. WHELIHAN:** Well, that is true, too. I mean, I
[6] think -

[7] **THE COURT:** - I have got to figure out who.

[8] **MS. WHELIHAN:** Well, but I think - right. I
[9] mean, I think overall, we will be arguing that the two
[10] Defendants: the Stuart Hack Company and Stuart Hack
[11] individually, should win based upon the lack of damage
[12] evidence. I am not considering Hack's case; I am just
[13] looking the contribution case in a vacuum. As to the third
[14] claim against Greybush that Mr. Shofer should have been told
[15] by Greybush not to amend, Mr. Intner does not say that. He
[16] says the option should have been presented to Mr. Shofer.

[17] **THE COURT:** Let's assume for the sake of argument
[18] that I agree with Mr. Shofer that he got bad advice from Mr.
[19] Hack on his telephone call, and that he went ahead and
[20] relied on that and made this first loan, the very first one.
[21] And let's say I agree with Mr. Intner that, based on the
[22] information available to Greybush, they should have picked
[23] that up on the 1984 return or asked more questions about it.
[24] Do I not have to hold both the Defendants in the case at
[25] this point until I have heard all the evidence?

[1] **MS. WHELIHAN:** Yes, although the damage question
[2] then based upon the timing of when what occurred becomes
[3] important; but, yes.

[4] **THE COURT:** I think I need to put you to your test
[5] of putting on your case.

[6] **MS. WHELIHAN:** Okay.

[7] **THE COURT:** I am going to deny your motion.

[8] **MS. WHELIHAN:** All right. Your Honor, at this
[9] time I would like to call Mr. Goldstein.

[10] **BENNETT GOLDSTEIN,**

[11] a witness produced on call of the Defense, having first been
[12] duly sworn, was examined and testified as follows:

[13] **THE CLERK:** State your name and address for the
[14] record, please.

[15] **THE WITNESS:** Bennett Goldstein. My address is
[16] 2 Hopkins Plaza, Baltimore, Maryland, 21201.

[17] **THE CLERK:** Thank you.

[18] **VOIR DIRE EXAMINATION OF BENNETT GOLDSTEIN**

[19] **BY MS. WHELIHAN:**

[20] **Q:** Mr. Goldstein, could you tell the Court how you
[21] are employed?

[22] **A:** Pardon?

[23] **Q:** Could you tell the Court how you are employed?

[24] **A:** I'm a partner in the firm of Grant Thornton.

[25] **Q:** What kind of work do you do?

[1] **A:** Well, we're a CPA and consulting firm, and I do
[2] accounting, auditing, and consulting work for clients.

[3] **Q:** Tell me briefly about your educational background.

[4] **A:** I have a Bachelor of Science degree from the
[5] University of Maryland that I received in 1970.

[6] **Q:** All right, and when did you become a CPA?

[7] **A:** 1971.

[8] **Q:** All right, and did you pass your CPA exam on the
[9] first taken?

[10] **A:** Yes.

[11] **Q:** All right. What kind of work do you do as a CPA?

[12] **A:** I have over, since 1971, done accounting,
[13] auditing, tax work, and consulting work.

[14] **Q:** All right. What kind of consulting work have you
[15] done to directors and associates of your firm?

[16] **A:** Oh, when I said consulting work, I was speaking in
[17] terms of consulting work with the clients.

[18] **Q:** All right, have you been involved in peer review?

[19] **A:** Oh, yes.

[20] **Q:** All right. What kind of peer review things have
[21] you done?

[22] **A:** I've been team captain of 10 or 12 SEC Division
[23] peer reviews. What that means is that I was in charge of
[24] reviewing the CPA firm at that had engaged us.

[25] **Q:** All right. In your consulting services that you

[1] have provided, have you charged as a consultant on technical
[2] matters to other members of your firm?

[3] **A:** Yes.

[4] **Q:** All right, and how many tax returns have you
[5] actually prepared?

[6] **A:** In my career?

[7] **Q:** In your career.

[8] **A:** I have no idea.

[9] **Q:** Okay. What professional societies do you belong
[10] to?

[11] **A:** I belong to the, I currently belong to the
[12] American Institute of Certified Public Accountants, the
[13] Maryland Association of Certified Public Accountants, and
[14] the Health Care Financial Management Association.

[15] **Q:** All right, and have you held any offices with any
[16] of those societies?

[17] **A:** Not with those; with one other.

[18] **Q:** Okay. What is the one other that you have held
[19] office?

[20] **A:** When I was with Ellin and Tucker, we belonged to
[21] an organization called DFKUSA. I was on the board of -
[22] it's a national association of independent CPA firms. And I
[23] was on the board of that for a long time and chairman of
[24] that for two, that organization for two years.

[25] **Q:** All right. Were you also chairman of the Public

[1] Service Appointments Committee for the Maryland Association
[2] of Certified Public Accountants?

[3] **A:** Yes, I was.

[4] **Q:** All right.

[5] **MS. WHELIHAN:** Your Honor, at this time I would
[6] like to offer Mr. Goldstein as an expert.

[7] **THE COURT:** Would anyone like to question the
[8] witness?

[9] **MS. TRUHE:** Yes, Your Honor.

[10] **VOIR DIRE CROSS-EXAMINATION**

[11] **BY MS. TRUHE:**

[12] **Q:** Mr. Goldstein, is it not true that you have never
[13] testified as an expert witness before in an accounting
[14] malpractice case that involved allegations of negligence in
[15] the preparation of an income tax return?

[16] **A:** That's correct.

[17] **Q:** Is it not also true, Mr. Goldstein, as you have
[18] candidly admitted to me at your deposition, that you do not
[19] know what questions an accountant who is the same position
[20] as Mr. Larash and who was exercising reasonable care would
[21] have asked in the context of Mr. Larash's preparation of the
[22] 1984 tax return? You only know what you would have asked
[23] and done, correct?

[24] **A:** That's correct.

[25] **MS. WHELIHAN:** Objection, Your Honor. I do not

[1] know that this goes to his qualifications.

[2] **MS. TRUHE:** This goes to whether he is familiar
[3] with the standard of care being exercised by accountants in
[4] the mid-1980's in Maryland.

[5] **THE COURT:** It seems atypically specific for voir
[6] dire, but I think it does go to that.

[7] **MS. WHELIHAN:** All right.

[8] **THE COURT:** Overruled.

[9] **BY MS. TRUHE:**

[10] **Q:** Is it not true, again -

[11] **A:** Pardon me?

[12] **Q:** - Mr. Goldstein, as you candidly admitted to me
[13] in your deposition, that you do not know what questions an
[14] accountant in the position of Mr. Larash, exercising
[15] reasonable care, would have asked of his client when
[16] presented with the interest deduction?

[17] **A:** Well, I think, Ms. Truhe, the rest of my answer
[18] was I know the questions I would ask, and I know that I
[19] conduct my practice in accordance with the standards of
[20] care.

[21] **Q:** But you do not know what any other accountant
[22] would have done, correct?

[23] **A:** Then they would do what I would do.

[24] **Q:** Well, as you stated to me in your deposition on
[25] page 51, beginning at line 8: Question, I am sorry, let me

[1] begin at line 7, which was your answer: "I know what
[2] questions I would've asked." Question: "But not any other
[3] accountant, is that correct?" Answer: "Not until I talked
[4] to them." Does that refresh your recollection?

[5] **A:** That's what it says. What it - I don't know what
[6] that means.

[7] **MS. TRUHE:** Well, Your Honor, I do have an
[8] objection to this witness testifying as to the standard of
[9] care applicable to accountants in the mid-1980's if he does
[10] not know what anyone else would have done in this context:
[11] exercising reasonable care.

[12] **THE COURT:** Well, I think I need to hear more from
[13] the witness before I can determine whether or not he is
[14] qualified to offer opinions about that. He certainly is
[15] qualified to assist the Court in the area of public
[16] accounting, if that is the area in which he is offered.
[17] Whether, under the specifics of this case, his opinion is
[18] going to carry any weight is something I need to hear from
[19] the testimony.

[20] **MS. WHELIHAN:** Well, maybe I should do some
[21] additional voir dire.

[22] **THE WITNESS:** That may be -

[23] **MS. WHELIHAN:** Would that help?

[24] **VOIR DIRE REDIRECT EXAMINATION**

[25] **BY MS. WHELIHAN:**

[1] **Q:** Your current office with your firm is what?

[2] **A:** I'm a partner in the firm of Grant, Thornton.

[3] **Q:** All right. As a partner, do you review other
[4] accountants' work?

[5] **A:** Yes.

[6] **Q:** All right, and do you act as a peer review as one
[7] of the peer reviews for other members of your firm?

[8] **A:** Yes.

[9] **Q:** All right, when you were the senior director of
[10] Ellin and Tucker, Chartered, did you do the same sort of
[11] thing?

[12] **A:** Well, at Ellin and Tucker, I was the managing
[13] partner of that firm for 12 years. As such, I was
[14] responsible for the quality control, ultimate quality
[15] control over all aspects of the practice. And I was
[16] entirely familiar with the standards of care for auditing,
[17] accounting, and tax, as well as consulting work.

[18] **MS. WHELIHAN:** All right, Your Honor, at this
[19] time, I would offer him as an expert in the field of -

[20] **THE COURT:** Maybe you misunderstood me. I have no
[21] doubt that Mr. Goldstein is a fine accountant and has many
[22] years of experience at very high levels. The issue that I
[23] think Ms. Truhe was raising was whether or not, in the
[24] context of offering forensic testimony in a malpractice
[25] action, the response that he gave was supportive of standard

[1] of care testimony. I do not know yet what until I hear the
 [2] questions -
 [3] **MS. WHELIHAN:** Oh, I am sorry.
 [4] **THE COURT:** - that are asked.
 [5] **MS. WHELIHAN:** I did misunderstand what you said.
 [6] **THE COURT:** All right. I mean, I am familiar with
 [7] the firms he has been associated with. I am sure that
 [8] Mr. Goldstein is a very highly qualified accountant.
 [9] **BY MS. WHELIHAN:**
 [10] **Q:** What did you review in preparation for your
 [11] testimony?
 [12] **A:** I reviewed a number of deposition transcripts and
 [13] their related exhibits.
 [14] **Q:** All right. Did you review any tax returns?
 [15] **A:** If they were included in with the deposition
 [16] exhibits, and there were, I reviewed them.
 [17] **Q:** All right. You also sat through some of the
 [18] testimony?
 [19] **A:** Yes.
 [20] **Q:** All right. Do you have an opinion with a
 [21] reasonable degree of accounting certainty as to whether or
 [22] not Greybush met the standard of care in failing to identify
 [23] Mr. Shofer's pension loans as taxable income on the 1984
 [24] return?
 [25] **A:** I have an opinion, yes.

[1] **Q:** What is that opinion?
 [2] **A:** Greybush Newman's work was in accordance with the
 [3] standards of care.
 [4] **Q:** All right, and what -
 [5] **MS. TRUHE:** I am sorry, Your Honor, I did not hear
 [6] the answer to that question.
 [7] **THE WITNESS:** Their work was in accordance with
 [8] the standards of care.
 [9] **BY MS. WHELIHAN:**
 [10] **Q:** All right, and what is the basis for that opinion?
 [11] **A:** My own personal experience and my familiarity with
 [12] those standards.
 [13] **Q:** All right, and what is the factual predicate for
 [14] that opinion?
 [15] **A:** The factual predicate is that accountants engaged
 [16] in tax practice are sub, are entitled to rely on
 [17] representations made by their clients. And those
 [18] representations do not require any additional
 [19] investigations. And that's set forth in the AICPA
 [20] Statements on Tax Practice.
 [21] **Q:** All right, and you have had an opportunity to read
 [22] Mr. Intner's deposition and also listen to his testimony
 [23] today?
 [24] **A:** Yes.
 [25] **Q:** Do you have an opinion within a reasonable degree

[1] of accounting -
 [2] **THE COURT:** Can you wait just a second because I
 [3] cannot hear with all this -
 [4] **MS. WHELIHAN:** Oh, I am sorry.
 [5] **THE COURT:** - outside racket. I apologize. This
 [6] goes on constantly. It is like they put this courtroom in
 [7] the corner of Baltimore that is the noisiest.
 [8] **BY MS. WHELIHAN:**
 [9] **Q:** Do you have an opinion within a reasonable degree
 [10] of accounting certainty as to whether or not Greybush met
 [11] the standard of care in advising Mr. Shofer to amend his
 [12] 1984 and 1985 tax returns?
 [13] **A:** Yes.
 [14] **Q:** What is that opinion?
 [15] **A:** They met the standard of care.
 [16] **Q:** Why is that?
 [17] **A:** Because they have an -
 [18] **THE COURT:** We have to stop for a second. The
 [19] tape seems to have -
 [20] (Discussion off the record.)
 [21] **MS. WHELIHAN:** All right.
 [22] **THE COURT:** I am sorry. We are back on the
 [23] record.
 [24] **BY MS. WHELIHAN:**
 [25] **Q:** Do you have an opinion within a reasonable degree

[1] of accounting certainty as to whether or not Greybush Newman
 [2] and Company should have told the Plaintiff to amend his 1984
 [3] return?
 [4] **A:** Yes.
 [5] **Q:** All right, and what is that opinion?
 [6] **A:** That they should've told him to amend his return.
 [7] **Q:** All right, and why is that?
 [8] **A:** Because that is what should be done under the
 [9] income tax laws of the United States. That's why they
 [10] provide for amended returns.
 [11] **Q:** All right. What is the factual predicate for your
 [12] opinion that Greybush should have told Mr. Shofer to amend
 [13] his 1984 and 1985 returns?
 [14] **A:** The factual predicate?
 [15] **Q:** Right. What facts are you using for your opinion?
 [16] **A:** They were aware - they had become aware of
 [17] material errors in the original returns that were filed.
 [18] **Q:** Okay. Once Greybush Newman and Company became
 [19] aware of the taxable income created by Mr. Shofer taking
 [20] pension loans, could Greybush have told Mr. Shofer not to
 [21] amend his 1984 and 1985 tax returns? And would that have
 [22] met the applicable standard of care of a reasonable
 [23] accountant?
 [24] **A:** Absolutely not.
 [25] **Q:** Why not?

[1] **A:** Because that would be advising a client to not pay
 [2] his income tax as required by law.
 [3] **Q:** All right, and what would have been the
 [4] consequences to Greybush had they advised Mr. Shofer to not
 [5] amend his 1984 and 1985 returns?
 [6] **A:** Well, I imagine if the IRS found out, certain of,
 [7] some of the members of Greybush Newman would not be allowed
 [8] to practice before the IRS. I don't know what would happen
 [9] if the state licensing board found out.
 [10] **Q:** In your opinion, within a reasonable degree of
 [11] accounting certainty and based upon your familiarity with
 [12] the standard of care applicable to accountants in Greybush's
 [13] situation, could Greybush have prepared Mr. Shofer's 1985
 [14] return without disclosing any pension loan taxable income in
 [15] February of 1987?
 [16] **A:** No.
 [17] **Q:** Why not?
 [18] **A:** Because they were aware that the loans had been
 [19] made.
 [20] **Q:** Okay.
 [21] **MS. TRUHE:** Well, objection, Your Honor; move to
 [22] strike. There has never been any contention that they
 [23] should have prepared the 1985 returns and not disclosed as
 [24] taxable income the monies which Mr. Shofer withdrew in 1985.
 [25] **THE COURT:** Well, I mean, I think the witness is

[1] could prepare it properly and still not amend the 1984
 [2] return.
 [3] **THE COURT:** I am not sure that is the that you
 [4] asked the witness -
 [5] **MS. TRUHE:** But it is.
 [6] **MS. WHELIHAN:** Right. Well, I want to make -
 [7] that is the beginning. I want to make sure that it is clear
 [8] that they could not prepare the 1985 tax return if
 [9] Mr. Shofer decided not to amend.
 [10] **THE COURT:** That is not the question you asked the
 [11] witness, either, I do not believe. My understand of your
 [12] question, and maybe I am wrong, was in February of 1987
 [13] could Greybush Newman have prepared the 1985 return and not
 [14] disclosed the loan income?
 [15] **MS. WHELIHAN:** Right, any loan income.
 [16] **THE COURT:** Right.
 [17] **MS. TRUHE:** Well, and that is -
 [18] **THE COURT:** That is not the same question, is it,
 [19] that -
 [20] **MS. TRUHE:** That has never been an allegation in
 [21] this case.
 [22] **MS. WHELIHAN:** All right, well -
 [23] **MS. TRUHE:** But they should have.
 [24] **BY MS. WHELIHAN:**
 [25] **Q:** Do you have an opinion within a reasonable degree

[1] entitled to offer his opinion on it. I do not know whether
 [2] it is a contention in the case.
 [3] **MS. WHELIHAN:** Well, let me see if I can make it
 [4] clearer as to what I am trying to elicit from the witness.
 [5] **BY MS. WHELIHAN:**
 [6] **Q:** Would it have been within the standard of care
 [7] applicable to a reasonable accountant for Greybush Newman
 [8] and Company to prepare the 1985 return without disclosing
 [9] any taxable income from the pension loans once they
 [10] discovered that Mr. Shofer had taken the pension loans from
 [11] his pension.
 [12] **MS. TRUHE:** Objection, Your Honor. We have never
 [13] contended that they should not have. I mean, it is an
 [14] opinion about something that is not at issue in the case
 [15] and never even been alleged. It is the basis of evidence.
 [16] **THE COURT:** Well, is there some misunderstanding?
 [17] **MS. WHELIHAN:** No, I am just trying to make it
 [18] clear that I am not sure that, and maybe I misunderstood Ms.
 [19] Truhe's comments, but I thought that Ms. Truhe was
 [20] suggesting that Greybush could prepare the 1985 return and
 [21] advise Mr. Shofer not to amend.
 [22] **MS. TRUHE:** Not to amend what?
 [23] **MS. WHELIHAN:** Not to amend the 1984 return.
 [24] **MS. TRUHE:** Yes, they could prepare the 1985
 [25] return and disclose the entire \$80,000 as taxable income and

[1] of accounting certainty as to whether or not Greybush Newman
 [2] prepared the 1985 tax returns properly based upon Mr. Shofer
 [3] having borrowed \$80,000?
 [4] **A:** Based upon that and the fact that they received
 [5] advice from Mr. Giampietro.
 [6] **Q:** All right, and what is that opinion?
 [7] **A:** It was the application of the voluntary account in
 [8] that return.
 [9] **Q:** Well, so what is your opinion?
 [10] **A:** That they properly prepared the return.
 [11] **Q:** All right.
 [12] **MS. WHELIHAN:** Your Honor, I have no questions of
 [13] this witness.
 [14] **THE WITNESS:** Okay.
 [15] **THE COURT:** Do you have questions?
 [16] **MS. TRUHE:** Yes, Your Honor. Thank you.
 [17] **VOIR DIRE FURTHER CROSS-EXAMINATION**
 [18] **BY MS. TRUHE:**
 [19] **Q:** Mr. Goldstein, do you know Ken Larash?
 [20] **A:** Only through this case. And I met him once at a
 [21] not-for-profit organization I was a member of the board of.
 [22] **Q:** Well, your relationship is a little closer than
 [23] that. Page 18, beginning at line 10. Question: "Do you
 [24] know Mr. Kenneth Larash of Greybush Newman?" Answer:
 [25] "Yes." Question: "How do you know him?" Answer: "I know

[1] him from work Greybush Newman has done in the past year for
 [2] a not-for-profit organization of which I am a director."
 [3] **A:** Isn't that what I just said to you, Ms. Truhe?
 [4] **Q:** I do not believe so. I believe you said -
 [5] **A:** I said I knew him from this case and from work
 [6] that he did on a not-for-profit that I was a member of the
 [7] board on.
 [8] **Q:** All right.
 [9] **A:** Now that's what I said to you.
 [10] **Q:** I do not believe it was, but that is fine. Okay.
 [11] Do you agree with the proposition that when one holds
 [12] himself out as a tax preparer, that one should know what
 [13] constitutes taxable income and what does not?
 [14] **A:** Yes.
 [15] **Q:** Now if I had come to you in 1985, like Mr. Shofer
 [16] did with Mr. Larash, and told you that I borrowed \$200,000
 [17] from my pension in 1984, would you have known there was a
 [18] tax issue there?
 [19] **A:** Probably not, no, I would not've known there was a
 [20] tax issue there?
 [21] **Q:** Yes.
 [22] **A:** I would've concluded that there was no tax
 [23] consequence to the loan.
 [24] **Q:** Well, did you not testify in your deposition that
 [25] you would have asked me some questions about that

[1] **Q:** You would have asked me whether I had checked with
 [2] my pension consultant about the proper tax treatment of
 [3] those monies, correct?
 [4] **A:** I would've asked you if you had checked as to the
 [5] taxability.
 [6] **Q:** All right. Now do you know whether Mr. Larash did
 [7] that with Mr. Shofer?
 [8] **A:** I believe he talks about it in his testimony.
 [9] **Q:** Have you -
 [10] **A:** I -
 [11] **Q:** - read Mr. Larash's testimony?
 [12] **A:** I've read his testimony.
 [13] **Q:** Are you assuming that he asked Mr Shofer and had a
 [14] discussion with him about -
 [15] **A:** Well, there's nothing in there about a discussion.
 [16] **Q:** Okay. Well, you concede, do you not, that
 [17] Mr. Larash was aware of the \$200,000 which Mr. Shofer had
 [18] withdrawn from the pension in 1984, correct?
 [19] **A:** Let me back up a second. I'm sorry, I've answered
 [20] your question incorrectly.
 [21] **Q:** Which one?
 [22] **A:** Going back to the borrowing, the \$200,000. I
 [23] don't know, you had said something about income, and I kept
 [24] thinking income. If Mr. Shofer came to me and told me he
 [25] borrowed \$200,000 from his pension plan, I would say okay

[1] representation to you?
 [2] **A:** Yes.
 [3] **Q:** In fact, you would have asked me whether I had
 [4] checked with my pension consultant about the proper tax
 [5] treatment of those loans, correct?
 [6] **A:** That is what I said at that time.
 [7] **Q:** Do you know whether Ken Larash had that discussion
 [8] with Mr. Shofer when he went to gather the information
 [9] necessary to prepare the 1984 return; namely: "Have you
 [10] discussed this, Mr. Shofer, with Mr. Hack the issue of
 [11] whether any of these monies might be taxable?"
 [12] **A:** I don't know. Oh, I'm sorry, he discussed that
 [13] with - did he discuss it with Mr. Shofer when he prepared
 [14] the return?
 [15] **Q:** No, when he met with - I am sorry.
 [16] **A:** I am sorry.
 [17] **Q:** When he met with Mr. Shofer for the purpose of
 [18] preparing the 1984 return -
 [19] **A:** Yes.
 [20] **Q:** - is it not true that Mr. Larash never discussed,
 [21] I am sorry; strike that. Let's back up. I believe you
 [22] agree with me that if I had come to you in 1985 and told you
 [23] that I had borrowed \$200,000 from my pension, that you would
 [24] have asked me some questions about that, correct?
 [25] **A:** Yes.

[1] and that would be the end of it.
 [2] **Q:** Oh, that is not what you told me, however, at
 [3] your -
 [4] **A:** I understand that.
 [5] **Q:** - deposition. Oh, you are changing your
 [6] deposition testimony?
 [7] **A:** What I'm telling you is what I'm telling you now.
 [8] **Q:** Oh, so when you testified in 1993, page 17,
 [9] beginning at line 5 and I used myself in the hypothetical
 [10] instead of Mr. Shofer. Question: "If I came to you, let's
 [11] say, in 1985 and told you that I had borrowed approximately
 [12] \$200,000 from my pension plan, would you have known the tax
 [13] treatment of that money?" Answer: "Would I have known the
 [14] proper tax treatment of that money?" Question: "Yes."
 [15] **Answer:** "I probably would've asked you at the time did you
 [16] check with your pension consultant on the proper tax
 [17] treatment of that money. That's what I would've done." Are
 [18] you changing that testimony?
 [19] **A:** Yes.
 [20] **Q:** So you believe you would not have done that?
 [21] **A:** I've just answered your question. If it was a
 [22] loan at that point in time, a loan would not be considered
 [23] taxable.
 [24] **Q:** Did you know in the mid-1980's whether any of the
 [25] monies which Mr. Shofer had withdrawn from his pension in

[1] 1984 were taxable to him as income?
 [2] **A:** Say that again?
 [3] **Q:** Did you know in the mid-1980's yourself whether
 [4] the monies which Mr. Shofer had withdrawn in 1984 would have
 [5] been taxable?
 [6] **A:** I knew that a time came in the 1980's where the
 [7] tax treatment of loans did change, yes.
 [8] **Q:** Well, is it not true that there were a whole lot
 [9] of changes beginning in 1982 with TEFRA?
 [10] **A:** Yes, they were.
 [11] **Q:** Yet, you take the position in this case that the
 [12] accountants at Greybush Newman had no duty to even spot that
 [13] as an issue when they knew that Mr. Shofer had withdrawn
 [14] \$200,000 from his pension in 1984?
 [15] **A:** The accountants fulfilled their professional duty
 [16] when they made their inquiries of Mr. Shofer in preparing
 [17] the tax return. I believe the testimony talks about the
 [18] preparation of the tax return as it relates to the interest
 [19] expense.
 [20] **Q:** And that is all they had to do?
 [21] **A:** That's correct.
 [22] **Q:** So that if I walked into your firm in the mid-
 [23] 1980's and told you I had withdrawn \$200,000 from my pension
 [24] in 1984, here is the interest deduction to take on it, that
 [25] would have been the end of it as far as you were concerned,

[1] **A:** That is what I testified to then.
 [2] **Q:** Do you still subscribe to that view that that is
 [3] what you would have done?
 [4] **A:** No.
 [5] **Q:** You have changed that, too?
 [6] **A:** I have reviewed all the information, and I do not
 [7] subscribe to that view today.
 [8] **Q:** Okay. Okay, I understand you take the position
 [9] that no accountant in the mid-1980's, 1985, which is the
 [10] year when Mr. Larash sat down to prepare the 1984
 [11] return that no accountant exercising reasonable care would
 [12] have known the proper tax treatment of a loan from a pension
 [13] because this area is so specialized and obscure and
 [14] infrequent." Correct?
 [15] **A:** Correct.
 [16] **Q:** Yet, you would concede that in the mid-1980's,
 [17] most, if not all, accountants would have been familiar with
 [18] the concept of the deferred taxability of monies put into a
 [19] pension?"
 [20] **A:** Correct.
 [21] **Q:** And even the accountants at Greybush would have
 [22] been familiar, or should have been familiar with, that
 [23] concept, correct?
 [24] **A:** Right.
 [25] **Q:** With respect to the 1984 return, none of the

[1] correct?
 [2] **A:** Yes.
 [3] **Q:** And that is because, as you told me at your 1993
 [4] deposition: "You were entitled as a preparer to rely on
 [5] your client's representations," correct?
 [6] **A:** Correct.
 [7] **Q:** Again, back in 1993, I put myself in that
 [8] situation and said if I walked into your firm with a list of
 [9] deductions for you to prepare my return, and I said I want
 [10] you to prepare my return based on whatever I tell you to
 [11] deduct, you said at that time and I am referring to your
 [12] deposition at page 42, you could "pretty much assure me that
 [13] you would ask me why I thought interest on a pension loan
 [14] was deductible," did you not?
 [15] **A:** If that's what is says. I don't have any
 [16] recollection of that.
 [17] **Q:** Are you changing that testimony as well?
 [18] **A:** I'm not saying anything about it. If that's what
 [19] it says, it says.
 [20] **Q:** Well, but again, you do not believe Mr. Larash had
 [21] any such duty with respect to Mr. Shofer in this case?
 [22] **A:** No.
 [23] **Q:** Do you believe well, back in 1993, you thought you
 [24] would have had such a duty if I had come to you as a client,
 [25] correct?

[1] monies which Mr. Shofer had withdrawn from his pension in
 [2] 1984 were treated as taxable income to him by Greybush,
 [3] correct?
 [4] **A:** Correct.
 [5] **Q:** And they should have been, correct?
 [6] **A:** Yes.
 [7] **MS. TRUHE:** That is all I have. Oh, I am sorry.
 [8] I am sorry, Your Honor, one more question.
 [9] **BY MS. TRUHE:**
 [10] **Q:** When an accountant discovers an error on a
 [11] previous year's return, may the accountant go the IRS and
 [12] reveal that?
 [13] **A:** No.
 [14] **MS. TRUHE:** That is all I have.
 [15] **THE COURT:** Anything -
 [16] **MR. TAYLOR:** I just had a couple of questions,
 [17] Your Honor.
 [18] **VOIR CROSS-EXAMINATION**
 [19] **BY MR. TAYLOR:**
 [20] **Q:** Mr. Goldstein, you had testified that the
 [21] accountants at Greybush were correct in advising Mr. Shofer
 [22] that he should amend his return after the discovery of this
 [23] distribution which would be treated as income in 1984. Is
 [24] that correct?
 [25] **A:** Yes.

[1] Q: Are there really any other options that the
 [2] accountants would have to advise Mr. Shofer under those
 [3] circumstances?
 [4] A: No.
 [5] Q: So that the advice contained in the letter of
 [6] February 20, 1987, perfectly meets the standard of care of
 [7] accountants practicing general -
 [8] A: Yes.
 [9] Q: - accounting? You indicated that the TEFRA act
 [10] in 1982 did bring about changes which would affect the
 [11] taxability of loans from pensions. Is that correct?
 [12] A: I believe it did.
 [13] Q: You also indicated, I think, that the pension tax
 [14] law was a somewhat complex and specialized area. Is that
 [15] right?
 [16] A: Yes.
 [17] Q: Would you expect a pension consultant or
 [18] administrator to advise a participant in a plan with regard
 [19] to the taxability of any loans taken from his pension
 [20] account?
 [21] A: Absolutely.
 [22] Q: Did you review as a part of your preparation for
 [23] the expression of opinion Mr. Hack's various depositions in
 [24] this matter?
 [25] A: Yes.

[1] Q: Do you know what Mr. Hack's position was or what
 [2] advice he had given Mr. Shofer with respect to whether or
 [3] not Mr. Shofer should amend his 1984 return?
 [4] MS. TRUHE: Objection, Your Honor. This witness
 [5] has not been offered in the area of what a pension
 [6] consultant should or should not do. I think this is beyond
 [7] the scope.
 [8] THE COURT: That is beyond the scope. I will
 [9] sustain the objection.
 [10] BY MR. TAYLOR:
 [11] Q: In the course of your review of Mr. Hack's
 [12] depositions in preparation for your testimony, do you have
 [13] opinion as to whether or not Mr. Shofer was a client of Mr.
 [14] Hack's or the Stuart Hack Company's?
 [15] MS. TRUHE: Objection.
 [16] THE COURT: Sustained.
 [17] MR. TAYLOR: I do not have any other questions,
 [18] Your Honor.
 [19] THE COURT: Ms. Whelihan?
 [20] MS. WHELIHAN: I have some redirect.
 [21] VOIR DIRE FURTHER REDIRECT EXAMINATION
 [22] BY MS. WHELIHAN:
 [23] Q: Do you have an opinion within a reasonable degree
 [24] of accounting certainty as to whether or not Greybush, as
 [25] accountants, could rely upon other professionals?

[1] A: Yes, I do.
 [2] Q: What is that opinion?
 [3] MS. TRUHE: Objection. At this point, I would
 [4] like to ask rely upon other professionals for what?
 [5] BY MS. WHELIHAN:
 [6] Q: Rely upon other professionals in preparation of
 [7] tax returns?
 [8] A: Yes.
 [9] Q: All right. You were here during Mr. Larash's
 [10] testimony in court, is that right?
 [11] A: Yes.
 [12] Q: What is your understanding as to why Mr. Larash
 [13] did not identify the pension loans as taxable income on the
 [14] 1984 return?
 [15] A: Because loans are not taxable income in the
 [16] ordinary course of business.
 [17] Q: What effect, if any, on your opinion is there if
 [18] you assume what Mr. Larash also testified to, that there was
 [19] also no 1099 generated?
 [20] A: The absence of a 1099, 1099's are typically the
 [21] trigger to record taxable income on a tax return. In the
 [22] absence of one, the first red flag isn't there.
 [23] Q: All right, is it your understanding that Mr.
 [24] Larash had a discussion with Mr. Shofer about whether or not
 [25] he had sought advice from his pension consultant regarding

[1] the loans?
 [2] A: Yes.
 [3] Q: All right. What is your factual understanding of
 [4] those discussions?
 [5] A: It's my recollection of information I've gotten
 [6] from reading these depositions.
 [7] Q: All right. What is your recollection of Mr.
 [8] Larash's discussions with Mr. Shofer about the pension
 [9] loans?
 [10] A: That at some point in those discussions, Mr.
 [11] Shofer mentioned to Mr. Larash that he had a letter from Mr.
 [12] Hack. I don't know if he gave him that letter at that time
 [13] or not. But that letter supported the position that there
 [14] was no tax consequences to borrowing.
 [15] Q: Do you have any understanding whether Mr. Shofer
 [16] knew of the options of amending versus not amending?
 [17] A: I don't unders - I don't buy the fact that there
 [18] are options there.
 [19] Q: Okay.
 [20] A: So I would not tell Mr. Shofer he had options.
 [21] Q: All right, and why is that?
 [22] A: Because to tell him not to amend is to encourage
 [23] him to exploit the audit system of the IRS.
 [24] MS. WHELIHAN: I have no further redirect, Your
 [25] Honor.

[1] THE COURT: Anything further of the witness?

[2] MS. TRUHE: Just a couple more, Your Honor.

[3] VOIR DIRE FURTHER RECROSS EXAMINATION

[4] BY MS. TRUHE:

[5] Q: Mr. Goldstein, you testified that the receipt by
[6] an accountant at Greybush of a 1099 would have been the
[7] first red flag there was some taxable income to Mr. Shofer
[8] when he was withdrawing money from his pension, let's say,
[9] in 1984, correct?

[10] A: Yes.

[11] Q: Would that have been the only red flag?

[12] A: In this particular transaction, probably yes.

[13] Q: Even though the accountants had worked on the
[14] pension ledger and were aware that Mr. Shofer had withdrawn
[15] \$200,000 from his pension in 1984?

[16] A: No, ma'am. My understanding is that they did a
[17] form 990-T, which has nothing to do with those loans.

[18] Q: Is it not true as a matter of evidence, and as
[19] Mr. Larash you testified that you were present during his
[20] testimony did work on the pensions ledger in June, June 17,
[21] to be specific, 1985 and knew at that time that Mr. Shofer
[22] had withdrawn \$200,000 from his pension?

[23] A: I recall Mr. Larash said stating that he provided
[24] some accounting services to the bookkeeper at Mr. Shofer's
[25] place of business. I do not recall him saying that he

[1] borrowed \$200,000. If he did, he did. I mean, I just don't
[2] recall hearing it.

[3] Q: Well, let's assume he did. Would you consider
[4] that another red flag?

[5] A: No.

[6] Q: Is it not also true that Mr. Larash has no idea
[7] when he saw Mr. Hack's August 9 letter?

[8] A: I don't know.

[9] Q: Well, assuming he has no idea when he saw Mr.
[10] Hack's August 9 letter, how in the world could he be relying
[11] on it for any purpose in preparing the 1984 tax return?

[12] A: I didn't say that, I didn't testify, I don't
[13] believe I testified that he relied on the letter. I believe
[14] I testified that Mr. Shofer told him about the letter. I
[15] don't know when he got the letter.

[16] Q: Do you know for a fact that Mr. Shofer told Mr.
[17] Larash about the letter in 1985 when Mr. Larash went to
[18] prepare the 1984 return?

[19] A: Sitting here now, Ms. Truhe, I don't recall where
[20] I read it in the deposition.

[21] Q: Well, assuming he did not tell Mr. Larash about
[22] any letter from Mr. Hack, do you believe Mr. Larash had a
[23] right to rely on Mr. Shofer for anything else?

[24] A: Yes, I do. I've testified to that.

[25] MS. TRUHE: I have no further questions.

[1] THE COURT: Anything else for the witness?

[2] MR. TAYLOR: Just to ask two quick questions, Your
[3] Honor.

[4] VOIR DIRE RECROSS

[5] BY MR. TAYLOR:

[6] Q: Mr. Goldstein, on a pension loan which constitutes
[7] an income distribution, who would typically prepare a 1099
[8] form to be included in the tax return?

[9] A: Whoever's doing the administration of the pension
[10] plan.

[11] Q: That would be the pension administrator?

[12] A: Yes.

[13] Q: You also indicated that advice to not file an
[14] amended file would encourage the taxpayer to exploit the
[15] audit system of the Internal Revenue Service. What did you
[16] mean by that?

[17] A: That in practicing before the IRS, you are
[18] prohibited from providing advice to people to not report
[19] income or underpay tax in reliance upon weaknesses in the
[20] audit system. Particularly, that is, you know, the sampling
[21] process.

[22] Q: Would that violate the standard of care expected
[23] of accountants?

[24] A: Yes.

[25] MR. TAYLOR: The Court's indulgence. I have no

[1] other questions, Your Honor.

[2] THE COURT: Are there any further questions of the
[3] witness?

[4] MS. TRUHE: Just one, Your Honor.

[5] VOIR DIRE FURTHER RECROSS EXAMINATION
[6] BY MS. TRUHE:

[7] Q: Mr. Goldstein, do you have any knowledge or
[8] awareness of the Supreme Court rulings on this issue of
[9] whether a taxpayer has a duty to amend a return to correct a
[10] previous error?

[11] A: No.

[12] MS. TRUHE: That is all I have.

[13] THE COURT: Anything else?

[14] MS. WHELIHAN: Just some limited redirect.

[15] VOIR DIRE FURTHER REDIRECT EXAMINATION
[16] BY MS. WHELIHAN:

[17] Q: Whose duty is it to amend the tax returns?

[18] A: The taxpayer.

[19] Q: Do you have any understanding as to whether or not
[20] Mr. Larash and Mr. Shofer discussed the pension loans in
[21] 1985 in preparation for preparing Mr. Shofer's 1985 tax
[22] return?

[23] MS. TRUHE: 1985?

[24] THE WITNESS: 1985?

[25] MS. WHELIHAN: I am sorry, I am sorry; strike the

[1] question.

[2] **BY MS. WHELIHAN:**

[3] **Q:** Do you have any understanding at all of what
[4] discussions occurred between Mr. Larash and Mr. Shofer when
[5] Mr. Larash was preparing the 1984 tax return in July of
[6] 1985?

[7] **A:** No, just about the interest expense.

[8] **Q:** Okay.

[9] (Discussion off the record.)

[10] **MS. WHELIHAN:** All right, I have no further
[11] questions, Your Honor.

[12] **MS. TRUHE:** Just one based on one of the questions
[13] Ms. Whelihan just asked.

[14] **VOIR DIRE FURTHER RECROSS EXAMINATION**

[15] **BY MS. TRUHE:**

[16] **Q:** Mr. Goldstein, do you have any legal authority on
[17] which you are relying for your statement just now that a
[18] taxpayer has a legal duty to amend a tax return to correct a
[19] previous error not committed out of fraud?

[20] **A:** I didn't say that.

[21] **Q:** I thought you just did, that in response to Ms. -

[22] **A:** Legal duty?

[23] **MS. WHELIHAN:** No. I asked whose duty it was -

[24] **THE WITNESS:** She asked me whose duty it was -

[25] **MS. WHELIHAN:** - to amend tax returns, not if he

[1] had one.

[2] **BY MS. TRUHE:**

[3] **Q:** What kind of duty is that, then, if not, let me
[4] ask you. When you say a taxpayer has a duty to amend a tax
[5] return to correct an error not committed out of fraud, are
[6] you saying that is a legal duty?

[7] **A:** As I understand it, it is a duty -

[8] **Q:** What kind of duty?

[9] **A:** - of the taxpayer, to properly record his income
[10] to the Internal Revenue Service.

[11] **Q:** Is he legally required to do that?

[12] **A:** From what I understand from this case, no.

[13] **Q:** Thank you, that is all I have.

[14] **A:** 'Cause it surprised me.

[15] **Q:** Thank you.

[16] **THE COURT:** Is there anything further of the
[17] witness. Hearing none, Mr. Goldstein, thank you. You are
[18] excused.

[19] (The witness was excused.)

[20] **MS. WHELIHAN:** Can we take a brief break, Your
[21] Honor?

[22] **THE COURT:** How long?

[23] **MS. WHELIHAN:** Three minutes.

[24] **THE COURT:** Yes. Well, tell me, are you going to
[25] be calling another witness?

[1] **MS. WHELIHAN:** I am just going to call Mr. Larash

[2] for five seconds.

[3] **THE COURT:** We will take a few minutes.

[4] (Brief recess.)

[5] **KENNETH LARASH,**

[6] a witness produced on call of the Defense, having first been
[7] duly sworn, was recalled to the stand and testified further
[8] as follows:

[9] **THE CLERK:** Sir, would you state your name and
[10] address again for the record, please?

[11] **THE WITNESS:** Kenneth E. Larash, 311 Wickersham
[12] Way, Cockeysville, Maryland.

[13] **THE CLERK:** I would like to remind you you are
[14] still under oath.

[15] **DIRECT EXAMINATION**

[16] **BY MS. WHELIHAN:**

[17] **Q:** Mr. Larash, was Mr. Shofer aware that he had the
[18] option of not amending his 1984 return?

[19] **A:** Yes, he was.

[20] **Q:** How do you know that?

[21] **A:** I know that through the various meetings and
[22] discussions that occurred from the point in time where we
[23] originally had our meeting in November of '86 with Alan
[24] Marvel, myself, and Richard Shofer, plus the various other
[25] meetings and discussions we had up until the date the

[1] returns were actually, excuse me, the amended returns were
[2] actually filed in December of '87 that the various options
[3] were discussed.

[4] **Q:** All right.

[5] **MS. WHELIHAN:** I have no further questions.

[6] **THE COURT:** Do you have questions?

[7] **MS. TRUHE:** Yes, Your Honor.

[8] **CROSS-EXAMINATION**

[9] **BY MS. TRUHE:**

[10] **Q:** Mr. Larash, you realize today you are under oath,
[11] correct?

[12] **A:** Yes.

[13] **Q:** Did you realize when your deposition was taken on
[14] August 2, 1990, by me at my office that you were also under
[15] oath?

[16] **A:** (No audible response.)

[17] **Q:** Your testimony back in 1990 was very different
[18] from your testimony just now, and I would like to read to
[19] you from page 90, beginning at line 20 -

[20] **MS. WHELIHAN:** Well, Your Honor, I would object to
[21] the form of the question because I do not think that that is
[22] true.

[23] **THE COURT:** I cannot hear you.

[24] **MS. WHELIHAN:** I would object to the form of the
[25] question because I think it is inappropriate to characterize

[1] his testimony as being different, and I do not think that is
[2] supported -

[3] **THE COURT:** Why do you not just read him his
[4] testimony and ask him -

[5] **MS. TRUHE:** All right.

[6] **THE COURT:** - if it was accurate?

[7] **BY MS. TRUHE:**

[8] **Q:** Mr. Larash, beginning at line 20: "Did you ever
[9] tell Mr. Shofer anything along the lines of well, you should
[10] amend your tax return, you are under no legal duty to do so.

[11] Did you ever tell him anything like that?" Answer: "I
[12] can't honestly say I did. I don't remember." Question:

[13] "All right. To your knowledge, did Mr. Marvel ever tell him
[14] anything like that?" Answer: "I don't know." Does that
[15] refresh your recollection?

[16] **A:** I said that then, yes.

[17] **Q:** Are you saying something different now, that
[18] indeed someone - you, Mr. Marvel, or someone else at
[19] Greybush Newman told Mr. Shofer that he had the legal option
[20] not to amend his tax returns?

[21] **A:** I'm saying that in my previous testimony, which
[22] was on Monday, I referred to specifically a meeting with Stu
[23] Hack which Richard Shofer attended, Alan Marvel attended,
[24] and I attended. And in that meeting, the issue was
[25] definitely brought up about not amending his '84 return.

[1] And that's really the the documentation I can rely on.

[2] **Q:** Who brought it up at that meeting?

[3] **A:** That was initially brought up by Stu Hack.

[4] **Q:** My question to you again did you, Mr. Marvel, or
[5] anyone else at Greybush advise Mr. Shofer that he was under
[6] no legal duty to amend his 1984 tax return to correct the
[7] error?

[8] **A:** I can't answer that because I wouldn't have worded
[9] it that way. I wouldn't have said you have no legal duty.

[10] **Q:** Well, what did you tell Mr. Shofer on that issue,
[11] if anything?

[12] **A:** Just that there were a variety of options
[13] in general, you know, that he could follow. And that
[14] Greybush Newman was going to recommend that he amend his
[15] returns.

[16] **Q:** Well again, I am going to read your testimony
[17] beginning at line 20: "Did you ever tell Mr. Shofer
[18] anything along the lines of well, you should amend your tax
[19] return, you are under no legal duty to do so. Did you ever
[20] tell him anything like that?" Answer: "I can't honestly
[21] say I did. I don't remember." Mr. Larash, are you changing
[22] that testimony -

[23] **MS. WHELIHAN:** Objection, Your Honor. Ms. Truhe
[24] is asking this witness a different question. She is asking
[25] this witness whether or not he told Mr. Shofer he was under

[1] no legal duty to amend. That is not what the witness'
[2] testimony at pages 89 through 90 of his deposition. What he
[3] says, what he has consistently said both in his deposition
[4] and on the witness stand is that the issue was discussed,
[5] but that Greybush recommended that he had a legal duty to
[6] amend. She is trying to impeach him with testimony that
[7] says exactly that, that Greybush told him that he was under
[8] a legal duty to amend, but that the issue of whether he
[9] should amend was debated.

[10] **MS. TRUHE:** Counsel, that is a flat out
[11] misrepresentation of the deposition testimony. It says -

[12] **MS. WHELIHAN:** Well, let me just -

[13] **MS. TRUHE:** - exactly the opposite.

[14] **MS. WHELIHAN:** Well, let me just read the

[15] deposition testimony so that we are absolutely crystal-
[16] clear. "By the way" this is a question by Ms. Truhe at page
[17] 89 of the deposition -

[18] **MS. TRUHE:** No. I am on page 90.

[19] **MS. WHELIHAN:** I am going to get to that.

[20] **MS. TRUHE:** Okay.

[21] **MS. WHELIHAN:** We are going to read the whole
[22] thing together. "By the way, let me ask you one other
[23] question in connection with that. Who was it who decided
[24] either at Greybush or anywhere else that Mr. Shofer should
[25] amend his 1984 return." Then Ms. Shude objects. Then Janet

[1] asked the question again, I mean, Ms. Truhe asked the
[2] question again. "No, who decided that Mr. Shofer should be
[3] advised to amend his 1984 return?" The answer is: "It was
[4] a combination of Alan Marvel and myself."

[5] **Question:** "So you and Mr. Marvel decided that you
[6] should advise Mr. Shofer to amend his 1984 return in this
[7] regard. Is that correct?" Answer: "Yes." Question: "All
[8] right, did anyone else assist you or otherwise participate
[9] in that particular decision-making?" Answer: "It was
[10] discussed at various times in conjunction with how much
[11] income would have to be reported on those prior years
[12] because that also presumed in order to report it, you would
[13] have to amend the return.

[14] "So we would have discussed it prior to this
[15] letter with Shofer, with Nick Giampietro, perhaps with Stu
[16] Hack. I am not sure on that." And then the question that
[17] Janet is asking and attempting to impeach this witness with
[18] is: "Did you, and for now, I will just confine my question
[19] to you personally. Did you ever advise Mr. Shofer that he
[20] was under no legal duty to amend his 1984 return?" And then
[21] Janet goes on and re-asks the question: "No, I'm not
[22] necessarily saying that one way or another.

[23] "I'm just asking whether he ever told Mr. Shofer
[24] anything to the effect that I guess, you'll have to assume
[25] for the purpose of my question that there was no legal duty

[1] to amend the tax return. But did you ever tell Mr. Shofer
[2] anything along the lines of well, you should amend your tax
[3] return, you are under no legal duty to do so. Did you ever
[4] tell him anything like that?" Answer: "I can't honestly
[5] say I did. I don't remember."

[6] **MS. TRUHE:** Exactly, which was my point.

[7] **MS. WHELIHAN:** No, it was -

[8] **MS. TRUHE:** It was exactly my point, did anyone at
[9] Greybush -

[10] **THE COURT:** I have heard the witness' testimony,
[11] and I have heard the transcript testimony. So I think I
[12] understand.

[13] **MS. TRUHE:** Thank you, Your Honor. No further
[14] questions.

[15] **THE COURT:** Anything else of the witness?

[16] **MR. TAYLOR:** I have a couple.

[17] **THE COURT:** All right.

[18] **CROSS-EXAMINATION**

[19] **BY MR. TAYLOR:**

[20] **Q:** Mr. Larash, you mentioned the meeting with Stuart
[21] Hack in 1987 that you, Alan Marvel, and Mr. Shofer attended
[22] with Mr. Hack. Is that correct?

[23] **A:** That's correct.

[24] **Q:** Did Mr. Hack express advice to Mr. Shofer with
[25] respect to amending or not amending the 1984 tax returns?

[1] **A:** Yes. I believe I just said that his advice was to
[2] not amend.

[3] **Q:** Was that issue thoroughly discussed at that
[4] meeting as to the pros and cons of amending or not amending
[5] the return?

[6] **A:** I think the discussions really went on because
[7] we it was all part of the research that was being done and
[8] we, I mean Alan Marvel, Nick Giampietro, et cetera. So I
[9] can't say that everything was thoroughly discussed and that
[10] a decision had been made at that point.

[11] **Q:** The underlying issue was whether or not the loans
[12] themselves were taxable. Was that not the principal reason
[13] why you were at the meeting?

[14] **A:** Yes.

[15] **MR. TAYLOR:** I have no other questions.

[16] **MS. TRUHE:** Just a few, Your Honor.

[17] **RE-CROSS-EXAMINATION**

[18] **BY MS. TRUHE:**

[19] **Q:** Mr. Larash, you would agree, would you not, that
[20] at no time during the events in this case was Mr. Hack
[21] acting as Mr. Shofer's accountant, correct?

[22] **A:** That's correct.

[23] **Q:** All right, and that Mr. Hack had no duty one way
[24] or another with respect to the preparation of Mr. Shofer's
[25] 1984, 1985, or amended 1984 and 1985, tax returns, correct?

[1] **A:** Correct.

[2] **Q:** Sitting here today, is it your recollection or
[3] actually, tell me whether you recall, whether you, Mr.
[4] Marvel, or anyone at Greybush ever advised Mr. Shofer that
[5] he was under no legal duty to amend his tax return?

[6] **A:** I can only repeat what I just previously said. I
[7] would not have used the - what did you just say, legal
[8] duty. I would not have used that term.

[9] **Q:** So Mr. Shofer was unaware, after that meeting or
[10] any other you had with him on that subject, that he had the
[11] option of legally not amending his tax return, correct?

[12] **MS. WHELIHAN:** Objection. That is completely
[13] contrary to what his testimony was and not, as she is
[14] implying, the opposite of what he just said.

[15] **THE COURT:** Well, I do not know how this witness
[16] would know what Mr. Shofer was aware of. If the question is
[17] was he made aware at that meeting, it might be a different
[18] question.

[19] **MS. TRUHE:** All right.

[20] **BY MR. TAYLOR:**

[21] **Q:** To your knowledge, Mr. Larash, was Mr. Shofer made
[22] aware at that meeting by anyone at Greybush that he had no
[23] legal duty to amend his tax return?

[24] **A:** Again, I can't, comment on having said anything
[25] about legal duty. I don't recognize having used that term

[1] in that meeting or anywhere else.

[2] **Q:** Well, if you do not recognize that term, is it
[3] fair to assume you never would have used it?

[4] **A:** That's right.

[5] **MS. TRUHE:** I have no further questions.

[6] **THE COURT:** Is there anything further of the
[7] witness?

[8] **MR. TAYLOR:** No.

[9] **THE COURT:** Okay, thank you.

[10] (Discussion off the record.)

[11] **THE COURT:** Thank you, Mr. Larash.

[12] (The witness was excused.)

[13] **THE COURT:** Is there anything further from the
[14] Third-Party Defendant?

[15] **MS. WHELIHAN:** The only thing I would like to do,
[16] Your Honor, is I would like to introduce a couple of pages
[17] from Mr. Larash's deposition testimony. It is the
[18] deposition testimony that I read into the record earlier in
[19] response to Ms. Truhe's cross of Mr. Larash -

[20] **THE COURT:** Just now?

[21] **MS. WHELIHAN:** The first time and the second
[22] time - pages 46 to 49, and also pages 89 to 91.

[23] **THE COURT:** 89 to what?

[24] **MS. WHELIHAN:** 89 to 91.

[25] **MS. TRUHE:** Well, she did not read 46 to - what

[1] was it?

[2] **MS. WHELIHAN:** Yes, 46 to 49 is what I read the

[3] first time when we were going through whether or not Mr.

[4] Larash had spoken to Mr. Shofer about the pension loans.

[5] That was the first time Mr. Larash testified in Mr. Taylor's

[6] case, I read as a prior consistent statement pages 46 to 49.

[7] And then, today I read pages 89 to 91. So what I would like

[8] to do is introduce those deposition pages from Mr. Larash's

[9] deposition into the record, as I am allowed to do under

[10] 2-412.

[11] **MS. TRUHE:** Your Honor, I have no objection. But

[12] if Ms. Whelihan is going to introduce those early pages -

[13] what was it, 4 -

[14] **MS. WHELIHAN:** 46 to 49.

[15] **MS. TRUHE:** - and, again, this goes back to a

[16] couple of day ago, some deposition testimony you read?

[17] **MS. WHELIHAN:** Right.

[18] **MS. TRUHE:** Forty-what to what?

[19] **MS. WHELIHAN:** 46 to 49.

[20] **MS. TRUHE:** All right, let me find those.

[21] **THE COURT:** Do you want your current designations?

[22] Madam Clerk, what exhibit numbers would these be for the

[23] Third-Party Defendant?

[24] **THE CLERK:** Exhibit 4.

[25] **THE COURT:** Okay. I will admit those. Ms. Truhe,

[1] if you want to make counter-designations -

[2] (Third-Party Defendant's Exhibit No. 4,

[3] pages 46-49 of Larash deposition, was

[4] marked for identification and received

[5] in evidence.)

[6] **MS. WHELIHAN:** Your Honor, do you want me to mark

[7] as an exhibit also the AICPA blurb that I gave you as -

[8] **THE COURT:** If you want to submit it.

[9] **MS. WHELIHAN:** Sure. Let's mark that as

[10] number 5. **THE COURT:** I do not have it any longer, do

[11] you? I gave it back to you -

[12] **MS. WHELIHAN:** Oh, I am sorry.

[13] **THE COURT:** - at lunch time.

[14] **MS. WHELIHAN:** I have an extra copy. Let's mark

[15] this then as Exhibit 5.

[16] **THE COURT:** Is there any objection to that, Ms.

[17] Truhe?

[18] **MS. TRUHE:** None at all, Your Honor.

[19] (Third-Party Defendant's Exhibit

[20] No. 5, pages 89-91 of Larash

[21] deposition, was marked for

[22] identification and received in

[23] evidence.)

[24] **MS. TRUHE:** In terms of a fairness designation of

[25] Mr. Larash's deposition testimony, again, I have no

[1] objection to the excerpts which Ms. Whelihan has introduced

[2] and have been admitted. I would just to add to that

[3] pages 43 and 44 as well of Mr. Larash's testimony. I do

[4] not, however, have another copy, but I think I can get one

[5] from someone else. So I will give you my pages.

[6] **MS. WHELIHAN:** I have extras; I will give you one.

[7] **THE COURT:** That would be Defendant's what -

[8] **MS. TRUHE:** 41?

[9] **THE COURT:** - 41?

[10] **THE CLERK:** Defendant's 41.

[11] **MS. TRUHE:** 41.

[12] **THE COURT:** All right, so that is admitted.

[13] (Defendant's Exhibit No. 41, pages 43-44

[14] of Larash deposition, was marked for

[15] identification and received in

[16] evidence.)

[17] **THE COURT:** Is the Third-Party Defendant resting

[18] then, Ms. Whelihan?

[19] **MS. WHELIHAN:** I am.

[20] **THE COURT:** Okay. Is there going to be rebuttal

[21] testimony?

[22] **MR. TAYLOR:** Your Honor, I had earlier

[23] contemplated some rebuttal, but this is the situation. The

[24] Court may recall I mentioned that we had issued a subpoena

[25] for Barry Berman to authenticate a letter which he wrote to

[1] Mr. Shofer. I have talked with Ms. Truhe recently, and she

[2] has agreed to stipulation to the admission of that letter.

[3] I had some conversation with Mr. Berman's attorney earlier,

[4] and we had tentatively made arrangements for him to be here

[5] in the morning since I thought we might be going over to

[6] tomorrow. The only problem I have, Your Honor, is the

[7] original of that letter is in Mr. Shofer's possession. He

[8] did not bring that with him, and I do not have a copy here,

[9] and I would like to - .

[10] **THE COURT:** You can submit it.

[11] **MR. TAYLOR:** Could I just submit that?

[12] **THE COURT:** Yes. What Plaintiff's Exhibit would

[13] that be?

[14] **MR. TAYLOR:** Is that 39, the next Plaintiff's

[15] exhibit?

[16] **THE CLERK:** 40.

[17] **MR. TAYLOR:** 40.

[18] **THE COURT:** Okay, and that is coming in by

[19] stipulation?

[20] **MS. TRUHE:** Yes, Your Honor.

[21] **THE COURT:** It is admitted.

[22] (Plaintiff's Exhibit No. 40, Berman

[23] letter to Shofer, was marked for

[24] identification and was received in

[25] evidence.)

[1] **THE COURT:** And that would be the rebuttal case?
 [2] **MR. TAYLOR:** That would be the rebuttal case, Your
 [3] Honor. Thank you.
 [4] **MS. TRUHE:** Your Honor, I have one more
 [5] housekeeping matter. I have been informed by the Clerk that
 [6] I neglected to move for the admission into evidence
 [7] Defendant's Exhibit Number 3, which is the 1982 letter which
 [8] Mr. Shofer wrote to Barry Blomberg at the Maryland National
 [9] Bank concerning the financing of the company's receivables,
 [10] and tax consequences, and that type of thing.
 [11] **THE COURT:** Is there any objection to that?
 [12] **MR. TAYLOR:** There is no objection, Your Honor.
 [13] **THE COURT:** It is admitted.
 [14] **MS. TRUHE:** Thank you.
 [15] (Defendant's Exhibit No. 3, Shofer 1982
 [16] letter to Blomberg, previously marked
 [17] for identification, was received in
 [18] evidence.)
 [19] **THE COURT:** Okay. So I guess the question is
 [20] where are we? We are at the end of the evidence. That is
 [21] clear.
 [22] **MS. WHELIHAN:** Do you want us to file written
 [23] motions for judgment that you can consider along with the
 [24] proposed findings of fact?
 [25] **THE COURT:** Well, it seems to me we can do a

This is to certify that the proceedings in the matter of Shofer v. Hack, et al., heard on July 2, 1997, were recorded by means of videotape.

I do hereby certify that the foregoing pages constitute the official transcript of said videotaped proceedings to the best of my ability in a complete and accurate manner.

In Witness Whereof, I have hereunto subscribed my name this 24th day of March 1998.

Connie Jones
Transcriber

[1] couple of things. Let's talk about them. Maybe we will go
 [2] off the record and come back on.
 [3] (Discussion off the record.)
 [4] (The trial was recessed at 5:22 p.m.)
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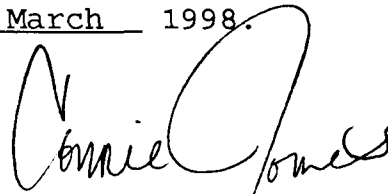
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Transcriber

12/97D

DEPARTMENT OF PROBATION AND PAROLE
COMMUNITY CONTROL DIVISION
FELONY SERVICES SECTION

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

RICHARD SHOFER,

Plaintiff,

v. Case No. 88102069/CL79993

STUART HACK, et al.,

Defendants.

----- X

OFFICIAL TRANSCRIPT OF PROCEEDINGS

Baltimore, Maryland

August 8 1997

BEFORE:

HONORABLE JUDGE MATRICCIANI

APPEARANCES:

For the Plaintiff:

DOUGLAS TAYLOR, ESQUIRE

For Defendants, Stuart Hack and the

Stuart Hack Company:

JANET TRUHE, ESQUIRE

For the Defendant, Greybush Newman:

DEBORAH WHELIHAN, ESQUIRE

JOHN MAY, ESQUIRE

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CIRCUIT COURT FOR
BALTIMORE CITY

[1] purpose of our being here today was to allow us to have
[2] opportunity to argue or comment on submissions that Counsel
[3] has in fact made prior to this point. The format, or the
[4] form, of our closing argument was really submitted to Your
[5] Honor in the form of proposed findings of fact and
[6] conclusions of law.

[7] I note that Ms. Truhe and Ms. Whelihan submitted
[8] actual closing arguments. But I wanted to have the
[9] opportunity to comment on the points that were raised in the
[10] closing arguments. I have done that in written form. I
[11] would be happy to, as I say, in lieu of taking time now to
[12] argue these points or to at least orally express them, to
[13] simply submit them in written form. I have given -

[14] **THE COURT:** However you want to proceed, Mr.
[15] Taylor. This is your opportunity to hit or emphasize
[16] anything that you bring to the Court's attention,
[17] particularly before I make my final decision in the case.
[18] If you want to do it in writing or orally, it is entirely up
[19] to you.

[20] **MR. TAYLOR:** Well, as I say, I have prepared a
[21] written rebuttal. I would be happy to submit that with the
[22] only proviso that if Ms. Truhe or Ms. Whelihan make
[23] arguments today, that I might just have a few minutes to
[24] make comments on anything they happen to say.

[25] **THE COURT:** Sure. Ms. Truhe, do you wish to be

PROCEEDINGS

[1] (These proceedings commenced at 3:21 p.m.)
[2] **THE COURT:** Okay, for the record, Counsel are here
[3] in the matter of Shofer v. Hack for the purposes of sort of
[4] wrapping things up after a bench trial which was concluded,
[5] when did we conclude this?

[6] **MR. TAYLOR:** July 2, I believe, Your Honor.

[7] **THE COURT:** July 2 or August 2 - July 2. Was it
[8] that long ago?

[9] **MR. TAYLOR:** Well, it does not seem that long.

[10] **MS. TRUHE:** Yes, Your Honor.

[11] **THE COURT:** Yes, okay. In any event, I had asked
[12] Counsel to make submissions after trial, and they did. We
[13] are here today to hear from them. Before you begin, there
[14] was just one matter. That was on Plaintiff's motion to
[15] reconsider my order excluding evidence. I have ruled on
[16] that, and I have denied the motion. As a matter of fact, I
[17] am going to make that order a part of the record, okay.
[18] Otherwise, I am prepared to hear from Counsel. Mr. Taylor,
[19] do you want to proceed?

[20] **MR. TAYLOR:** Well, Your Honor, I had, prior to
[21] beginning court today, advised Ms. Truhe that in lieu of
[22] making an oral rebuttal to her closing argument, I had put
[23] together a written summation of the points that I would
[24] address, I think, at this point. It seemed to me that the

[1] heard?

[2] **MS. TRUHE:** Yes, Your Honor.

CLOSING ARGUMENT OF DEFENDANT HACK

[3] **MS. TRUHE:** The two counts remaining in the
[4] Plaintiff's fourth amended complaint are for negligence and
[5] breach of contract. I would like to address the breach of
[6] contract count first, which is Count 2. Your Honor, we
[7] believe this must be dismissed because there was simply no
[8] evidence produced at trial of any contractual relationship
[9] between the Plaintiff and the Defendants. On cross-
[10] examination, Mr. Shofer conceded that he personally was
[11] never a client of Mr. Hack's firm, and that their contact
[12] was no more than about once a year.

[13] It is interesting, in Plaintiff's memorandum
[14] regarding the duty owed and the applicable standard of care,
[15] the Plaintiff states on page 2 that there was a close
[16] working relationship developed over a period of years. I
[17] believe that is a gross overstatement of what the testimony
[18] in this case was. I think the bottom line is that Mr. Hack
[19] did not owe any broader duty to Mr. Shofer, either from a
[20] contract or a tort standpoint, than to simply answer the
[21] question which he posed to Mr. Hack and to answer it
[22] correctly.

[23] **THE COURT:** But did Mr. Shofer stand, at least as
[24] a third-party beneficiary, to any contractual relationship
[25]

[1] that existed between your client and the Catalina trust?
[2] **MS. TRUHE:** I do not believe he did, because
[3] otherwise, that would render every participant in the plan
[4] somehow a client of Mr. Hack's firm. I think they were
[5] owed, if another participant had called Mr. Hack up and
[6] asked a question about the legality of doing something with
[7] respect to a pension transaction, I think he owes them a
[8] duty to answer that question correctly on behalf of the
[9] pension because the pension is itself a client of the firm
[10] and its participants are entitled to correct advice and
[11] information with respect to the pension.

[12] But I do not think that renders everybody
[13] automatically a client of the firm. Indeed, Mr. -
[14] **THE COURT:** Well, I was not suggesting that -
[15] excuse me. Ms. Whelihan, we only began a few moments ago.

[16] **MS. WHELIHAN:** I know. I am sorry. I have got -

[17] **THE COURT:** Okay. I was not suggesting that it
[18] raised him to the level of privity, but that the
[19] participants in the plan, and in this case, there was only
[20] one, right?

[21] **MS. TRUHE:** No, there were many; all the employees
[22] of Catalina Enterprises were participants.

[23] **THE COURT:** Well, but the participants are third-
[24] party beneficiaries of that agreement, are they not, to the
[25] extent that if their pension funds were jeopardized by the

[1] administrator, he owes them a duty not to do that, does he
[2] not?

[3] **MS. TRUHE:** Well, it gets into an interesting
[4] question of standing. Here, the only party is Mr. Shofer,
[5] not the pension. The pension has not sued Mr. Hack for any
[6] wrong done to the pension.

[7] **THE COURT:** I understand.

[8] **MS. TRUHE:** And I do not think, with reference to
[9] any question which a participant might pose to Mr. Hack, or
[10] whether you are going to read into Mr. Hack's responsibility
[11] towards the pension's participants areas of advice other
[12] than what Mr. Hack has been contractually bound to do for
[13] the pension, I think it becomes an issue of what did the
[14] participant ask and what can reasonably be expected of Mr.
[15] Hack in terms of deciding even whether they are a third-
[16] party beneficiary.

[17] In this particular case, if you get specific, Mr.
[18] Shofer is looking for personal tax advice. I do not think
[19] Mr. Hack signed on for that with respect to any participant
[20] in advising them about the legality of -

[21] **THE COURT:** I was taking you away from the facts a
[22] bit. But I mean, at least theoretically, the administrator
[23] in this case did not play the role of investing the monies,
[24] is that correct?

[25] **MS. TRUHE:** When you say administrator, you are

[1] talking about Mr. Shofer?

[2] **THE COURT:** Yes.

[3] **MS. TRUHE:** No, he did not. He did not render any
[4] investment advice for a fee or anything like that. And I
[5] think whether they are third-party beneficiaries of any
[6] agreement between Mr. Hack, his company, and the pension,
[7] would, I think, relate to, or necessarily have to turn on,
[8] by nature of the inquiry from the participant. I do not
[9] think Mr. Hack was an all-purpose advisor to any participant
[10] of the plan simply by virtue of his contractual relationship
[11] with the plan. Again, I think it turns on what the nature
[12] of the inquiry was.

[13] **THE COURT:** If there were an inquiry from the plan
[14] trustee to the plan consultant which resulted in the loss of
[15] a substantial portion of the pension monies, these are not
[16] the facts of this case would they not be third-party
[17] beneficiaries of that transaction?

[18] **MS. TRUHE:** If it were advice from Mr. Hack to Mr.
[19] Shofer about what to do with plan assets, then, I believe,
[20] there would be. That is a much more direct link. That is
[21] something which Mr. Hack would have been contractually
[22] obligated to do for the pension so that anyone who suffers
[23] damages as a result of that, including the pension itself, I
[24] think that is a much closer relationship than simply a
[25] participant, for example, in this case, calling up and

[1] saying I am going to borrow from my pension. And then Mr.
[2] Hack somehow taking it upon himself in the absence of a
[3] specific request to say oh, you need to worry about tax
[4] consequences; you need to worry about these kinds of
[5] consequences or those kinds of consequences. I think that
[6] gets a lot broader. Even outside the duty of what Mr. Hack
[7] owes to the pension in the first instance, I do not think he
[8] owes tax advice in his whole relationship or course of
[9] dealings with the pension and its participants and its
[10] trustee.

[11] **THE COURT:** Where is the Court to go to ascertain
[12] the scope of any duty, if any?

[13] **MS. TRUHE:** That is a huge problem and brings up,
[14] really, the point of this case. Where do you go? Where is
[15] the evidence? Because that is the heart of this case. The
[16] issue which the Court has to decide is whether, when Mr.
[17] Shofer called Mr. Hack up in August of 1984 and said can I
[18] borrow from my pension, whether Mr. Hack's failure to
[19] identify or at least raise with Mr. Shofer the possibility
[20] of a tax implication has got to come from somewhere. Where
[21] would it come from?

[22] Well, there is no written contract that says Mr.
[23] Hack has a duty to give this kind of advice. There was no
[24] verbal request on the part of Mr. Shofer for it. Do other
[25] professionals do it? Well, if you look at the evidence in

[1] the case, what did Mr. Burroughs and what did Mr. Kabala say
[2] other pension consultants in the position of Mr. Hack would
[3] have done? Well, if you look at, first of all, the
[4] Plaintiff's own expert, Edward Kabala, he had admitted at
[5] deposition and at trial that if a participant in a pension
[6] called him and the pension was a client of the firm but that
[7] participant himself personally was not, he would not give
[8] that tax advice.

[9] Of course, he thinks, frankly, that a pension
[10] lawyer and a pension consultant are one and the same. But
[11] even with a higher standard, he says he himself would not
[12] have done that. I think it is a critical admission on the
[13] part of Mr. Kabala because that is exactly the situation we
[14] have got here. Mr. Shofer is not personally a client of Mr.
[15] Hack's firm; only the pension. He is calling up and posing
[16] the kind of question which I posed to Mr. Kabala at his
[17] deposition. Mr. Kabala, the Plaintiff's own expert, says
[18] no, that is not within the scope of what I would have done
[19] in that type of situation if I had gotten an inquiry from a
[20] participant who was not a client.

[21] **THE COURT:** Does your client's duty, if he has
[22] one, become expanded, or is he - let me see how to
[23] articulate this. Well, let me ask that question first. Is
[24] his duty, if any, expanded when the Plaintiff asks for a
[25] letter as followup to the inquiry?

[1] **MS. TRUHE:** Well, but the letter that he asked for
[2] was simply a memorialization of the question and the answer
[3] he had received. It was not any broader. He did not say
[4] okay, you have told me I can borrow from my pension; now I
[5] want a general opinion letter as to all the aspects of that.
[6] He simply said oh, I can borrow from my pension; I can
[7] borrow up to 100 percent? Mr. Hack, would you put that in a
[8] letter to me? Again, you get a very -

[9] **THE COURT:** Did your client not volunteer that he
[10] would verify that with Mr. Berman?

[11] **MS. TRUHE:** He did not actually tell Mr. Shofer in
[12] the conversation that he was going to run that by somebody
[13] else. He told Mr. Shofer this is what he thought, and then
[14] Mr. Hack, on his own, called Mr. Berman up. Mr. Berman said
[15] that is correct advice; you can borrow up to 100 percent
[16] from your pension. So at that point, Mr. Hack testified
[17] that he was confident that he had given the right answer. I
[18] do not believe he ever testified that he told Mr. Shofer
[19] that he in fact had checked it out with someone else.

[20] He knew he had given the right advice, and he did
[21] not go beyond that or say I checked it out with other
[22] people. But again, that was the limited question asked,
[23] that was the limited answer given. Then he was simply asked
[24] to put that in writing; no more, no less. Again, what the
[25] Court has to wrestle with in this case is whether Mr. Hack's

[1] failure to do any more than that was negligence. Now
[2] Defendants' expert, Ed Burroughs, said absolutely not.

[3] I think his credentials in the field speak for
[4] themselves, and I believe his testimony that he gave during
[5] the course of this trial is worthy of substantial weight.
[6] He is actually a pension consultant in the trenches doing
[7] what Mr. Hack does day in and day out. He says it is an
[8] area you just do not go into, period; not even a little bit.
[9] I had asked Mr. Burroughs the question would it not have
[10] been a good idea, and his response was along the lines of it
[11] is a slippery slope. Because the moment you give a little,
[12] how far do you go after that because it is almost too
[13] dangerous to give a little bit because you can be accused of
[14] not giving enough, so you do not go there at all.

[15] **THE COURT:** I appreciate that, but how does one
[16] deal in pensions and draw that line? You know, you are a
[17] real estate lawyer and your client is getting divorced, and
[18] they own a lot of real estate. They ask you questions about
[19] the marital values of those various properties, replete with
[20] family law issues that you may know nothing about. Once you
[21] are asked the question, because you are operating in this
[22] real estate field, how do you get away from being charged
[23] with the obligation to know more?

[24] **MS. TRUHE:** But at least you know it is an issue.
[25] You have enough information to know that is going to be an

[1] issue. Unless he borrows more than \$126,600, it is not
[2] going to be issue with Mr. Shofer, and he did ask more than
[3] just one question. He asked can I put my pension up as
[4] collateral for a loan. He was asked a very narrow question;
[5] different from even what Your Honor just raised in that
[6] hypothetical; very, very narrow. It is so easy to look at
[7] this case in hindsight after you see what happened.

[8] But if you just take it as a quick, 5-, 10-minute
[9] conversation at best, in which someone who is not your
[10] client, who calls you no more than about once a year anyway,
[11] calls you up and asks you can I borrow money from my
[12] pension? Sure, you can borrow money from your pension. Can
[13] I do this without limit? Sure, you can do it without limit.
[14] You know he has other advisors. You know he has people
[15] preparing his tax returns, presumably properly. Again, you
[16] bring up line-drawing.

[17] Mr. Shofer also did not ask during that telephone
[18] conversation well, if I am going to borrow from my pension,
[19] how do I go about doing this? Yet, would we be sitting here
[20] today saying somehow that in August of 1984, it was Mr.
[21] Hack's responsibility to try and imagine every possible
[22] scenario under which Mr. Shofer could get himself into
[23] trouble in borrowing from his pension, and then give him an
[24] opinion letter based on that because that letter could have
[25] been 10 pages; it could have been 20 pages.

[1] He answered the question asked. Again, no more,
[2] no less. Where do we look to see whether there is any
[3] obligation legally on the part of Mr. Hack to do more?
[4] There is no contract, there was no specific request, so
[5] there was no wrong answer given. And if you look at what
[6] other professionals do, well, we heard from Mr. Kabala and
[7] what he would have done. He did not say anybody would have
[8] done any differently. And we heard Mr. Burroughs testify.
[9] So in terms of -

[10] **THE COURT:** As a Monday morning quarterback, if
[11] Mr. Hack asked you today about that question, would you tell
[12] him not to answer it at all?

[13] **MS. TRUHE:** If the question were simply, can I
[14] borrow from my pension without limit, is it legal? I would
[15] tell him to stay away from the question, and perhaps to add
[16] one more sentence to his letter: If you do this, get back
[17] to me. Because then the client is at least or whomever,
[18] Mr. Shofer or a participant or whomever is at least getting
[19] back to you with details from which you would at least know
[20] there is an issue.

[21] Because if he gets back to him and says well, I am
[22] borrowing \$10,000, then Mr. Hack knows okay, you need
[23] adequate security, you need this kind of note, you need it
[24] payable back within this period of time. If he says, I am
[25] planning to raid my pension and basically drain it all out,

[1] you might want to give Phil Matz a call at Greybush. There
[2] is just nothing putting Mr. Hack on notice when this call is
[3] made and, I think, deliberately made in a very furtive
[4] manner and with more than just that question asked. I
[5] think, frankly, that was by design and not by accident.

[6] Also, on the issue of primary negligence, there is
[7] just no evidence that had Mr. Hack given that advice, that
[8] the Plaintiff would have done anything different. He never
[9] said it at trial that had I known there would have been tax
[10] consequences, I would have done anything differently. In
[11] fact, the evidence was rather overwhelming that he needed to
[12] borrow money from his pension, a lot of it; more than the
[13] taxable amount of \$126,600. Indeed, after the first two
[14] loans, he is over that amount.

[15] He needed it to preserve Crown's line of credit.
[16] I think he was going to do it no matter what the advice
[17] given was as far as tax consequences. Again, he got over
[18] the taxable amount right away; the first three loans in 1984
[19] all for the purpose of repaying debt to Crown Motors, all up
[20] to that amount that he told Glen Wilson at the bank he was
[21] going to borrow. So I think, frankly, the tax consequences
[22] is a red herring in a nice way to blame somebody else for
[23] what you were going to do anyway.

[24] With respect to Greybush Newman, I think the
[25] bottom line is that nothing in this case would have ever

[1] happened if Greybush had simply prepared the Plaintiff's
[2] 1984 tax return correctly. As Mr. Inter put it, when you
[3] hold yourself out as a tax preparer, you have a duty to know
[4] what is taxable and what is not. I think that is a
[5] proposition so self-evident, it does not require much
[6] further elaboration. But even Mr. Goldstein, whose
[7] testimony at trial was somewhat erratic and recanted in
[8] several places, said he would have spotted the issue.
[9] A defense from Greybush that we just do not do the
[10] fine points, I do not think cuts it on the part of any
[11] professional. The only evidence which I believe was clearly
[12] established in this case was the negligence committed by
[13] Greybush in their preparation of the two tax returns at
[14] issue. Finally, I would like to say just a word about
[15] damages. With respect to tax penalties, one of the
[16] categories of damage which the Plaintiff is claiming in this
[17] case, Mr. Hack was in no way involved in the preparation of
[18] the tax returns at issue. He had no duty to prepare them
[19] correctly, therefore, in the first instance. He cannot,
[20] under any possible legal theory, be held liable for
[21] penalties for the failure to report additional monies as
[22] taxable income.

[23] **THE COURT:** Did he not advise that they not report
[24] it?

[25] **MS. TRUHE:** No, I am talking about the penalties

[1] that were assessed when it first basically hit the fan. In
[2] other words, when Mr. Shofer amended, the IRS immediately
[3] came in to audit and assessed penalties for the
[4] underreporting of this income. That would have happened no
[5] matter what the moment he amends. He is going to be
[6] assessed penalties as a result of the failure to report
[7] income. The failure to report income can only be laid at
[8] the feet of Greybush Newman. Mr. Hack simply, as a factual
[9] matter, was not involved in the preparation of the tax
[10] returns at issue. The penalties were assessed solely as a
[11] result of the failure to report the income initially when
[12] the original returns were filed.

[13] As far as interest is concerned, Plaintiff has had
[14] the use of the money which he should have paid in taxes
[15] during the years in question. I looked at all of the case
[16] law, and it is uniform on that point in professional
[17] malpractice situations, vis-a-vis accountants. That leaves,
[18] basically, taxes. Plaintiff would have had to pay taxes on
[19] these monies eventually, so there is simply a timing
[20] difference. With respect to professional fees, this is a
[21] very interesting category.

[22] I do not believe it is an item of damage sustained
[23] by the Plaintiff personally. He has not paid any of the
[24] professional fees. I think it is interesting that all of
[25] the bills which were introduced by the Plaintiff into

[1] evidence were addressed to Crown Motors. I think that casts
[2] a lot of doubt on whether the Plaintiff was ever going to be
[3] paying those bills in the first place, or even eventually
[4] himself. And he has not always been without a salary.

[5] His excuse for that was well, Crown could not pay
[6] me a salary so I could not pay Crown back for all of the
[7] monies that they have been fronting for me to professionals.
[8] Well, he has not always been without a salary. Where is any
[9] evidence that he ever paid the first dime of any bill
[10] submitted by a professional to him in this case? The fact
[11] that he says he is going to eventually pay them, I think is
[12] highly speculative and not worthy of much belief.

[13] So from a damage standpoint, I think the worst-
[14] case scenario, in the event Mr. Hack is somehow held liable,
[15] is the timing difference in the taxes. I think that is
[16] something that should be shared at least equally with the
[17] accountants whose, frankly, negligence caused the problem in
[18] the first place. But I do not believe the issue of damages
[19] should even be reached in this case because I just do not
[20] see where Mr. Shofer can find a legal basis on which to hold
[21] Mr. Hack responsible for failing to raise a tax issue any
[22] more than failing to raise how you borrow money from the
[23] pension in the first place. The professionals are in
[24] agreement that no one does it, it was not asked, and there
[25] is no contract saying Mr. Hack would otherwise give this

[1] type of information. He answered the question asked
[2] correctly; no more, no less. Thank you.

[3] **THE COURT:** Thank you. Do you want to respond, or
[4] do you want to go forward, Ms. Whelihan?

[5] **MS. WHELIHAN:** It does not make any difference to
[6] me.

[7] **CLOSING ARGUMENT OF DEFENDANT GREYBUSH**

[8] **MS. WHELIHAN:** Well, I do not have much to add
[9] beyond what Ms. Truhe said in any case. But I mean, I think
[10] the evidence clearly shows that Mr. Shofer knew exactly what
[11] he was doing. I think that he purposely did not ask about
[12] the tax consequences to Mr. Hack. I think he purposely did
[13] not ask Greybush Newman about the tax consequences. In
[14] fact, I think he went out of his way to convince Mr. Larash
[15] that there were no tax consequences from his pension
[16] borrowings. And I think that he acted completely
[17] unreasonably.

[18] I think he was contributorily negligent. And I
[19] think the evidence shows that he assumed the risk when he
[20] borrowed up to \$300,000 based upon, you know, a several-
[21] minute telephone conversation that he concedes he has no
[22] recollection of, and that is the only evidence of has been
[23] presented by Mr. Hack, and Mr. Hack says he was not asked
[24] about tax consequences. I think what is crucial as to why
[25] the Plaintiff cannot recover is that they failed to produce

[1] evidence of the but-for.

[2] Neither their expert witness nor Mr. Shofer ever
[3] testified that if Mr. Hack had given different advice, Mr.
[4] Shofer would not have borrowed from his pension plan. I
[5] think Ms. Truhe is correct that the evidence overwhelmingly
[6] shows that Mr. Shofer was somewhat financially desperate to
[7] control his borrowings, and that he borrowed from the most
[8] logical source. So I think that the problem with the
[9] Plaintiff's case, beyond what I think the evidence clearly
[10] shows, is that there is a complete absence of causality
[11] evidence, and that is the Plaintiff's burden.

[12] There is no but-for evidence that was ever
[13] introduced from the Plaintiff. Then, I think, in addition
[14] to that you can look at the damages. There was no competent
[15] admissible evidence of damages produced by Mr. Shofer. Nor
[16] was there evidence, other than Mr. Shofer's statement on the
[17] witness stand, that he owed this debt back to Crown Motors
[18] but that was all dependent on whether or not Crown Motors
[19] paid him his salary.

[20] The evidence was also pretty clear that Crown
[21] Motors had not paid him his salary, and Crown Motors owed
[22] him other money. And until that debt was all cleared and he
[23] was paid his salary, he was not going to pay anything to
[24] Crown Motors. So I think that there is - you can look at
[25] the Plaintiff's complaint about the third-party beneficiary

[1] theory because that is not pled in the third amended
[2] complaint at all. It is actually a strict privity argument,
[3] and I am not sure that the Plaintiffs can now introduce
[4] third-party beneficiary argument to bring that up.

[5] **THE COURT:** Are we not on the third amended, you
[6] mentioned the fourth, but I thought I had -

[7] **MS. TRUHE:** I think we are on the fourth.

[8] **MS. WHELIHAN:** We are actually on the -

[9] **THE COURT:** I know I ruled -

[10] **MR. TAYLOR:** I think we are on the third
[11] amended -

[12] **MS. WHELIHAN:** I think the fourth and fifth were
[13] struck; we are on the third.

[14] **MR. TAYLOR:** The fourth and fifth were eliminated.

[15] **THE COURT:** I thought I struck them.

[16] **MR. TAYLOR:** Yes.

[17] **MS. WHELIHAN:** Okay. But I mean, there is no
[18] third-party beneficiary claim pled in the third amended
[19] complaint. So I am not sure that there is any evidence,
[20] other than the evidence that was introduced by the
[21] Defendants, of a legal duty that Mr. Hack owed to Mr.
[22] Shofer, number one, you know. Then on the breach of duty, I
[23] think it is a squaring contest, perhaps. If you are going
[24] to look at Mr. Kabala's evidence in the light most favorable
[25] to the Plaintiff, which this Court is not obligated to do,

[1] then I think Mr. Burroughs was clearly much more credible
[2] than Mr. Kabala.

[3] Then I think if you get down to the causality,
[4] there is just no evidence of that, and again, no evidence of
[5] damages. But I think, more importantly, what there is
[6] evidence of is that the Plaintiff, I think, either is by the
[7] magnitude of his borrowings and the fact that he did no
[8] followup conversations whatsoever. I mean, he clearly
[9] assumed the risk was contributorily negligent.

[10] Then as to the contribution claim that is against
[11] Greybush, in the event that this Court actually finds that
[12] Mr. Shofer has not by his actions been contributorily
[13] negligent, or assumed the risk, or that he actually has an
[14] affirmative right to recover, and that he actually has
[15] admissible evidence of damages, I think the evidence is
[16] pretty clear that Mr. Shofer misled Greybush just as he
[17] misled Mr. Hack.

[18] I think that the other claims that the Defendants
[19] asserted against Greybush, there simply is really no
[20] evidence to those as well. And I am not even sure what the
[21] damages would be for the contribution claim. I think there
[22] is a significant question this Court can resolve legally as
[23] to whether or not the Defendants are even entitled to
[24] contribution. For that, I would just refer this Court to
[25] our motion for judgment and the closing argument that we

[1] submitted.

[2] **THE COURT:** Okay.

[3] **CLOSING ARGUMENT OF THE PLAINTIFF**

[4] **MR. TAYLOR:** Your Honor, very briefly, I would to
[5] just like to make a couple of comments, first of all, with
[6] regard to the duty issue. I think that the evidence clearly
[7] establishes that Mr. Hack and his company owed a duty to Mr.
[8] Shofer and to the pension and to all of the plan
[9] participants. There has been some discussion about the
[10] third-party beneficiary exception to the privity
[11] requirement. We have actually submitted a memo. There is a
[12] case, I think, that deals with the fact that there is a
[13] well-recognized exception to the privity -

[14] **THE COURT:** Well, you concede there is no privity,
[15] right?

[16] **MR. TAYLOR:** No, I do not concede that at all. I
[17] am just saying that on the tort aspect -

[18] **THE COURT:** Tell me what the privity derives from.

[19] **MR. TAYLOR:** Well, I think the privity aspect can
[20] be established in the fact that Mr. Shofer was the trustee
[21] of the pension. He is also a plan participant of the
[22] pension. He is an officer of the corporation that
[23] established the plan. I think the contractual relationship
[24] that exists between Mr. Hack and his company and Catalina
[25] Enterprises encompasses Mr. Shofer, as it does all the plan

[1] participants. Mr. Hack and his company are the
[2] administrators and consultants for that plan. The plan
[3] only -

[4] **THE COURT:** All the plan participants are in
[5] privity with the plan contract?

[6] **MR. TAYLOR:** I think Mr. Hack owes a duty to all
[7] the plan participants when he is administering the plan.

[8] **THE COURT:** I just want to be clear with you
[9] because when I discussed this with Ms. Truhe, I was
[10] discussing that in the context of a third-party beneficiary
[11] theory, not a privity theory. Your argument to the Court is
[12] that they have privity of contract?

[13] **MR. TAYLOR:** Well, I am saying that I think there
[14] are three areas here which give rise to a duty on the part
[15] of Mr. Hack. I am not conceding that there is no privity
[16] simply because Mr. Shofer's name is not on the contract. I
[17] think that as a trustee, as a plan participant, as a
[18] fiduciary, I think Mr. Kabala made that point during his
[19] testimony. It was his opinion that Mr. Hack and his company
[20] owed Mr. Shofer a duty, and part of that reason was because
[21] of the position that Mr. Shofer held in the plan.

[22] The whole idea of the contractual relationship
[23] between a plan and a consultant or administrator is to
[24] provide advice in the administration of the pension plan.
[25] The person who is receiving that advice is Mr. Shofer, the

[1] trustee. But I think there is also the third-party
[2] beneficiary aspects of this, the people who are
[3] participating in this pension plan are not people just off
[4] the street to whom Mr. Hack would have no duty whatsoever.

[5] I think if you even look at the materials, even
[6] the fee agreement that was submitted on an annual basis -
[7] and there are several in the record. I think you will find
[8] that one of the special services that the Hack Company
[9] provided was loan advice. Loan advice has to relate to
[10] participants of the plan. Who else is going to borrow the
[11] money? I think their own documents encompass that scope of
[12] duty that they have assumed, that scope of care that they
[13] have assumed even contractually. But even aside from that,
[14] I think Mr. Shofer is clearly a third-party beneficiary to
[15] this contract. I think that Mr. Hack clearly owes him a
[16] duty.

[17] **THE COURT:** Let me take you back for a minute
[18] because I think it is the kind of thing that needs parsing.
[19] If Mr. Shofer as trustee calls Mr. Hack as consultant and
[20] says can we realign the monies that are held in the trust
[21] without detrimental impact to the participants because in
[22] one of the accounts (inaudible) for some reason, they want
[23] to realign the monies because it would make it easier to
[24] invest a portion of the monies in something with a greater
[25] yield than in one of the other accounts or something like

[1] that.

[2] The kind of question that has impact on all plan
[3] participants and their ultimate pension benefits, so that he
[4] is clearly functioning as the trustee on behalf of all the
[5] beneficiaries. In that situation, you would argue that
[6] there is privity as well as third-party?

[7] **MR. TAYLOR:** Well, I would argue that, yes.

[8] **THE COURT:** Now if Mr. Shofer calls Mr. Hack
[9] wearing the same hats, but asks a question that applies only
[10] to his interest in the pension, would you also contend there
[11] is privity?

[12] **MR. TAYLOR:** Well, I think that is a part of the
[13] plan administration to advise plan participants.

[14] **THE COURT:** You base that on the fee agreement?

[15] **MR. TAYLOR:** Well, there is the fee agreement.
[16] Also, I wanted to emphasize that I think is the course of
[17] conduct over a 12-year period. I think that has been
[18] totally ignored.

[19] **THE COURT:** But can you get privity from that? Is
[20] there any case law to that effect?

[21] **MR. TAYLOR:** Well, I am not saying you get privity
[22] because, obviously, in a strict contractual relationship -
[23] I mean, you are looking at the privity. But what I am
[24] talking about is a course of conduct that can give rise, I
[25] think, to creating a duty. If the Hack Company undertakes

[1] to provide similar services, similar advice to the one that
[2] they have undertaken to provide in 1984, and if you can show
[3] a pattern going back 12 years of that type of relationship,
[4] it seems to me that that has established a relationship.

[5] **THE COURT:** Well, tell me what you are talking
[6] about. If you are saying that there is a pattern here
[7] established by the evidence that your client would call Mr.
[8] Hack and ask him questions about the monies in the pension
[9] as they related to his personal account and what he could do
[10] with them, like he did on this occasion. Is there evidence
[11] that he did that on prior occasions?

[12] **MR. TAYLOR:** I think there is evidence actually,
[13] Your Honor; either Plaintiff's Exhibits 3 and 4, I think;
[14] and maybe Exhibit 5. I do not have those in front of me.
[15] But I would suggest that the Court might look at Plaintiff's
[16] Exhibits 3, 4, and 5. I think -

[17] **THE COURT:** Well, what would remind me of what
[18] they had to do with it.

[19] **MR. TAYLOR:** Well, they dealt with were inquiries
[20] from Mr. Shofer with regard to methods of using pension
[21] assets to finance receivables.

[22] **THE COURT:** In those situations, each one was a
[23] telephone conversation only, or was there -

[24] **MR. TAYLOR:** Well, I do not have the exhibit in
[25] front of me, and I do not recall whether it says you have

[1] telephoned and asked us, but there is a letter which
[2] responds to an inquiry. Whether that inquiry was in writing
[3] or by telephone, I am not sure.

[4] **THE COURT:** Well, explore with me for a moment the
[5] scope of the duty then. Assuming that you are correct that
[6] they established by a course of conduct that Mr. Hack was
[7] willing to extend himself to provide that kind of service,
[8] what does he owe Mr. Shofer when he does it, other than to
[9] be correct in his response?

[10] **MR. TAYLOR:** Well, I think that is what he owes
[11] him: the duty to be correct and the duty to give him advice
[12] that will not result in Mr. Shofer sustaining damage or
[13] other injuries.

[14] **THE COURT:** Well, all right, let's continue
[15] parsing then. In 3, 4, and 5, you do not contend that Mr.
[16] Shofer got incorrect advice or suffered injuries from advice
[17] Mr. Hack gave in those instances?

[18] **MR. TAYLOR:** No, I do not, but I am using those
[19] examples as the type of advice -

[20] **THE COURT:** Mr. Taylor, I understand.

[21] **MR. TAYLOR:** - the type of service that was being
[22] provided.

[23] **THE COURT:** So your entire focus then is on the
[24] questions asked in August of 1984, if I have the dates
[25] right.

[1] **MR. TAYLOR:** The focus -

[2] **THE COURT:** Your entire focus in on the inquiry
[3] that Ms. Truhe and I were discussing which went to two
[4] questions: the ability to borrow from his voluntary
[5] account, and/or to use his account as collateral for loans.
[6] Is that right?

[7] **MR. TAYLOR:** Well, that is what the focus of this
[8] action is about, as to whether or not Mr. Hack provided
[9] accurate and complete information in response to those two
[10] questions which are the questions that Mr. Hack has recited
[11] in his letter.

[12] **THE COURT:** And continuing my inquiry, you do not
[13] contend that the information he gave your client was
[14] inaccurate; you contend it was incomplete?

[15] **MR. TAYLOR:** I contend it was both.

[16] **THE COURT:** In what sense was it inaccurate?

[17] **MR. TAYLOR:** Well, as Mr. Kabala, I think, pointed
[18] out in testifying, there is a limitation on whether you can
[19] borrow up to 100 percent of your voluntary account.
[20] Actually, the letter that Mr. Hack wrote is in conflict with
[21] the plan document itself. That is, the pension plan has
[22] restrictions in it itself that limit the ability of plan
[23] participants to borrow from the plan. The letter does not
[24] conform to the plan itself. The letter is also incorrect in
[25] that it does not apprise Mr. Shofer of the tax consequences

[1] that would occur is he borrows more than his voluntary
 [2] contributions.
 [3] **THE COURT:** But that is in the area of
 [4] incompleteness because it does not -
 [5] **MR. TAYLOR:** It's all right.
 [6] **THE COURT:** He does not say there are no tax
 [7] consequences?
 [8] **MR. TAYLOR:** He does not address that issue.
 [9] **THE COURT:** So he does not wrong about it; he is
 [10] incomplete about it?
 [11] **MR. TAYLOR:** Incomplete about that.
 [12] **THE COURT:** Now let's go back then to the other
 [13] one, the limitations that were inherent in the plan document
 [14] itself. Tell me how they have -
 [15] **MR. TAYLOR:** I have the letter. I believe Mr.
 [16] Kabala made these points in his testimony. He mentions in
 [17] the letter that there is an entirely different treatment for
 [18] voluntary accounts. I believe that Mr. Kabala testified
 [19] that there is no different treatment between voluntary
 [20] accounts, that these accounts are treated the same.
 [21] **THE COURT:** Let me ask you something about that.
 [22] Maybe I am getting off on a tangent here because I have
 [23] heard a number of cases since this, so I do not recall all
 [24] the testimony about it, but I have copious notes that I can
 [25] refer to. Weren't the voluntary contributions after-tax

[1] dollars?
 [2] **MR. TAYLOR:** The voluntary contributions, I do not
 [3] believe so.
 [4] **MS. WHELIHAN:** Oh, yes, they were.
 [5] **MS. TRUHE:** Yes, they were.
 [6] **MR. TAYLOR:** Oh, they were?
 [7] **MS. TRUHE:** Yes.
 [8] **MS. WHELIHAN:** That is why he could borrow them.
 [9] **THE COURT:** Was that not the distinction? I mean,
 [10] my recollection is that the account, where there were
 [11] contributions by the company, would be pre-tax and you
 [12] cannot access those generally until you are 59-1/2 or
 [13] whatever the pension law allows. Then, you take it
 [14] generally because you are in a lower tax bracket. I mean,
 [15] are we on the same wave length on that issue?
 [16] **MR. TAYLOR:** Yes. I think the income earned on
 [17] the voluntary account was not taxable at that time.
 [18] **THE COURT:** So explain again to me what the
 [19] limitation was inherent in the document because if you are
 [20] talking about after-tax dollars, what tax implication is
 [21] there on withdrawing it? Am I confusing apples and oranges
 [22] here?
 [23] **MR. TAYLOR:** Well, I think the law was that you
 [24] could take out or you could borrow, I guess, up to the
 [25] amount that you had voluntarily put into your account.

[1] There was a threshold before there was a tax imposed. I
 [2] think in this particular case, it was \$126,600 that had been
 [3] deposited which could be used for loan purposes without
 [4] incurring any tax obligations.
 [5] **THE COURT:** What I am trying to get at is are you
 [6] contending that your client suffered an economic detriment
 [7] from his borrowings from his voluntary account in this case?
 [8] **MR. TAYLOR:** No. The additional taxes were
 [9] imposed on the sums that were borrowed above that amount.
 [10] **THE COURT:** But all the monies above that amount
 [11] came out of not the voluntary account, did they not; the
 [12] accounts other than the voluntary account?
 [13] **MR. TAYLOR:** They came out of the voluntary
 [14] account.
 [15] **THE COURT:** Okay.
 [16] **MS. WHELIHAN:** Well, just - I do not mean to
 [17] interrupt, but just so we are all clear on this, you can
 [18] borrow up to \$50,000 from your employer's account. That was
 [19] part of the \$126,600. You can borrow 100 percent of your
 [20] voluntary contributions, but when you borrow above the
 [21] \$50,000 limit -
 [22] **THE COURT:** I remember. Is that limitation -
 [23] **MS. WHELIHAN:** - that is where the \$126,600 -
 [24] **THE COURT:** - a tax code limitation or a plan
 [25] limitation?

[1] **MS. TRUHE:** A tax code limitation, not plan.
 [2] **MS. WHELIHAN:** It is tax code. It is in ERISA.
 [3] That is in 72-P, but then it is really the IRC provision.
 [4] **MS. TRUHE:** It is not a plan document or a pension
 [5] plan document limitation; only the tax law.
 [6] **THE COURT:** Okay.
 [7] **MS. WHELIHAN:** I think 72-P was put into evidence
 [8] during Mr. Intner's -
 [9] **THE COURT:** Yes. I remember it now.
 [10] **MS. TRUHE:** Indeed, that is the distinction Mr.
 [11] Giampietro drew in one of the exhibits, one of his letters
 [12] to the Plaintiff explaining Mr. Hack was correct that you
 [13] could borrow up to 100 percent. That was lawful. The only
 [14] difficulty which you have encountered is that some of that
 [15] is taxable.
 [16] **MR. TAYLOR:** Income or growth from the voluntary
 [17] account which would have been part of this loan that was
 [18] taken -
 [19] **MS. WHELIHAN:** You cannot take it.
 [20] **MR. TAYLOR:** - was subject to taxes.
 [21] **THE COURT:** So the accretions in the account were
 [22] all taxable?
 [23] **MR. TAYLOR:** The accretions in the account.
 [24] **MS. TRUHE:** Exactly.
 [25] **MR. TAYLOR:** Right.

[1] **THE COURT:** Okay. I am sorry, I did not mean to
 [2] interrupt.
 [3] **MS. WHELIHAN:** Oh, that was my fault. I
 [4] interrupted; I am sorry.
 [5] **THE COURT:** Okay, it is your fault.
 [6] **MS. WHELIHAN:** It is.
 [7] **MR. TAYLOR:** Well, I believe that there are both
 [8] inaccuracies and incompleteness in the advice that Mr. Hack
 [9] gave Mr. Shofer. I think that it was incumbent on Mr. Hack,
 [10] when he wrote this letter responding to Mr. Shofer's
 [11] inquiries, to include a reference to the taxability of these
 [12] loans. His firm had done that in the past. Again, if you
 [13] take a look at Plaintiff's Exhibits it is either 3 or 4 you
 [14] will find a discussion of the tax implications of the
 [15] question which Mr. Shofer had posed at that time.
 [16] Contrary to the position that the Defendants take
 [17] that this letter of August 9 should have put Mr. Shofer on
 [18] notice that he should go and consult with his accountants,
 [19] if you compare this letter with some of the prior letters
 [20] which do contain tax advice, this letter appears to be
 [21] something that does not require any further advice or
 [22] information. You have almost a carte blanche here; a
 [23] scheme, if you will, of going forward to borrow the money.
 [24] There are no impediments referenced here to borrowing money
 [25] from the -

[1] **THE COURT:** Let me ask you a question. The letter
 [2] says incompletely that you can borrow all you want from your
 [3] voluntary account, and your client knew what was in the
 [4] voluntary account. Assuming your theory is correct, at that
 [5] point, he was owed a duty to be told the consequences of
 [6] going beyond that. But moving along temporally, he clearly
 [7] knew that he had gone beyond that.
 [8] Your argument is that he is an officer in the
 [9] corporation that established the pension, the trustee of the
 [10] pension, and a beneficiary along with the other employees of
 [11] the pension. So he is not an unsophisticated individual
 [12] with respect to the pension, and he has dealt with this
 [13] consultant over time over rather sophisticated issues, and
 [14] he never asked another question, even when he gets beyond
 [15] the voluntary account.
 [16] **MR. TAYLOR:** Well, Your Honor, with all due
 [17] respect, I think if you look at this letter, there is
 [18] nothing in this letter that would even hint that there is a
 [19] problem with borrowing these monies.
 [20] **THE COURT:** Which monies?
 [21] **MR. TAYLOR:** Any of the monies from the pension
 [22] account. Mr. Shofer never actually went beyond his
 [23] voluntary account. The additional taxes that were imposed
 [24] of the penalties and the interest all relate to the
 [25] accretions in the voluntary account. But the point is that

[1] there is nothing in this letter that would put him on notice
 [2] that he ought to go and consult with a tax advisor. We are
 [3] dealing with an area that is rather sophisticated and rather
 [4] complex.
 [5] We have had accountants. We had Greybush Newman
 [6] and their witnesses testifying that some of their
 [7] accountants did not know whether these loans were taxable or
 [8] not. I think the basic point in this whole case is that Mr.
 [9] Hack himself did not know that the loans were taxable. As a
 [10] matter of fact, the position he took when Greybush
 [11] confronted him was that there are not taxable events here.
 [12] In the meeting of May of 1987 when Ken Larash and Alan
 [13] Marvel and Mr. Shofer and Mr. Hack sat down to talk about
 [14] this, it was still Mr. Hack's position that these loans were
 [15] not taxable.
 [16] He did not believe they were taxable. If he did
 [17] not know that they were taxable, of course, he is not going
 [18] to even give the advice in his letter. I think that is
 [19] where the deficiency lies is that Mr. Hack was not aware
 [20] that the loans that he was advising his client about were
 [21] taxable, subject to additional taxes and other penalties.
 [22] I think that regardless of whether Defendants'
 [23] expert, Mr. Burroughs, thinks it is a good idea or not for
 [24] actuaries to give tax advice does not really have any
 [25] relevance to what Mr. Hack's obligations were once he

[1] undertook to answer the questions that Mr. Shofer put to him
 [2] in August of 1984. Mr. Kabala, in answer to questions on
 [3] cross-examination, was dealing with the subject matter of
 [4] whether actuaries ought to provide tax advice in a general
 [5] setting.
 [6] But in this particular case, when Mr. Hack
 [7] undertook to answer Mr. Shofer's question, he had an
 [8] obligation to give him a complete answer. If Mr. Hack did
 [9] not know the answer, he should have referenced that in his
 [10] letter and recommended or advised Mr. Shofer to seek tax
 [11] advice or counsel. As a matter of fact, again, if you look
 [12] back through the correspondence that is in evidence and
 [13] actually, one of the Defendants' exhibits, I just happened
 [14] to remember.
 [15] I think it is Defendants' Exhibit Number 26 is a
 [16] letter from John Moleno - Marlerno of the Hack Company to
 [17] Mr. Shofer. Where there is a tax issue involved, there is a
 [18] copy of that letter sent to Harvey Newman of Greybush
 [19] Newman. So the pattern appeared to be that when there was a
 [20] tax issue identified by the Hack Company, they would always
 [21] copy Greybush Newman. But in this case, there is no copy to
 [22] Greybush Newman. I would suggest to you that there is not
 [23] because Mr. Hack himself did not know that these loans were
 [24] taxable, and I think he should have known.
 [25] **THE COURT:** Of course, when a copy is sent to

[1] somebody's accountant, you do not know whether it is done
 [2] on - I mean, who asked for that? I mean, do you not
 [3] sometimes ask your lawyer to copy your partner on something
 [4] that he is sending you? I mean, I do not know.
 [5] **MR. TAYLOR:** Well, I am only suggesting, Your
 [6] Honor, that if we look back at the history of this case,
 [7] there is testimony that Greybush Newman were the accountants
 [8] for Mr. Shofer and his corporation. They were involved
 [9] contractually before Mr. Hack and his company got involved
 [10] in this case. It was Greybush Newman who referred Mr.
 [11] Shofer and his company to the Hack Company. All I am
 [12] looking at is a pattern of letters involving tax issues
 [13] related to matters that involve plan participants, those -
 [14] **THE COURT:** You cited me to one.
 [15] **MR. TAYLOR:** Well, I think there are some others
 [16] there, Your Honor.
 [17] **THE COURT:** You just only remember one?
 [18] **MR. TAYLOR:** I do not remember offhand which of
 [19] those exhibits. In going through the exhibits that have
 [20] been admitted, I think you will find several that contain
 [21] copies to the accountants.
 [22] **THE COURT:** You do not contend that Greybush
 [23] Newman did anything wrong here?
 [24] **MR. TAYLOR:** Well, we have not made a claim
 [25] against Greybush Newman, Your Honor. I find it somewhat

[1] disingenuous, as I have mentioned in my written statement,
 [2] that Mr. Hack comes into court and points the finger at
 [3] Greybush Newman for not recognizing these loans as taxable
 [4] events when Mr. Hack himself, in meetings with Greybush
 [5] Newman, kept maintaining there were no taxes due. I mean, I
 [6] find it a little hard to square that with Mr. Hack pointing
 [7] the finger to Greybush as being responsible when he himself
 [8] is maintaining all along there are no taxes due.
 [9] I think Mr. Larash candidly testified that this is
 [10] an area that is relatively specialized and relatively
 [11] complex. Mr. Larash, I think, if my recollection is
 [12] correct, testified that his firm relied on Mr. Hack and his
 [13] company for answers to these kinds of questions. Not that
 [14] the Hack Company would do the paperwork or complete the
 [15] necessary tax returns, but that they would identify the
 [16] problems. I think that is where Mr. Hack and his company
 [17] have failed. They did not identify the problem. None of
 [18] these -
 [19] **THE COURT:** Do you believe the CPA's had any
 [20] obligation to your client?
 [21] **MR. TAYLOR:** I think they did, yes. Candidly,
 [22] Your Honor, I think they did. I do not think they were
 [23] vigorous enough in pursuing this issue of loans. The loans
 [24] were in fact made known to them. I think it is pure
 [25] fabrication on the part of the Defendants and the Third

[1] Party Defendant to accuse Mr. Shofer of trying to hide or be
 [2] secretive about his loans from the pension. There is no
 [3] evidence of that.
 [4] As a matter of fact, the evidence is the exact
 [5] contrary position. He reported those loans on the corporate
 [6] ledgers. There was a separate document that was sent to the
 [7] Hack Company in October of 1985 which reflected the loans
 [8] being made. Mr. Larash testified that he picked up the fact
 [9] that there were loans in 1985 - 1986 when they were doing
 [10] the 1984 returns. So there is no evidence of some concerted
 [11] effort -
 [12] **THE COURT:** From the time he saw it, they had all
 [13] been made, though, right?
 [14] **MR. TAYLOR:** Well, of course. The loans were made
 [15] as soon as Mr. Hack gave Mr. Shofer the advice. This was a
 [16] point we discussed during the course of the trial. You made
 [17] the comment, Your Honor, that Mr. Shofer took the loans
 [18] before he got the letter from Mr. Hack. But he got the
 [19] advice from Mr. Hack. The advice is the operative fact
 [20] here; not the letter. The letter was another opportunity, I
 [21] think, given Mr. Hack to correct his mistake. Mr. Hack puts
 [22] in writing what he told Mr. Shofer on two occasions.
 [23] Now we have a written memorandum of what Mr.
 [24] Hack's advice actually is, and it is totally wrong. Mr.
 [25] Shofer immediately starts to borrow the money. As soon as

[1] he crosses the threshold where taxes are due, all of the
 [2] penalties and the interest and the additional taxes are due.
 [3] I do not know how it would make any difference if Mr. Shofer
 [4] had gotten back to Mr. Hack and told him he was borrowing
 [5] the money because I think the evidence is clear that Mr.
 [6] Hack did not even know the loans were taxable.
 [7] **THE COURT:** If you confine yourself to the
 [8] evidence in the case, it is difficult because your client
 [9] testified that he had no recollection of the telephone
 [10] conversation.
 [11] **MR. TAYLOR:** That is correct, and neither did Mr.
 [12] Hack.
 [13] **THE COURT:** So there is no evidence before the
 [14] Court as to what was said.
 [15] **MR. TAYLOR:** But the best -
 [16] **THE COURT:** And there are some loans made prior to
 [17] the letter being received.
 [18] **MR. TAYLOR:** I think there was one loan made prior
 [19] to the letter.
 [20] **THE COURT:** One or two but I thought what you were
 [21] just arguing to me anyway was that the letter was
 [22] superfluous. It just confirmed -
 [23] **MR. TAYLOR:** It confirms the advice.
 [24] **THE COURT:** Okay. But if I have to tie the
 [25] damages to the evidence, there is clearly some damage

[1] incurred prior to any evidence of that advice.
[2] **MR. TAYLOR:** I believe, Your Honor, and you can
[3] look at the evidence itself, that the first loan did not
[4] incur any there were no tax obligations incurred with that
[5] first loan because that was within the threshold area of no
[6] taxes. That was coming out of the money that Mr. Shofer had
[7] contributed. It was already taxed. The subsequent loans
[8] were the ones where the damages were done.

[9] **THE COURT:** And they were occasioned by the
[10] letter?

[11] **MR. TAYLOR:** They were occasioned - well, they
[12] were not occasioned by the letter because Mr. Hack had
[13] orally given Mr. Shofer the okay to do this. He simply
[14] memorialized that in a letter because Mr. Shofer called him
[15] up again and said hey, Mr. Hack, you know the advice you
[16] gave me on August 3, I would like to have you put that in
[17] writing because I want to take it to my bank and show them
[18] that I can in fact do this legally.

[19] Which, I think, also shoots holes in the argument
[20] that these are hypothetical questions. Ms. Truhe has
[21] manufactured and fabricated this idea that Mr. Shofer is
[22] sitting at his desk coming up with hypothetical questions on
[23] which he is not going to take any action. When he made that
[24] telephone call on August 7, he had a specific purpose in
[25] mind. That was, Mr. Hack, give me a letter because I want

[1] to take it to my bank; I want to show them that what I plan
[2] to do is legal.

[3] I think that the only rational conclusion on this
[4] is that these were not hypothetical questions. Mr. Shofer
[5] in fact wanted to go ahead and do this, and he went to the
[6] one man who he thought knew whether this could be done.
[7] That was Mr. Hack, the pension consultant and advisor; Mr.
[8] Hack, who is the lawyer; who is a member of the ABA Tax
[9] Section; who is a member of the American Society of Pension
[10] Actuaries; who is an author; who is a seminar speaker. He
[11] is the one person that Mr. Shofer thought could give him the
[12] correct answer. I would simply say, Your Honor, with
[13] respect to the damages, I think that once the loans were
[14] made, once the amount that was borrowed exceeded the limits,
[15] the tax penalties were already incurred. These penalties
[16] were -

[17] **THE COURT:** What evidence do I have of the tax
[18] penalties?

[19] **MR. TAYLOR:** Well, there is evidence, I think
[20] Plaintiff's Exhibit Number 35 is a schedule of all of the
[21] taxes, interest, and penalties that Mr. Rosenberg put
[22] together. I think his testimony was that he got those
[23] figures from the amended tax returns which are in evidence.
[24] He confirmed those numbers with the Internal Revenue Service
[25] and the Comptroller's office. He did the calculations on

[1] those numbers, although the penalties were the penalties
[2] assessed by the taxing authorities. They are contained in
[3] that exhibit.

[4] **THE COURT:** Mr. Rosenberg's exhibit comes in under
[5] the Maryland Rule that allows me to accept it for the
[6] limited purposes of supporting an expert's opinion, right?
[7] It is not substance evidence?

[8] **MR. TAYLOR:** Yes, but he testified with regard to
[9] those penalties.

[10] **THE COURT:** He gave opinions, yes, but it is based
[11] on hearsay.

[12] **MR. TAYLOR:** Well, I do not recall offhand whether
[13] or not Mr. Larash had calculated the penalties that were
[14] due. I was thinking that there is an exhibit -

[15] **THE COURT:** I have to go back and look.

[16] **MR. TAYLOR:** Yes, Mr. Shofer says there is an
[17] exhibit that is in evidence that reflects the penalties that
[18] were in fact imposed. That exhibit was prepared by Greybush
[19] Newman who were, at the time, the accountants for Mr. Shofer
[20] and his corporation. So there is evidence in the record as
[21] to what those penalties and the interest were.

[22] **THE COURT:** I have to check.

[23] **MS. WHELIHAN:** There is an exhibit that does
[24] discuss potential penalties and taxes, but it is purely
[25] hypothetical. It is dated around the time that the first

[1] issue was discovered. So I do not think, I mean, with all
[2] due respect, I do not think that exhibit is indicative of
[3] anything. In fact, the numbers are not even correct based
[4] upon what the Plaintiff is claiming.

[5] **THE COURT:** The evidence is what the evidence is.

[6] **MS. WHELIHAN:** Right.

[7] **MR. TAYLOR:** That is right, Your Honor. That is
[8] right. I would simply say that I think once the loans were
[9] taken, once the threshold had been passed, the penalties
[10] were incurred, the interest was incurred, the additional
[11] taxes were incurred. Mr. Shofer was not looking for
[12] additional taxes. This is a distinguishing facts situation
[13] from the cases that I think Ms. Truhe has offered in which
[14] there is a failure to report something that really should be
[15] income and there are penalties and interest assessed on
[16] that. This was a situation where, had the loans not been
[17] taken in the first place, there would not been any
[18] penalties, interest, or taxes at all. Mr. Shofer was not
[19] looking to incur new taxes. I just think that there is a -
[20] I think there is a difference between his situation and the
[21] situation cited in the cases that Ms. Truhe has -

[22] **THE COURT:** Is there any significance at all to
[23] the question about using the pension monies as collateral?
[24] That was never done, right? I mean, you are not contending
[25] that you did that or suffered any consequence from that, are

[1] you?

[2] **MR. TAYLOR:** From using the pension as a
[3] collateral for a loan? I do not believe that was -

[4] **THE COURT:** It probably is not an issue, is it?

[5] **MR. TAYLOR:** No. The problem we have in this
[6] case, candidly, Your Honor, is that there are certain
[7] damages obviously that outside the case, and there were
[8] certain actions that were taken which we cannot try because
[9] they get into ERISA violations.

[10] **THE COURT:** I understand. But on that particular
[11] issue, (a) you do not contend it, and (b) there is not any
[12] evidence it -

[13] **MR. TAYLOR:** No, I think that is correct.

[14] **THE COURT:** - would have caused any tax
[15] implication anyway, is there?

[16] **MR. TAYLOR:** No, that is correct. That is
[17] correct. Thank you, Your Honor.

[18] **THE COURT:** Thank you. Anything else, Counsel?

[19] **MS. TRUHE:** Very briefly, Your Honor. I am
[20] relieved that Counsel's argument is definitely not evidence,
[21] and that the Court will go back and look at its notes
[22] because there were a number of misstatements very recently
[23] by Mr. Taylor. I would like to clear just a few of them up.
[24] There was absolutely no evidence that when the 5500-C for
[25] 1984 was filed, that it was sent to Mr. Hack revealing any

[1] loans taken in 1984 or 1985.

[2] In fact, the 5500-C admitted into evidence that
[3] Mr. Hack's own firm received, showed zero loans to
[4] participants and did not have that sheet of paper attached
[5] to it that was attached to Mr. Shofer's own 5500-C that in
[6] fact reflected a \$200,000 in loans from the pension in 1984.
[7] So Mr. Hack definitely, as a matter of the evidence, did not
[8] know, and was not in any position to prevent, any of these
[9] borrowings.

[10] Also, Mr. Shofer never testified that he told Mr.
[11] Hack during either August telephone conversation that he
[12] wanted a letter from him so that he could take it to Glen
[13] Wilson at the bank. Mr. Shofer testified unequivocally that
[14] he could not remember any aspect of the conversation -
[15] either conversation. What Mr. Shofer did testify was that
[16] when he got the letter from Mr. Hack, he was then intending
[17] to take it to Glen Wilson to show him that he could borrow
[18] all of this money from the pension, but he never told Mr.
[19] Hack that.

[20] Again, I do not think that was any accident. I
[21] think that was by design. In terms of penalties and
[22] interest being incurred the moment Mr. Shofer went above the
[23] \$126,600 threshold, that is not true. No penalties and no
[24] interest were incurred until the moment Mr. Shofer or, I
[25] should say, Greybush Newman filed a 1984 tax return that did

[1] not report the monies it should have reported as taxable
[2] income. When Mr. Shofer borrowed more than \$126,600 in
[3] 1984, he was entitled to do that; he just had to pay some
[4] more taxes come the time he files his 1984 return.

[5] **THE COURT:** Back up for a second. We were
[6] discussing this earlier. My understanding based on the
[7] earlier discussion was that you could borrow the principal
[8] that you contributed in after-tax dollars -

[9] **MS. TRUHE:** Plus \$50,000.

[10] **THE COURT:** - plus \$50,000. Was the \$50,000
[11] taxable?

[12] **MS. TRUHE:** No.

[13] **MS. WHELIHAN:** No.

[14] **THE COURT:** So there was no tax event -

[15] **MS. WHELIHAN:** You can take \$50,000 -

[16] **THE COURT:** So you either tapped into the
[17] accretions in the account -

[18] **MS. TRUHE:** Exactly.

[19] **THE COURT:** - or the principal went beyond the -

[20] **MS. WHELIHAN:** The \$50,000.

[21] **THE COURT:** - principal plus \$50,000?

[22] **MS. TRUHE:** Right, exactly.

[23] **MS. WHELIHAN:** Anybody can borrow from their
[24] employer's account up to a maximum of \$50,000, tax-free.

[25] **THE COURT:** You mean, can the voluntary

[1] contributions exceed \$50,000?

[2] **MS. TRUHE:** Sure.

[3] **MS. WHELIHAN:** Your voluntary contributions are
[4] paid with after-tax money.

[5] **THE COURT:** That is what I thought.

[6] **MS. TRUHE:** And his were \$76,600.

[7] **MS. WHELIHAN:** If you contribute \$200,000, you can
[8] take \$200,000 out. In Mr. Shofer's case, it was \$76,600
[9] that he could borrow because that was how much he
[10] contributed.

[11] **MS. TRUHE:** Plus \$50,000.

[12] **THE COURT:** That was the principal?

[13] **MS. TRUHE:** Right.

[14] **MS. WHELIHAN:** That was the principal of his
[15] voluntary account, and then the \$50,000 came from the
[16] employer's account, because that was what he was allowed to
[17] take out of his employer's account. That included the
[18] accumulations of the voluntary contributions because those
[19] are in fact part of the employer account.

[20] **THE COURT:** I am sorry, say what you just last
[21] said.

[22] **MS. WHELIHAN:** Anything that he contributes after-
[23] tax money, the earnings on that is included in part of the
[24] employer account. So that is all -

[25] **THE COURT:** Why?

[1] **MS. WHELIHAN:** I do not know why. That is just
 [2] the way they do it.
 [3] **THE COURT:** They are not segregated?
 [4] **MS. WHELIHAN:** There is a segregation, but the
 [5] non-tax event, the money is tax-deferred. So the earnings
 [6] on the investments all of the investments are made together.
 [7] So I do not know how Mr. Shofer's pension account worked
 [8] because I do not think there is any evidence of that. But
 [9] generally -
 [10] **THE COURT:** We do not whether it was that liquid
 [11] or whether it was invested.
 [12] **MS. WHELIHAN:** Right, but generally, all of the
 [13] earnings under the pre-tax dollars and the after-tax dollars
 [14] are part of the employer account, and that is all tax-
 [15] deferred. So if you take that money out before you are 70-
 [16] 1/2 or 59-1/2, then you have a tax consequence; you are not
 [17] allowed to take that. You can only borrow \$50,000 from your
 [18] employer account up to pre-tax dollars without a tax -
 [19] **THE COURT:** There is nothing in that account but
 [20] pre-tax dollars, right?
 [21] **MS. WHELIHAN:** And the tax-deferred monies that
 [22] are earned on the investments.
 [23] **THE COURT:** Right.
 [24] **MS. WHELIHAN:** Both the voluntary and employer
 [25] account.

[1] **THE COURT:** Okay.
 [2] **MS. TRUHE:** A few more just factual matters. The
 [3] plan document is Defendant's Exhibit Number 25. When Mr.
 [4] Hack told Mr. Shofer that he could borrow up to 100 percent
 [5] of his voluntary account from the pension, there was no
 [6] provision of the plan document that was violated when he did
 [7] that, when Mr. Shofer proceeded to borrow that much money.
 [8] Mr. Burroughs testified to that. Mr. Giampietro testified
 [9] to that. There is no - in other words, there was
 [10] absolutely nothing wrong with Mr. Hack's advice vis-a-vis
 [11] the pension plan document. It was correct advice. With
 [12] respect to the past course of dealings between Mr. Shofer -
 [13] **THE COURT:** Well, tell me what Mr. Kabala said
 [14] about that, if you recall.
 [15] **MS. TRUHE:** Well, when Mr. Kabala was confronted
 [16] on cross-examination about the plan document and asked to
 [17] identify what it was in the plan document itself just the
 [18] plan document that was violated when Mr. Shofer borrowed the
 [19] money that he did, Mr. Kabala did not have an answer.
 [20] Mr. Kabala's chief complaint was with respect to -
 [21] **THE COURT:** Incomplete.
 [22] **MS. TRUHE:** - incomplete. If you look at the
 [23] past dealings, these letters that Mr. Taylor referred to,
 [24] Greybush was involved when Mr. Shofer got Greybush involved.
 [25] It is interesting with respect to the financing of the

[1] company's receivables, there was testimony that two years
 [2] prior to the events which are at issue in this case, Mr.
 [3] Shofer looked to Greybush for advice as to tax consequences
 [4] of that whole transaction, and he looked to Mr. Hack as to
 [5] advice regarding the legality of that transaction from a
 [6] pension standpoint.
 [7] The expectation was that he was going to get the
 [8] tax advice from Greybush and Ken Larash conceded on cross-
 [9] examination that it was Greybush's role in 1982 with respect
 [10] to the financing of the company's receivables, to give Mr.
 [11] Shofer the tax advice. And that Mr. Hack's role was to give
 [12] him the pension advice. In other words, is it legal for you
 [13] to use your pension monies in this fashion? Mr. Hack was
 [14] not giving any tax advice, and Greybush was in the loop
 [15] because Mr. Shofer knew to bring him into the loop.
 [16] In fact, if anybody was the tax expert, if the
 [17] Court refers to Defendant's Exhibit Number 3, it is a letter
 [18] from Shofer to Barry Blomberg at Maryland National Bank,
 [19] where Mr. Shofer is setting forth his understanding of what
 [20] the tax consequences are going to be. Of course, he gets
 [21] all of that from Greybush. The bottom line in this case
 [22] is, as the Court put his finger on earlier, where do we go
 [23] to find out what Mr. Hack's duty was in the context of this
 [24] particular inquiry?
 [25] His duty, I submit, was to answer the question

[1] correctly in terms of the legality of the use of the pension
 [2] monies. It was proper for him to borrow that much money.
 [3] There were implications from a tax standpoint if you got
 [4] over a certain amount. But again, is there anything in the
 [5] law that says Mr. Hack had a duty to point any of that out?
 [6] No contract that says he had a duty to do that. This fee
 [7] agreement says we will give advice about loans. Indeed he
 [8] did: You may borrow money from your pension; that does not
 [9] say we are going to tell you about the tax aspects of it or
 [10] any other aspects of it.
 [11] **THE COURT:** If he succeeded in federal court under
 [12] an ERISA claim, would any of this expand?
 [13] **MS. TRUHE:** No, because the ERISA statute is
 [14] silent as to the scope of the duty of a non-fiduciary. But
 [15] the ERISA statute is completely silent, so we are stuck much
 [16] like we are if we are dealing with a professional accountant
 [17] or -
 [18] **THE COURT:** Which is why this was allowed to
 [19] continue?
 [20] **MS. TRUHE:** Yes, exactly. Well, there are some
 [21] circuits that say even though the ERISA statute is silent on
 [22] issues pertaining to non-fiduciaries and their roles, that
 [23] nevertheless, that is okay -
 [24] **THE COURT:** Which is why we are here.
 [25] **MS. TRUHE:** Exactly, which did not agree which is

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[1] why we are here. So where do you look? There is no written
[2] contract. There is no specific inquiry from the
[3] participant. If you look at, okay, what do other pension
[4] consultants do, you are stuck with what is the battle of the
[5] experts, as in most malpractice cases. Mr. Kabala himself
[6] said - although it is interesting he did not even know it
[7] from a evidentiary standpoint whether Mr. Shofer was
[8] personally a client of Mr. Hack's firm.
[9] But in any event, the evidence is unequivocal that
[10] he was not. And Mr. Kabala says I would not have advised a
[11] participant non-client of my firm; I would not have
[12] volunteered tax advice if he had simply asked me whether I
[13] could borrow from the pension. Then Mr. Burroughs also
[14] expands a great deal more on that. But I think that is a
[15] critical admission on the part of Mr. Kabala. Even if
[16] somehow you want to say the participants and Mr. Shofer as
[17] trustee were third-party beneficiaries of some
[18] relationship or, I should say of the relationship between
[19] Mr. Hack and his pension, okay, there is a duty. But what
[20] is that duty? What is the scope of that duty? Is it to
[21] give them advice about everything under the sun, or is it to
[22] give them advice about what they ask about? Do you get tax
[23] advice if you ask about can I borrow money from my pension;
[24] is it legal to do that? I do not think you do. Mr. Kabala
[25] said he would not do it. Mr. Burroughs says you darn well

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matter of Richard Shofer v. Stuart Hack, et al., heard on
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accurate manner.

In Witness Whereof, I have hereunto subscribed
my name this 26th day of March 1998.

Connie Jones
Transcriber

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[1] should not do it. I think that is all the Court has to go
[2] on in the absence of any other contract or document or
[3] statute. That is all the Court has to hang its hat on.
[4] Thank you.
[5] THE COURT: Anything else, Counsel?
[6] MS. WHELIHAN: No, sir.
[7] MR. TAYLOR: No, Your Honor.
[8] THE COURT: All right, then. I appreciate the
[9] submissions. I am going to go through them very carefully,
[10] as well as review all my notes from the trial and from this
[11] hearing. I will take this under advisement, I hope briefly,
[12] and try to render a decision as quickly as possible.
[13] MS. TRUHE: Thank you, Your Honor.
[14] THE COURT: Thank you.
[15] MR. TAYLOR: Thank you, Your Honor.
[16] MS. WHELIHAN: Thank you, Your Honor.
[17] THE COURT: I appreciate all of your help.
[18] (The trial was concluded at 4:29 p.m.)
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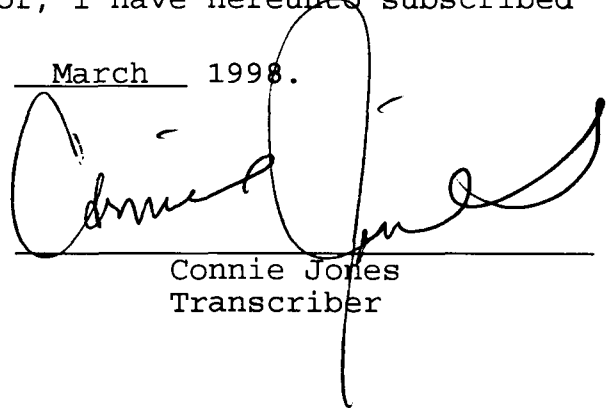
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System design by Dr. Edward C. Papenfuse and Nancy Bramucci.
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Technical support provided by Wei Yang, Dan Knight, Tony Darden, and Matt Davis.
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