1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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IN RE CONVERIUM HOLDING
3 AG SECURITIES LITIGATION 04 cv 7897 (DC)
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4 New York, N.Y.
November 16, 2006
5 10:15 a.m.
Before:
6 HON. DENISE COTE,

7 District Judge

8 APPEARANCES

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Attorneys for Defendant Zurich Financial Services
25 RALPH FERRARA
JONATHAN RICHMAN

1 (Case called)

2 (In open court)

3 THE DEPUTY CLERK: Matter of Converium Holding
4 litigation. Counsel for the plaintiff, please state your name
5 for the record.

6 MR. COFFEY: Sean Coffey, Bernstein Litowitz Berger
7 and Grossman. I'm here today with my partner, Steve Singer, on
8 behalf of the lead plaintiffs in the putative class.

9 MR. ROSEMAN: Good morning, your Honor. Robert
10 Roseman from Spector Roseman & Kodroff on behalf of the
11 plaintiffs.

12 MR. WILLIS: Mark Willis from Cohen Milstein, also on
13 behalf of the plaintiffs.

14 MR. WEISS: Good morning. Joseph Weiss, and with me
15 is Jack Zwick of Weiss & Lurie on behalf of Michael Rubin.

16 MS. FARBER: Good morning, your Honor. Beata Farber
17 on behalf of the plaintiffs, Bernstein Litowitz Berger &
18 Grossman.

19 THE DEPUTY CLERK: For the defendants, please state
20 your name for the record.

21 MR. MANCINO: Good morning, your Honor. Richard
22 Mancino on behalf of Converium Holding, AG and the individual
23 defendants, and I'm joined by my colleague, Josh Ellison.

24 MR. FERRARA: Good morning, your Honor. Ralph
25 Ferrara, LeBoeuf, Lamb, on behalf of Zurich Financial Services.

1 I'm accompanied today by my partner, Jonathan Richman.

2 MR. ROSEMAN: Good morning.

3 MR. BROADWATER: Good morning, your Honor. Douglas

4 Broadwater. I'm with Cravath. We represent UBS AG and the

5 underwriters on the December '01 prospectus.

6 THE COURT: Welcome to everyone. Thank you for coming

7 here. I know that there is a lot I have to master about this

8 case and I'm going to use this conference to help get me

9 organized. This is a transferred case. Sadly, this court has

10 lost Judge Mukasey, but as consolation prize, I get to preside

11 over this case and a few others.

12 I've spent some time trying to understand the lay of

13 the land, but not an extraordinary amount of time, because I

14 thought it would be more efficient for me to hear today from

15 each of you what the status is, so I thought I'd start by just

16 giving you sort of an outline of what I understand the open

17 motions are and the issues and what remains to be done and

18 where we are, so that you can fill in the gaps and correct any

19 misunderstanding that I have.

20 I'd also like to run this as an initial conference,

21 even though I know the litigation is at least two years old,

22 but it's my first meeting with you, and it's a chance for me to

23 learn factually what the case is about. I understand that

24 Judge Mukasey chose two lead plaintiffs and appointed three law

25 firms as lead counsel. I'm not quite sure what Mr. Rubin's

1 role is, so I'm sure Mr. Weiss will fill me in on where that
2 comes in.
3 As I understand it, there actually hasn't been a
4 consolidation order executed here. I have a draft which is
5 unsigned. I think I might in executing a consolidation order
6 perhaps use a slightly different format that I'm familiar with
7 from cases I've supervised on my own docket before this that
8 were securities cases, but I don't think there will be many
9 surprises in that.
10 I think we have six cases that are potential
11 candidates for consolidation. However, with respect to one of
12 them I understand that there is an unopposed motion for remand.
13 So let me list the six cases. They are Taylor, 04 Civ 8038 --
14 no, I'm sorry, let me start again.
15 There are seven cases that need to be consolidated.
16 The lead case is Meyer, 04 Civ 7897. And then the additional
17 cases would be Taylor, 04 Civ 8038; Triden, 04 Civ 8060;
18 Bassin, 04 Civ 8295; Maxfield, 04 Civ 8994; Jakob, 04 Civ 9479,
19 and then the last being Rubin, 05 Civ 3871. And it's with
20 respect to that last case, Rubin, that I believe I have an
21 unopposed motion for remand that has been pending since May of
22 '05.
23 In terms of motions, I have a motion, I think perhaps
24 two motions to withdraw as counsel; one for a Mark Debrowski,
25 which I don't think has been granted, but is really just

1 cleaning house and needs to be so ordered by me, an attorney
2 left a law firm and should no longer be listed as representing
3 one of the plaintiffs.
4 I also have a motion by LeBeouf to withdraw as counsel
5 for Zurich Financial Services, which I don't think has been
6 addressed, and I see that Mr. Ferrara is here, so I don't know
7 if I should be granting that or not.
8 MR. FERRARA: Well, your Honor, I certainly hope not.
9 I think, as I understand it, there may be some confusion on the
10 record. Sullivan & Cromwell had originally appeared on behalf
11 of Zurich Financial Services. I believe they are withdrawing
12 and we are replacing them, and I believe that motion was
13 granted, your Honor. At least I'm told that.
14 THE COURT: Okay.
15 MR. FERRARA: I don't have the order, but I'm told
16 that that was granted.
17 THE COURT: Okay. So I'm going to check into that and
18 if we don't find a record on the docket of a signed order --
19 MR. FERRARA: We'll submit a new order.
20 THE COURT: Great. But don't do that unless we call
21 you. We'll check into it.
22 MR. FERRARA: Rest assured, though, we are here to
23 stay.
24 THE COURT: Good, thank you. And you were replacing
25 who?

1 MR. FERRARA: Penny Shane from Sullivan & Cromwell.
2 THE COURT: More substantively, I have a motion to
3 dismiss, a motion to strike, a motion to file a second amended
4 complaint. And I grouped those together, which I'll want to
5 hear about. I assume the motion to strike is related to those
6 other motions, but perhaps not, and you'll tell me.
7 I'd be interested in hearing, when we get to this part
8 of the conference, whether or not plaintiffs are intending to
9 file yet another amended complaint or whether the motion for
10 leave to file a second amended class action complaint can be
11 considered by me as the plaintiffs' complaint on which I should
12 decide the motion to dismiss practice. So you'll let me know.
13 Okay. I'm also interested in understanding -- some of
14 you have appeared before me before in other securities
15 litigation, in particular Bernstein Litowitz, but I think
16 several of you, and you probably know that I sort of have a
17 presumption that there will be a single lead plaintiff
18 represented by a single law firm. I don't probably intend to
19 revisit that issue in this case. Judge Mukasey has made a
20 decision and everybody has been functioning under it for two
21 years, and I know of no reason at this point to revisit it, and
22 I entirely trust his judgment about how to organize the case
23 from the plaintiff's point of view.
24 But, that said, let me explain why I have this
25 preference for a single lead plaintiff represented by a single

1 law firm, and that is when it comes time, should it come time
2 ever in this case for a review of attorneys fees, I take that
3 role extremely seriously, and even if the application is
4 unopposed, I scrutinize it myself independently, and when there
5 are multiple law firms I bring an extra level of attention to
6 that issue, to make sure that there's been no unnecessary
7 duplication or waste, such that the class, should it receive a
8 recovery in this case, is not deprived of every single penny to
9 which it is entitled.
10 Good. So you sort of know what I know, and what I
11 don't know at this point, so let's start as if this were an
12 initial conference, and I'll ask the plaintiffs to, before we
13 get to the procedural framework and motion practice and all
14 that, to just describe to me what this litigation is about from
15 a factual point of view, and then I'll hear from defense
16 counsel.
17 MR. COFFEY: Good morning, your Honor. Sean Coffey.
18 It's a securities class action, and it involves
19 Securities Act claims relating to a December 2001 initial
20 public offering by Converium and open market 10(b) claims for
21 the period of time after that from December 11, 2001 through
22 early September, 2001. I'll give you the precise date,
23 September 2, 2004.
24 The defendants are Converium, its parent, which was
25 involved with the IPO, it's directors, officers and the

1 underwriters, the two lead underwriters for the IPO.
2 THE COURT: So let me look at that. So that's UBS and
3 Merrill Lynch?
4 MR. COFFEY: Correct, your Honor. In the offering,
5 Zurich sold 35 million shares of Converium to the public at a
6 price of $24.59, realizing gross proceeds of approximately
7 $2 billion. That was at the time the largest IPO for a
8 reinsurance company in history.
9 In July of 2004, the company announced that it had
10 underreserved and would have to take a charge against earnings
11 of 400 million to increase its North American reserves. The
12 market reacted swiftly with a 50 percent drop in the stock
13 price from approximately $25 to approximately $12-1/2. It was
14 a market cap loss of about a billion and a half dollars in one
15 day.
16 A number of lawsuits were filed, and as you noted
17 earlier, your Honor, Judge Mukasey appointed two lead
18 plaintiffs; the Public Employees Retirement System of
19 Mississippi, which is a Bernstein Lewis client, and then Avalon
20 Holdings, together with the other two firms, Spector and
21 Roseman and Cohen Milstein.
22 The lead plaintiff's motions were made in December of
23 '04 and decided, I believe, in August of '04 and a consolidated
24 complaint was filed in September. Motions to dismissed were
25 fully briefed and then the restatement came out. And so we

1 sought leave to file the second amended complaint, and that is
2 pending.
3 THE COURT: So what was the theory of the first
4 complaint if it was before the restatement?
5 MR. COFFEY: Well, they had made an announcement --
6 I'm sorry, they had subsequent announcements and the amount
7 they were underreserved grew and grew. Our complaint, we ended
8 up interviewing somebody in the mix who shared with us the fact
9 that the underreserve was known within the company, was known
10 before the IPO, so there were false statements made and
11 omissions made about the adequacy of their reserves and when
12 the truth came to light the stock plummeted precipitously.
13 THE COURT: Give me the dates again of the IPO?
14 MR. COFFEY: December 11, 2001.
15 THE COURT: And then the date of the announcement of
16 the underreserve?
17 MR. COFFEY: July 20, 2004.
18 THE COURT: And the lawsuits were then filed after
19 July of '04?
20 MR. COFFEY: Correct, your Honor. They began to be
21 filed in the fall of '04 and were assigned to Judge Mukasey.
22 THE COURT: And then when was the restatement issued?
23 MR. COFFEY: The restatement was issued in March of
24 '06, your Honor. So after the first consolidated complaint had
25 been filed.

1 THE COURT: Okay. So the principal function of the
2 second amended complaint is to fold in the restatement?
3 MR. COFFEY: That, your Honor, and also to address
4 something that from a plaintiff's perspective should be wholly
5 unnecessary, but we are who we are.
6 We also wanted to address the sounds in fraud argument
7 that is so often made with regard to Securities Act claims and
8 in light of a recent decision in the Third Circuit, Suprema,
9 this is happening more and more, and again, why complete in the
10 alternative everywhere else but securities cases, that's a
11 question for another day, but the second purpose for the second
12 amended complaint was to go through the exercise of breaking
13 the claim into two pieces, putting the Securities Act claim
14 first without any allegations of fraud and then the specific
15 allegations of fraud and then the Exchange Act claims to
16 further underscore that plaintiffs should be entitled to press
17 Securities Act claims without having to satisfy the heightened
18 burdens of pleading that go along with Exchange Act claims. So
19 those were the two purposes.
20 I could jump ahead to two issues that your Honor has
21 already raised. I have good news to report. If you haven't
22 read these letters, maybe that's a good thing, but there's been
23 a lot of correspondence back and forth about the leadership of
24 the case. I'm pleased to say that in discussions coming here
25 today with regard to the role of Mr. Rubin, his case, whether

1 there were --

2 THE COURT: Introduce me to Mr. Rubin. Who is he?

3 MR. COFFEY: He's a plaintiff who filed a case and who
4 has the unopposed motion to remand. He filed in state court,
5 he was removed, he seeks -- wanted to be lead plaintiff in a
6 separate case so there would be two cases side by side. Of
7 course, there had not been a consolidation. We talked about it
8 and have concluded it would be in the best interests of the
9 class to consolidate those cases, so he's willing to stay in
10 federal court and be consolidated and to serve as a named
11 plaintiff for the Securities Act claims for which he had filed
12 a lawsuit.

13 So what we would do with regard to the second amended
14 complaint, it would be the operative complaint but for an
15 additional named plaintiff. We have the two lead plaintiffs
16 we've talked about, LASERS, the Louisiana State Employees
17 Retirement System is a named plaintiff in this complaint, and
18 we have concluded it's in the best interests of the class to
19 have Mr. Rubin as an additional named plaintiff, and to resolve
20 these issues about who should be the lead, whether his case is
21 separate, whether he is remanded and we have a competing state
22 action. We have some experience with that, and the challenges
23 that poses, and in viewing the merits of what he has done
24 already and how it resolves some of the issues that have been
25 raised in the motions to dismiss, we concluded, and Mr. Rubin

1 ultimately agreed, that it was better to have him as a named
2 plaintiff. So that in my opinion would have resolved some of
3 the issues about whether he gets this case remanded, and
4 whether there's a separate lead plaintiff. He won't be a lead
5 plaintiff. His counsel will not be lead counsel, and that's
6 news on that front. So the proposed second amended complaint
7 would be amended to add him as an additional named plaintiff.
8 THE COURT: And we'll get to this when each of defense
9 counsel have an opportunity to address the Court, but I'm
10 assuming there will be no opposition to that additional
11 amendment. Okay.
12 MR. COFFEY: And I'll say simply, we read you loud and
13 clear on your admonition about duplication of efforts by the
14 plaintiffs' attorneys. We're very mindful of that, and I
15 believe we have a track record on that, and we intend to act
16 consistently with that track record on being as efficient as we
17 can on behalf of the class. That's all I have at this point,
18 your Honor.
19 THE COURT: Okay. So you're willing to have the
20 proposed second amended complaint rise or fall on its merits.
21 MR. COFFEY: We are, your Honor.
22 THE COURT: Okay.
23 MR. WEISS: Your Honor?
24 THE COURT: Yes.
25 MR. WEISS: Before you get to defense counsel, if

1 Mr. Coffey is finished, I represent Mr. Rubin, I just wanted to
2 take a moment, can I? Good morning, your Honor, Joseph Weiss.
3 I represent Mr. Rubin. I just wanted to explain that we had
4 filed the case on behalf of Mr. Rubin in state court, and the
5 theory was that there's concurrent jurisdiction in the state
6 court for Section 11 claims. Mr. Rubin asserted only a Section
7 11 and 12-2 claim, no 10(b) claims. So our position had been
8 that there should be separate representation for the Section 11
9 12-2 claims, and there had been an issue with respect to that.
10 But we've spoken to Mr. Rubin, we spoke to Mr. Coffey, and I
11 think we all agree that it would be in the best interests of
12 the class if in fact the plaintiffs are united in prosecuting
13 this litigation.
14 There was no one else who had filed Section 11 claims,
15 and our complaint had been filed just before the statute of
16 limitations ran. So the defendants had raised an issue in this
17 case here as to whether the Section 11 claim that was asserted
18 by the other plaintiffs was timely asserted or not.
19 THE COURT: When you say no one else had filed a
20 Section 11 claim, do you mean no one else -- what do you mean?
21 MR. WEISS: Those exact words, your Honor. No one
22 else filed a Section 11 claim before the statute of limitations
23 expired. Just the way you hear it. We were the only ones to
24 do that. But the point is --
25 THE COURT: So these '04 cases did not have a Section

1 11 claim?

2 MR. WEISS: That's correct, your Honor. Eventually,
3 after we filed, and after the statute expired, it was added
4 here and it was added based on Mr. Rubin in effect tolling the
5 statute on behalf of everyone else.

6 So in order to avoid this issue, which in effect has
7 now been raised, of Mr. Rubin becoming a plaintiff in the
8 consolidated case if your Honor in fact consolidates them which
9 we believe she should, that will no longer be an issue, I don't
10 think the defendants will be able to assert it, your Honor
11 won't have to deal with it. The one thing I guess I would add
12 with respect to this Section 11 claim and that Mr. Coffey
13 touched upon, everything that Mr. Coffey said was correct, that
14 he touched upon, even when they first announced they didn't
15 have sufficient researches before any restatement, what they
16 announced were, and this is a quote, these are legacy issues,
17 namely, meaning that these issues that they have about being so
18 vastly underreserved go back prior to the public offering,
19 which means that even then they in effect conceded that the
20 registration statement and prospectus did not accurately
21 reflect Converium's financial position.

22 So I'm pleased to report to your Honor that we have
23 been able to resolve this. We are working together. The only
24 comment that I may like to add to what Mr. Coffey said is
25 because with respect to the amended complaint, the second

1 amended complaint that they filed, there may be a paragraph or
2 two which I would like to make a suggestion to him. So with
3 your Honor's permission, we're not going to overdo it, but
4 there might be a paragraph or two that I would like to talk to
5 him about in addition to Mr. Rubin being named, but otherwise,
6 I think it's clear that the second amended complaint and this
7 addition is something we should stand on.
8 And I guess, your Honor, I would say that we would be
9 withdrawing our motion to remand, if that's even necessary to
10 say now. But I guess I want to explicitly say it, we do
11 withdraw that.
12 THE COURT: Okay. I know I have counsel for Avalon
13 here. I'd love to know what Avalon is.
14 MR. WILLIS: Good morning, your Honor, Mark Willis.
15 Avalon is a Greek trust. It's a trust for a shipping company
16 based in Athens, and they purchased Converium stock, and --
17 THE COURT: In their own name. Are they beneficial
18 owner?
19 MR. WILLIS: Avalon is, yes. They purchased the stock
20 and they filed lead plaintiff papers as well as Mississippi.
21 They actually have the highest loss of any of the movants, and
22 through our good relationship with Bernstein Litowitz and
23 recognition of their good work and our good work with respect
24 to Rubin, we determined it would be in the best interests of
25 the class not to have a prolonged lead plaintiff issue, and the

1 clients wanted to work together on this and felt that was a
2 positive thing to do, and so we presented that to Judge
3 Mukasey.
4 THE COURT: Thank you. So, Mr. Mancino, why don't I
5 start with you?
6 MR. MANCINO: Good morning, your Honor. To give you
7 the background of the case from my perspective, and I'm sure if
8 there's anything to fill in, my bretheren at defense counsel
9 table will volunteer. As the plaintiffs allege in the first
10 paragraph of their complaint, this case is about the
11 intentional manipulation of loss reserves to manufacture
12 profit. That's the gravamen of their case. And that becomes
13 relevant later when you talk about the restatement allegation.
14 My client, Converium Holding AG, is an international
15 reinsurance company. It was formed in 2001 out of the then
16 reinsurance business of Zurich Financial Services, which at
17 that time operated under the trade name of Zurich Re. It's
18 composed of a number of separate subsidiaries. Most relevant
19 to this action is the North American subsidiary called
20 Converium Reinsurance North America, known previously as Zurich
21 Re North America.
22 In March, 2001, your Honor, Zurich announced that it
23 was making a strategic change in its business, such that it was
24 going to essentially exit the reinsurance business and as a
25 result of that it was contemplating the disposition of its

1 reinsurance business, and it was through that, once that
2 decision was made, the Converium entities were formed. And
3 then as part of that, they retained the well-known actuarial
4 consulting firm, Tillinghast, to review the loss and loss
5 expense of the reserves in that reinsurance business in
6 anticipation of the disposition of it.
7 In September of 2001, Zurich announced that the
8 Converium reinsurance business would be spun off in a public
9 offering. Also in that time frame of September 2001,
10 Tillinghast issued its final report on its review, the final
11 report of its review of the loss reserves of the reinsurance
12 business of Converium. The initial public offering occurred on
13 December 11, 2004 -- 2001, excuse me, and over the next -- and
14 in the offering documents, your Honor, Converium noted that as
15 a result of the Tillinghast review of its loss reserves, it had
16 strengthened its reserves by approximately 112 million in
17 response to that, 125 million of which related to the Converium
18 North America business, offset by some redundancies in other
19 parts of the business. That prospectus also disclosed that in
20 2000, there had also been substantial increases, strengthenings
21 of Converium's loss reserves.
22 Following the IPO, which was conducted via a firm
23 commitment underwriting whereby Zurich sold its shares to the
24 underwriting consortium and they in turn sold it to the public,
25 in the eleven months following the IPO, Converium announced

1 over a period of time additional substantial reserve
2 strengthenings in regard primarily to its North American
3 business, relating principally to the underwriting years of '97
4 through 2000. There were in this eleven-month time period
5 immediately on the heels of the IPO approximately four
6 additional reserve increases, totaling approximately
7 $160 million, substantial amount.
8 Converium was operating as an independent reinsurance
9 company, and like all reinsurance companies, or insurance
10 companies, for that matter, was constantly evaluating and
11 reassessing its loss reserves, and from time to time changes
12 were made in those loss reserves.
13 What prompted these lawsuits was the announcement in
14 July 2004 that upon a further review of its loss reserves,
15 Converium had concluded that they needed to be strengthened by
16 an additional, at least an additional $400 million, and in that
17 announcement, they noted that an actuarial consultant had been
18 retained to review further the loss reserves, and that the
19 results of that review would be announced in the following
20 months.
21 THE COURT: Now, was that, again, Tillinghast or
22 someone else?
23 MR. MANCINO: It was Tillinghast that conducted the
24 review in 2004 as well. There was also another independent
25 actuarial consultant involved with the Converium reserves, and

1 that was the actuarial branch of Deloitte called Bacon Woodward
2 Deloitte that did an independent evaluation of Converium
3 reserves in 2003. I should note that in the prospectus,
4 Converium noted that, by this reserves, following the
5 strengthening corresponded to Tillinghast's best estimates
6 based on the review that Tillinghast had done leading up to the
7 IPO in 2001, and Tillinghast expertized the offering documents.
8 Following the announcement of the $400 million reserve
9 deficiency in July, 2004, there was another announcement in
10 September, 2004 following the results of the Tillinghast
11 review, which announced that there were going to be additional
12 reserve strengthenings, such that the total reserve
13 strengthenings in '04 were in excess of $500 million.
14 Then in October 2004, as your Honor has noted, the
15 series of class action complaints were filed in federal court.
16 Each of those complaints alleged violations of Section 10B and
17 Rule 10B-5 on account of, as the consolidated complaint
18 mentions, an alleged manipulation of loss reserves to
19 manufacture profit.
20 On December 9, 2004, Mr. Weiss on behalf of his
21 client, Mr. Rubin, filed the Section 11 and Section 12 lawsuit
22 in state court. That was subsequently removed to federal
23 court, your Honor.
24 THE COURT: On what theory?
25 MR. MANCINO: Under SLUSA, your Honor.

1 THE COURT: Was it brought as a class action?
2 MR. MANCINO: Yes, it was, under the theory that it
3 was a covered class action under SLUSA.
4 So we removed it to federal court. Mr. Rubin filed a
5 motion to remand, and there's been -- let me just correct the
6 record on that, your Honor, because there was a mention made
7 that it was an unopposed motion to remand. It was really, that
8 motion to remand was withdrawn pursuant to a stipulation that
9 Converium entered into with Mr. Rubin, Mr. Rubin's lawyer,
10 Mr. Weiss, pursuant to which he agreed to withdraw his motion
11 to remand.
12 THE COURT: Was that stipulation so ordered? Should I
13 find it in the docket sheet?
14 MR. MANCINO: It was not so ordered, your Honor. It
15 was presented to Judge Mukasey, and I think that stipulation
16 ran into the buzz saw that was presented by the debate that was
17 ongoing between Mr. Weiss and the lawyers for the federal
18 plaintiffs over who would be the lead plaintiff and lead law
19 firm, and as a result of that, I believe, that stipulation was
20 not entered by Judge Mukasey.
21 THE COURT: Okay. Mr. Coffey, I'm going to ask you to
22 get me an order which will, among other things, address the
23 motion for remand which is still pending on the docket.
24 MR. COFFEY: Will do.
25 THE COURT: Thank you.

1 MR. MANCINO: We had a conference before Judge
2 Mukasey, after which the parties agreed to a schedule by which
3 the now lead plaintiffs and their lawyers would file a
4 consolidated amended complaint and that was filed in September
5 of 2005, your Honor. And that complaint, unlike all of the
6 prior complaints that had been filed, I believe I'm correct on
7 this, named in addition to Converium, the individual defendants
8 and Zurich Financial Services, the underwriter defendants. All
9 of the defendants in turn filed motions to dismiss that
10 complaint. Our motions to dismiss were filed in early 2006.
11 Shortly after we filed those, Converium announced that
12 after an internal review of the reinsurance accounting
13 treatment of certain discrete finite risk transactions, it was
14 going to be restating certain of its financial statements
15 because it had concluded that reinsurance accounting treatment
16 for certain of those transactions had been incorrectly taken,
17 such that it should have been recorded using deposit accounting
18 rules, not reinsurance accounting rules.
19 On March 1, 2006, Converium announced, formally
20 announced the results of a restatement and sometime in the
21 following month of April, the plaintiffs made a motion to amend
22 their complaint to include allegations relating to the
23 restatement in their 1933 Act claims.
24 THE COURT: Thank you, this is all very helpful. But
25 just before you get too far ahead of me, here, so when you

1 mention the restatement as suggesting that the company should
2 have used deposit accounting rules instead of reinsurance
3 accounting rules, that means that, wholly apart from the issue
4 about the size of the loss reserves, there's a second issue
5 about the accounting treatment? Do I understand that
6 correctly?
7 MR. MANCINO: Yes, your Honor. The restatement does
8 not involve the review and establishment of loss reserves. The
9 restatement, on the other hand, involves the accounting
10 treatment under FAS 113 of these discrete complex finite risk
11 transactions and looks at the question of whether under the
12 contractual language and the dealing between the parties to
13 those contracts there was sufficient risk transfer to justify
14 taking reinsurance accounting treatment for those contracts.
15 THE COURT: So that restatement was necessary even if
16 there had been no underreserved issue?
17 MR. MANCINO: Yes, your Honor.
18 THE COURT: Okay. So there are two independent
19 issues?
20 MR. MANCINO: Yes, your Honor.
21 THE COURT: Did the restatement also address the
22 underreserve issue?
23 MR. MANCINO: It did not, your Honor.
24 THE COURT: That had already been accounted for in an
25 ongoing way through 2001 and 2002, et cetera?

1 MR. MANCINO: And up through 2004 and the announcement
2 of those increased loss reserves.
3 THE COURT: Okay, so you see the restatement as an
4 entirely separate issue?
5 MR. MANCINO: We do, your Honor.
6 THE COURT: Okay.
7 MR. MANCINO: So there is now a motion to amend, to
8 amend the '33 Act claims to include some allegations relating
9 to the restatement of these finite risk transactions. The
10 defendants have opposed that motion to amend, and indeed the
11 plaintiffs have filed their opposition to our motions to
12 dismiss the original consolidated and amended complaint, and
13 all those motions have been fully briefed since June of this
14 year, and are pending a decision.
15 And we basically took the view that the pending
16 motions should be resolved because the proposed amended
17 complaint is futile, for a number of reasons, one of which is
18 that it's time barred because the plaintiffs have first raised
19 restatement allegations over four years after the date of the
20 initial public offering, and it's therefore barred by Section
21 13's three years statute of repose.
22 In addition, in line with our view that the two sets
23 of allegations really are independent, we have taken the
24 position that the restatement allegations do not relate back to
25 the plaintiff's original consolidated amended complaint,

1 because they involve an entirely different subject matter,
2 because the original case is not a case about the reinsurance
3 accounting treatment of complex finite risk transactions. It's
4 a case about the alleged intentional manipulation of loss
5 reserves.
6 And we also oppose the amended complaint on grounds of
7 futility because there is not a '33 Act claim to which it can
8 relate back, because the '33 Act claims alleged in the
9 plaintiff's consolidated amended complaint are barred by the
10 one-year statute of limitations under Section 13, because the
11 plaintiffs were on notice of their claims from at least as
12 early as November, 2002, because of the series of storm
13 warnings that were emanating from Converium in the eleven
14 months following the IPO.
15 THE COURT: Ah, mm-hmm.
16 MR. MANCINO: So, in our perfect world, at least
17 speaking for Converium, your Honor, the pending motions to
18 dismiss the original consolidated amended complaint should go
19 forward, and as part of that, your Honor can address the
20 briefing on the motions to amend because we think at the end of
21 that process, we will have a situation where all or part of the
22 original consolidated complaint may fall, but that in any
23 event, the proposed amendments regarding restatement will be
24 deemed not to have any place in this lawsuit whatsoever.
25 THE COURT: Your briefing, then, when you opposed the

1 amendment, did not restate the arguments in the briefing on the
2 original motion to dismiss, so I do have to decide, from your
3 point of view, two separate motions here; the motion to dismiss
4 and the motion to amend.
5 MR. MANCINO: Yes, your Honor.
6 THE COURT: Okay.
7 MR. MANCINO: And we think, given the time and effort
8 that the parties have already devoted to that briefing and the
9 period of time that it's been pending, that that's the best way
10 to approach it, from an efficiency and economical perspective.
11 THE COURT: Don't worry, I am aware of the PSLRA. I
12 will decide your motions.
13 So with respect to the motion to dismiss, you were
14 faced with both Securities Act and Exchange Act claims.
15 MR. MANCINO: Yes, your Honor.
16 THE COURT: And you've addressed both in your motion
17 to dismiss?
18 MR. MANCINO: Yes, we have.
19 THE COURT: And your attack on the Securities Act
20 claims is not failure to state a claim, but, rather, that it's
21 untimely.
22 MR. MANCINO: We've attacked it from a number of
23 perspectives. One is that it's time barred, because of the
24 storm warnings, and also on the grounds that it does not
25 adequately allege a misrepresentation or omission, and then

1 from my perspective, because we also represent individual
2 defendants, we've also challenged the control person allegation
3 with respect to the '33 Act claims as well.
4 THE COURT: Well, you know that's a loser with me.
5 MR. MANCINO: I have read your Honor's decisions, yes.
6 THE COURT: Okay, good. And then your attack on the
7 10B?
8 MR. MANCINO: The attack on the 10B-5 claims is that
9 they do not adequately allege scienter, nor do they adequately
10 allege a material misrepresentation or omission.
11 THE COURT: And then when we get to the motion to
12 amend, it doesn't relate back?
13 MR. MANCINO: That's right, your Honor. As a
14 stand-alone set of allegations of restatement of client at-risk
15 transactions, it's barred by the statute imposed, but they
16 can't make it relate back, because it doesn't relate back.
17 THE COURT: This has been very helpful. Yes.
18 MR. FERRARA: Thank you, your Honor.
19 First, forgive me. I think I'm recovering from
20 terminal laryngitis, not good for a litigator. We will take
21 the Court's admonition of having a single counsel appear for
22 plaintiffs as a gentle suggestion as defense counsel not appear
23 as a gaggle and I promise not repeat everything my colleague
24 representing Converium has said.
25 But perhaps I can give just a bit of focus to some of

1 the points that have been raised, because I think it's
2 important at this initial conference, your Honor, that we try
3 to separate the ministerial from the procedural from the
4 substantive. And sometimes when we get into these long
5 narrations, it's awfully hard to separate the three.
6 First, with respect to what Mr. Coffey said --
7 THE COURT: I want to be clear. You represent Zurich?
8 MR. FERRARA: Your Honor, representing Zurich
9 Financial Services, the former parent of Converium, who
10 Mr. Coffey said was involved in the IPO. And I'd like to pause
11 on that description just for the moment to make it clear that
12 my client was not the issuer for purposes of Section 11, nor
13 were we involved, using the verb that Mr. Coffey used, in the
14 offering in the sense that would trigger issues under 12A-2.
15 We never sold a share of stock to the public, as he said.
16 Indeed, we sold our stock to counsel -- sorry -- the
17 underwriters that are represented by Cravath here today.
18 Now, that's just a small detail that I'd like to
19 clarify.
20 Second, your Honor --
21 THE COURT: And what are you named in?
22 MR. FERRARA: Your Honor, we're named for everything,
23 but we are told that the plaintiffs intend to drop the Section
24 11 case against us and continue with the 12A-2 case, although
25 that hasn't happened yet.

1 Another footnote. Your Honor asked that Avalon be
2 introduced, and we listened hard to what Avalon had to say, and
3 when you abstract the Avalon statement here today, what you
4 hear is that this public offering involved a perhaps
5 significant number of shareholders, who, apparently like
6 Avalon, were foreign purchasers of these securities in foreign
7 accounts in foreign markets. And that, your Honor, raises for
8 this Court and for us as defendants, the opportunity, perhaps
9 on our part the obligation to raise with this Court a
10 fundamental jurisdictional issue that's not been raised yet
11 with respect to whether this Court should exercise its
12 discretion to adjudicate claims on behalf of those foreign
13 purchasers in this court. This is an issue that remains to be
14 briefed and we intend to do so soon.
15 Third, your Honor, we focused --
16 THE COURT: Give me one second. Thank you.
17 MR. FERRARA: Your Honor, I think we have to focus on
18 the second amended complaint issue, focus on that as, in my
19 judgment at least, the most substantive issue facing this Court
20 today. Indeed, even the order in which this Court described
21 consideration of this issue is important.
22 The Court said a moment ago I have two motions; a
23 motion to dismiss and a motion on the second amended complaint.
24 Indeed, your Honor, perhaps if one is trying to prioritize
25 these motions, it is first important to consider the motion

1 with respect to the second amended complaint. There an
2 enormously important substantive issue is being presented. The
3 complaint as originally pled that this Court heard alleges that
4 the defendants brought some kind of undue pressure or influence
5 on Tillinghast at the time of the IPO to understate the
6 reserves. That was the case that was pled.
7 Now, when the restatement comes along, well after the
8 period of repose, the plaintiffs would now like to seek to add
9 to the complaint a wholly separate obligation that does not
10 arise to the same core facts, doesn't involve the same type of
11 transaction and certainly is out of time with that transaction.
12 Now, what the plaintiffs are trying to say is that a statement
13 that was precipitated by so-called faulted reinsurance
14 agreements should be included in this case. That would be a
15 dramatically different claim than was originally made, a
16 dramatically different claim than has been briefed on the
17 motion to dismiss, a claim which is time barred and would
18 extend the scope of this case significantly. Your Honor, we
19 have briefed that issue I think carefully in our opposition to
20 the filing of the second amended complaint, and I'm only
21 dwelling on it here to the extent that I am because having
22 done, as this Court has in many cases in the past, usually in
23 the filing of a complaint, even a second amended complaint is
24 regarded as, if not ministerial, a procedural issue, and some
25 how as long as it on some abstract level it, quote, relates

1 back, it should be permitted.
2 This case at this point turns on the distinction of
3 whether restatement-based claims which go to faulted
4 reinsurance contracts have anything to do with the originally
5 pled allegation that somehow the experts at the time of the IPO
6 were influenced. And so, your Honor, we would ask that from
7 Zurich's point of view, perhaps the first issue the Court
8 should consider is the wisdom of allowing the second amended
9 complaint to go forward.
10 THE COURT: Okay. Tell me what the financial
11 ramifications are of the restatement claim? If I understand
12 correctly, the July 2004 announcement which this case was
13 originally based on is a $1 billion case.
14 MR. FERRARA: Right.
15 THE COURT: What was the impact on the stock of the
16 restatement?
17 MR. FERRARA: Your Honor, let's stop for a moment.
18 Recall the original announcement of underreserving goes to the
19 claim that was pled; somehow Tillinghast was manipulated into a
20 repose. When the restatement was first announced, I believe
21 the stock dropped 23 cents, so it was a stock that had been
22 significantly eroded in value because of the prior
23 underreserving announcements by this company. By the time the
24 restatement was announced, there was a, I wouldn't say
25 infinitesimal, but very, very small drop in the stock, which

1 quite apart from the causation arguments, which we'll argue at
2 a later point in this case, really shows the distinction, the
3 fundamental distinction between these two types of claims.
4 Also, your Honor --
5 THE COURT: What I'm hearing, then, is the restatement
6 becomes important to this case not because it adds to the
7 amount of the damages the plaintiffs can recover, but instead,
8 it would add more defendants or increase the risk, the scope of
9 liability of certain of the defendants. Am I right?
10 MR. FERRARA: I think, your Honor, you are right on
11 both points, but perhaps more right on the second point than
12 the first. You see, my colleague from Converium said, in
13 essence, we are, I think I heard him say, we are not making a
14 12B-6 attack on the allegations respecting the restatement.
15 Perhaps I heard him wrong. Zurich's point of view is that
16 restatement, which takes these reinsurance contracts and tries
17 to restate them to the pre-IPO area, makes one huge difference
18 and, your Honor, we will be in this court for a very long time
19 seeking to persuade you and ultimately a jury if we must, that
20 that restatement either was improvident, or if not, should have
21 not related back to the pre-IPO period.
22 Those restatements arose from current period change in
23 circumstances, and were not eligible under the applicable
24 accounting standards, APB 20 paragraph 19 to go back to the
25 pre-IPO state. So how this Court deals with the restatement

1 issue not only affects where the liability hits, but goes to
2 the very heart of the case that we're going to be arguing about
3 in this courtroom for a very, very long time to come.
4 Is it a 10B case, which is tied to underreserving and
5 post-IPO restatement, or is it a Section 11 case that somehow
6 sweeps in not only underreserving, but the unrelated concept
7 and subject of restatements? It is a very important issue to
8 decide early on in this case.
9 THE COURT: So Zurich doesn't feel that it has much at
10 risk here on the original complaint, but if I let the
11 restatement in, you're facing significantly greater liability?
12 MR. FERRARA: Well, your Honor, what I would like to
13 say is that there are two separate lines of defense that we
14 would have to engage in. The first line of defense on the case
15 that was already pled is whether or not Tillinghast, who set
16 the reserves at the IPO date, was somehow unduly influenced,
17 pressured or manipulated by us. The second issue involves the
18 fundamental question and very complicated accounting question
19 of whether a series of reinsurance contracts, A, should have
20 been restated at all, that is, did they shift significant risk
21 to not require restatement, and, B, if they needed to be
22 restated, to what period should they attach, and that is a much
23 more complicated and detailed case to deal with than the case
24 that was originally pled.
25 And, your Honor, it is not that we are incapable of

1 dealing with a restatement case. We have done many of them,
2 but when it is both time barred by the three-year statute and
3 also barred by the one-year statute, given all the information
4 that was out in the marketplace upon which this case could have
5 been pled before it was, we think that in this unusual case, a
6 statute of limitations argument and a motion to oppose the
7 second amendment of the consolidated class action complaint
8 arises like a phoenix to be a substantive issue, not merely
9 ministerial or procedural.
10 THE COURT: Well, Mr. Ferrara, you're going to lose
11 this argument.
12 MR. FERRARA: Which is that?
13 THE COURT: To the extent you're asking me to take the
14 motion to amend first, I'm not going to. Because, if I
15 understand you correctly, I can't really analyze that motion
16 effectively until I understand the original theory in the
17 plaintiff's case. And so you may win ultimately on no relation
18 back, but I think I'm going to take the motion to dismiss
19 first.
20 MR. FERRARA: Frankly, your Honor, if you'd like to
21 take the motion to dismiss first and perhaps schedule oral
22 argument on the motion to dismiss, that's fine. If we prevail
23 on the motion to dismiss, we would love to see this Court
24 dismiss this case with prejudice, but if it did not, it would
25 give leave to replead, and then we would deal with this issue

1 as to whether or not it was really a leave to replead a
2 dismissed complaint or whether it was really through the back
3 door of repleading an effort to amend, and we can deal with it
4 then and I'm happy to deal with it then, your Honor.
5 THE COURT: Right. Thank you so much.
6 MR. WEISS: Your Honor, may I call something to the
7 Court's attention? Thank you, your Honor. Joseph Weiss.
8 I just want to point out that I enjoy listening to
9 counsel, to everyone here in the Court, and I find these
10 discussions fascinating. But what's missing, what's missing is
11 the fact that even if your Honor were to deal with the motions
12 to dismiss, there would still be the Rubin complaint, which has
13 not yet been consolidated, and as against which none of these
14 motions are addressed and the Rubin complaint reads differently
15 than the original complaint here, than the amended complaint,
16 then the second amended complaint. And the Rubin complaint
17 they're not going to be able to get that dismissed, I don't
18 believe, with all due respect.
19 The Rubin complaint does not allege these storm
20 warnings. The Rubin complaint alleges that the prospectus and
21 registration statements, the financials were false and it only
22 cites as an example the reserve issue. I believe that the
23 Rubin complaint does read differently, and whether the
24 financials had to be redone or were incorrect because of issues
25 involving reserves or issues involve financial accounting, our

1 complaint is broad enough that it clearly can be amended and
2 relate back and all these issues about statute of limitations
3 don't apply.

4 There's been no motion against the Rubin complaint,
5 and so what I would --

6 THE COURT: Do we have a stay with respect to the
7 Rubin complaint? Was there an answer?

8 MR. WEISS: The stay, in effect, your Honor, was that
9 Judge Mukasey simply never ruled, for whatever reason, on any
10 of the motions, including the initial motion of whether Rubin
11 is going to be remaining in this court or is going back to the
12 state court, so he couldn't deal with even that issue, and
13 basically, we were just all waiting for Judge Mukasey to rule
14 before we addressed the complaint.

15 But it just seems to me that the Court should be aware
16 that if the Court decides the motion to dismiss, it would then
17 presumably face another motion to dismiss with respect to the
18 Rubin complaint. It just doesn't make any sense in terms of
19 efficiency. It would seem to me that the first order of
20 business is to get these cases consolidated, to decide what the
21 complaint that the Court is going to have to deal with is going
22 to deal with, and I do appreciate the fact that counsel have
23 gone to the trouble of already writing the motions to dismiss,
24 but the fact of the matter is, whatever research has been done,
25 has been done. It's all in the word processor and they ought

1 to be able to update it so the Court only needs to deal with
2 one set of motion and not two sets of motions.
3 THE COURT: All right, thank you.
4 MR. WEISS: If I may, your Honor, there is one thing
5 your Honor was not aware of, which I think I should turn to the
6 Court's attention, because it's procedural. One of the issues
7 is the issue of the underwriters in terms of the Section 11 and
8 12-2 liability. Just before the statute of limitations ran, we
9 negotiated a tolling agreement with the underwriters. When I
10 say with the underwriters, I mean that literally, because their
11 counsel whom we've first been dealing with told us he couldn't
12 get anywhere, deal with my client directly, so we got that
13 tolling agreement from the underwriters.
14 It was pursuant to that tolling agreement that we then
15 filed a second case only against the underwriters in state
16 court. It's in Supreme Court, New York County, just against
17 the underwriters, and we named each of the underwriters
18 individually, separately, as opposed to an underwriter class.
19 In other words, it wasn't just Merrill and UBS, the lead
20 underwriters, we named the other underwriters as well.
21 That case was timely brought. There can't be any
22 issue on that. The tolling agreement required, we were
23 required to give them 30 days notice. We gave them 30 days
24 notice. We did everything by the book. So that case is
25 pending there. They did not remove that case to federal court

1 and the time to do so has expired.

2 We have no objection, if it can be done, that

3 notwithstanding the expiration of that time for the case to

4 come before your Honor and be consolidated as part of these,

5 but I think in any event, your Honor should certainly be aware

6 that there is this other case out there pending, and I wanted

7 to call it to your Honor's attention.

8 THE COURT: We'll have to come back to that.

9 Mr. Broadwater.

10 MR. BROADWATER: Thank you, your Honor.

11 I'm here on behalf of the two lead underwriters of the

12 December '01 prospectus. I'm not going to repeat or try to

13 elaborate significantly on the presentations thus far. I do

14 have some things I think were glossed over that were important

15 for the Court to understand as to where we are now with respect

16 to my client.

17 You focused, even though you weren't intending, on one

18 of the issues, which is the names and the dates all of these

19 cases now sought to be consolidated in the first amended and

20 now the second amended were brought, they were brought in '04.

21 But none of them named an underwriter. None of them made the

22 Section 11 claim saying there were false statements in the

23 prospectus. There was no lawsuit anywhere with respect to the

24 underwriters. There was no claim that they had failed to live

25 up to their obligations or that they had been parties to a

1 prospectus that contained false statements. There was no such
2 claim anywhere; state court, federal court or anywhere else,
3 until September.
4 THE COURT: Of '04?
5 MR. BROADWATER: '05. '05. The first consolidated
6 amended complaint. You'll see when you read the motions to
7 dismiss, it is very clear that the reason there had not been
8 any claims against the underwriters until September of '05 was
9 because people fully understood our role in the prospectus and
10 what we had done and what they said was false in the
11 prospectus, fraudulent in the prospectus, but they had decided
12 not to sue the underwriters and they didn't, until they had the
13 correspondence that Mr. Coffey referred to earlier today and
14 suggested you not read.
15 There was a fight going on as to who was going to get
16 the lead counsel role, and Mr. Weiss, whose case had been
17 removed from state court, it, too, had not named any
18 underwriters, but it did have a Section 11 claim, and there was
19 a fight saying I need to have a role here, because I'm the only
20 person that's brought a timely Section 11 claim, to which the
21 federal plaintiffs counsel said, no, you don't, we didn't need
22 a Section 11 claim, we didn't drop the ball, we let that one
23 go.
24 Now, what happens in September of '05? They've got to
25 keep Mr. Weiss in his place, and so they add us as plaintiffs,

1 belatedly. They were out of time. When they first made that
2 motion they were barred two or three different ways as to out
3 of time. Now, that didn't take much effort on their part to
4 add us, since they just put our name there and said they failed
5 to exercise proper due diligence. That's the only substantive
6 allegation in the complaint. That's the one which we moved to
7 dismiss. It's the one that outlines both the statute of
8 limitations, the failure to make out a claim and to --
9 essentially under 12B-6. We're only named on the prospectus
10 and we're only named on claims that somehow this
11 doubly-expertized estimate, and that's all it could be since
12 it's an estimate of what losses will occur in the future as a
13 result of historic periods of underwriter, that's all they said
14 was false. It was doubly expertized, not only by
15 PriceWaterhouseCoopers, but by the Tillinghast group. They
16 said no, we're putting you in there because that's the only way
17 we can get rid of the problem we have here whether we can get
18 lead plaintiff role.
19 So we're here to dismiss it. And we hear here today
20 that must be a pretty good argument, because the complete lack
21 of need, the desire to exclude Mr. Weiss and Mr. Rubin from the
22 parties has been suddenly reversed. The reason it's been
23 suddenly reversed is not anything you heard here today, it's
24 reversed because in December of '04, Mr. Rubin got a tolling
25 agreement with respect to the underwriters. And it is clear in

1 that tolling agreement that the only person that can invoke it
2 and use it as a basis to claim the tolling of the statute for a
3 period is Mr. Rubin and those Mr. Rubin represents. It's his
4 ticket, and the plaintiffs' lawyers here have decided they want
5 to buy that ticket.
6 Well, that ticket doesn't work, because Mr. Weiss was
7 a little inaccurate in describing his two state court
8 complaints; one removed here and sought to be remanded but
9 maybe now it won't, and one he filed only recently. Those
10 complaints, even with respect to Mr. Rubin, even with respect
11 to the only person here with a tolling agreement, and all the
12 other plaintiffs saying we don't want one, we don't need one,
13 we know what we're doing, we don't have a Section 11 claim
14 against the underwriter, that tolling agreement, he didn't get
15 it until after the statute of limitations had already expired.
16 It is clear under Second Circuit law that the four
17 adjustments, starting almost immediately after the IPO went
18 out, of the amount incurred but not reported losses, the
19 estimate, the guess as to what the future will bring, having
20 done that four times in eleven months, whatever notice or
21 inquiry they were under had clearly occurred.
22 We're now sitting here today talking about whether or
23 not they can not only bring that complaint against us for the
24 first time in September of '05, that is, almost four years
25 after the prospectus as to which there's a three-year statute

1 of repose and a one-year after notice of inquiry, whichever
2 comes first. It's quite clear they were barred, we were added
3 as a strategic ploy to deal with the management or lead counsel
4 status.
5 Now, I want to say one more thing about the status of
6 where these pieces of paper are. I thought I heard just a
7 moment ago that there was no motion to dismiss pending with
8 respect to the Rubin complaint, and so even if you throw out
9 the consolidated amended complaint filed first in September
10 '05, he's still got a complaint as to which there's been no
11 motion. Well, now, he'll either be gone or he'll be
12 consolidated, but he doesn't have a separate complaint.
13 Two, the complaint he's talking about me not having
14 moved against, didn't sue me. As I said, nobody, nobody sued
15 the underwriters until Mr. Weiss did in state court, relying
16 upon his tolling letter, which there's been, nothing happened
17 in that case, we have a good motion when and if he ever -- this
18 case ever gets straightened out and it's decided whether his
19 case is going to go forward or not. It just sat there pursuant
20 to a stipulation that says we'll deal with it when this case
21 gets on track or dismissed.
22 The fact is that we have very, very good grounds, much
23 better than you will normally see, when someone asserts a
24 statute of limitations. There is no such thing as equitable
25 tolling with respect to the three-year statute on Section 11.

1 It isn't the law that you're entitled in this case now with
2 respect to the amendment, nearly five years after the
3 prospectus, to say, a-ha, I found another thing that I can
4 claim is false with respect to the numbers.
5 THE COURT: I didn't write down precise dates. I have
6 December '01 as the IPO.
7 MR. BROADWATER: Right.
8 THE COURT: And I have December '04 as the tolling
9 agreement.
10 MR. BROADWATER: With Rubin.
11 THE COURT: Right. So is that December '04 tolling
12 agreement within the three years or not?
13 MR. BROADWATER: By one day.
14 THE COURT: Okay.
15 MR. BROADWATER: Right, Mr. Weiss, one day?
16 MR. WEISS: I thought you said it was one day late.
17 MR. BROADWATER: Maybe it is.
18 MR. WEISS: I think highly of myself, I guess, and I
19 have an ego, but to tell you the truth, I never thought it
20 could be persuasive enough to get the underwriters represented
21 by Davis Polk to agree to a tolling of the statute of
22 limitations the day after the statute is run. We have a
23 tolling agreement.
24 MR. BROADWATER: It was about a year and a half after
25 the statute had run, because of the four adjustments to the

1 incurred but not reported loss estimates that occurred during
2 2002 and 2003, all of which happened between a year and two and
3 a half years before the tolling letter was executed, and three
4 years or thereabouts before the first actual complaint was
5 filed.
6 Now, what we have is we have -- we made these
7 arguments. These arguments are ones that the other defendants
8 have with respect to the Section 11 claims, they have different
9 arguments with respect to the 10B-5 claims aspects to the first
10 consolidated amended complaint, but we had a particularly good
11 one with respect to the statute of limitations, so they decided
12 to bring Mr. Rubin in to try and deal with one of those
13 problems.
14 Now, let me go to the next point, and that is --
15 THE COURT: Before you move ahead, let me just make
16 sure I understand here. The motion to dismiss was brought
17 against a complaint that did not have Mr. Rubin as a plaintiff,
18 and therefore the tolling agreement argument. But essentially,
19 that's irrelevant from your point of view, that I could decide
20 the motion to dismiss based on the briefing that now exists,
21 and rule in your client's favor.
22 MR. BROADWATER: You could, but they also sought in
23 opposition to our motion to say they were protected by and
24 entitled to invoke the Rubin tolling letter as if they were
25 third party beneficiary, that tolled the agreement, tolled the

1 running of the one-year statute with respect to them. So you
2 will encounter it in their opposition to our motion in the case
3 of the federal plaintiffs.
4 THE COURT: So let's assume I just ignore the third
5 party beneficiary line of arguments and treat it head-on that
6 the plaintiffs are entitled to the benefit of the tolling
7 agreement. Is the briefing complete?
8 MR. BROADWATER: Yes.
9 THE COURT: From your point of view?
10 MR. BROADWATER: Yes, on the first amended complaint.
11 It is complete and they are out of luck. If they can't invoke
12 and rely upon the Rubin, the personal Rubin, it's over. Over
13 and out, it's over.
14 THE COURT: Even if they can rely on it --
15 MR. BROADWATER: We have good argument that they still
16 have a statute of limitations argument with respect to
17 belatedly adding us in September of '05 to any complaint of any
18 kind with respect to that prospectus.
19 THE COURT: And your point of view is the briefing is
20 complete on that issue?
21 MR. BROADWATER: Yes. Now, one other thing I do want
22 to say, jumping a little off point, but I do want you to
23 understand. As the underwriters, these were the two
24 international components. This was an international
25 underwriting. It's a Swiss company, it was registered and

1 sold, the underwriting and the activities relating to the
2 underwriting took place in Europe, but it's a little difficult
3 because, of course, you don't have to buy in the U.S. or buy in
4 Switzerland, depending upon your nationality, but the fact of
5 the matter is that there was a prospectus on file in
6 Switzerland under their rules and there was a prospectus on
7 file in the U.S. and approximately a third of it was sold in
8 the U.S. Two-thirds were sold in Switzerland.
9 Now, the reason I say "approximately" is American
10 entities can buy in Switzerland if they prefer. The prices are
11 going to be arbitraged back and forth, so the prices aren't
12 going to vary that much. The fact is they were sold in Europe
13 with respect to the European prospectus on file to
14 international or non-U.S. citizens. This refers back to the
15 approximately two-thirds. This is what Mr. Ferrara referred to
16 in his remarks. I want to give you an idea of the fact this
17 isn't a vestigial question, it's a question of the tail might
18 wag the dog.
19 Secondly, the assertion that might be dealt with once
20 we get Mr. Rubin in this case, the issues of the statute of
21 limitations will be gone is wrong. Even if they manage to
22 graft him in, not as lead plaintiff status, but to the extent
23 of getting rid of the problem that he's not here they're not
24 going to get rid of the problem that they thought about and
25 decided to add us way too late. I also think it is the case if

1 they're going to try to do that, Mr. Weiss can't be in the
2 position where he says, well, I got an ace in the hole, I have
3 the old complaint that raises different issues or slightly
4 different articulation of what's wrong about the prospectus,
5 that I can rely upon to get around the pending motions to
6 dismiss. I thought that was the gist of what Mr. Weiss said,
7 and I don't think he can do that.
8 With respect to the other point that I wanted to make,
9 everything that you rehearsed with respect to the procedural
10 history, all of it happened before we were here. We weren't
11 here when the six complaints were talked about, when the fight
12 over who was going to be in the driver's seat, whether or not
13 Mr. Rubin was going to be here or go home, all of those things
14 occurred before we were here or had anything to do with it.
15 The first time we had anything to do with any of the claims in
16 this case was September '05 when, almost as an afterthought,
17 we're added, no substantive allegations at all, other than the
18 fact that we're here.
19 Now, with respect to whether you go with the motion
20 for leave to amend and add the restatement issues, or you go
21 with the fully briefed motion to dismiss the first amended
22 complaint, consolidated amended complaint, I think, I wanted to
23 adjust one thing about how distinct from the standpoint of the
24 underwriters, sitting there doing their due diligence with
25 respect to putting together a newly formed reinsurance

1 subsidiary in 2001. Finite insurance or finite transaction, as
2 to whether or not enough risk transfers under the FASB rules
3 that allow it to be treated as a reinsurance transaction as
4 opposed to deposit accounting, based on whether or not there
5 was a sufficient transfer of risk, sufficient uncertainty, that
6 is an entirely different issue and one that bears no
7 relationship whatsoever to the claims with respect to the
8 allegedly purposefully suppressed understated estimate of
9 future losses that was incorporated into the financial
10 statements and thereby incorporated into the prospectus in
11 December '01.
12 The first point, and the one that was mentioned, but I
13 think bears emphasis. When they went back and did the
14 restatement with respect to fixing the finite transactions,
15 accounting for them in a different method than had been done in
16 the earlier years, nothing was done, even though they go back
17 and say as of the end of this year, as of the end of this year,
18 as of the end of this year, nothing was done to change what the
19 incurred but not reported or the estimates of the losses were.
20 The only impact there was on those loss reserves is if one of
21 the transactions no longer to be treated as insurance but as a
22 deposit or a contract, if that had contributed to the reserve
23 that little piece was taken out, but with respect to whether
24 they were too low or whether future facts would show that they
25 were too low, that wasn't fixed. There is no restatement of

1 the loss reserves. And that's what forces the plaintiffs to
2 say in this situation, well, it all relates back, because it
3 had an impact on the financial statements and that's what this
4 is really about. At that level of generality, there isn't
5 anything later decided to be false, with the benefit of three
6 or four or five years of ad hoc information that comes to light
7 later that wouldn't relate back, because it all has an impact
8 on the desirability of the stock and the financials. That
9 level of generality would essentially obliterate the statute of
10 limitations and the statute of repose with respect to this area
11 of law, where, yes, there is a sort of a lower standard of
12 culpability required if there is a false material statement in
13 the prospectus.
14 But I do want to add, the little fillup the defendants
15 have with respect to that statement, it depends on what is
16 false. In this case, the falsity that was the only falsity at
17 the time was an estimate. By definition, it wasn't a fact, it
18 was an estimate, and the question is whether it was a bad
19 faith, artificially suppressed unrealistic and intentionally so
20 an estimate, and it was an estimate. It clearly wasn't going
21 to be exactly right, because it's a guess about what's going to
22 happen in future years and past claims and losses on those
23 claims that have not yet been asserted. It has to be a good
24 faith estimate. And to make a claim that it was false, you
25 can't just say it turned out to be wrong, you got to say it was

1 a bad faith estimate.

2 That's why with respect to estimates, particularly
3 insurance reserves, as the cases make clear, you really have to
4 prove, even on a Section 11 claim, that it was essentially
5 fraudulent or bad faith. And that is clear in the cases that
6 we cited and it is another reason that I wanted to bring it up
7 is that I represented the underwriters. The underwriters had
8 in December '01, not only did they have strengthened reserves
9 that had been done, they had the fact that it was reported in
10 the financial statements, but it had been independently
11 verified by, or not independently, but verified by an
12 independent actuarial firm in December '01, that the number, as
13 adjusted and strengthened and reflected in the documents put
14 forward in the Swiss markets and the U.S. markets in December
15 '01, was in accord with the best estimates of Tillinghast who
16 had undertaken that independent review.

17 So we're sitting here being threatened with years of
18 discovery across Europe, in the U.S. with respect to allegedly
19 mistaken numbers in the financial statements with respect to
20 the loss reserves and if they get to amend their complaint with
21 respect to the finite insurance and whether or not some small
22 number of the large number of transactions they did should have
23 been accounted for as deposit accounting as opposed to
24 insurance accounting, all something that supposedly we should
25 have figured out, ferreted out and changed back in the fall of

1 2001, notwithstanding the fact that they were expertized and in
2 the case of the insurance reserves, doubly expertized, both by
3 the outside accountants and by the actuarial.
4 Now, I've gone on, I said I wasn't going to go on a
5 long time, but I did. Do you have any questions?
6 THE COURT: I think I asked my questions as you spoke.
7 Thank you very much, counsel.
8 Let me deal with a couple of housekeeping issues and
9 then we'll return to some matters of substance.
10 Mr. Mancino, will you serve, please, as my liaison
11 counsel for the defendants, so that if we need to get word to
12 all the defendants, we can just do it through one call to you?
13 MR. MANCINO: Of course, your Honor.
14 THE COURT: Thank you.
15 Mr. Coffey, are you going to be adding any defendants
16 in this case?
17 MR. COFFEY: I don't believe we are, your Honor.
18 THE COURT: Mr. Coffey, you've heard this interesting
19 exchange about the impact that Mr. Rubin's presence, because of
20 the agreements to toll, has on this case. Do you also agree
21 that the briefing on the underlying motion to dismiss will
22 permit me to decide that issue so that we don't need more
23 briefing?
24 MR. COFFEY: Yes, your Honor, but if you could grant
25 me the leeway to give you a summary response to what was laid

1 out. It's certainly our view -- the lead plaintiffs were
2 appointed in August of '05. They then sought to file their
3 consolidated complaint. They added the underwriters with a
4 Section 11 claim, with their first consolidated complaint. We
5 did so in a timely manner. We were aware that there was a
6 tolling agreement. You can read it for yourself, but we're of
7 the view that we're not third party beneficiaries, that
8 Mr. Weiss and Mr. Rubin did an excellent job of protecting the
9 entire class. It says it. That's the consideration that was
10 given by the underwriters in return for not being sued by
11 Mr. Rubin. However, it's for the benefit of any individual or
12 class claim brought against the underwriters. They would like
13 to add into that the words "by Mr. Rubin." Those words aren't
14 there. It was timely brought.
15 But there are fights about that, and it's our
16 considered view that by having Mr. Rubin as a named plaintiff,
17 many of those fights disappear, because even if your Honor were
18 to say, you know, I will engraft into that the words "by
19 Mr. Rubin" and disqualify anyone else from bringing it, we will
20 have a named plaintiff who can bring those claims on behalf of
21 the class. We don't think we need to do that, but considering
22 what's in the best interests of the class, it makes sense and
23 we're doing that, and we're doing it because I'm interested in
24 eliminating defense arguments and getting to the substance of
25 this case.

1 What I heard a lot of on this table, a lot of fact
2 issues, we have very significant disagreements about the facts.
3 For example, the idea that -- well, I don't need to get into
4 it. They can't even agree among themselves about the
5 restatement. I heard some defendants are going to challenge
6 the restatement, others are going to stand by the restatement,
7 et cetera.
8 So we want to get to those issues, and I'm going to
9 certainly enjoy more watching them quarrel than I have
10 reviewing the record of how the plaintiffs are going to
11 quarrel. So with regard to the tolling agreement, at the time
12 the claims were brought on behalf of the class in this action,
13 they were timely, for any number of reasons, but certainly
14 because of the tolling agreement that had been secured by
15 Mr. Rubin.
16 Now, we have a separate issue, of course, with regard
17 to storm warnings. That issue involves all sorts of fact
18 issues as well. But the short answer is yes, your Honor, we
19 think it's fully briefed and you can decide that.
20 THE COURT: Are the submissions that are subject to
21 this motion to strike part of the submissions in connection
22 with storm warnings? I don't know what that motion to strike
23 is.
24 MR. MANCINO: Your Honor, Rich Mancino. I don't think
25 the motion to strike goes to the storm warnings issues. They

1 have moved to strike the final Tillinghast report, which is
2 integral to the complaint, in our view, and a submission with
3 the Connecticut Insurance Department related to have novations
4 of certain insurance contracts, but I think the storm warnings
5 are fleshed out in the complaint and are things the Court can
6 take judicial notice of.
7 THE COURT: Okay. And on the plaintiffs' side, too,
8 we need to be able to make one phone call. So, since I have
9 three co-counsel for the plaintiffs, who is that phone call
10 going to --
11 MR. WILLIS: Your Honor, we're happy to have
12 Mr. Coffey and Bernstein Litowitz be liaison for the
13 plaintiffs.
14 THE COURT: Okay, thanks.
15 Depending on the case, sometimes I encourage counsel
16 to consider settlement discussions at a very early phase. My
17 sense, given our conference today, is that I need to decide
18 these motions before I send you to see anyone. Is there anyone
19 that has a different view of that? No.
20 Let's do some housekeeping. If you have occasion to
21 write me a letter, it should be no longer than two pages. You
22 can't raise a dispute or controversy with me unless you've had
23 a meet and confer process and been unable to resolve the
24 dispute.
25 If there is an application to me through letter, I

1 deeply appreciate it if the letter reflects whether or not
2 there's agreement or disagreement among counsel.
3 I'll post my orders and opinions in this case on
4 Courtweb and so the calls, there will be two calls; one to the
5 plaintiffs' counsel, one to defense counsel, will be just to
6 alert you that something's been posted, and you can download it
7 then from Courtweb.
8 I think that's it. Yes, Mr. Coffey.
9 MR. COFFEY: Your Honor, there's one other motion that
10 hasn't been referred to. We filed a motion to lift the PSLRA
11 stay for the limited purpose of serving document preservation
12 subpoenas on Tillinghast and Deloitte, and I just want to note
13 that that is outstanding as well, your Honor.
14 THE COURT: Okay. Is there opposition to that motion?
15 MR. MANCINO: No, there isn't, your Honor. It was
16 just simply to, as Mr. Coffey indicated, to insure document
17 preservation.
18 THE COURT: Okay. Mr. Coffey, we're going to look and
19 see if we can locate that proposed order, and if we can't,
20 we'll call and ask for another copy.
21 MR. COFFEY: Very good.
22 MR. FERRARA: Your Honor, keeping with the theme of
23 housekeeping, you have been very gracious in allowing all of us
24 from the plaintiff and defense side in the course of this
25 initial conference to take a good deal of time in touching upon

1 many of the substantive issues that were raised in the motion
2 to dismiss, but we've done it in a rather uncoordinated way.
3 If it would be of help to the Court, should the Court decide to
4 move on the motion to dismiss and consider it, to have oral
5 argument on that motion, we would be delighted to serve.
6 THE COURT: Thank you. My practice with respect to
7 oral argument is to address the motions and figure out if I
8 think oral argument would be helpful to me. Frequently, in
9 cases like this, and in many cases, the papers are of such a
10 quality or the issues are such that I don't feel the need for
11 oral argument.
12 If I feel the need for oral argument, it will probably
13 be with a request that identifies the specific issues that I'd
14 like to hear the parties address, not that you would be
15 confined to that, but to give you some heads up about what I'm
16 focusing on as a troubling area for me, but if you don't hear
17 from me, don't be surprised, because usually the papers are
18 sufficient.
19 Well, all I can say is I'm really glad I didn't do any
20 more work than I did to get ready for this conference, because
21 I've learned a lot. You've been very helpful and I think I
22 made a wise decision to let you do the heavy lifting and help
23 get me oriented in the case. I look forward to presiding over
24 it, and I want to thank you each for your assistance today.
25 (Adjourned)