Lilliana Cahuasqui v. U.S. Security Insurance Co.

YOU WERE TELLING ME THAT IT WAS AS AN ASSISTANT.

THAT WAS WHEN I PUT UP THE COLLATERAL. I PROBABLY WOULD NOT HAVE DONE THAT, IF IT WAS SOMEONE THAT I HAD NO KNOWLEDGE OF.

YOU KNEW HIS SISTER?

I DIDN'T KNOW HIM VERY LONG. I THOUGHT THAT WOULD BE OKAY. I FELT SORRY FOR HIM, AND I WAS TRYING TO HELP HIM OUT, BUT IT CAME TIME TO COME TO COURT AND --

HE NEEDED $400.

SHE COULD ONLY GET HIM $60. I BORROWED THE MONEY FROM MY MOTHER BECAUSE I DIDN'T HAVE IT, AND IF HE DIDN'T SHOW FOR COURT, THEN THAT COULD BE A PROBLEM, BECAUSE I HAD THE HOUSE UP FOR COLLATERAL.

I KNOW WHAT THE CONSEQUENCES ARE. YOU DON'T HAVE TO ELABORATE ON THAT.

I HAVE THE CANNES HE WOULD CHECK FOR $340 FOR THE COURT COSTS.

SO HE IS BROKE, RIGHT?

HE WAS BROKE.

AND THERE IS A WARRANT OUT FOR HIM FOR FAILURE TO PAY ON TIME. OKAY. YOU HAVE THE PAPERWORK ALL ALONG.

I DO. HAVE A CANCELLED CHECK. ABOUT TWO WEEKS AFTER THAT, HE WAS SEVERAL PAYMENTS BEHIND ON HIS CAR PAYMENT, SO HE WAS VERY WORRIED THAT THEY WERE GOING TO REPOSES HIS CAR, SO, I AGAIN BORROWED MONEY FROM MY CAR AND PAID A CAR PAYMENT. HE SAID CAN I PLEASE BORROW MONEY AND ADD IT TO WHAT I OWE YOU?

HOW MUCH WAS THAT?

$134.46. AND. THE THING, I HAD A CELL PHONE.

NOT A CELL PHONE.

YEAH. HE TOLD ME THAT HE NEEDED IT FOR HIS JOB.

THE THIRD DISTRICT CERTIFIED THIS AS AN ISSUE OF GREAT PUBLIC IMPORTANCE?

NO. THE COUNTY COURT CERTIFIED IT. THAT IS THE NATURE OF THE GREAT PUBLIC IMPORTANCE.

THE THIRD DISTRICT HAS NOT CERTIFIED IT AS AN ISSUE OF GREAT PUBLIC IMPORTANCE. IS THAT CORRECT?

NO. THEY DID NOT.

WOULD YOU TAKE A MOMENT AND REMIND US OF WHY WE HAVE JURISDICTION TO REVIEW THIS CASE?

YES. WE BELIEVE THAT, FIRST, IT IS AN ISSUE OF GREAT PUBLIC IMPORTANCE BECAUSE IT AFFECTS PIP INSURANCE THROUGHOUT THE ENTIRE STATE OF FLORIDA.

THAT WOULDN'T BE A BASIS UNLESS THE DISTRICT COURT CERTIFIED IT, WOULD IT?

NO. BUT IN ADDITION TO THAT, WE BELIEVE THAT THE CONFLICTS, WHICH SEVERAL DECISIONS OF THIS COURT IN A LONG-STANDING, LONG-STANDING LINE OF CASES THAT HAVE COME OUT OF THIS COURT REGARDING THE WAY THAT PIP STATUTES ARE INTERPRETED.

WHAT OTHER CASES HAVE RULED ON THE INTERPLAY BETWEEN THESE TWO PARTICULAR ATTORNEYS FEE STATUTES?

WELL, NOT BETWEEN THE SPECIFIC ATTORNEYS FEE STATUTE, BECAUSE BU THEY HAVE RULED, BETWEEN THE INTERPLAY, THAT, ON THE ISSUE OF 627.428, ASAP APPLIES TO PIP, IT IS A ONE-WAY STATUTE, A ONE-WAY POSITION IN FAVOR OF INSURANCE.

YOU AGREE THAT THERE ARE NO OTHER CASES OUT THERE THAT DISCUSS THESE TWO STATUTES TOGETHER.

FROM THE SUPREME COURT THAT I AM AWARE OF, NO.

OR FROM THE DISTRICT COURTS. IN OTHER WORDS THERE AREN'T ANY -- YOU DON'T CLAIM THAT THERE ARE ANY DISTRICT COURT DECISION THAT IS CONFLICT WITH THIS DECISION.

NOT DIRECTLY WITH THE DECISION. WE DO BELIEVE THAT THE COLORADO OSSIE DECISION FROM THE -- THAT THE COLOSSI DECISION FROM THE THIRD DISTRICT DOES COMPORT WITH THIS DECISION. IN NATIONWIDE CASE, THE ISSUE BEFORE THIS COURT, THE ISSUE WAS THE ARBITRATION PROVISION, AND THE ARBITRATION PROVISION OF THE PIP STATUTE WAS FOUND TO BE UNCONSTITUTIONAL, BECAUSE IT PROVIDED FOR A TWO-WAY ATTORNEY FEE PROVISION AS APPLIED TO MEDICAL PROVIDERS. ONE OF THE THING THAT IS THIS COURT SAID WAS THAT THE PREVAILING PARTY FEES IN THAT POSITION DOES NOTHING TO FURTHER THE PROMPT PAYMENT OF BENEFITS OR TO ENCOURAGE INSURANCE DENIAL OF VALID CLAIMS, AND WE BELIEVE THAT THE APPLICATION, THE OFFER OF JUDGMENT TO THE PIP STATUTE DOES EXACTLY THE SAME. IT DOES NOTHING TO FURTHER THE PROMPT PAYMENT OF BENEFITS AND DISCOURAGES -- OR TO DISCOURAGE THE DENIAL BY INSURORS. THEREFORE --

DON'T YOU HAVE A SORT OF AN UNDERLYING ASSUMPTION AS TO ANY PIP CLAIM THAT ANY INSUROR COULD RAISE. I MEAN, THE CD RESOLUTION AND CD PAYMENT, AND WHAT DEFENSES COULD AN INSUROR RAISE TO A PIP CLAIM?

THE INSUROR COULD RAISE ANY DEFENSES THAT IT HAS TO THE PIP CLAIM. THE FACT THAT THE OFFER OF JUDGMENT SHOULD NOT BE APPLIED TO PIP HAS NOTHING TO DO OR DOES NOT NEGATE ANY DEFENSES THAT THEY MAY HAVE. THIS COURT HAS, ALSO, IN THE CASE OF LASKY VERSUS STATE --

WHAT WOULD BE -- YOU ARE SAYING THAT THERE IS NO RELATIONSHIP, THEN, BETWEEN THE ATTORNEYS FEE ISSUE AND ANY DEFENSES THAT AN INSUROR COULD RAISE?

THAT'S CORRECT. BECAUSE THE FEE, THE OFFER OF JUDGMENT HAS NOTHING TO DO WITH THE DEFENSES IN PARTICULAR. THE OFFER OF JUDGMENT IS A PROVISION WHEREBY, IF THE DEFENDANT WERE TO PREVAIL, THE DEFENDANT, AND THERE IS AN OFFER OF JUDGMENT THAT

HAS BEEN MADE, THE DEFENDANT GETS FEES. WHAT MAKES IT WORSE IS THAT, IF THE PLAINTIFF PREVAILS BUT DOES NOT GET AT LEAST 75 PERCENT LESS THAN THE OFFER, THE PLAINTIFF WINSANT DEFENDANT STILL GETS FEES.

WHAT DO WE DO WITH THE APPLICATION OF THIS STATUTE TO ALL CIVIL ACTIONS? IS THERE A PIP CLAIM IN A CIVIL ACTION?

A PIP CLAIM IS A CIVIL ACTION AND NO DOUBT IT IS INTENDED TO APPLY TO ALL CIVIL ACTIONS, WITH A CERTAIN EXCEPTION, AND THAT EXCEPTION IS, UNDER FLORIDA STATUTE 768.61, WHICH IS PART OF THE OFFER OF JUDGMENT PART, IT STATES, IN SUBSECTION 3, IF A PROVISION OF THIS PART IS IN CONFLICT WITH ANY OTHER PROVISION OF THE FLORIDA STATUTES, SUCH OTHER PROVISIONS SHALL APPLY. IT IS OUR POSITION THAT THERE IS A CLEAR CONFLICT BETWEEN AN ATTORNEY FEE PROVISION, AS IN THE PIP, WHICH PROVIDES ONE-WAY FEES ONLY TO THE INSURED, AND THEN A PROVISION THAT, WHEN APPLIED, NOT ONLY PROVIDES THE DEFENDANT OR THE INSURANCE COMPANY WITH ATTORNEYS FEES IF THEY PREVAIL, BUT PROVIDES THE DEFENDANT COMPANY, ATTORNEY FEES IN SERLT SITUATIONS WHERE THE INSURED PREVAILS.

BUT 627.428, WHICH IS THE GENERAL ONE-WAY STREET PROVISION APPLIES TO ANY INSURANCE DISPUTE DISPUTE. ARE YOU SEPARATING OUT AND MAKING AN ARGUMENT THAT PIP CLAIMS CANNOT BE SUBJECT TO THE OFFER OF JUDGMENT, OR BECAUSE PIP CLAIMS ARE ON ONE-WAY STREET NO PIP CLAIM COULD BE SUBJECT TO AN OFFER OF JUDGMENT.

THAT IS THE WAY IT APPLIED.

THEN WHAT ABOUT OUR CASES LIKE SCOTTSDALE AND STAMUS, AND WE HAVE DISCUSSED THE ENTER PLAY BETWEEN HOW 428 AND THE OFFER OF JUDGMENT STATUTE WORKS.

I DON'T BELIEVE IN DAMAGE TO ANY OF THE OTHER CASES. THE ISSUE IS WHETHER OR NOT THERE WAS A CONFLICT BETWEEN THE OFFER OF JUDGMENT STATUTE AND THE PIP FEE STATUTE HAS EVER BEEN RAISED.

BUT YOUR ARGUMENT, TODAY, IS THAT, IF WE WOULD FIND THAT THE PIP STATUTE IS IN CONFLICT, SO WOULD 428 BE IN CONFLICT, ALSO, SO THAT ALL INSURANCE DISPUTES WOULD NOT BE SUBJECT TO THE OFFER OF JUDGMENT STATUTE?

YES. BUT IN ADDITION, THERE IS A CONSTITUTIONAL ELEMENT THAT NEEDS TO BE CONSIDERED HERE, BECAUSE PIP IS IN DEROGATION OF COMMON LAW.

BUT IF WE ACCEPT THAT APPROACH, WOULD THAT NOT, ALSO, APPLY, THEN, TO OTHER CONSUMER LEGISLATION? FRAUDULENT PRACTICES, UNFAIR AND DECEPTIVE TRADE PRACTICES, WHERE THEY HAVE THE ATTORNEYS FEE PROVISIONS, WOULD YOUR ARGUMENT, THEN, TAKE THOSE, TAKE THE OFFER OF JUDGMENT OUT OF THAT CONTEXT AS WELL, BECAUSE IT IS THE SAME SITUATION, REALLY, AS INSURANCE.

IT CERTAINLY MIGHT. I THINK WHAT U.S. SECURITY WANTS THE COURT TO IGNORE IS THE CLEAR PROVISION UNDER SUBSECTION 3 OF 768.71, WHICH WAS PLACED -- OF, WHICH PLACES THE OFFER OF AMENDMENT THERE OVER THE YEARS STILL REMAINS THERE, AND CLEARLY THIS OFFER, IF IT IS IN CONFLICT WITH ANY OTHER PROVISION, SUCH PROVISIONS WOULD APPLY. IF THAT SUBSECTION MAKES THE APPLICATION OF THE OFFER OF JUDGMENT STATUTE IN APPLICABLE TO OTHER CASES, THEN THAT IS THE WAY THE LEGISLATURE INTENDED AND THAT IS THE WAY THIS COURT SHOULD INTERPRET IT. IN THE SITUATION OF PIP, WE HAVE IT GOES A LITTLE BIT FURTHER, BECAUSE PIP IS STATUTORY. THE COMMON LAW RIGHTS OF THE, OF FLORIDIANS WERE TAKEN AWAY, AND THIS PIP SCHEME WAS PUT INTO EFFECT. THIS COURT --

IF YOU ARE GETTING THESE OTHER ATTORNEYS FEE SECTIONS, IT WOULD JUST ABOUT ERODE THE

SUBSECTION OF THE STATUTE, WOULDN'T IT?

THERE ARE PLENTY OF ACTIONS FOR DAMAGES WHERE THERE ARE NO ATTORNEY FEE PROVISIONS. HOWEVER, IF THERE IS AN ACTION FOR DAMAGE THAT IS HAS AN ATTORNEY FEE PROVISION THAT WOULD CONFLICT WITH THE OFFER OF JUDGMENT STATUTE, THE OFFER OF JUDGMENT, THE PART THAT HAS THE OFFER OF JUDGMENT CLEARLY PROVIDED THAT, IN THE EVENT OF A CONFLICT, OFFER OF JUDGMENTS DO NOT AND PLI..

-- WOULD NOT APPLY.

GOING TO OTHER STATUTORY PROVISION THAT IS YOU ARE TALKINGS ABOUT, THESE EXCEPTIONS THE OFFER OF JUDGMENT STATUTE, IF YOU READ IT IN ISOLATION, IT IS PRETTY CLEAR WHAT IT SAYS, ISN'T IT, THAT IT APPLIES ALL CIVIL SUITS?

YES. AND OBVIOUSLY IT HAS TO APPLY TO ALL CIVIL SUITS WHERE DAMAGES COME INTO PLAY. HOWEVER, THERE IS THE EVENINGS EXCEPTION. THE EX -- THERE IS A EXCEPTION. THE EXCEPTION IS WHERE THE OFFER OF JUDGMENT CONFLICTS. WHEN IT CONFLICTS WITH THAT PROVISION, THE MORE CLEAR STATUTE SHOULD PREVAIL. THAT IS THE CASE IN THE RULES OF STATUTORY CONSTRUCTION, SUCH AS I CITED IN THE ADAMS CASE, FROM 1959, WHERE THIS COURT TUNED FOUND THAT SPECIAL STATUTES -- WHERE THIS COURT FOUND THAT SPECIAL STATUTES COVERING THE SPECIAL SUBJECT MATTER IS THE SAME AS COVERING IN OTHER GENERAL TERMS.

WHY COULDN'T THESE STATUTES TWO IN TOND EM? IT -- IN TANDEM? WHY CAN'T THEY WORK IN THAT FASHION?

WELL, FIRST, UNDER 627.736, SUBSECTION 8, WHICH IS THE PIP PROVISION, IT PROVIDES THAT ATTORNEY FEES UNDER PIP SHALL BE UNDER 627.428, WHICH IS A ONE-WAY STREET THIS. COURT HELD, ONE OF THE THINGS THAT THIS COURT HELD IN IVY VERSUS ALLSTATE INSURANCE COMPANY, THIS COURT SAID IT IS CLEAR TO US THAT THE PURPOSE OF THIS PROVISION, TALKING ABOUT 627.428, IS TO LEVEL THE PLAYING FIELD, SO THAT THE ECONOMIC POWER OF THE INSURANCE COMPANIES IS NOT SO OVERWHELMING THAT PEOPLE WILL NOT HAVE THE NECESSARY MEANS TO SEEK REDRESS IN THE COURTS. BY APPLYING THE OFFER OF JUDGMENT STATUTES TO PIP, YOU ARE REDISTRICTING THE -- REDISTRIBUTING THE ALTERNATIVE AND REAPPLYING THE PIP STATUTE, SO THAT IT IS NOT THE ALTERNATIVE FOR THE RIGHTS IN STATUTE THAT WERE TAKEN AWAY.

NOW YOU ARE MAKING A CONSTITUTIONAL ARGUMENT THAT WOULD PERTAIN TO PIP BUT NOT OTHER TYPES OF INSURANCE CLAIMS.

THAT PARTICULAR ARTICLE WOULD ONLY APPLY TO -- ARGUMENT WOULD ONLY APPLY TO PIP.

IN THIS CASE, CALLING IT A PIP CASE, BUT IN FACT THIS IS A COVERAGE ISSUE AS TO WHETHER A PARTICULAR MEMBER OF A HOUSEHOLD WAS COVERED UNDER A POLICY, AND IN FACT THE JURY FOUND THAT A MATERIAL MISREPRESENTATION OF FACT WAS MADE, AS TO IN THE APPLICATION FOR INSURANCE. SO IN TERMS OF THE POLICY THAT WE ARE TALKING ABOUT, WHY SHOULD AN INSURED BE ABLE TO, IN THIS SITUATION, SAY THAT THERE IS COVERAGE, WHEN THERE IS CLEARLY NOT COVERAGE, NOT RESPOND TO AN OFFER OF JUDGMENT. GO TO TRIAL. HAVE AN ADVERSE VERDICT AND SUFFER NO CONSEQUENCE, IN TERMS OF THE VERY PURPOSE OF THE OFFER OF JUDGMENT STATUTE, WHICH IS TO ENCOURAGE SETTLEMENT OF DISPUTES? I GUESS I AM HAVING TROUBLE, BECAUSE OF THE FACTS OF THIS CASE, OF EVEN FINDING MUCH SYMPATHY, REALLY, WITH YOUR PUBLIC POLICY ARGUMENT. COULD YOU SORT OF RESPOND IN THE CONTEXT OF THIS CASE, WHY IT WOULD BE GOOD POLICY THAT THE COURT WOULD FIND OR THAT THE LEGISLATURE WOULD FIND THAT 768.69 SHOULDN'T APPLY IN A CASE LIKE THIS?

BECAUSE AT THE TIME THERE WAS A CONTROVERSY AS TO WHETHER THIS COURT WOULD APPLY

PIP BENEFITS. THERE WAS A TIMEX TENSION TO FILE FOR PIP LIKE SHE DID, BECAUSE IN FACT SHE WAS A RELATIVE LIVING IN THE HOUSEHOLD AND WOULD NORMALLY BE SUBJECT TO THE SUBSECTION OF PIP, AND THERE WAS NO FINDING FROM THE JURY FINDING THAT SHE WASN'T, AND AT THAT TIME I THINK WE NEED TO LOOK AT THE OFFER OF JUDGMENT AT THAT TIME, CONSIDERING IT WAS AN ISSUE INVOLVING PIP, AND OUR POSITION IS THAT THE OFFER OF JUDGMENT SHOULD NOT APPLY, NOT ONLY BECAUSE OF THE CONFLICT BUT BECAUSE OF THE CONSTITUTIONAL PROBLEMS THAT IT CREATES. I DON'T KNOW IF THAT ANSWERS YOUR QUESTION. IN ADDITION, OBVIOUSLY -- SORRY. IN ADDITION, WE WOULD LIKE THE COURT TO CONSIDER THAT THE OFFER OF JUDGMENT REDISTRIBUTES THE ECONOMIC PART, BUT THE INSUREDS ARE FORCED TO GAMBLE THEIR ECONOMIC LIVELIHOOD TO APPLY FOR BENEFITS, AND IF THE MEDICAL PROVIDERS, FOR EXAMPLE, IN A SITUATION OF AN OFFER OF JUDGMENT --

YOU ARE IN YOUR REBUTTAL.

YES. I UNDERSTAND. IN A SITUATION WHERE THERE IS AN OFFER OF JUDGMENT, THE INSURED DOES NOT HAVE THE OPTION OF ASKING THE MEDICAL PROVIDERS TO ACCEPT AN OFFER OF JUDGMENT, SO YOU CAN HAVE A SITUATION WHERE THE INSURED ACCEPTS AN OFFER OF JUDGMENT BECAUSE OF FEAR OF FINANCIAL RUIN, YET THE MEDICAL PROVIDER CAN STILL GO AFTER THE INSURED FOR THE DIFFERENCE BETWEEN WHAT THE INSURED ACCEPTED AND WHAT THE 80 PERCENT OF THE MEDICAL BILLS WERE. THE PROBLEM WHICH I THINK THAT JUSTICE FEHR ANTE RAISED IS -- PARIENTE RAISED IS THE STATUTE DISCOURAGES MEDICAL PROVIDERS FROM ACCEPTING ASSIGNMENT OF BENEFITS, BECAUSE MEDICAL PROVIDERS HAVE TO SUE TO GET PAID, THEY ARE ALSO SUBJECT TO THE JUDGMENT RULE, AND THEREFORE THAT WOULD BE SOMETHING THAT I BELIEVE WOULD RESULT CONTRARY TO THE SCHEME OF THE NO-FAULT STATUTE. I WILL SAVE MY ADDITIONAL TIME FOR REBUTTAL. THANK YOU.

THANK YOU. MR. PAKULA.

GOOD MORNING. MAY IT PLEASE THE COURT. I AM DAVID PAKULA, REPRESENTING US SECURITY. I BELIEVE THAT THIS CASE, REALLY, A SIMPLE CASE OF STATUTORY INTERPRETATION, AND I DON'T BELIEVE THAT IT IS NZ NECESSARY TO EVEN REORITY -- THAT IT IS NECESSARY TO EVEN RESORT TO STATUTORY CONSTRUCTION BECAUSE I THINK IT IS CLEAR IN THE LANGUAGE. THE OFFER OF STATUTE SAYS THAT IT APPLIES IN ANY CIVIL ACTION FOR DAMAGES. I THINK EVERYBODY, EVEN THE PETITIONER PROBABLY AGREES. THAT MEANS THAT IT APPLIES IN PIP CASES.

IT WAS NOT ALWAYS -- WHEN DID THE STATUTE CHANGE? WHAT IS THE CHRONOLOGY OF THE ATTORNEYS FEE STATUTE?

THE OFFER OF JUDGMENT STATUTE WAS INITIALLY ENACTED IN 1986, AND AT THAT TIME IT PROVIDED THAT IT ONLY APPLIES TO THIS PART WHICH WAS THE DAMAGES SECTION OF CHAPTER 768. IN 1990, THERE WAS AN AMENDMENT IN WHICH THE LEGISLATURE CHANGED THAT LANGUAGE, AND NOW IT READS IN ANY CIVIL ACTION FOR DAMAGES, AND IT GOES ON. SO THE LEGISLATURE MADE IT VERY CLEAR THAT THEY WANTED THIS TO APPLY TO ALL CIVIL ACTIONS FOR DAMAGES.

HOW DO YOU RESPOND TO OPPOSING COUNSEL'S ARGUMENT THAT YOU HAVE A CAVEAT TO THAT. IF THERE IS A STATUTE TO THE CONTRARY, HOW DO YOU DEAL WITH THAT PORTION OF IT?

WELL, YOU KNOW, THE KEY IS THAT THERE HAS TO BE A CONFLICT. IF THERE IS A CONFLICT, THEN THE OTHER STATUTE WOULD CONTROL. HOWEVER --

WELL, THAT IS HIS POSITION. IT CAN EXIST.

CORRECT. WELL, CONFLICTS CAN'T BE CREATED. GETTING BACK TO THE LANGUAGE OF THE STATUTE, IF YOU LOOK AT 627.428, IT SIMPLY PROVIDES THAT THE INSURORS ENTITLED TO FEES.

IT DOESN'T STATE THAT THERE CAN NEVER BE ANY OTHER STATUTE THAT ENDS UP GIVING A FEE AWARD TO AN INSURANCE COMPANY.

HOW DOES HA WORK, IF YOU ARE ENTITLED, UNDER 627, TO FEES, BECAUSE YOU PREVAILED AS THE INSURED, BUT THERE HAS BEEN AN OFFER OF JUDGMENT AND YOUR PREVAILING IS LESS THAN 75 PERCENT. ISN'T THAT WHAT IT HAS TO BE, UNDER THE OFFER OF JUDGMENT STATUTE?

RIGHT.

ISN'T THAT A CONFLICT, THEN, BECAUSE THEN YOU HAVE A SITUATION WHERE 768 SAYS THAT YOU DON'T GET FEES, WHEREAS 627 WOULD SAY THAT, BECAUSE YOU PREVAILED, YOU DO GET FEES.

WELL, I THINK THAT THIS COURT HAS ALWAYS TRIED TO HARMONIZE STATUTES, AND I THINK THAT, IN THAT PARTICULAR SITUATION THAT YOU MENTIONED, IT TWO STATUTES CAN BE HARMONIZED, AND THE WAY THAT THEY WILL ARE HARMONIZEED IS VERY CLEAR. UNDER THE INDUSTRIES RULE, IF THE PLAINTIFF RECOVERS LESS THAN THE AMOUNT OF THE OFFER, HIS FEE ENTITLED AND -- HIS FEE ENTITLES AND IS CUTOFF AT THE TIME THAT THE OFFER IS MADE. ON THE OTHER HAND, THE INSURANCE COMPANY WHICH BEAT THE OFFER OF FEES THERE, IS NO STATUTE.

IF YOU ARE TRYING TO HARMONIZE, IT WOULD OUTWEIGH THE GENERAL, SO YOU WOULD LOSE THERE WOULDN'T YOU? IF WE HAVE THE STATUTORY INTERPRETATION AND WE HAVE A SPECIFIC RULE AND A GENERAL STATUTE AND A SPECIFIC STATUTE, THE SPECIFIC STATUTE WOULD PREVAIL, WOULDN'T IT?

IF THE STATUTES CAN BE HARMONIZEED, I DON'T THINK SPECIFIC -- WHEN I SAY SPECIFIC VERSUS GENERAL, A CLASSIC EXAMPLE WOULD BE COLLATERAL SOURCE STATUTES F THERE IS A GENERAL COLLATERAL SOURCE STATUTE, THERE IS A COLLATERAL SOURCE STATUTE THAT APPLIES SPECIFICALLY TO MOITION OR IT DID AT ONE TIME, THEN THERE IS. THE COLLATERAL SOURCE STATUTE THAT APPLIES IN PIP ACTIONS. NOW, IF YOU APPLY, ONE COLLATERAL SOURCE STATUTE RATHER THAN. THE, YOU CAN GET DIFFERENT RESULTS PARKS BECAUSE THEY BOTH DEAL WITH THE SAME SUBJECT MATTER, AND THEY CAN RESULT IN DIFFERENT RESULTS, DEPENDING UPON WHICH STATUTE IS APPLIED. SO OBVIOUSLY IF YOU ARE IN A MOTOR VEHICLE CASE, YOU APPLY THE MOTOR VEHICLE COLLATERAL SOURCE STATUTE, AND IF YOU ARE IN A PIP CASE, YOU APPLY THE PIP COLLATERAL SOURCE STATUTE. WE HAVE TWO STATUTES HERE, ONE THE OFFER OF JUDGMENT STATUTE AND THE OTHER THE ATTORNEYS FEES STATUTE. IF THEY CAN BE RECONCILED, I THINK THE COURT HAS THE DUTY TO DO. THAT.

CAN THEY BE RECONCILED? I HAVE CONCERN FOR POSSIBLE INEQUITIES THAT CAN OCCUR. FOR INSTANCE SOMEBODY GOES, WITH A STACK OF MEDICAL BILLS, TO A LAWYER, AND SAYS I HAVE MADE A CLAIM WITH MY INSURANCE COMPANY FOR THESE MEDICAL BILLS, UNDER PIP, AND THE INSURANCE COMPANY HAS STONEWALLED ME. THE ATTORNEY EXPLAINS TO THEM ABOUT THE PIP STATUTE. THE ATTORNEYS FEE STATUTE. AND SAYS, FINE, LET ME INVESTIGATE THIS. AND SEE WHAT IS GOING ON. BUT YOU NEED TO KNOW THAT, IF YOU ARE RIGHT ABOUT THIS, THAT YOU WILL GET YOUR ATTORNEYS FEES TOO. THAT IS THAT I -- I WILL BE WORKING, REALLY, AS FAR AS YOU ARE CONCERNED, FOR FREE. THAT THE INSURANCE COMPANY, IF YOU ARE RIGHT, WILL HAVE TO PAY THE FEES, AND SO THE LAWYER DOES DO THE INVESTIGATION, AND INITIALLY THE CLAIMS PERSON SAYS, NO, WE ARE NOT GOING TO PAY THEM, FOR THE SAME REASONS THAT THERE IS NOT ENOUGH SUPPORT THERE. WE DIDN'T GET THE DOCTORS REPORT. WHATEVER IT IS. AND NOW THE LAWYER BRINGS THE LAWSUIT, AND, AGAIN, INSURING HIS CLIENT THAT THEY ARE GOING TO GET ATTORNEYS FEES, IF THEY PREVAIL, IF THEY TURN OUT TO BE RIGHT, AND THEN, IN THE MIDST THE OF THAT LITIGATION, THE INSURANCE COMPANY SAYS, THEY PREVAIL, AND THEN THEY MAKE AN OFFER OF JUDGMENT, WHICH INCLUDES THE ATTORNEYS FEES, WHICH I THINK

THAT IS WHAT WAS INCLUDED IN THE OFFER OF JUDGMENT HERE. DO I UNDERSTAND THAT CORRECTLY?

THAT'S CORRECT.

BUT CLEARLY WHEN YOU GO AND HAVE AN OFFER OF JUDGMENT, IT CLEARLY DOESN'T INCLUDE COSTS AND ATTORNEYS FEES, AS FAR AS WHAT THE INITIAL JUDGMENT WAS FOR. WHAT I AM CONCERNED ABOUT IS THAT NOW THE INSURANCE COMPANY KNOWS THE MOST CLAIMANT CAN GET IS THE AMOUNT OF THE MEDICAL BILLS, WHICH THE INSURANCE COMPANY ADMITS THAT THEY NOW OWE BUT THE OFFER OF JUDGMENT FOR THAT AMOUNT SAYS THAT YOU MUST, ALSO, IN ESSENCE, WAIVE YOUR CLAIM FOR ATTORNEYS FEES AND COSTS, AND THEN THAT IS EXACTLY WHAT HAPPENED, AND SO THEY GET A JUDGMENT FOR LESS THAN THAT OFFER, BECAUSE THE OFFER WAS INTENDED TO COVER ALL THOSE THINGS. I DON'T KNOW IF YOU -- THAT IS OBVIOUSLY A LONG HYPOTHETICAL.

I THINK I FOLLOWED YOU.

DO YOU UNDERSTAND MY CONCERNS?

I THINK, YEAH.

THAT IT LOOKS LIKE MAYBE THERE IS A CATCH-22 IN THERE, THEN, THROUGH THE USE OF THE OFFER OF JUDGMENT STATUTE. IS THAT --

I DON'T BELIEVE SO. IF I UNDERSTAND YOUR HYPOTHETICAL, THE INSURANCE CARRIER HAS NO DEFENSES. IT IS STONEWALLING. AND IT TRIES TO MAKE AN OFFER.

IT HAS INITIALLY, BUT NOW THEY SEE THAT THEY ARE GOING TO BE LIABLE, AND SO 4 IN TERMS OF THIS OFFER, BECAUSE IT INCLUDES ATTORNEYS FEES, IT ASKS IN ESSENCE, IF YOU ARE GOING TO ACCEPT THAT OFFER, THAT IS THE TOTAL AMOUNT WE ARE GOING TO PAY YOU, INCLUDING ATTORNEYS FEES AND COSTS, AND OF COURSE THE OFFER IS JUST FOR THE A THE MEDICAL BILLS, BECAUSE THE INSURANCE COMP ANY OF RECOGNIZES THAT, IN EVALUATING THE OFFER OF JUDGMENT STATUTE, ALL THAT THE JUDGE WOULD CONSIDER IS WHAT THE RECOVERY IS.

RIGHT. WELL, I THINK THAT, IN THAT SITUATION, THE INSURED'S ATTORNEYS WOULD BE WELL TO ADVISE HIS CLIENT NOT TO ACCEPT THE OFFER, BECAUSE IF HIS ATTORNEYS FEES INCURRED UP TO THE DATE THAT THE OFFER WAS MADE WAS IN ANY AMOUNT, ANY SUBSTANTIAL AMOUNT AT ALL, THEN HE IS NOT GOING TO HAVE ANY PROBLEM BEATING THE OFFER. FOR EXAMPLE, LET'S SAY THE AMOUNT OF BENEFITS THAT THE INSURANCE COMPANY OWES IS $5,000 AND THEY REALIZE THAT THAT IS THE AMOUNT THAT THEY OWE, IF THEY MAKE AN OFFER OF JUDGMENT IN THE AMOUNT OF 5,000, INCLUSIVE OF ATTORNEYS FEES, WHAT YOU WOULD THEN DO TO DETERMINE WHETHER THAT OFFER IS BEATEN OR NOT IS YOU WOULD ADD $5,000 PLUS THE ATTORNEYS FEES THAT WERE INCURRED UP TO THE DATE THAT THE OFFER WAS MADE, AND I WOULD EVENTUALLY GUESS THAT HAD, IN 99 PERCENT OF THE CASES, THAT IS GOING TO EXCEED 75 OR 125 PERCENT, WHATEVER THE NUMBER IS THAT YOU NEED TO BEAT THE OFFER OF JUDGMENT, SO I DON'T THINK YOU ARE PUTTING THE INSURED IN A POSITION WHERE THEY ARE FORCED TO ACCEPT AN OFFER. I THINK THE ATTORNEY WOULD PROBABLY HAVE TO ADVISE HIS CLIENT NOT TO ACCEPT THAT.

JUST TO MAKE SURE, YOUR ARGUMENT IS, IN THAT SITUATION, THAT IT IS FINDING OUT WHETHER THERE IS A SUCCESSFUL RECOVERY. YOU WOULD INCLUDE, THE JUDGE WOULD HAVE TO CALCULATE WHAT THE ATTORNEYS FEES WAS, THROUGH THE DATE OF THE OFFER.

CORRECT.

ACTUALLY WE HAVE THE CONFLICT AMONGST DISTRICTS ON WHETHER THAT IS THE CASE OR NOT, AND WE HAVE THAT CASE IN FRONT OF US.

I SEE.

JUST AS SORT AFTER FLIP SIDE OF SOMETHING, 768.79 IS OFFER OF AND DEMAND FOR JUDGMENT, AND WE ARE TALKING ABOUT HOW THIS WILL WORK TO EXPEDITE SETTLEMENT AND HOW THE INSURANCE COMPANY SHOULD BE ABLE TO TAKE ADVANTAGE OF 768.69. IS THERE ANY WAY -- IT, ALSO -- 768.79. IS THERE ANY WAY -- IT ALSO SAYS "OFFER FOR JUDGMENT". IN THE CASE OF ATTORNEYS FEES, DOES 768.79 GIVE THE PLAINTIFF SOMETHING THAT THEY DON'T GET UNDER 428? IN OTHER WORDS IS THERE AWAY, UNDER THE PIP STATUTE, THAT YOU GET SOMETHING UNDER THIS STATUTE THAT YOU WOULDN'T GET, UNDER THE 428? AND THAT IS WHERE I AM CONCERNED ABOUT HOW THIS ONE-WAY STREET, MAYBE, DOESN'T -- THERE IS A PROBLEM THERE.

WELL, IN 99 PERCENT OF THE CASES, THE INSURED IS NOT GOING TO BE ABLE TO TAKE ADVANTAGE OF THE OFFER OF JUDGMENT STATUTE. I CAN THINK OF SOME CONVOLUTED SITUATION WHERE THEY MIGHT BE ABLE TO MAKE ONE, BUT BASICALLY IT DOESN'T 56 AFFECT THEIR RIGHTS UNDER 428, BUT IT DOESN'T ASSIST THEM, EITHER.

IF IT IS CLEAR ON THE CASE THAT IT LOOKS LIKE A GOOD COVERAGE DEFENSE. LET'S SAY IT IS A BOGUS COVERAGE DEFENSE, AND THE ATTORNEY MAKES AN OFFER TO SETTLE WITH THE ATTORNEYS FOR THE AMOUNT OF MEDICAL BILLS AND WHATEVER, THAT IS NOT GOING TO GIVE THEM -- THEY DON'T GET ANYTHING, BECAUSE THEY MADE THE OFFER OF JUDGMENT.

THAT'S RIGHT.

NOW, DOESN'T THAT, THOUGH, SO COULD YOU RESPOND, THEN, IF YOU CAN'T, IF 768.79 REALLY CAN'T APPLY AND IN YOUR TO THE BENEFIT OF A -- AND INURE TO THE BENEFIT OF A PLAINTIFF'S ATTORNEYS FEES, ISN'T THAT A CASE WHERE THERE IS A CONFLICT BETWEEN TWO STATUTES, IN OTHER WORDS, SHOWING THAT THIS WASN'T INTENDED TO APPLY IN SITUATIONS WHERE YOU HAD PREVAILING PARTY ATTORNEYS FEES?

WELL, WHAT I HAVE ARGUED ABOUT THE ONE-WAY STREET IS THAT IF YOU HAD A PREVAILING PARTY PROVISION, I CAN SEE -- I CONCEDE IT IN MY BRIEFS, AND I BELIEVE THIS, THAT A STATUTE WHICH SIMPLY SAID THAT THE PREVAILING PARTY IS ENTITLED TO FEES, AND IF THAT WAS CONSTRUED ASAP PLYING IN INSURANCE CASES, IT WOULD CONFLICT WITH 627.428. WHAT IT WOULD DO IS IT WOULD, THEN, CHANGE THE WHOLE DYNAMIC FOR THE WHOLE SITUATION. NOW YOU HAVE TO DETERMINE, UNDER THE MORITZ TEST, YOU WOULD HAVE TO DETERMINE WHO WOULD PREVAIL ON THE CLAIMS. UNDER 627.428, YOU WOULD HAVE A DIFFERENT TEST AS TO WHO PREVAILED. THE OFFER OF JUDGMENT STATUTE DOES NOT INCLUDE WHO PREVAILS AT ALL. IT IS DEPENDENT BY ENCOURAGING SETTLEMENT.

BUT YOU WOULD READ THAT THE PLAINTIFF WHO IS INSURED, THE INSURED CANNOT TAKE ADVANTAGE OF 768.79?

IN THE VAST MAJORITY OF CASES I AGREE WITH THAT.

AND DO YOU AT ALL MAKE ANY DISTINCTION, IF WE ARE LOOKING AT THIS, AS TO WHETHER THIS IS A PIP CASE AND WHETHER THERE SHOULD BE A DIFFERENT POLICY WHERE YOU HAVE GOT ISSUES JUST ABOUT REASONABLENESS OF MEDICAL BILLS AND WHAT THE LEGISLATURE MAY HAVE INTENDED, VERSUS BEING ACUFF RAJ CASE, AND THAT -- A COVERAGE CASE,AND THAT DOESN'T REALLY AFFECT THE LARGER SPECTRUM OF CASES, WHICH ARGUABLY BY IMPLICATION WE HAVE, ALREADY, DECIDED THAT, UNDER DANOFF, THAT REALLY THERE IS NO WAY TO RECONCILE IT. DO YOU SEE ANY WAY THAT THIS COURT, IT WOULD BE APPROPRIATE TO SAY, IN A STRAIGHT PIP CASE WHERE YOU ARE TALKING ABOUT AN INSURANCE COMPANY, NO COVERAGE

BUT JUST AMOUNT OF MEDICAL BILLS THAT, THE OFFER OF JUDGMENT STATUTE WAS NOT INTENDED TO APPLY, AND THE BROADER SECTION OF COVERAGE CASES UNDER 428 S THAT A DIFFERENT STORY?

I DON'T SEE ANY DIFFERENCE BETWEEN PIP CASES INVOLVING THE AMOUNT OF MEDICAL BILLS AND ANY OTHER INSURANCE CASE. THE ARGUMENT COMES FROM THE LANGUAGE IN 628.736 [8] WHICH SAYS THAT THE ATTORNEYS FEE STATUTE APPLIES IN PIP CASES. I MEAN THAT, IS THE ONLY POSSIBLE ARGUMENT THAT I THINK THAT WOULD PIP FROM OTHER CASES, AND I GUESS, ALSO, THE ACCESS TO COURTS ARGUMENT, BUT I THINK IF THE LEGISLATURE HAD WANTED 627.428 TO BE THE ONLY STATUTE THAT WOULD APPLY IN PIP CASES, THEY WOULD HAVE SAID SO, AND THEY KNOW HOW TO DO THAT AND THEY DIDN'T. AS FAR AS THE ACCESS TO COURTS ARGUMENT, I JUST DON'T THINK THAT THE OFFER OF JUDGMENT STATUTE CONSTITUTES THAT KIND OF IMPEDIMENT TO PIP CLAIMS.

DOESN'T THAT PUT THE PLAINTIFF, IS THE ISSUE WAS THAT THE AMOUNT OF MEDICAL BILLS WERE HIGH, NOT THAT THEY WEREN'T RELATE BUD HIGH. YOU HAVE GOT MEDICAL PROVIDERS WHO CHARGE THE BILL. THERE IS NO ASSIGNMENT. THEY WON'T TAKE THE ASSIGNMENT. AND NOW YOU ARE GOING TO DISPUTE IN A TRIAL, WHETHER, HOW MUCH, WHETHER THE BILLS WERE REASONABLE OR NOT. ISN'T THE INSURED IN A DIFFICULT SITUATION THERE? BECAUSE IT IS REALLY NOT THEIR MONEY THAT THEY ARE BRINGING THIS, IN A WAY, FOR THE BENEFIT OF THEIR MEDICAL PROVIDERS. HOW, DOESN'T THAT, DOESN'T THAT START TO DEFEAT THE PURPOSE OF THE PIP STATUTE? I MEAN WHAT IS THE INSURED TO DO IN THAT SITUATION? THEY HAVE GOT A MEDICAL PROVIDER THAT IS MAYBE CHARGED MORE THAN HE OR SHE SHOULD HAVE, BUT THEY DON'T HAVE CONTROL OVER THAT.

I DON'T SEE HOW THAT IS DIFFERENT FROM A LOT OF OTHER INSURANCE SITUATIONS, WHERE MONEY IS OWED TO PROVIDERS. HOW ABOUT PROPERTY INSURANCE? SOMEBODY HAD HURRICANE DAMAGE AND THEY HAD TO GET IT FIX AND THEY OWE CONTRACTORS, AND IT IS THE SAME DEAL REALLY.

WHY WOULDN'T IT MAKE MORE SENSE, IN TERMS OF TRYING TO HARMONIZE ALL OF THESE STATUTES, TO SAY THAT, WHERE THE LEGISLATURE HAS MADE A SEPARATE PROVISION FOR ATTORNEYS FEES, IN TERMS OF THAT TO BE CALCULATED IN THE DISPUTE BETWEEN THE PARTIES, FOR THE SPECIFICS TO PREVAIL OVER THE GENERAL, THAT IS FOR REGULAR INSURANCE STATUTE TO PREVAIL, BECAUSE DOESN'T THE LEGISLATURE TAKE INTO CONSIDERATION, WHEN THEY ENACT THOSE STATUTES, THE FACT THAT THE PARTIES MAY LITIGATE BETWEEN ONE. THE, AND HAVEN'T THEY ALREADY FACTORED IN THAT ASPECT OF POLICY, WHEN THEY ENACT THAT ATTORNEYS FEE STATUTE? YOU KNOW, WHETHER IT IS TO GO BOTH WAYS OR WHETHER IT IS TO GO ONE WAY OR WHATEVER. AS OPPOSED TO THE VERY COMPLICATED SITUATION WE GET, NOW, IN DECISION WHETHER OR NOT THE ONE STATUTE TRUMPS THE OTHER STATUTE, BECAUSE AREN'T ALL THE SAME POLICY CONSIDERATIONS TAKEN INTO CONSIDERATION, WHEN THE LEGISLATURE ENACTS A SCHEME LIKE THAT?

WELL, IT DEPENDS ON WHAT KIND OF STATUTE YOU ARE TALKING ABOUT. IF IT IS A PREVAILING PARTY STATUTE THAT IS IN QUESTION, AS BEING COMPARED TO THE INSUREDS ATTORNEYS FEES STATUTE, IT WOULD BE SPECIFIC, BUT IN GENERAL I THINK IT WOULD PRETTY WELL RECOGNIZE THAT, WHEN OTHER STATUTES DON'T RECOGNIZE, THEN THE ATTORNEYS FEE STATUTE CAN COEXIST. 57.105 APPLIES AND NOBODY DISPUTES THAT 57.105 CAN APPLY IN INSURANCE CASES. WHY NOT 768.79? THEY ALL HAVE DIFFERENT OBJECTIVES AND ARE ALL BASED ON CERTAIN CRITERIA AS TO WHY FEES ARE BEING AWARDED. FEES IN AN OFFER OF JUDGMENT CASE OR 57.105 CASE, FEES ARE NOT GIVEN BECAUSE THE CASE IS WON OR LOST. OFFER OF JUDGMENT HAS A SPECIFIC POLICY IN MIND. THE LEGISLATURE WANTS TO ENCOURAGE THE SETTLEMENT OF LAWSUITS AND REDUCE LITIGATION. IT DOES THAT SPECIFICALLY BY REFERENCES TO OFFERS OF JUDGMENT AND REQUIRES PARTIES TO EVALUATE THEIR CASE REALISTICALLY BEFORE

CONTINUING. NOBODY IS 100 PERCENT HAPPY WITH SETTLEMENTS, AND NEITHER SIDE, AND, BUT, THAT IS THE POLICY, AND IT REDUCES LITIGATION. THAT IS THE POLICY THAT IS ENFORCED BY THE OFFER OF JUDGMENT STATUTE, AND UNLESS THERE IS SOME DIRECT CONFLICT WITH ANOTHER STATUTE, I THINK THAT THE PLAIN LANGUAGE OF THE STATUTE AND THE POLICY HAS TO BE ENFORCED. AND I DON'T SEE ANY DIRECT CONFLICT THERE. THE CONFLICT IS MORE OF A THEORETICAL. I THINK TO FIND IF THERE IS A CONFLICT BETWEEN THESE STATUTES, YOU HAVE TO BUY INTO THE NOTION THAT, BECAUSE THE PLAINTIFF, IN AN INSURANCE CASE, IS ENTITLED TO FEES, THAT THE DEFENDANT INSURANCE COMPANY CAN NEVER BE ENTITLED TO FEES UNDER ANY CIRCUMSTANCES, AND I THINK, IF YOU BUY THAT ARGUMENT, YOU WOULD HAVE TO SAY THAT 57.105 DOESN'T APPLY IN INSURANCE CASES, EITHER.

WELL, CAN'T THAT ARGUABLY BE DISTINGUISHED AS A SANCTIONING STATUTE, REALLY? THAT IS THAT THIS, REALLY, HAS GONE TO. THE LEVEL, NOW, WHERE WE ARE HOLDING THE PEOPLE FILE PRIVILEGED LAWSUITS, SO THAT COULD BE PUT IN A SEPARATE CATEGORY?

NOT REALLY. THE OFFER OF JUDGMENT STATUTE IS A SANCTION, REALLY.

IN MY HYPOTHETICAL, WHERE SOMEBODY GOES TO A LAWYER AND THE LAWYER SAYS THERE IS A STATUTORY SCHEME ON YOUR SIDE, WITH REFERENCE TO INSURANCE COMPANIES, AND THAT I WILL TAKE YOUR CASE, BECAUSE THE STATUTORY SCHEME PROVIDES THAT THE INSURANCE COMPANY, IF YOUR CLAIM HAS MERIT, IS GOING TO HAVE TO PAY YOUR FEES, SO YOU ARE REALLY IN GOOD SHAPE HERE, PROVIDED THAT YOUR CLAIM IS A VALID ONE, AND THEN ALONG COMES, AFTER THEY GET INTO LITIGATION, THIS OFFER OF JUDGMENT, SAYING NOW THE LAWYER, THE CLIENT SAYS, WELL, I THOUGHT YOU TOLD ME IT WAS LIKE THIS. AND THE LAWYER SAYS, WELL, NOW WE HAVE GOTTEN. THE STATUTORY SCHEME THAT ALLOWS THE INSURANCE COMPANY TO MAKE WAS OFFER OF JUDGMENT. NOW WE HAVE TO EVALUATE THAT AS THOUGH WHAT WE ARE HAVING IS THAT THERE IS A CONFLICT, BUT WE ARE RESOLVING THE CONFLICT, NOW, BY SAYING THIS OFFER OF JUDGMENT STATUTE TRUMPS THE ONES THAT THE LEGISLATURE THOUGHT OUT IN TERMS OF HAVING RELATIONSHIPS BETWEEN INSUREDS AND INSURORS.

WELL, I MEAN, THE INSURORS ATTORNEYS FEE STATUTE HAS BEEN ON THE BOOKS, IN ONE FORM OR. THE, FOR 100 YEARS. IT HAS BEEN SAID MANY TIMES THAT THE PURPOSE OF THE STATUTE IS TO DISCOURAGE INSURORS FOR CONTESTING VALID CLAIMS AND TO REIMBURSE INSURORS WHEN THEY ARE FORCED TO SUE. I THINK THAT THOSE WORDS HAVE A SPECIFIC MEANING THAT IS PERTINENT TO WHAT YOUR HONOR JUST SAID. WHAT IS A VALID CLAIM? A VALID CLAIM IS A CLAIM --

I HIM SORRY, BUT YOUR TIME IS UP.

OKAY. THANK YOU.

THE BANLS IS NOT OF -- THE BALANCE IS NOT OF THE POWER OF THE INSURED AND THE INSURANCE COMPANY.

CAN'T YOU ARGUE THAT THE GENERAL STATUTE IS THE ONE THAT IS CONCERNED HERE, BECAUSE THE PIP STATUTE INCORPORATES THAT BY REFERENCE, RIGHT?

ON THE CONFLICT ARGUMENT THAT IS CORRECT. THE ARGUMENT NOW GOES MORE TO THE CONSTITUTIONALITY OF THE ARGUMENT. I THINK THERE IS NO ARGUMENT, THAT 628.428 IS A ONE-WAY STREET. THE RACIAL EW IS NATIONWIDE. THE -- THE ISSUE IS NATIONWIDE. THE ISSUE OF JUDGMENT AS TO AN OFFER OF PIP, TURNS IT INTO A TWO-WAY STREET, BECAUSE IF THE INSURANCE COMPANY IS THE PREVAIL PREVAILING PARTY, ASSUMING, OF COURSE, THAT THE OFFER OF JUDGMENT WAS MADE, THEN THE INSURANCE COMPANY WILL GET FEES AS TO PREVAILING PARTY. WHAT IS WORSE IS THAT, IF THE PLAINTIFF PREVAILS BUT JUST DOES NOT GET 75 PERCENT OF THE AMOUNT OF THE OFFER, THEN THE INSURANCE COMPANY WILL STILL

GET FEES, SO YOU HAVE A SITUATION WHERE THE PLAINTIFF PREVAILS BUT THE INSURANCE COMPANY IS GETTING FEES. CERTAINLY THAT IS IN CONFLICT WITH THE ONE-WAY PROVISION OF 627.428. WITH THE INSURANCE COMPANIES GETTING FEES, WHERE THE PLAINTIFF PREVAILS.

THAT IS NOT WHAT HAPPENED HERE, THOUGH, IS IT?

NO. THAT IS NOT WHAT HAPPENED HERE. BUT THAT IS ONE OF THE REASONS THAT THERE WAS CONFLICT. ONE OF THE REASONS THAT THE MOTION TO STRIKE THE JUDGMENT WAS OFFERED, BECAUSE THERE WERE CONFLICTS. UNDER THE REASONING IN THE OFFER OF JUDGMENT, THE OFFER OF JUDGMENT HAS THE SET OFF PROVISION THAT ALLOWS THE FEES OF THE DEFENDANT TO BE SET OFF AGAINST THE FEES OF THE PLAINTIFF, WHICH MEANS THE PLAINTIFF WINS, THE PLAINTIFF'S FEES CAN BE REDUCED, CAN BE ELIMINATED, OR THERE CAN ACTUALLY BE A JUDGMENT AGAINST THE PLAINTIFF, EVEN THOUGH THE PLAINTIFF WON, AND THAT WOULD ALSO BE IN CONFLICT WITH THIS COURT'S DECISION IN SCOTTSDALE VERSUS DEVALVE-, WHERE THIS -- IN SCOTTSDALE VERSUS DESALVE-, WHERE THIS -- VERSUS DE SALVO, WHERE THE OFFER WAS MADE, AND THIS COURT CLEARLY STATED, IN DE SALVO, THAT THE ATTORNEY WILL GET HIS FEES UP TO THE TIME OF THE OFFER.

WHAT ABOUT THE CONFLICTS, THAT THERE WAS GOING TO BE A FEE SITUATION, IN WHICH WHAT HAS TO BE EVALUATED IS WHAT THE STATUS OF THE CLAIM IS, ON THE DAY THAT THE OFFER IS MADE. CORRECT?

THAT'S CORRECT.

AND SO, IF THE STATUS OF THE CLAIM IS MADE ON THE DATE THAT THE OFFER IN A PIP CLAIM IS MADE THAT, GET THE AMOUNT OF COVERAGE IS OFFERED PLUS THE ATTORNEYS FEES UP AND THROUGH THAT DATE, THEN, IN THAT OFFER, IT IS MADE AND ACCEPTED BY THE INSURANCE COMPANY, THAN THE -- THEN THE PLAINTIFF GETS THEIR ATTORNEYS FEES, CORRECT?

CORRECT.

THE ONLY THING THAT IS TO THE DETRIMENT OF THE PLAINTIFF IN THAT INSTANCE IS THAT THE CASE GOES FORWARD AND THE PLAINTIFF DOESN'T SUCCEED IN PREVAILING ON ONE OF THOSE ELEMENTS THAT YOU WOULD LOOK AT, IF THE CASE WAS FROZEN ON THE DATE THAT THE OFFER OF JUDGMENT WAS MADE, CORRECT?

THAT'S CORRECT. AND ASSUMING THAT WE DO THAT, AND THE COURT DETERMINES THAT THE PLAINTIFF HAD A CLAIM OF $5,000 FOR MEDICAL, AND AT THAT POINT, AND THERE WAS $2,000 OR $3,000 IN ATTORNEYS FEES, THAT IS WHAT THEY WOULD GET. NOW, THE OFFER OF JUDGMENT TAKES THAT AWAY, BECAUSE IN THE OFFER OF JUDGMENT PROVISION, THE SET-OFF PROVISION STATES THAT THE DEFENDANT IS ALLOWED TO SET OFF THEIR ATTORNEYS FEES AGAINST THE PLAINTIFF'S AWARD, AND THE PLAINTIFF'S AWARD INCLUDES THE AWARD OF PLAINTIFF'S ATTORNEYS FEES.

IF THEY DO NOT PREVAIL, UNDER THE FORMULA AS SET FORTH IN THE OFFER OF JUDGMENT STATUTE.

THAT'S CORRECT. IF THEY DO NOT PREVAIL UNDER THAT FORMULA, THEN --

WHAT I AM HAVING A HARD TIME WITH IS THAT IT SEEMS TO ME THAT WE DO HAVE A HARD TIME DISTINGUISHING THIS INSURANCE CLAIM FROM OTHER INSURANCE CLAIMS, AND OTHER INSURANCE CLAIMS, WE HAVE ALREADY DEALT WITH IN DESALVO. CORRECT?

IN DESALVO, YOU ULTIMATELY DETERMINED THE AMOUNT THAT THE ATTORNEYS FEES WERE DEALING WITH.

WE ARE DEALING WITH THAT IN 428, CORRECT?

THAT'S CORRECT. AND WHAT I AM SIMPLY SAYING IS THAT, IF THE PLAINTIFF -- IF DESALVO WAS AN OFFER OF JUDGMENT AND THE PLAINTIFF DID NOT GET AT LEAST 75 PERCENT OF WHAT WAS BEING OFFERED, WHATED PLAINTIFF WOULD -- WHAT THE PLAINTIFF WOULD GET UNDER DESALVO IS DIMINISHED IN THE OFFER OF JUDGMENT STATUTE, AND THEREFORE THAT IS WHAT THE RESULT THAT THIS COURT SAID SHOULD BE IN DESALVO, AND THAT IS ONE OF THE REASONS THAT WE HAVE THE CON FLOICKT HERE, BECAUSE THE PLAINTIFF COULD -- HAVE THE CONFLICT HERE, BECAUSE THE PLAINTIFF COULD WIN, YET THE PLAINTIFF GETS FEES SET OFF IN THE PLAINTIFF'S AWARD. I SEE MY TIME IS UP.

THANK YOU, MR. MONTES.