Richard Blumberg vs USAA Casualty Insurance Co.

WE HERE, TODAY, ON THE APPEAL OF A FINAL SUMMARY JUDGMENT, GRANTING SUMMARY JUDGMENT, BASED UPON THE STATUTE OF LIMITATIONS AND JUDICIAL ESTOPPEL IN AN INSURANCE AGENT NEGLIGENCE CASE. THE FACTS ARE RELATIVELY SIMPLE. IN 1982, MR. BLUMBERG PROCURED AN INSURANCE POLICY THROUGH HIS INSURANCE AGENT, THE BRUNER INSURANCE AGENCY, THROUGH SAINT FALL FIRE AND INSURANCE AGENCY. HE MAINTAINED THE POLICY THROUGH 1989, AT WHICH TIME HE MOVED TO A NEW RESIDENCE. AT THAT TIME HE SOUGHT TO OBTAIN A POLICY THROUGH ST. PAUL FOR THE NEW RESIDENCE, WHILE MAINTAINING COVERAGE ON THE OLD RESIDENCE, WHICH HE STILL OWNED. AT THAT TIME ST. PAUL SAID IT COULD NOT PROVIDE COVERAGE FOR THE NEW PREMISES. MR. BLUMBERG MOVED TO THE NEW PREMISES. THE COVERAGE ON THE OLD PREMISES WAS CHANGED TO REFLECT THE FACT THAT HE MOVED TO A NEW PREMISES. IN 1991, MR. BLUMBERG OBTAINED THE INVENTORY FROM A BASEBALL SPORTS CARD STORE WHICH HE HAD A SECURITY INTEREST IN. IN ORDER TO STORE THE CARDS, HE STORED THEM AT THE PROPERTY INSURED BY ST. PAUL. HE CONTACTED HIS INSURANCE AGENT AND ASKED IF THE CARDS WERE COVERED. THE INSURANCE AGENT SAID THAT THEY WOULD CONTACT ST. PAUL TO FIND OUT. IN THE MEANTIME, HE WENT TO A FEW OTHER PLACES TO DETERMINE IF THERE WOULD BE COVERAGE THROUGH THE RENTER WHO WAS AT THE PROPERTY OR IF THERE WOULD BE COVERAGE THROUGH HIS OTHER HOMEOWNER INSURANCE POLICY, AND THEY, BOTH, INDICATED THERE WOULD NOT BE COVERAGE. SUBSEQUENTLY THE BRUNNER INSURANCE AGENCY INDICATED TO MR. BLUKBERG THAT THERE WAS COVERAGE FOR THE CARDS STORED AT THE PREMISES. THE KADZ -- THE CARDS WERE, THEN STOLEN. INITIALLY WHEN MR. BLUMBERG MADE A CLAIM WITH ST. PAUL, ST. PAUL DID NOT DENY COVERAGE BUT INSTEAD OFFERED A SETTLEMENT AMOUNT THAT WAS LESS THAN THE AMOUNT WHAT HE THOUGHT THE CARDS WERE WORTH. A COUPLE OF MONTHS LATER MR. BLUKBERG MADE A CLAIM AGAINST ST. PAUL FOR BREACH AND CONTRACT AND DECLARATORY JUDGEMENT, TO DETERMINE WHETHER HE HAD OBTAINED COVERAGE FOR THE CARDS.

YOU ARE SAYING IN YOUR BRIEF, TODAY, SAYING THAT THEY DIDN'T DENY I COVERAGE. WAS THERE EVER A POINT WHERE ST. PAUL SAID THERE WAS NO COVERAGE?

INITIALLY THEY DID NOT DENY. THE ISSUE WAS THE AMOUNT.

AT SOME POINT?

AT SOME POINT AFTER THAT, ST. PAUL, IN ITS ANSWER FOR THE FIRST TIME, ASSERTED THAT THERE MAY BE AN ISSUE WITH RELATION TO COVERAGE, AS PART OF ITS AFFIRMATIVE DEFENSE. IN 1993, THERE WAS A SUMMARY JUDGMENT HEARING IN THE ST. PAUL MATTER, WHERE THEY SOUGHT SUMMARY JUDGMENT, BASED ON THE DEFENSE THAT THE CARDS WERE NOT COVERED.

DO YOU SEE A DIFFERENCE IN A CASE WHERE THE INSURANCE COMPANY AT THE OUTED SET -- AT THE OUTSET, DENIES COVERAGE, SAYING THERE WAS NO BINDING POLICY?

I THINK THE ISSUE IS NOT WHETHER THE INSURANCE COMPANY DECIDES THAT THERE IS NO COVERAGE OR FEELS THERE IS NO COVERAGE. THE ISSUE IS WHEN THERE IS A FINAL DETERMINATION THAT, IN FACT, THERE WAS NO COVERAGE.

YOU ARE SAYING THAT, BEFORE THAT, THE CAUSE OF ACTION DOES NOT ACCRUE?

BECAUSE UNTIL SUCH TIME AS THERE IS AN ADJUDICATION THAT THERE IS NO COVERAGE, THE COURT WOULD HAVE THE OPPORTUNITY TO FIND THERE IS DID YOU HAVE RAJ. -- THERE IS COVERAGE.

WOULD YOU BE ABLE TO SUE THE INSURANCE AGENCY FOR NEGLIGENCE, AT THE SAME TIME THAT ST. PAUL RAISES AFFIRMATIVE DEFENSE?

THAT IS OUR POSITION, THAT ALTHOUGH YOU COULD HAVE TECHNICALLY SUED THEM AT THE SAME TIME, YOU WOULD BE PLACED IN THE SAME POSITION THAT THEY WERE PLACED IN IN PEAT MARWICK, IN THE -- IN PETE MARWICK, IN THE UNTENABLE POSITION THAT THERE IS COVERAGE.

WHAT IF THE INSURANCE AGENT ADMITTED THAT THERE WAS NO COVERAGE? WHAT IF, WHEN ST. PAUL SAID THERE IS NO COVERAGE, THE AGENT CAME IN AND SAID WE OWN UP. THERE IS NO COVERAGE? WOULD THAT START?

I STILL DON'T THINK IT WOULD START THE STATUTE OF LIMITATIONS BECAUSE IF YOU BROUGHT A CLAIM AGAINST THE INSURANCE COMPANY, STILL CLAIMING THAT THERE WAS COVERAGE, EVEN IF THE AGENT SAID THAT THERE WASN'T, THERE IS THE POSSIBILITY THAT YOU COULD PREVAIL.

WELL, THE ISSUE, REALLY, BOILS DOWN TO, FOR ONE, WOULD YOU AGREE THAT THE STATUTE OF LIMITATIONS, THAT YOU ARE ASKING FOR, UNDER THAT SCENARIO, WOULD BE FIVE YEARS, ON THE BREACH OF CONTRACT, THE TIME IN WHICH YOU HAVE TO SUE ST. PAUL. THEN YOU WOULD HAVE TO GO TO FINAL JUDGMENT, AS TO DETERMINE NATION, THROUGH THE LAST APPELLATE COURT, AND THEN YOU WOULD HAVE FOUR YEARS AFTER THAT TO SUE THE AGENT. SO THE STATUTE OF LIMITATIONS COULD EFFECTIVELY BE 12 OR 13 YEARS, TUNED THAT SCENARIO. IS THAT --

THAT'S CORRECT. THAT IS NO DIFFERENT THAN THIS COURT'S DECISION IN PETE MARWICK AND RECENTLY IN SILVESTRONI.

ISN'T THE ESSENCE OF PEAT MARWICK -- OF PETE MARWICK, SINCE IT DIDN'T OBLITERATE OR DISTINGUISH SAWYER, THAT WHEN REDRESSABLE HARM IS REASONABLY CERTAIN TO HAVE OCCURRED. ISN'T THAT A FAIR ANALYSIS THERE?

I THINK PETE MARWICK STANDS FOR THE POSITION THAT REDRESS REDRESSABLE HARM OCCURS WHEN IT OCCURRED, NOT WHEN IT IS REASONABLY CERTAIN. OTHERWISE THIS COURT WOULD HAVE DETERMINED THAT, WHEN THE I.R.S. MADE A DETERMINATION OF SUFFICIENCY, THAT THERE IS A REASONABLE DETERMINATION THAT THERE IS A PROBLEM.

THEN YOU HAVE GOT THE SITUATION THAT I WAS JUST TALKING ABOUT, WHERE THE LAWYER OWNS UP TO THE FACT THAT HE MESSED UP. AND SO THAT THERE IS, FROM THAT POINT IN TIME, REASONABLY, IT IS REASONABLY CERTAIN THAT THERE IS REDRESSABLE HARM, ISN'T THERE?

THAT IS FACTUALLY DIFFERENT FROM THIS CASE, BUT IN THE SAWYER CASE, THEY OWNED UP TO THAT FACT AND, ALSO, THE INDIVIDUAL CLAIMED THAT THEY WERE DAMAGED BY HAVING TO INCUR FEES AFTER THAT POINT. IN THE INSURANCE AGENT CONTEXT, EVEN IF THE INSURANCE AGENT SAYS I THINK I MIGHT HAVE MADE A MISTAKE, THEY COULD -- THE INSURED COULD STILL GO AFTER THE INSURANCE COMPANY AND STILL BE MADE WHOLE.

WHY REQUIRE THEM TO DO THAT?

WHY --

I MEAN, THE INSURANCE COMPANY SAYS WE ARE DENYING COVERAGE. AND SO YOU ARE SAYING,

THOUGH, THAT THE INSURED, ALLEGED INSURED, HAS TO GO AGAINST THE INSURANCE COMPANY, BEFORE HE OR SHE CAN GO AGAINST THE AGENT.

WELL, I AM SAYING IN A SITUATION SUCH AS IN MY CASE, WHERE THE INSURANCE AGENT DID NOT SAY THAT THEY MADE A MISTAKE IT MAY BE DIFFERENT FROM THE SITUATION WHERE THE INSURANCE AGENT ADMITS THAT THEY MADE A MISTAKE, AND THEN IN THAT SITUATION --

WHY WOULD HE HAVE TO WAIT -- WHY DO YOU REQUIRE THE CLAIMANT TO WAIT UNTIL THERE IS THIS DETERMINATION IN THE UNDERLYING ACTION AGAINST THE INSURANCE COMPANY? WHY CAN'T THEY GO AHEAD AND HE OR SHE GO AHEAD AND MAKE THAT CLAIM AGAINST THE AGENT?

WELL, IT IS SIMILAR TO THE SITUATION IN THE BIERMAN CASE, WHERE THE THIRD DCA FOUND THAT YOU SHOULD STAY A MALPRACTICE CASE, UNTIL THE UNDERLYING CASE IS DECIDED.

THAT MAY BE SO, BUT WHY WOULD YOU REQUIRE THE CLAIMANT TO MAKE A CLAIM AGAINST THE INSURANCE COMPANY, BEFORE THE CLAIM AGAINST THE AGENT?

ARE YOU TALKING IN THE SITUATION WHERE THE AGENT ADMITS THEY MADE A MISTAKE?

NO. JUST INSURANCE COMPANY SAYS NO COVERAGE.

WELL, THE REASON WHY YOU WOULD DO THAT IS BECAUSE, UNTIL THERE IS A DETERMINATION THAT THERE IS NO COVERAGE, LIKE IN PETE MARWICK, UNTIL THERE WAS A FINAL ORDER BY THE TAX COURT THAT SAID THAT THERE WAS A DEFICIENCY, THERE IS NO REDRESS REDRESSABLE HARM AGAINST THE AGENT. IN FACT, IF YOU PROCEED HAD IN THIS CASE AND WE PREVAILED ON THE INSURANCE COVERAGE ISSUE AND IT WAS APPEALED AND IT WENT ALL THE WAY THROUGH AND THEN WE ULTIMATELY WON ALL OF THOSE DECISIONS, THE INSURANCE AGENT WOULD HAVE BENEFITED FROM THE -- BENEFITED FROM EVERYTHING THAT WE DID, IN ORDER TO SHOW THAT THERE WAS INSURANCE COVERAGE, SO WHILE AN AGENT HAS TO SIT BACK AND WAIT WHILE THE UNDERLYING ACTION IS LITIGATED, IT IS ALL TO THE BENEFIT OF THE INSURANCE AGENT, INSTEAD OF GOING FORWARD AND SAYING TO THE INSURANCE AGENT THAT WE ARE GOING TO BRING YOU INTO THE CASE.

WITH THAT BE TRUE IN EVERY CASE? WHAT IF YOU HAD A SITUATION THAT IS IT UNDISPUTED WITH EVERYBODY IN THE CASE FORM THE AGENT, AS HE TALKED ABOUT EARLIER IN A HYPOTHETICAL, IN ESSENCE FEZ UP -- IN ESSENCE FESTES UP. THAT IS SOMEBODY HAS -- IN ESSENCE FESSES UP. THAT IS SOMEBODY HAS MADE CONTACT THAT ISN'T A DIRECT AGENT OF THE COMPANY AND HAS NO CONTACT WITH THE COMPANY AND EVERYBODY AGREES THIS IS ONE WHERE HE TOOK THE INFORMATION AND PUT IT OVER HERE WITH HIS GROCERY LIST AND EVERYBODY -- THERE WAS A VIDEO CAMERA ON THE SITUATION THAT DAY, AND WE HAVE GOT A FILM OF THAT, AND THERE IT IS. NOW, WOULD THERE HAVE TO BE AN ACTION, THEN, PROCEEDED AGAINST THE INSURANCE COMPANY, WHERE EVERYBODY THROWS UP THEIR HANDS AND SAYS, WELL, IT IS OBVIOUS?

IF THERE IS AN ADMISSION OF LIABILITY BY THE INSURANCE AGENT THEN OBVIOUSLY THERE WOULD BE NO NEED TO GO AFTER THE INSURANCE COMPANY.

I AM NOT TALKING ABOUT NO NEED. I AM TALKING ABOUT WHETHER THE LIMITATIONS PERIOD AGAINST THAT AGENT, IF THAT INFORMATION IS DISCLOSED TO THE INSURED, WHETHER THE STATUTE OF LIMITATIONS IS STARTED TO RUN.

WELL, IN THAT SITUATION, ALTHOUGH IT MAY SEEM THAT IT SHOULD RUN, THE CASES THAT TALK ABOUT, SUCH AS LEGAL MALPRACTICE SUCH AS THE CASE OUT OF THE FIFTH DCA, THE ADAMS CASE, WHERE IN FACT, THERE WAS A MORTGAGE SITUATION, AND THERE WAS A FINAL ADJUDICATION.

I AM NOT TALKING ABOUT LEGAL MALPRACTICE NOW. I AM TALKING ABOUT THE HYPOTHETICAL THAT I GAVE YOU AND ASKING YOU TO TAKE A POSITION ON THAT.

MY POSITION IS THAT, UNTIL THERE IS A DETERMINATION BY A COURT THAT THERE IS NO COVERAGE, THE CAUSE OF ACTION SHOULD NOT ACCRUE, BECAUSE AS LONG AS --

HOW WOULD YOU GET A DETERMINATION LIKE THAT? IN OTHER WORDS WHY WOULD THE INSURED, WHO GOT A COPY OF THE VIDEO FILM, BRING AN ACTION AGAINST AN INSURANCE COMPANY, IN A SITUATION LIKE THAT? WHY WOULD THEY DO THAT? AN IF THERE IS A JUST TISSUEABLE ISSUE -- IF THERE IS A JUSTICIABLE ISSUE AGAINST THE INSURANCE COMPANY --

I THINK I GAVE YOU A SITUATION WHERE THERE IS A JUSTICIABLE ISSUE.

THEN THE STATUTE WOULD RUN AGAINST THE AGENT AT THAT TIME.

SO THERE ARE CIRCUMSTANCES, YOU AGREE, WHERE THE LIMITATIONS PERIOD WOULD START TO RUN RIGHT THEN.

YES. THAT IS AN UNIQUE SITUATION, THOUGH, WHICH THAT IS NOT SIMILARLY FACTUAL TO THIS CASE, BUT IN THAT CASE, WHERE THERE IS NO JUSTICIABLE ISSUE AGAINST THE INSURANCE COMPANY --

ISN'T THAT WHAT THE CLAIM IS GOING TO HAVE TO REST ON?

IT IS GOING TO HAVE TO REST ON IF THERE WAS ACTUAL REDRESS REDRESSABLE HARM.

LET ME, WHILE I HAVE YOU INTERRUPTED, ADDRESS THE OTHER ISSUE EW THAT IS IN THIS CASE -- ISSUE, THAT IS IN THIS CASE, AND THAT IS YOU AGREE, I WOULD ASSUME, THAT IF YOU HAD WON ON YOUR BREACH OF CONTRACT CLAIM AGAINST THE INSURANCE COMPANY, THEN YOU WOULD HAVE NO ACTION AGAINST THE AGENT. IS THAT CORRECT?

THAT'S CORRECT.

NOW, IF YOU HAD WON AGAINST THE INSURANCE COMPANY AND THE JURY HAD BOUGHT BACK A VERDICT OF $25,000, WOULD YOU HAVE BEEN ABLE TO GO INTENSE AGAINST THE AGENT?

NO. THAT IS A SITUATION WHERE THERE WOULD BE A FINDING OF COVERAGE UNDER THE POLICY AND THERE WAS RECOVERY.

WHY IS THERE ANY SUBSTANTIVE DIFFERENCE BETWEEN YOU WINNING ON A THEORY OF EQUITABLE ESTOPPEL. THAT IS THE THEORY THAT YOU WONDER ON. IS THAT CORRECT?

ESTOPPEL. YES.

PROMISSORY ESTOPPEL. WHY IS THERE ANY DIFFERENCE, THERE, IN TERMS OF THE EFFECTIVENESS, OF YOU BEING ABLE TO RECOVER AGAINST THE INSURANCE COMPANY, THAN THERE WOULD BE ON THE CONTRACT SITUATION?

BECAUSE A PROMISSORY ESTOPPEL CLAIM IS MERELY AN EQUITABLE CLAIM THAT SAYS IT IS UNJUST FOR THE INSURANCE COMPANY TO NOT HAVE TO PAY ANYTHING ON AN INSURANCE ISSUE LIKE THIS.

BUT AS FAR AS THE INSURED IS CONCERNED, DON'T YOU GET ALL OF THE SAME THINGS?

NO, YOU DON'T, BECAUSE YOU HAVE TO PROVE PROMISSORY ESTOPPEL BY CLEAR AND

CONVINCING EVIDENCE.

I AM NOT TALKING ABOUT WHAT YOU HAVE TO PROVE. I AM TALKING ABOUT AFTER YOU HAVE PROVED IT AND AFTER YOU HAVE MADE A RECOVERY.

YES, BUT THE POINT IS --

YOU AGREE THAT YOU WOULD GET EVERYTHING THAT YOU WOULD HAVE GOTTEN, IF YOU HAD PROVEN A BREACH OF CONTRACT DIRECTLY, AS FAR AS YOUR DAMAGES ARE CONCERNED.

CORRECT. OTHER THAN THE BURDEN OF PROOF BEING DIFFERENT. YES.

BUT YOU DID THAT IN THIS CASE SUCCESSFULLY.

YES, WE DID, BUT DUE TO THE FACT THAT THE AMOUNT OF THE JUDGMENT OR ACTUALLY OF THE VERDICT WAS SO SMALL, IT DID NOT REACH THE OFFER OF JUDGMENT BY ST. PAUL, WHICH, THEN, RESULTED IN THE FACT THAT THE INSURED WOULD HAVE A NEGATIVE JUDGMENT AGAINST HIM.

BUT THE AMOUNT OF THE VERDICT, HERE, HAD TO DO NOT WITH WHETHER YOU WERE ENTITLED TO RECOVER. THAT IS JUST THAT THE JURY DECIDES AGREED -- DISAGREED THAT YOUR DAMAGES -- I TAKE IT THIS IS A VALUATION ISSUE?

YES.

EVEN IF THIS JURY HAD FOUND THAT YOU RECOVERED ON YOUR BREACH OF CONTRACT CLAIM, PRESUMABLY THAT SAME JURY WOULD HAVE GIVEN YOU ONLY $25,000. ISN'T THAT APPARENT ON THE RECORD?

NO. I DISAGREE.

TELL ME WHAT THE DIFFERENT THEORIES OF DAMAGES WERE, THEN.

THE RECOVERY ISSUE ON THE VALUATION WAS AN ISSUE THAT WAS DECIDED BY THE JURY, BASED ON CLEAR AND CONVINCING EVIDENCE, AND THE DIFFERENCE BETWEEN CLEAR AND CONVINCING EVIDENCE AND A PREPONDERANCE OF THE EVIDENCE IN THIS CASE, I BELIEVE, IS QUITE SUBSTANTIAL, BECAUSE OF THE DIFFERENT VALUATIONS THAT CAME IN, AND THIS WAS MERELY JUST A PARTIAL RECOVERY THROUGHOUT AN EQUITABLE THEORY BY THE INSURED IN THIS CASE, NOT UNLIKE WHAT HAPPENED IN PETE MARWICK, WHERE THERE WAS A SETTLEMENT WITH THE I.R.S. AND THEY WERE ALLOWED TO GO AGAINST PETE MARWICK WITH THE I.R.S..

HAS YOUR THEORY, UNDER YOUR THEORY, COULD THE, ONCE THERE WAS, RAISED BY ST. PAUL, ACUFF RAJ ISSUE, COULD -- A COVERAGE ISSUE, COULD THE CLAIMANT, THEN, GO IN AND SUE THE AGENT ON THE BASIS OF THE CLAIM BY ST. PAUL THAT THEY DON'T HAVE COVERAGE?

UNDER EXISTING LAW, THEY COULD HAVE DONE SO, IF THEY WANTED TO, BUT, THEN, AS I SAID BEFORE, AS IN PETE MARWICK, YOU ARE PLACED ON A POSITION OF ON THE ONE HAND SAYING THAT THERE IS COVERAGE AND ON THE OTHER HAND SAYING THAT THERE IS NO COVERAGE.

YOU ARE TRYING AGAINST THE AGENT, AND THERE WOULD BE A CLAIM WITHIN THE CLAIM. CORRECT? THAT IS THE WAY IT COULD BE DONE.

IT WOULD BE DIFFICULT, AND THAT IS --

CONVERSELY, IF THE CLAIMANT DIDN'T BRING AN ACTION AGAINST ST. PAUL, FOR THE FIVE-YEAR PERIOD AND THE STATUTE OF LIMITATIONS RUN, DOES THAT BAR THE CLAIM?

AGENT THE AGAINST?

AGAINST THE AGENT?

WELL, IF THE STATUTE OF LIMITATIONS HAD RUN ON THE INSURANCE CLAIM, THEN I WOULD ARGUE THAT THAT WAS A FINAL DETERMINATION, BECAUSE YOU HAVE NO ABILITY TO EVEN BRING THAT CLAIM AT THAT POINT, AND IT WOULD BE NO DIFFERENT THAN A FINAL JUDGMENT THAT SAYS THAT YOU DON'T HAVE COVERAGE. ONCE THE FIVE-YEAR STATUTE RUNS ON THAT, IT IS BASICALLY A FINAL DETERMINATION THAT YOU HAVE NO RIGHT TO BRING THE CLAIM AND YOU WOULDN'T, THEN, HAVE A RIGHT TO BRING A CLAIM AGAINST AN INSURANCE AGENT, BECAUSE YOU NEVER BROUGHT A CLAIM, IN THE FIRST PLACE, AGAINST THE INSURANCE COMPANY.

IS YOUR POSITION SOMEWHAT INCONSISTENT BY SUGGESTING THAT THE CAUSE OF ACTION DOES NOT ACCRUE UNTIL AFTER THE COVERAGE DETERMINATION HAS OCCURRED BUT AT THE SAME TIME MAKING THE STATEMENT THAT YOU HAVE A CAUSE OF ACTION AGAINST THE AGENT, BEFORE THE ACTION ACCUSE FORM -- ACCUSE -- AC RUSE. IS THERE ANY OTHER AREA OF LAW BEFORE THE CAUSE OF ACTION HAS ACCRUED?

IN THE BIERMAN CASE, YOU CAN'T BRING THE CASE, IN THAT CLAIM, AGAINST THE ATTORNEYS, WHILE THE ACTION IN THE STATE WAS PENDING. I AM SAYING THAT, UNDER EXISTING LAW, YOU TECHNICALLY COULD AND SHOULD BRING A CLAIM AGAINST AN AGENT, UNDER EXISTING LAW, BUT IN A SITUATION SUCH AS THIS, I THINK THAT THIS COURT SHOULD FIND THAT YOU SHOULD NOT BE ABLE TO BRING ONE, UNTIL THE UNDERLYING ACTION IS TAKEN TO FINALITY AND THERE IS REDRESSABLE HARM. OTHERWISE YOU ARE INVITING PEOPLE TO FILE, EVERY TIME THERE IS A BREACH OF CONTRACT ISSUE ON INSURANCE COVERAGE, WHICH HAPPENS ALL THE TIME, YOU ARE INVITING SOMEBODY TO, ALSO, BRING A CLAIM AGAINST THE INSURANCE AGENT IN EVERY SITUATION.

SO YOU ARE SUGGESTING THAT THE PUBLIC POLICY OR THE POLICY OF THE LAW SHOULD BE TO NOT ENCOURAGE ADDITIONAL LAWSUITS TO BE FILED AGAINST AGENTS, JUST BECAUSE AN INSURANCE COVERAGE DISPUTE HASARIESEN?

THAT'S CORRECT. AND THAT THE PUBLIC POLICY WOULD BETTER BE SERVED UNTIL THERE WAS AN ADJUDICATION ON THE INSURANCE ISSUE, AND THEN, IF, IN FACT, YOU LOSE AND YOU DON'T RECOVER WHAT YOU ARE SUPPOSED TO RECOVER YOU CAN GO AGAINST THE AGENT.

BUT YOUR BRIGHT-LINE RULE, AGAIN, WOULD PRECLUDE, BECAUSE THE CAUSE OF ACTION DOESN'T ACCRUE UNTIL COVERAGE IS DETERMINED, IT WOULD PRECLUDE, IN THOSE SITUATIONS WHERE AN INSURED THOUGHT THAT THAT WAS AN APPROPRIATE COURSE TO TAKE, WHICH IS, WELL, I WANT TO SAY THERE IS COVERAGE, BUT IF THERE IS NO COVERAGE, THEN MY AGENT WAS NEGATIVE. THAT WOULD PRECLUDE THAT TYPE OF LAWSUIT FROM BEING BROUGHT.

AND I THINK THAT IS CONSISTENT. YES.

IS THAT CORRECT?

YES. THAT'S CORRECT IS CONSISTENT WITH THE BIERMAN CASE, WHERE THERE WAS A STAY ENTERED IN THE MALPRACTICE.

ISN'T A STAY DIFFERENT, THOUGH, THAN WHETHER A CAUSE OF ACTION ACCRUES, AND CAN'T YOU REALLY LOOK AT THE PETE MARWICK SITUATION AND SAY THAT WASN'T WHETHER A CAUSE OF ACTION ACCRUED. IT IS THE TIME OF TOLLING DURING REPRESENTATION CONTINUES.

I DON'T THINK THE PETE MARWICK FOUND THAT THERE IS REDRESSABLE HARM AT THE TIME

THAT THE I.R.S. WROTE THE LETTER AND THERE WAS AN ACTUAL TOLLING. THE REDRESSABLE HARM ONLY OCCURRED WHEN THE TAX COURT ENTERED ITS ORDER, WHICH IS DIFFERENT.

THEN IT DISTINGUISHED THE SAWYER CASE, I THINK IT WAS SAWYER, WITH WHICH WAS A SITUATION WHERE THE FINAL DETERMINATION HAD NOT BEEN MADE.

RIGHT. AND IN THAT SITUATION, THOUGH, THERE WAS AN ADMISSION BY THE ATTORNEYS, IF A MISTAKE HAD BEEN MADE. THEY WERE FIRED AND SOMEBODY ELSE CAME IN THE.

SO THERE YOU GO. WHEN YOU HAVE A SITUATION WHERE THERE HAS BEEN AN ADMISSION, ALL OF A SUDDEN WE ARE SAYING THERE IS KNOWLEDGE OF INJURY THAT HAS BEEN ESTABLISHED, SO, REALLY, WE ARE TALKING ABOUT WHEN KNOWLEDGE COMES TO PASS, RATHER THAN THE ISSUE OF REDRESSABLE HARM.

IN THAT SITUATION, YES, AND IN THIS CASE THERE WAS NEVER AN ADMISSION BY THE INSURANCE AGENT THAT THERE WAS NO COVERAGE. HE, IN FACT, TESTIFIED THAT THERE WAS COVERAGE RIGHT THROUGH THE TRIAL, SO IN THAT SENSE IT IS MORE SIMILAR TO PEAT MARWICK THAN TO -- TO PETE MARWICK THAN TO THE SAWYER CASE.

I AM SURE YOU HAVE USED UP ALMOST ALL OF YOUR REBUTTAL, BUT IF YOU WISH TO SAVE SOME, YOU MAY.

GOOD MORNING. I AM HENDA KLEIN HERE ON BEHALF OF THE RESPONDENT, BRUNER INSURANCE AGENCY. MR. BLUMBERG HAS ARGUED THAT THE STATUTE OF LIMITATIONS DID NOT BEGIN TO RUN UNTIL ST. PAUL RECEIVED A DIRECTED VERDICT ON ITS BREACH OF CONTRACT CLAIM, BECAUSE UNTIL THAT TIME HE THOUGHT HE HAD COVERAGE AND HE HAD NO REDRESSABLE HARM. HOWEVER, THE RECORD IS CLEAR THAT MR. BLUMBERG HAD PREVIOUSLY BLED A -- PREVIOUSLY PLED A CLAIM FOR PROMISSORY ESTOPPEL, WHICH IS AN ADMISSION THAT HE KNEW OR SHOULD HAVE KNOWN THAT THERE MIGHT NOT BE COVERAGE, BECAUSE PROMISSORY ESTOPPEL IS BASED ON, WELL, IF THERE IS NO COVERAGE UNDER THE CONTRACT, THEN THERE SHOULD BE COVERAGE BY WAY OF EQUITY.

SO LET'S GO BACK TO THE FLIP SIDE. ARE YOU SAYING THAT EVERY TIME THERE IS A DENIAL OF COVERAGE, THAT AN INSURED, NOT ONLY IN ACUFF RAJ DISPUTE, MUST SUE HIS OR HER INSUROR, BUT, ALSO, MUST SUE THE INSURANCE AGENT, AS WELL WELL?

WELL, IT WOULD CERTAINLY DEPEND UPON THE UNDERLYING FACTS. THERE MAY BE SITUATIONINGS WHERE THERE IS NO COVERAGE AND THAT WOULD HAVE NOTHING TO DO WITH WHETHER OR NOT THE INSURANCE AGENT WAS NEGATIVE. IN MANY CASES THAT WILL, IN FACT --

IF IT HAS NOTHING TO DO WITH THE INSURANCE AGENT, THERE WILL NEVER BE A CAUSE OF ACTION. BUT IF THERE IS A SITUATION WHETHER SOMETHING THE AGENT DID OR DIDN'T DO WOULD COME UP, YOU WOULD HAVE TO SAY THAT THAT CASE THAT THAT AGENT WOULD BE -- THAT THAT AGENT WOULD BE SUE AT THAT TIME OR IS THERE A STATUTE OF LIMITATIONS STAYED UNTIL THE --

THERE IS COVERAGE AND THEY MIGHT VERY WELL WANT TO BE ACTIVE IN THE COVERAGE PHASE OF THE CASE, SO IT WOULD BE UNWIELDY, IN MANY CASES, TO HAVE A BIFURCATED PROCEEDING, ALTHOUGH OBVIOUSLY THAT COULD BE APPROPRIATE, ON A CASE-BY-CASE BASIS.

WHAT ABOUT THE SITUATION THAT IS SIMILAR TO PETE MARWICK, IN WHICH ST. PAUL SENDS THE INSURED A LETTER SAYING WE HAVE GOT NO COVERAGE, AND SO THE INSURED CALLS HIS AGENT, WHO HE HAS USED FOR 20 YEARS, AND THE AGENT SAYS ST. PAUL IS DEAD WRONG. THERE IS COVERAGE. NOW, IN THAT TYPE OF SITUATION, WHY SHOULD THE STATUTE OF LIMITATIONS BEGIN TO RUN ON THE DATE THAT THE ST. PAUL SENDS THE LETTER OR THE INSURED RECEIVES

THE LETTER, WHERE HE IS BEING ASSURED BIRX HIS AGENT, THAT THERE -- ASSURED, BY HIS AGENT, THAT THERE IS COVERAGE? WHY WOULD THE STATUTE OF LIMITATIONS? WHY WOULD THERE BE REDRESSABLE HARM AT THAT POINT, BECAUSE IT IS MERELY ST. PAUL TAKING A POSITION? IT IS NOT THAT ANYBODY HAS MADE A DETERMINATION THAT THERE IS OR ISN'T COVERAGE?

WELL, I THINK THAT ENCOMPASSES, ACTUALLY, TWO DIFFERENT CONCEPTS. THERE IS THE CONCEPT OF KNEW OR SHOULD HAVE KNOWN AND THERE IS THE CONCEPT OF REDRESSABLE HARM. REDRESSABLE HARM HAS OCCURRED AT THE TIME THAT THE INSURANCE COMPANY DENIES COVERAGE TLCHT IS AN INJURY AT THAT POINT, AN INJURY FOR WHICH ONE CAN SEEK COMPENSATION, AND THE DAMAGES RECOVERABLE AGAINST THE INSURANCE COMPANY ARE THE SAME RECOVERABLE AGAINST THE AGENT, SO THAT IS ONE CONCEPT, BUT THE SECOND CONCEPT IS WHEN YOU KNEW OR SHOULD HAVE KNOWN. NOW, MY OPPONENT HAS ADVOCATED A BRIGHT-LINE TEST, AND I THINK, BASED UPON THE COURT'S QUESTIONS THAT IS SIMPLY NOT APPROPRIATE IN THIS INSTANCE. HERE WE HAVE A SITUATION WHERE OPPOSING COUNSEL HAS STATED, ON NUMEROUS OCCASIONS, THAT MR. MR. BRUNER REPEATEDLY SAID THAT THERE WAS COVERAGE, BUT THE ONLY REPRESENTATION OF RECORD, HERE, IS THE AFFIDAVIT WHERE HE SAYS HE THOUGHT HE HAD COVERAGE. MR. BLUMBERG HAD COVERAGE ON THE DAY OF THE BURGLARY. THERE IS NO NOTHING IN THIS RECORD TO INDICATE THAT, THROUGHOUT THE ENTIRE LAWSUIT BELOW, THAT MR. BRUNER WAS TELLING MR. BLUMBERG, YOU HAVE COVERAGE, YOU HAVE COVERAGE, YOU HAVE COVERAGE, AND IN A SITUATION WHERE MR. BRUNER WAS NOT REPRESENTING MR. BLUMBERG, AND AS THE FOURTH DISTRICT HAS SAID, IN THE RUSSELL CASE THAT, IS A VERY SIGNIFICANT DIFFERENCE BETWEEN THIS CASE AND PETE MARWICK.

WHY DOES AN INSURANCE AGENT WHO, IS AN INDEPENDENT AGENT, NOT REPRESENT, ACCORDING TO FLORIDA LAW, AS I UNDERSTAND IN READING IT, THAT AGENT IS AN AGENT OF THE INDIVIDUAL, FOR INSURANCE COVERAGE PURPOSES. YOU GO THAT PERSON. YOU ASK THEM TO GET YOU THE COVERAGE, AND THEY GO OUT AND OBTAIN THE COVERAGE, SUPPOSEDLY, THAT YOU WANT. HOW IS THAT DIFFERENT THAN SOME OTHER PERSON DOING SOMETHING FOR A CITIZEN OF FLA, AND WHY IS IT GOOD LEGAL POLICY THAT WE WANT TO SUE AGENTS AT THE TIME OF DENIAL OF COVERAGE. HOW DOES THAT SERVE THE POLICY OF FLORIDA LAW?

WELL, IT SERVES THE POLICY BY FIRST OF ALL, SERVING JUDICIAL ECONOMY. IT CERTAINLY MAKES NO SENSE TO HAVE A SITUATION WHERE A PARTICULAR SUIT CAN GO ON FOR 12 13, 14 YEARS, AND CERTAINLY THAT PREJUDICES THE INSURANCE AGENT, WHO MAY BE SUED FOR SOMETHING SIX, SEVEN, EIGHT YEARS AFTER THE FACT, AND COULD CONCEIVABLY BE BARRED FROM ASSERTING COVERAGE ISSUES, BECAUSE THEY HAVE BEEN RAISED AND LITIGATED BELOW, AND IN THIS SITUATION, THIS IS -- PARTICULARLY COMPLICATED SITUATION, BECAUSE IN THE UNDERLYING SUIT, MR. BLUMBERG HAD TAKEN THE POSITION THAT MR. BRUNER WAS THE AGENT FOR THE INSURANCE COMPANY, AND AS THE AGENT FOR THE INSURANCE COMPANY, MR. BRUNER'S REPRESENTATIONS TO MR. BLUMBERG BOUND THE INSURANCE COMPANY, VIA THE PROMISSORY ESTOPPEL COUNT, AND THEN HE TURNS AROUND, IN THIS LAWSUIT, AND SAYS, WELL, NOW YOU ARE MY AGENT FOR THIS PURPOSE, SO I THINK THAT THE PUBLIC POLICY OF THE STATE OF FLORIDA CAN'T POSSIBLY BE SERVED BY HAVING A SITUATION WHERE A CASE CAN GO ON AND ON AND ON FOR 12, 13, 14 YEARS, WHERE A PLAINTIFF CAN MAKE PATENTLY INCONSISTENT ALLEGATIONS AND CLAIMS AND THE DEFENDANT IS CLEARLY PREJUDICED BY HAVING TO DEFEND ITSELF WITH ONE HAND TIED BEHIND ITS BACK, FIRST OF ALL, BY HAVING LOST, MAYBE, VALUABLE EVIDENCE THAT MIGHT HAVE BEEN AVAILABLE FIVE, SIX, SEVEN YEARS AGO, AND, SECOND, BY POTENTIALLY BEING BARRED BY PRINCIPLES OF COLLATERAL ESTOPPEL, FROM MAKING THE SAME ARGUMENTS AND HAVING THE SAME DEFENSE THAT IT MIGHT HAVE HAD, HAD THEY BEEN SUED IN THE SAME LAWSUIT.

BUT DOESN'T THE SAME THING APPLY TO THE AGENT? CARRYING ON JUSTICE WELLS' EXAMPLE OR HYPOTHETICAL, WHERE THE AGENT COMES BACK AND SAYS, WELL, THE COMPANY IS ALL

WET, AND I CAN ASSURE YOU I HAVE BEEN YOUR AGENT FOR 20 YEARS, AND WE ARE GOING TO WIN ON THIS. THAT THERE IS COVERAGE. I HAVE NO DOUBT ABOUT IT. AND I HAVE BEEN DEALING WITH THIS COMPANY, AND THAT IS JUST A DIFFERENT CLAIMS ADJUSTOR THAT GOT IN THERE AND TALKED TO YOU, AND HE IS ALL WET, AND CONTINUES TO ADVISE THE INSURED THAT THERE IS COVERAGE. AND AFTER THEY LITIGATE AGAINST THE COMPANY, WAKES UP ONE DAY AND FINDS OUT THAT THE LIMITATIONS PERIOD AGAINST THE AGENT HAS EXPIRED. BECAUSE THE INSURED HAS AGREED OR GONE ALONG WITH WHAT THE AGENT HAS TO SAY. WHAT DO WE DO WITH A SITUATION LIKE THAT?

THEN YOU HAVE THE PETE MARWICK CASE, AND THAT LINE OF CASES, WHERE, IF THERE IS A RELATIONSHIP, BETWEEN THE AGENT AND THE PLAINTIFF, SUCH THAT THE PLAINTIFF REASONABLY HAS RELIED ON AFFIRMATIVE REPRESENTATIONS ON THE PART OF THE AGENT, AND THE AGENT CONTINUES TO REPRESENT THAT PLAINTIFF, AND THE PLAINTIFF DOES NOT HAVE A LAWYER TO WHOM HE CAN ASK FOR LEGAL ADVICE, THAT MIGHT BE A DIFFERENT SITUATION, BECAUSE THEN YOU ARE GETTING INTO THE PETE MARWICK SITUATION, WHERE THE QUESTION IS SHOULD THIS PERSON KNOW OR REASONABLY SHOULD KNOW, WITH THE EXERCISE OF DUE DILIGENCE? CERTAINLY HERE MR. BLUMBERG HAD COUNSEL.

SO IF YOU GET INTO THAT DIFFERENT SITUATION, WHAT RULE DO YOU APPLY? THAT IS YOU BEGIN THE LIMITATIONS PERIOD RUNNING EARLIER? DO YOUES TOP THE AGENT AND -- DO YOU ESTOP THE AGENT AND EQUITYBLY TOLL THE LIMITATIONS PERIOD? WHAT DO YOU DO?

I BELIEVE THE ESTOPPEL MAY BE APPROPRIATE, BUT I THINK IN FACT WE DON'T HAVE TO MAKE A BRIGHT-LINE RULE, AND I THINK A BRIGHT-LINE RULE WOULD BE COMPLETELY INAPPROPRIATE, WHEN YOU ARE TALKING ABOUT STATUTE OF LIMITATIONS SHOULD HAVE BEGUN TO RUN, WHEN SOME WHO SHOULD HAVE KNOWN OR DID KNOW SOMETHING, WHEN SUBJECTIVELY THERE IS A TEST, AND THAT IS ALWAYS THE CASE WHERE, IN EXTREME CIRCUMSTANCES, EQUITY COMPELS A LATER TOLLING OF THE STATUTE OF LIMITATIONS, BUT IN A VAST NUMBER OF CASES, WHERE THE INSURED HAS A LAWYER WHO IS REPRESENTING THEM, I DON'T THINK IT IS UNREASONABLE FOR THE INSURED TO SAY I DIDN'T PAY ATTENTION TO MY LAWYER. I DIDN'T CONSULT MY LAWYER ABOUT THE LAW. I DECIDED TO LIST TEN TO MY INSURANCE AGENT, AND CERTAINLY IN THIS PARTICULAR CASE, WHERE THERE IS NO EVIDENCE OF RECORD BEFORE THIS COURT, THAT THEY LIST END -- LISTENED OR REASONABLY LISTENED TO THE INSURANCE AGENT, AS OPPOSED TO LISTENING TO THEIR COUNSEL, THEN THERE IS CERTAINLY NO REASON TO APPLY THAT IN THIS PARTICULAR CASE.

JUSTICE SHAW HAD A QUESTION.

IT SEEMS TO ME THAT YOU ARE AGREEING WITH OPPOSING COUNSEL THAT A CAUSE OF ACTION DOES NOT ACCRUE UNTIL THERE IS REDRESSABLE HARM, WOULD YOU AGREE WITH THAT?

ABSOLUTELY.

PROPOSITION.

YES.

AND THEN YOU ARE USING, AS A VEHICLE, I THINK, WHERE YOU DEPART FROM COUNSEL, YOU ARE USING AS ONE OF THE VEHICLES, WHETHER THE INSURED KNEW OR SHOULD HAVE KNOWN THAT HE HAD COVERAGE OR DIDN'T HAVE COVERAGE COVERAGE. IS THAT A MAJORITY POSITION OF USING THAT CRITERIA AS A VEHICLE FOR REACHING THE DETERMINATION OF WHETHER THERE IS REDRESSABLE HARM?

THE KNEW OR --

THE NEW OR SHOULD HAVE KNOWN. YOU RAISE IT, BUT I AM NOT TOO SURE THAT -- YOU DON'T CITE TO A LOT OF AUTHORITY FOR THAT POSITION. IS THIS SOMETHING UNIQUE WITH YOU?

THERE ISN'T MUCH AUTHORITY.

IS THAT AN ACCEPTED? YOU SEE, YOU HAVE TWO PROBLEMS HERE. YOU ARE DEALING WITH A CRUEL OF A CAUSE OF ACTION, AND THEN YOU ARE DEALING WITH STATUTE OF LIMITATION AND TOLLING OF STATUTE, SO IT IS A LITTLE COMPLICATED, BUT ON THE CRUEL OF THE CAUSE OF ACTION, YOU SEEM -- ON THE ACCRUAL OF THE CAUSE OF ACTION, YOU SEEM TO BE IN ACCORD EXCEPT FOR THAT CRITERIA THAT YOU ARE USING. IS THAT --

YOUR HONOR, I HAVE MAINTAINED THAT POSITION, BASED ON THE FOURTH DISTRICT CASE OF RUSSELL VERSUS FURMAN, WHICH, REALLY, IS THE ONLY -- WELL, ONE OF TWO CASES ON POINT IN THE STATE OF FLORIDA, AND RUSSELL MADE IT VERY CLEAR THAT NOT ONLY IS IT APPROPRIATE TO BRING A CAUSE OF ACTION AGAINST AN INSURANCE AGENT AT THE TIME THAT YOU BRING THE CAUSE OF ACTION AGAINST THE INSURANCE COMPANY, BUT IT IS NECESSARY, BECAUSE, FIRST, YOU HAVE SUFFERED REDRESSABLE HARM AT THE TIME THAT THE INSURANCE COMPANY DENIES COVERAGE, AND, SECOND, IT IS NOT INCONSISTENT TO SUE BOTH OF THEM AT THE SAME TIME. I UNDERSTAND THAT, MAYBE, I AM NOT MAKING MYSELF TERRIBLY CLEAR ON THAT.

YOU REPEATEDLY USED THIS PHRASE "SHOULD -- KNEW OR SHOULD HAVE KNOWN". YOU ARE USING THAT AS A LEGAL TERM OF ART, AND THAT THROWS IT INTO A DIFFERENT BALLPARK, IF THAT IS, IN FACT, A CRITERIA.

WELL, IF THIS COURT FOLLOWS THE PETE MARWICK REASONING, WITH RESPECT TO THIS CASE AND OTHER CASES OF THIS ILK, THEN THE QUESTION AS TO WHEN THE STATUTE OF LIMITATIONS BEGINS TO RUN IS BASED ON A SUBJECTIVE FINDING OF WHEN THE PLAINTIFF KNEW OR SHOULD HAVE KNOWN.

WELL, THE ACCRUAL OF THE CAUSE OF ACTION, IS IT BASED ON THAT?

NO. THE ACCRUAL OF THE CAUSE OF ACTION IS BASED ON WHEN REDRESSABLE HARM IS SUFFERED. THAT IS WHEN TECHNICALLY IT ACCRUES, BUT IN PETE MARWICK, WHAT THIS COURT SEEMS TO BE IMPLYING IS THAT, INSERT VERY NARROW INSTANCES, WHERE THE PLAINTIFF COULD NOT REASONABLY HAVE KNOWN THAT THEY SUFFERED REDRESSABLE HARM, THEN THE STATUTE OF LIMITATIONS SHOULD NOT BEGIN TO ACCRUE OR SHOULD, AS JUSTICE PARIENTE MENTIONED, MAYBE BE TOLLED IN THAT PARTICULAR INSTANCE, BUT THAT --

WHEN HE TAKES A LEGAL POSITION CONTRARY TO COVERAGE, IT WILL BE YOUR POSITION, THEN, THAT THE CAUSE OF ACTION CERTAINLY WOULD ACCRUE AT THAT POINT. BECAUSE HE KNEW OR SHOULD HAVE KNOWN THAT HE DIDN'T HAVE COVERAGE.

THAT'S CORRECT.

IF HE IS TAKING A LEGAL POSITION.

THAT'S CORRECT, AND IN THIS CASE, CERTAINLY BY BRINGING A PROMISSORY ESTOPPEL COUNT, SAYING, WELL, IF I DON'T HAVE COVERAGE, THERE SHOULD BE COVERAGE BY WAY OF ESTOPPEL, CERTAINLY THEY KNEW, LONG BEFORE THEY BROUGHT THIS SUIT, THAT THERE WAS NO COVERAGE OR THE POSSIBILITY OF IT.

JUDGE LEWIS?

WHERE DOES THE RESERVATION OF RIGHTS CONCEPT FALL INTO YOUR SUGGESTED ANALYSIS?

INSURANCE COMPANY COMES BACK, AND THEY SEND OUT, IT IS TYPICAL IN THE INDUSTRY. YOU SEE THEM VIRTUALLY ON A DAILY BASIS. HOW WOULD THAT BE HANDLED, UNDER YOUR THEREY?

WELL, I BELIEVE THE STANDARD RESERVATION OF RIGHTS LETTER SUGGESTS, TO A PLAINTIFF, THAT THERE MAY NOT BE COVERAGE, AND THAT THEY SHOULD CONSULT INDEPENDENT COUNSEL. IT, ALSO, THEN, GENERALLY SPEAKING, SAYS WE ARE GOING TO HIRE DEFENSE COUNSEL FOR YOU. WELL, CERTAINLY IF DEFENSE COUNSEL IS HIRED, FOR THE DEFENDANT, AND THERE IS NO VERDICT AGAINST THE DEFENDANT, THEN THERE HAS BEEN NO HARM SUFFERED BY THE DEFENDANT. IT WOULDN'T BE UNTIL SUCH TIME AS THE DEFENDANT SUFFERS A DEFENSE VERDICT AND THEN THE INSURANCE COMPANY MAKES A FINAL DETERMINATION AS TO WHETHER OR NOT IT IS GOING TO PAY THE CLAIM. THAT IS WHEN, IN THAT INSTANCE, THE REDRESSABLE HARM HAS BEEN SUFFERED, EVEN THOUGH LONG BEFORE THEN, THE INSURED MAY HAVE KNOWLEDGE THAT THERE MAY NOT BE COVERAGE. YOU HAVE TO HAVE A SITUATION WHERE THERE IS, BOTH, THAT KNOWLEDGE AND THE REDRESSABLE HARM, BEFORE THE STATUTE CAN TECHNICALLY BEGIN TO TOLL.

SO YOU WOULD REQUIRE THAT THE INSURANCE COMPANY HAVE DENIED COVERAGE, NOT JUST RESERVE RIGHTS AS BEING THE STARTING POINT.

ABSOLUTELY.

LET ME ASK YOU THIS, AND I AM TRYING TO FIGURE OUT WHERE THIS COMES INTO PLAY, BUT IT SEEMS TO ME THAT ANOTHER DIFFERENCE BETWEEN THE PETE MARWICK LINE OF CASES AND SILVERSTONE IS THAT YOU HAVE GOT THE PERSON WHO IS REPRESENTING THE CLIENT, THE INSURED, ACTUALLY THEY ARE SEEKING TO MAKE SURE THAT THE UNDERLYING ACTION IS RESOLVED IN THAT PERSON'S FAVOR. AND IT WOULD STRIKE ME THAT, IN MANY CASES, IF YOU ACTUALLY HAD A LAWSUIT GOING ON, THAT IT WOULD BE, WHETHER THERE WOULD BE A MISS JOINED OR BE ABLE TO ACTUALLY FILE THE MALPRACTICE ACTION IN THE UNDERLYING CASE, YOU HAVE, HERE, THOUGH, AS YOU SAID, A DIFFERENT SITUATION, BECAUSE, REALLY, IF YOU ALLOW HAVE YOU COME ACROSS ANY LEGAL CONCEPTS THAT WOULD ALLOW US TO, REALLY, DISTINGUISH THOSE LINE OF CASES, WHERE YOU HAVE ATTORNEY REPRESENTATION, OTHER THAN JUST BASED ON WHEN THE CAUSE OF ACTION ACCRUES? HAVE YOU FOUND ANYTHING?

HONESTLY, JUDGE, I HAVE NOT LOOKED INTO THAT, SO MY ANSWER WOULD BE NO. HOWEVER, I DID WANT TO BRING UP ONE POINT IN RESPONSE TO YOUR OBSERVATION, AND THAT IS THERE IS ANOTHER VERY BIG DIFFERENCE BETWEEN THIS TYPE OF CASE AND THE LITIGATION MALPRACTICE CASES AND THAT IS THOSE CASES, THERE MAY ULTIMATELY BE NO REDRESSABLE HARM AT THE END OF THE DAY, WHILE, IN THIS CASE, THERE CLEARLY WAS REDRESSABLE HARM AT THE TIME THAT COVERAGE WAS DENIED.

BUT THE PROBLEM THAT, AT LEAST IN MULLING THIS OVER IN MY MIND, THAT WE ARE CONFRONTING, IS THAT THERE IS THE SAME TYPE OF REDRESSABLE HARM PIE GETTING THE LETTER FROM ST. PAUL, THAT THERE WAS -- HARM BY GETTING THE LETTER FROM ST. PAUL THAT THERE WAS IN GETTING THE LETTER FROM THE I.R.S., BECAUSE THE ONLY THING THAT MEANS IS THAT YOU HAVE GOT TO CONTEST IT. NOW, I HAVE A HARD TIME DISTINGUISHING THE PETE MARWICK SITUATION, IN THE PATH THAT THE COURT WENT DOWN, AND ST. PAUL SENDING THE LETTER, BECAUSE IT IS JUST A LETTER FROM DIFFERENT INSTITUTIONS, ISN'T IT?

THAT IS TRUE, BUT I THINK THE UNDERLYING RATIONALE FOR THE PETE MARWICK CASE, MORE THAN ANYTHING ELSE, AND I THINK THE FOURTH DISTRICT RECOGNIZED IT IN THIS CASE AS WELL AS IN RUSSELL, IS THE FACT THAT THE PERSON REPRESENTING THE PLAINTIFF -- THE TAXPAYERS IN PETE MARWICK, WAS THE SAME PERSON WHO, INSTEAD SIMPLY COMMITTED THE MALPRACTICE SO, AGAIN, YOU GO BACK TO DO THEY KNOW OR SHOULD HAVE KNOWN? THIS

SAME PERSON WHO REPRESENTED THEM THROUGH THE WHOLE THING SAID DON'T WORRY ABOUT IT. I AM GOING TO GET IT UNDONE. THAT IS NOT THE KIND OF SITUATION WE HAVE HERE.

GO AHEAD.

WHERE IS THE LOGIC, HOWEVER, IF YOU, IN PEAT MARWICK'S SITUATION, USED THE SAME ACCOUNTANT TO FOLLOW THROUGH AND CHALLENGE WHAT HAS OCCURRED, NO CAUSE OF ACTION, BUT IF THEY GO ACROSS THE STREET AND HIRE A DIFFERENT ACCOUNTANT, THEN YOU DO HAVE REDRESSABLE HARM? BECAUSE IT IS NOT THE SAME PERSON. YOU ARE NO LONGER RELYING UPON THEM. THEY HAVE DONE THEIR DEED AND SOMEONE ELSE IS DOING IT. WHERE IS THE LOGIC IN THAT?

WELL, HONESTLY, YOUR HONOR, I DON'T SEE A WHOLE LOT OF LOGIC IN THAT. I HAVE A MAJOR PROBLEM WITH PETE MARWICK. I BELIEVE THAT THE CASE MAY HAVE BEEN SOMEWHAT RESULT-ORIENTED, BECAUSE OF THE EQUITIES INVOLVED AND ONCE AGAIN, I THINK WE ARE GOING BACK INTO THIS QUESTION ABOUT THE INTERRELATIONSHIP BETWEEN REDRESSABLE HARM AND THE ACCRUAL OF CAUSE OF ACTION, WHEN YOU KNEW OR SHOULD HAVE KNOWN, AND I FIND THAT PETE MARWICK, THAT LINE SOMETIMES GETS BLURRED.

YOU CAN'T HAVE A CAUSE OF ACTION UNTIL YOU HAVE REDRESSABLE HARM.

THAT'S CORRECT. BUT IN PETE MARWICK, AND IN THE LITIGATION MALPRACTICE CASES, UNTIL SUCH TIME AS THE UNDERLYING CASE IS FINAL, THERE ISN'T A JUDGMENT THAT CAN BE COLLECTED AGAINST THE PUNITIVE PLAINTIFF, WHEREAS IN THIS CASE, YOU ABSOLUTELY HAD DAMAGES AT THE TIME THAT THE INSURANCE COMPANY DENIED COVERAGE. OTHERWISE THEY COULDN'T HAVE POSSIBLY HAVE SUED THE INSURANCE COMPANY. THEY ARE THE SAME DAMAGES THAT ARE RECOVERABLE AGAINST THE INSURANCE AGENT. SO HOW COULD YOU NOT SAY THAT THEY HAD REDRESSABLE HARM, UNTIL FIVE YEARS AFTER THEY SUED THE INSURANCE COMPANY FOR THE SAME EXACT DAMAGES?

MAYBE THAT IS THE KEY, IS THE SAME DAMAGES. BECAUSE WHEN YOU SUE AN ATTORNEY FOR MALPRACTICE AND THEY SCREW UP ON THE UNDERLYING CASE, THE DAMAGES, ALTHOUGH IT IS COMING OUT OF THE SAME THING, MAY ACTUALLY BE DIFFERENT DAMAGES.

THAT MAY BE THE KEY. EXACTLY. IF THERE ARE NO FURTHER QUESTIONS, THANK YOU FOR YOUR CONSIDERATION.

THAT IS AN OPTIMISTIC OBSERVATION. BUT THANK YOU.

I KNOW I HAVE VERY LITTLE TIME. I JUST WANTED TO POINT OUT THAT THE PROMISSORY ESTOPPEL COUNT WAS NOT EVEN ASSERTED UNTIL 1993 SO UNDER THEIR ARGUMENT THAT, WHEN WE ASSERTED PROMISSORY ESTOPPEL, AT THAT POINT WE WERE ON NOTICE, THEN, IN FACT, OUR CAUSE OF ACTION, WHICH WE SUED IN 1996, WOULD HAVE BEEN TIMELY.

THAT IS YOUR OUT HERE, IS YOU HAVE GOT PROMISSORY -- IT STARTS FROM WHEN YOU ASSERTED PROMISSORY ESTOPPEL.

HOPEFULLY SO. ALSO BRUNER SUBMIT ADD AFFIDAVIT IN SUPPORT OF OUR SIDE OF THE CASE, ON THE MOTION FOR SUMMARY JUDGMENT, SO THERE IS EVIDENCE THAT HE DID SUPPORT OUR SIDE OF THE CASE IN THE SUMMARY JUDGMENT. THANK YOU.

THANK YOU. THANKS TO BOTH OF YOU. WE WILL BE IN RECESS FOR 15 MINUTES. THE MARSHAL: PLEASE RISE.