Pepper's Steel & Alloys, Inc. v. United States of America

CHIEF JUSTICE: GOOD MORNING EVERYONE.

GOOD MORNING.

CHIEF JUSTICE: JUSTICE LEWIS IS RECUSED ON THE FIRST CASE, FOR THE BENEFIT OF THOSE IN THE AUDIENCE, AFTER WE HAVE ARGUMENT IN THE FIRST CASE, WE WILL TAKE ABOUT A FIVE-MINUTE RECESS, IN ORDER TO HAVE JUSTICE LEWIS JOIN US, BEFORE WE HEAR THE SECOND CASE. IT LOOKS LIKE COUNSEL IS READY TO PROCEED.

YES, YOUR HONOR. GOOD MORNING.

CHIEF JUSTICE: PEPPER STEEL AND ALLOYS VERSUS USA. GOOD MORNING.

I AM RICHARD BALES JR. AND WITH ME IS CO-COUNSEL CINDY EBENFELD, AND MR. NORTON BLOOM. JUSTICES, IF I MAY GIVE A BRIEF RECITATION OF THE ACTION HERE. WE KNOW THAT THIS ACTION COMMENCED ALMOST 18 YEARS AGO IN 1985, WITH AN ACTION BY THE UNITED STATES GOVERNMENT WITH RECOVER OF POLLUTION COSTS IN DADE COUNTY, DEALING WITH A SCRAP METAL SITE. AS SECURED UNDER POLICIES BY USF AND G, CLAIMS WERE MADE UNDER THE POLICIES. IN 1991, THERE WAS AN ORAL SETTLEMENT AGREEMENT OF $2 MILLION. THEY OFFERED US $2 MILLION, AFTER SOME DECISIONS CAME DOWN, ALMOST TWO YEARS LATER, THERE WAS A WRITTEN ACCEPTANCE OF THAT ORAL SETTLEMENT AGREEMENT IN 1993. USF AND G REFUSED TO HONOR THE SETTLEMENT, DISPUTED THE EXISTENCE OF THE SETTLEMENT, CAUSED US TO LITIGATE UNTIL 1994, IN THE DISTRICT COURT IN THE SOUTHERN DISTRICT, WHERE IN AT THAT TIME AN AMENDED FINAL JUDGMENT CAME DOWN, ENFORCING THE SETTLEMENT BUT DENYING OUR CLAIM FOR FEES. INCURRED IN ENFORCING THE SETTLEMENT. WE APPEALED TO THE ELEVENTH CIRCUIT COURT OF APPEALS AND IN 1996 THE DECISION CAME DOWN IN THE COURT AND THE ELEVENTH CIRCUIT AFFIRMED THE EXISTENCE OF THE SETTLEMENT AGREEMENT BUT VACATED AND REMANDED THE AMENDED FINAL JUDGMENT AS RELATES TO THE ISSUE OF FEES AND COSTS.

THE FEES THAT YOUR CLAIMING ARE THOSE THAT WERE INCURRED IN, AFTER THEY OR YOU CLAIM THEY RENEGEED ON THE ORAL SETTLEMENT, UNTIL, WHAT --

YES, YOUR HONOR. THE FEES WE ARE SEEKING. WE SEEK NO FEES, NOT ONE PENNY OF FEES INCURRED PRIOR TO THE OCTOBER '93 SETTLEMENT ACCEPTANCE. ALL OF THE FEES WE SEEK COME AFTER WE ACCEPT IT. THE $2 MILLION BY USF AND G. THAT, YOUR HONOR, IS THE VERY QUESTION THAT THE ELEVENTH CIRCUIT REMANDED IN THE CASE, FOR THE DISTRICT COURT TO DETERMINE.

DO YOU SEE ANY DISTINCTION, BECAUSE THIS IS ALL AN ISSUE OF WHETHER IT ARISES OUT OF THE INSURANCE CONTRACT.

YES.

THAT IF THERE HAD ALREADY BEEN A WRITTEN SETTLEMENT AGREEMENT AND THAT WAS IN PLACE AND, SAY, MONIES PAID OUT, PURSUANT TO IT BUT SOMEHOW SOME ISSUE AROSE AS A RESULT OF THE TERMS OF THE SETTLEMENT AGREEMENT, AND YOU WERE SEEKING FEES THERE.

IS THERE ANY, IN OTHER WORDS IS THERE ANY POINT IN TIME AT WHICH 627.428, BY ITS VERY TERMS, WOULD NO LONGER BE APPLICABLE, BECAUSE AT THAT TIME THE WRITTEN SETTLEMENT AGREEMENT WOULD ESSENTIALLY SUPERSEDE THE STATUTE, AND IT WOULD NO LONGER BE UNDER THE INSURANCE CONTRACT? DO YOU UNDERSTAND WHAT I AM --

OF COURSE I DO, YOUR HONOR, AND CERTAINLY THE PARTIES, IF THERE WERE A WRITTEN SETTLEMENT AGREEMENT, HERE, FIRST OF ALL, I WANT TO MAKE ONE THING VERY HE CLEAR. THERE IS NO WRITTEN SETTLEMENT AGREEMENT CONTAINING ANY RELEASE PROVISIONS WHATSOEVER. THERE WAS AN ORAL OFFER. THERE WAS A ONE-PAGE LETTER ACCEPTING. SO TO ANSWER YOUR QUESTION, YOUR HONOR, FIRST OF ALL, THERE IS NO WRITTEN AGREEMENT, BUT TO GO BEYOND THIS CASE, IF THAT IS WHAT THE COURT IS INQUIRING, TO OTHER SITUATIONS, JUDGE, YOU PUT YOUR FINGER RIGHT ON IT, WHEN YOU SAID THE ISSUE IS, DOES THE DISPUTE BETWEEN INSURED AND INSURED ARISE UNDER THE POLICY? THE WORD ARISE APPEARS IN THIS COURT'S LEXILE DECISION. THE WORD ARISE APPEARS IN THIS COURT'S PALMA DECISION. SO THE ISSUE IN THE PARTICULAR CASE THAT YOU ARE ENVISIONING WOULD DEPEND ON WHAT IT IS.

BUT WHAT SECTION ARE YOU ASKING FEES UNDER? IS IT 627.428?

YES, SIR.

WELL, DOESN'T THAT SECTION, IN AND OF ITSELF, CONTAIN A LIMITATION? PERMITS FEES ONLY FOR SERVICES INVOLVED IN OBTAINING A JUDGMENT, OBTAINING A JUDGMENT AGAINST A CARRIER AND NOT FOR ENFORCING COMPLIANCE, COLLECTION, OR EXECUTION. IS THAT AN ILLOGICAL READING OF THAT STATUTE?

JUDGE, YOU HAVE READ THE STATUTE SAYS "UNDER THE POLICY OR CONTRACT OF INSURANCE." HOWEVER, THIS COURT, THIS COURT HAS INTERPRETED THAT TO MEAN ARISEING UNDER THE CONTRACT OF INSURANCE. HERE, CAN ANYBODY SERIOUSLY DISPUTE THAT THERE WAS NOT A CONTRACT OF INSURANCE? THERE WAS NOT A DISPUTE, AND THAT WE PREVAILED? BUT, JUDGE, THINK, I WOULD LIKE TO ANSWER YOUR QUESTION IN THIS WAY AS WELL. WE DIDN'T HAVE A FINAL JUDGMENT AT ALL, UNTIL 1994. AFTER WE SEND THE ORAL SETTLEMENT, THERE WAS NO FINAL JUDGMENT. SO CLEARLY, WITHOUT DOUBT, BETWEEN 1993 AND 1994, WE WERE IN THE PROCESS OF OBTAINING OUR FINAL JUDGMENT. WE SEEK THOSE FEES. FROM OCTOBER '93 UNTIL AMENDED FINAL JUDGMENT IN '94. LET'S GO BEYOND THAT. THERE WAS AN APPEAL TO THE ELEVENTH CIRCUIT. WE CROSS APPEALED. THAT DECISION FROM THE ELEVENTH CIRCUIT --

WELL, ARE YOU JUST SATISFIED WITH OBTAINING FEES FOR OBTAINING THE JUDGMENT?

JUDGE, WE DID NOT OBTAIN FINALITY ON THAT JUDGMENT UNTIL 1996, WHEN THE ELEVENTH CIRCUIT AFFIRMED, AFFIRMED THE DISTRICT COURT AMENDED FINAL JUDGMENT. BUT LET'S GO BEYOND THAT. SO, UNTIL 1996, FROM 1993 UNTIL 1996, WE DON'T HAVE A FINAL, FINAL JUDGMENT, IF YOU WILL, SO I WOULD ADDRESS THE COURT'S QUESTION AS TO THAT TIME PERIOD IN THAT WAY. GOING BEYOND THAT, JUDGE, IF WE COULD, LET'S VISIT, FOR A MOMENT, PALMA AND LEXILE. TWO DECISIONS OF THIS COURT.

BEFORE YOU MOVE ON, IT SEEMS THAT EVEN YOUR OPPONENT IS SAYING UNDER THIS STATUTE, 627.428, THAT YOU CAN ONLY GET FEES, IF YOU ARE LITIGATING A COVERAGE DISPUTE, AND THAT HE ALLEGES THAT THERE IS NO COVERAGE DISPUTE THAT WAS GOING ON. IT WAS SIMPLY WHETHER OR NOT THERE WAS, IN FACT, A VALID SETTLEMENT AGREEMENT THAT WAS BEING LITIGATED. HOW DO YOU RESPOND TO THAT ARGUMENT?

YES, YOUR HONOR. THE WORDS "COVERAGE", "COVERAGE DISPUTE", RESOLUTION OF COVERAGE DISPUTES" DO NOT APPEAR IN 627.428 RESPECTFULLY. THE QUESTION IS AS TO PALMA. WHAT DID PALMA INVOLVE? IT INVOLVED A SITUATION WHERE, IS THE INSURED ENTITLED TO ATTORNEYS FEES LITIGATING THE ISSUE OF ENTITLEMENT? YES, THE ANSWER IN PALMA WAS YES. THE

INSURED IS ENTITLED TO ATTORNEYS FEES IN LITIGATING THE ISSUE OF ENTITLEMENT. WHY? WE HAVE TO LOOK AT THE PURPOSES AND THE POLICY BEHIND THE STATUTE. IN PALMA, THE COURT HELD BECAUSE THE STATUTE APPLIES IN VIRTUALLY ALL SUITS ARISING UNDER INSURANCE CONTRACTS, WE AGREE WITH THE CINCINNATI COURT THAT THE TERMS OF SECTION 627.428 ARE AN IMPLICIT PART OF EVERY INSURANCE CONTRACT ISSUED IN FLORIDA. THE WORD "ARISING" THERE APPEARED. THAT WASN'T ENTITLEDMENT. IT WAS ENTITLEMENT TO ATTORNEYS FEES NOT ENTITLEMENT TO COVERAGE. LEXILE WAS MORE DIRECT, AND REMEMBER THE PURPOSE IS TO MAKE THE INSUREDS WHOLE AND TO DISCOURAGE LITIGATION. SO, THERE, IN PALMA, WE HAVE THE SITUATION WHERE WE ARE HAVING THE AWARD OF ATTORNEYS FEES SOLELY ON THE ISSUE OF ENTITLEMENT. LOOK AT WOLER FROM THIS COURT. IN WOHLER, THE ISSUE WAS DO YOU REALLY HAVE TO HAVE A JUDGMENT, AND THIS COURT SAID, NO, YOU DON'T HAVE TO HAVE A JUDGMENT. THAT KPULTS FORM OTHER SUBSTANCE. -- THAT EXULTS FORM OTHER SUBSTANCE. I WANT TO CALL THIS COURT'S ATTENTION TO IVEY, IN 2000, A DECISION OF THIS COURT, THIS COURT STATED TO THE CONTRARY, FLORIDA LAW IS CLEAR THAT, IN ANY DISPUTE, AND THE WORD ANY DISPUTE IS IN QUOTES, WHICH LEADS TO JUDGMENT AGAINST THE INSURED AND IN FAVOR OF THE INSURED, AGAINST THE INSURED, IN FAVOR OF THE INSURED, ATTORNEYS FEES SHALL BE AWARDED TO THE INSURED. THEN THIS COURT STATED, IN COMBINING POLICIES BEHIND THE PIP STATUTES AND SECTION 428.

BUT DOESN'T YOUR POSITION FORCE US INTO INTERPRET AGO STATUTE THAT IS CLEAR ON ITS FACE THAT NEEDS NO INTERPRETATION? ISN'T THAT THE POSITION YOU ARE PLACING THE COURT IN?

NO, YOUR HONOR. I THINK THIS COURT HAS ALREADY INTERPRETED THE STATUTE DIRECTLY IN ACCORDANCE WITH WHAT WE ASKED. IN WOHLER, THIS COURT STATED STATUTES WILL NOT BE, AND INTERPRETING THIS STATUTE, WILL NOT BE CONSTRUED TO REACH AN ABSURD RESULT.

IN OTHER WORDS, YOU ARE SAYING THAT SOME OF THESE PRIOR DECISIONS ACTUALLY HAVE TAKEN THE STATUTE AND INTERPRETED IN WAYS THAT MAY NOT HAVE BEEN EXACTLY THE WAY THE PLAIN LANGUAGE OF THE STATUTE IS WRITTEN.

ABSOLUTELY. YOU KNOW, WE ARE THE FIRST TO SAY THAT WE ARE AWARE OF THE CONCEPT THAT STATUTES, IN DEROGATION TO THE COMMON LAW, MUST BE STRICTLY CONSTRUED, BUT --

BUT YOU CAN'T STRAY FROM THAT PRINCIPLE, CAN YOU, THAT A STATUTE THAT NEEDS NO CONSTRUCTION TO GET A JUST RESULT OF WHAT WE CONSIDER A JUST -- OR WHAT WE CONSIDER A JUST RESULT, WE ARE FREE TO GIVE IT A CONSTRUCTION?

YES, YOUR HONOR. YOU ARE FREE TO GIVE IT A CONSTRUCTION, AND THIS COURT, IN LEXILE, DID GIVE IT A CONSTRUCTION, AND YOU SAID THIS. LET'S LOOK AT THE DISPUTE. DOES THAT DISPUTE ARISE UNDER THE POLICY? DOES IT ARISE UNDER THE POLICY? IN LEXILE WHAT WERE THE FACTS? IN LEXILE, THE INSUROR PAID THE CLAIM. IT PAID 100 PERCENT OF THE CLAIM UNDER ITS LIMITS. IT THEN SUED AND MADE A SUBJUGATION CLAIM TO TRY TO RECOVER THE MONIES THE INSURED HAD RECOVERED. AND EXCUSE ME, THE COURT HELD THERE, IN LEXILE, WE ARE GOING TO HOLD THAT THE INSURED IS ENTITLED TO RECEIVE HIS ATTORNEYS FEES IN DEFENDING THAT CLAIM BYED INSURED, BECAUSE THERE IS NO DIFFERENCE FOR THE INSUROR PAYING AND ASKING FOR MONEY BACK AND NOT PAYING AT ALL, SO LOOK AT THE STATUTE. IN STRICT CONSTRUCTION, THIS COURT HAS CONSTRUED THAT STATUTE IN ACCORDANCE WITH ITS POLICIES, IN ACCORDANCE WITH ITS PURPOSES, SO AS NOT TO REACH AN ABSURD RESULT. THINK OF THIS CASE. CAN AN INSURANCE COMPANY IN FLORIDA SAY YES, MR. INSURED, WE WILL PAY YOUR CLAIM? REFUSE TO PAY THE CLAIM AND THEN SAY COME SUE ME. COME SUE ME. I AM NOT GOING TO PAY YOUR CLAIM. THAT IS EXACTLY WHAT THEY ARE SAYING. WHAT IS THE DIFFERENCE IN REALITY BETWEEN SAYING WE WILL PAY YOUR CLAIM AND REFEINGING -- AND RENEGING ON THE PROMISE AND NEVER MAKING THE PROMISE, TO BEGIN WITH. WHAT IS THE

DIFFERENCE, BETWEEN PROMISING AND RENEGEING AND NEVER PROMISING, TO BEGIN WITH. THERE IS NO DIFFERENCE. WHY? BECAUSE THE INSURED IS FORCED TO LITIGATE AGAINST THE INSURANCE COMPANY. THE PUBLIC POLICY RAMIFICATIONS OF A HOLDING THAT AN INSURANCE COMPANY IN FLORIDA, WHETHER IT IS HURRICANE ANDREW, HURRICANE STEFFI, WHATEVER MAY COME UP IN THE FUTURE, WE HAVE ALL THESE CLAIMS. WHAT WE COULD DO IS WE COULD SETTLE THEM, TAKE A SECOND LOOK A LITTLE BIT LATER AND SEE WHETHER WE WANT TO FUND THE SETTLEMENT, BUT WHAT WE KNOW WE HAVE DONE BY RENEGEING IS OBVIATING OUR RESPONSIBILITY TO PAY ATTORNEYS FEES? THAT CAN'T BE THE LAW OF THIS STATE.

THAT IS WHY I THINK I ASKED YOU INITIALLY, WHETHER YOU SAW A DIFFERENCE BETWEEN THAT SITUATION, WHICH IS THAT THESE WERE FEES BEING SOUGHT BECAUSE THEY RENEGED ON AN AGREEMENT TO GET THEM TO COMPLY WITH THE AGREEMENT, AND A LITIGATION THAT MIGHT ARISE AFTER THERE HAS BEEN AN AGREEMENT AS TO THE TERMS OR SOME ASPECT OF ENFORCING THE AGREEMENT. WOULD THAT, AT THAT POINT, BE BEYOND WHAT IS CONTEMPLATED BY 627.428?

I THINK CLEARLY, YOUR HONOR, THAT THE THIRD DISTRICT, IN THE MOORES CASE, TOOK THE VIEW THAT COLLECTION EFFORTS, FOR EXAMPLE, WOULD NOT BE RECOVERABLE. THAT WOULD BE A SITUATION, PERHAPS, WHERE YOU WOULD HAVE TO COLLECT --

WOULD THAT STILL BE UNDER THE RULE OF LAW THAT WE WOULD ANNOUNCE IN THIS CASE? WOULD THE THIRD DISTRICT CASE STILL BE GOOD LAW?

NO. THE THIRD DISTRICT CASE CLASHES WITH BRADY, THE BRADY CASE OF THE FIFTH DISTRICT, WHICH HOLDS. IF THE INSURED HAS TO SUE TO ENFORCE AN ORAL SETTLEMENT AGREEMENT THAT, IS THIS CASE. THE INSURED IS ENTITLE TO RECOVER. THOSE CASES CLASH. THE ELEVENTH CIRCUIT RECOGNIZES THAT AND SENT IT DOWN. JUDGE, IF YOU LOOK AT MORRIS RESPECTFULLY, WAS WRONGFULLY DECIDED. I WOULD ANSWER YOUR QUESTION BY SAYING THAT THE INSURANCE COMPANIES IN THIS STATE OUGHT TO KNOW, MUST KNOW THAT THEY MUST FULLY COMPLY, 100 PERCENT, WITH THEIR CONTRACTS OF INSURANCE AND WITH THEIR SETTLEMENT AGREEMENTS, WHICH ARISE FROM CONTRACTS OF INSURANCE. AND IF THERE IS ANY DISPUTE, ANY DISPUTE USING THIS COURT'S WORDS IN IVEY, IF THERE IS ANY DISPUTE, THAT PLAYING FIELD NEEDS TO BE LEVELED, SO THAT ALL INSUREDS HAVE ACCESS TO THE COURTS. THEY NEED TO RECEIVE THEIR ATTORNEYS FEES, TO VINDICATE THE PUBLIC POLICY CONSIDERATIONS, TO MAKE THE INSURED WHOLE, AND TO DISCOURAGE, NOT ENCOURAGE LITIGATION. TO ANSWER YOUR QUESTION, JUDGE, WHEN THIS COURT USED ANY DISPUTE IN 2000, IN IVEY, I THINK YOU MEANT ANY DISPUTE --

WHAT IF THERE WAS A JUDGMENT ENTERED AGAINST USF AND G AND THEN THEY WENT INTO SOME TYPE OF RECEIVERSHIP AND YOU WERE TRYING TO COLLECT ON THAT. WOULD THAT BE WITHIN 627.428?

THAT IS A SIMILAR SITUATION TO THE CASE CITED IN MORRIS BY JUDGE SCHWARTZ FOR THE THIRD DISTRICT. IN THERE, THE, IT WAS UNDER, NOT THIS STATUTE BUT A RELATED STATUTE, AND THE COURT THERE HELD THAT, NO, THAT THAT TYPE OF SITUATION, IT IS NOT THE INSURANCE COMPANY ANYMORE. IT IS A DIFFERENT ENTITY, THE SEVER, SO I COULD SEE SOME SITUATIONS, JUSTICE, WHERE THERE WOULD NOT BE AN ENTITLEMENT, DEPENDING ON IF IT WAS DEFUNCT, FOR EXAMPLE. THAT IS ONE OF THE CASES CITED IN MORRIS. THAT IS A DIFFERENT CASE THAN THIS OBVIOUSLY. THERE IS NO DEFUNCT INSURANCE COMPANY HERE. THERE IS USF AND G WHO SAID WE WILL PAY YOU. THEY DIDN'T PAY US. THEY ARE FORCING US TO LITIGATE FOR TEN MORE YEARS.

SO WHAT HAPPENS IN A CASE WHERE, LET'S SAY YOU HAVE A WRITTEN SETTLEMENT AGREEMENT. THERE IS NO PROVISION IN THE SETTLEMENT AGREEMENT, REGARDING ATTORNEYS

FEES, ONE WAY OR THE OTHER, AND IT IS A PAY OUT, AND TEN YEARS LATER, THE INSURANCE COMPANY OR SO THE INSURED ALLEGES, VIOLATES THE SETTLEMENT AGREEMENT BUT BY NOT PAYING OUT OR -- BY NOT PAYING OUT OR SOMETHING, AND THE INSURED SUES. DO WE ALSO HOLD THAT IN THAT CASE THE INSURED WOULD BE INTEELINGTSED -- ENTITLEED TO ATTORNEYS FEES?

YES, YOUR HONOR. I DON'T THINK THERE IS A TEMPORAL LAW THAT WE HAVE ADVANCED. DISPUTE MEANS ANY DISPUTE. THE INSURANCE COMPANIES ARE ONLY GATED BY CONTRACT WHEN THEY SETTLE. IF THEY WANT TO OBVIATE FOR ATTORNEYS FEES, JUST SAY SO. IF THE INSURED DOESN'T AGREE, I GUESS THERE WON'T BE A SETTLEMENT, IF THAT IS A MATERIAL TERM. THAT IS A CONSENT THAT CAN BE UNDER DURESS BY CONTRACT. BUT IT IS INSURED AGAINST INSURED. AS MATTER OF POLICY, JUSTICE, I DON'T SEE ANY INTERPRETATION, WHETHER TODAY OR TOMORROW OR TEN YEARS, BECAUSE OF STRONG POLICY CONSIDERATIONS AND TO LEVEL THE PLAYING FIELD AND TO MAKE THE INSURED WHOLE, TO NOT CLOG AND CONGEST THE COURTS OF THIS STATE AND FIGHT OVER SETTLEMENT AGREEMENTS.

CHIEF JUSTICE: WE HAVE A WARNING LIGHT, IF YOU WANT TO PAUSE AT THIS TIME FOR RE, TO SAVE FOR REBUTTAL.

I WILL PAUSE AT THIS TIME.

YOUR HONORS, GOOD MORNING. IF IT PLACE THE COURT, MY NAME IS EDWARD GRASS, REPRESENTING UNITED STATES FIDELITY AND GUARANTEE COMPANY.

LET ME SEE IF I CAN, AND IN SORT OF A SIMPLIFIED WAY, CONFIRM MY UNDERSTANDING OF THIS. USF AND G HAD A POLICY, WHICH THE INSURED MADE A CLAIM ON THE BASIS OF THE POLICY FOR THIS POLLUTION DAMAGE. IS THAT FIRST, CORRECT?

IT MAY HAVE. IT IS NOT AN ISSUE BEFORE THIS COURT.

BUT THAT, I MEAN, THE UNDERLYING ACTION WAS THAT THERE WAS, AND THEN THERE WAS AN OFFER TO PAY, IN ORDER TO SATISFY THE POLICY.

THAT IS INCORRECT, YOUR HONOR.

OKAY. WHERE IS IT?

I AM GLAD YOU WENT RIGHT TO THE FACTS, BECAUSE I UNDERSTAND COUNSEL IS RELATIVELY KNEW TO -- NEW TO THIS CASE. I, IN MY FIRM, HAVE BEEN LITIGATING THIS CASE SINCE 1993.

WHERE IS HE WRONG?

IS HE WRONG IN ALMOST ALL OF THE FACTS. WHAT HAPPENED HERE WAS, IN 1983 HE WAS, OF COURSE, CORRECT. THERE WAS AN EPA ACTION THAT BEGAN. USF AND G WAS BROUGHT INTO THE LITIGATION WITH THIRD PARTIES, WITH DOZENS OF OTHER INSURANCE COMPANIES, OTHER PARTIES INVOLVED IN THIS CLEANUP.

WHAT WAS THE ROLE OF USF AND G? IN OTHER WORDS WHAT WAS THE RELEVANCE OF USF AND G?

YES. PEPPER STEEL AND OTHERS SUED USF AND G TO PROVIDE INSURANCE COVERAGE FOR THIS CLEANUP OF PCB TRANSFORMER AND BATTERY CRACKING.

TRANSFORMER INSURANCE HAD A POLICY WITH USF AND G?

YES, YOUR HONOR.

WHAT WAS THE POLICY?

A GENERAL LIABILITY POLICY THAT CON STAINED -- CONTAINED AN EXCLUSION LANGUAGE IN IT, UNLESS USF AND G WAS BROUGHT IN.

THERE WAS LIABILITY OF U.S. SF AND G -- THERE WAS USF AND G BROUGHT IN, BECAUSE THEY MADE A CLAIM ON THE INSURANCE POLICY, IS THAT CORRECT?

YES, YOUR HONOR.

I THOUGHT THAT WAS AN OFFER TO SATISFY USF AND G'S OBLIGATIONS UNDER ITS POLICIES.

THAT IS INCORRECT, YOUR HONOR. IN 1981, USF AND G HAD BEEN IN THIS CASE AND UNABLE TO GET A RESOLUTION TO ITS CLAIM UNDER ITS COVERAGE. IT OFFERED TO PAY $2 MILLION IN ALL CLAIMS AND LITIGATION, SO THAT IT COULD STOP PAYING INDEMNIFICATION COSTS, BECAUSE OF THIS CASE.

IS THAT THE FACTS IN THE COURT OF OPINION. IS THAT CORRECT?

I DON'T BELIEVE THE COURT EVER STATED THAT F IT DID, IT IS INCORRECT.

WELL, U.S. OPEN-IT SAYS PEPPER STEEL DEMANDED COVERAGE FROM USF AND G, WHICH IT ISSUED AN INSURANCE POLICY COVERING THE SITE IN 1991. USF AND G MADE AN ORAL OFFER TO SETTLE FOR $2 MILLION. IS THAT CORRECT?

THAT IS ABSOLUTELY CORRECT, BUT WHAT YOU WERE ASKING IS THE PURPOSE IS OF THAT SETTLEMENT.

WHAT I WAS ASKING, BECAUSE WHAT I WANT TO KNOW IS THAT, IF THIS IS A PAYMENT THAT IS IN CONNECTION WITH AND THIS INSURANCE POLICY AND THEIR INVOLVEMENT, AND IF THERE HAS TO BE A PAYMENT, WHY ISN'T THAT, UNDER 428, PROSECUTING THE SUIT IN WHICH RECOVER IS -- RECOVERY IS HAD?

BECAUSE THAT IS NOT WHAT HAPPENED IN THIS CASE. LET ME BRIEFLY GO THROUGH THE FACTS, AND THIS WAS A BIG PROBLEM IN THE LENT CIRCUIT. I DON'T THINK THEY UNDERSTOOD THESE FACTS N 1991 --

DON'T WE HAVE TO -- FEES FACTS. IN 1991 --

DON'T WE HAVE TO ACCEPT, HERE, THE FACTS AS ARE INDICATEED? WE ARE ASKED A SPECIFIC QUESTION BY THE ELEVENTH CIRCUIT, AND I AM NOT SURE WE CAN GO BEHIND AND TRY TO DISCOVER FACTS FOR THEM.

THIS IS A UNDISPUTED FACT THIS. IS CRITICAL. IN 1991, THERE WAS AN OFFER FOR A GLOBAL SETTLEMENT. IN 1993, THIS COURT HANDED DOWN THE DEMMIT DECISION, SAYING THAT THESE POLICIES WITH SUDDEN ACCIDENTAL EXCLUSIONS COULD NOT POSSIBLY PROVIDE COVERAGE FOR THIS SITE.

BUT THE ONLY REASON YOU WOULD BE OFFERING ANY AMOUNT OF MONEY IS BECAUSE THERE WAS SOME PIECE OF PAPER IN EXISTENCE CALLED AN INSURANCE POLICY.

ABOUT -- BUT THIS WAS ALL SETTLED AND UNDERSTOOD AND AN UNDISPUTED FACT. IN 1993, PEPPER'S AND BLOOM DISPUTED THE SETTLEMENT TERMS. THEY SAID IT DID NOT INCLUDE A RELEASE. IT DID NOT INCLUDE AN INDEMNIFICATION. USF&G PREVAILED ON THOSE ARGUMENTS

AND SAID BECAUSE THEY WERE DISPUTING THOSE TERMS, THERE WAS NO SETTLEMENT AND -- THERE WAS A SETTLEMENT AND IT INCLUDED THOSE TERMS. THEY LOST IN THE ELEVENTH CIRCUIT IN 1994, AND THEY CLAIMED, SPECIFICALLY, WE WANT FEES, UNDER 627.428, TO LITIGATE COVERAGE FROM 1983 TO 1993, WHEN THE SETTLEMENT WENT INTO EFFECT. THEY DEMANDED THAT AND THEY LOST. THAT IS THE LAWFUL THE CASE OF THE ELEVENTH CIRCUIT.

YOU ARE NOT ASKING FOR THOSE FEES.

NOT NOW BECAUSE THEY LOST.

DO YOU AGREE WITH THE GENERAL PROPOSITION THAT, IF THE INSURANCE COMPANY IS GOING TO, THEY GO BACK TO SETTLE BUT THEN THEY SAY NO AND THERE IS FURTHER LITIGATION INVOLVED TO GET THEM TO SETTLE, THAT THAT SHOULD BE, THAT WOULD ORDINARILY BE WITHIN 627.428 FEES. YOU ARE NOW TELLING US THERE IS SOME NUANCES ABOUT HOW THIS LITIGATION WENT ON, THAT IS DIFFERENT THAN THE FACTS AS WE HAVE JUST BEEN TOLD BY THE APPELLANT.

RIGHT. WHAT APPELLANT HAS LEFT OUT, AND THE ELEVENTH CIRCUIT FOUND THIS, LAW OF THE CASES, THAT ALL FEES TO LITIGATE COVERAGE FROM 1993 BACK IN TIME TO 1983, WERE RELEASED. ALL FEES UNDER 627.428. THE ONLY ISSUE IS --

I THINK I UNDERSTAND THAT, BUT WHAT I AM STRUGGLING WITH, AND WHAT I WANT JUST TO UNDERSTAND SIMPLY, IS THAT THERE WAS AN OFFER TO PAY $2 MILLION BY USF&G. THERE WAS AN ACCEPTANCE OF THE OFFER. THERE WAS A JUDGMENT ENTERED ON THE OFFER AND THE ACCEPTANCE.

YES.

WAS THE $2 MILLION PAID?

THE $2 MILLION WAS PAID. IT WAS POST-JUDGMENT INTEREST. IT HAS BEEN PAID. THEY HAVE IT.

WHAT HAPPENED NEXT?

WHAT HAPPENED, THEN, IN 1994, THERE WAS AN EVIDENTIARY HEARING. SO FROM 1993 FORWARD, THE ONLY THING THAT IS HAVE BEEN DISPUTED IN THIS CASE FROM 1993 FORWARD, WHETHER THERE WAS AN OFFER AND ACCEPTANCE. WHETHER OR NOT THE ORAL OFFER REMAINED OPEN. HAD IT BEEN WITHDRAWN? HAD COUNSEL MADE A COUNTERCLAIM? THAT IS WHAT WAS LITIGATED FROM 1993 TO THE PRESENT TIME. THAT HAS ABSOLUTELY NOTHING TO DO WITH ANYTHING UNDER AN INSURANCE CONTRACT. ALL THAT IS AT ISSUE FROM 1993 FORWARD, IS WHETHER OR NOT THERE WAS AN ORAL SETTLEMENT OFFER. WHETHER THERE WAS AN ACCEPTANCE AND WHAT THE TERMS WERE, MANY ISSUES OF WHICH PEPPER STEEL LOST, AS TO WHAT THE TERMS WERE, SO GOING TO THE STATUTE UNDER 627.428 FROM 1993 TO THE PRESENT TIME, THERE HAS NOT BEEN A SINGLE ISSUE ABOUT COVERAGE UNDER AN INSURANCE POLICY.

IS THAT THE SAME ARGUMENT THAT WAS MADE IN LEXILE AND WE MELD HELD, EVEN THOUGH IT WAS -- AND WE HELD, EVEN THOUGH IT WAS A SEPARATE LAWSUIT, EVEN THOUGH THE INSURED HAD GONE AND SUED THE TORTFEASOR AND RECOVERED MONEY FROM THE TORTFEASOR AND NOW THE INSURANCE COMPANY WERE LITIGATED UNDER THOSE ARGUMENTS, THAT IS NOT ARISEING ABOUT THAT POLICY. IT IS DISPUTED FUNDS. WHY ARE WE NOT HELD OTHERWISE AND NOT BOUND BY THAT CASE?

THERE IS NOT A SINGLE CASE, YOUR HONOR, IN THE STATE OF FLORIDA OR IN THE ELEVENTH CIRCUIT THAT EVER AWARDS FEES UNDER 627.428, UNLESS THE TERMS OF AN INSURANCE POLICY WERE AT ISSUE. LEXILE WAS A DISPUTED SUBJUGATION PROVISION. THE INSURANCE COMPANY

SAID WE HAVE RIGHTS TO GET MONEY BACK FROM YOU, POLICYHOLDER, BECAUSE WE PAID YOU, AND WE ARE SUBROGATED TO THAT MONEY. THAT COURT THE INSURANCE COMPANY LOST, BECAUSE THE INSURED HAD NOT, IN FACT, BEEN FULLY COMPENSATED, AND THE INSURED WAS ENTITLED TO THAT $100,000, SO THE CLAIM AROSE UNDER A DISPUTED SUBJUGATION PROVISION IN THE POLICY.

BUT HAVEN'T WE GONE FARTHER THAN THAT? BECAUSE IF YOU TAKEOLWARD, THAT FIRST OF ALL YOU AGREE THAT THE SETTLEMENT IS, BECOMES A FUNCTIONAL EQUIVALENT OF THE JUDGMENT UNDER WOL ARRESTED, RIGHT? -- UNDER WOLLARD, RIGHT?

YES. YES.

SO IF THE ATTORNEY FOR THE INSURED, IF USG AND F -- IF USF&G SAYS ALL RIGHT, WE ARE PAYING, THERE IS PAYMENT, AND THERE DOESN'T HAVE TO BE A COVERAGE DISPUTE. IT JUST HAS TO ARISE UNDER THE POLICY, BUT NOW WE ARE GOING TO GET DOWN TO WHETHER THERE IS THIS MUCH MUST NOT TOIB PAID OR THAT, WHETHER IT IS TO BE -- THIS MUCH MONEY TO BE PAID OR THAT, WHETHER IT IS TO BE DIVIDED UP BETWEEN, SAY, A HUSBAND AND WIFE AND WHETHER WE ARE GOING TO GIVE THIS MUCH TO THE HUSBAND AND THIS MUCH TO THE WIFE, THAT WOULD BE FEES UNDER 627.428, EVEN THOUGH AT THAT POINT YOU ARE NOT REALLY DISCUSSING A TERM OF THE POLICY, BUT YOU ARE FIG EW -- BUT YOU ARE FIGURING OUT HOW TO SETTLE A CLAIM. WOULD YOU AGREE THAT THAT WOULD BE IN AN ORDINARY CASE, GARDEN VARIETY CASE, AWARDED IN THIS STATE AS ATTORNEYS FEES?

NO, AND WOLLARD IS THE PERFECT EXAMPLE OF THAT. IN WOLLARD, EVERY DOLLAR OF FEES WAS TO LITIGATE COVERAGE UNDER 627.428. WHAT HAPPENED WAS THE POLICY, COVERAGE WAS DISPUTED, AND ON THE EVE OF TRIAL THE INSURANCE COMPANY SAID WE MADE A MISTAKE. WE OWE THIS CLAIM.

IF THE INSURED DISPUTES HOW MUCH TO PAY --

YES.

-- YOU DON'T GET FEES --

NO, YOU DO. I AM SORRY, IF YOU MISUNDERSTOOD, BUT AS TO WOLLARD THERE WAS A DISPUTE AS TO HOW MUCH WAS OWED.

BUT COVERAGE IS NOT A DISPUTE AS TO GETTING FEES UNDER 627.428, SO IF THERE IS A DISPUTE AS TO HOW TO PAY THE MONEY IN SOME WAY, UNLESS IT GETS TO A SETTLEMENT, UNLESS THE SETTLEMENT RELEASES THE CLAIM, IT IS GOING TO BE FEES UNDER 627.428.

UNLESS IT GETS TO A SETTLEMENT AND WHAT HAPPENED IN WOLLARD IS THEY DISPUTED COVERAGE AND FOR THE ABOUT WHAT TO DO UNDER THE POLICY. THEY GOT TO COURT AND ALL IT SAID WAS A CONFESSION OF JUDGMENT IS THE SAME THING AS A JUDICIAL JUDGMENT. THAT IS ALL WOLLARD SAID. IN THIS CASE, ALL FEES HAVE BEEN SETTLED. THERE IS NO DISPUTE ABOUT THAT IN WOLLARD.

IF I UNDERSTOOD YOUR DISPUTE OF FEES, IT WENT SOMETHING LIKE THIS. WHAT HAPPENED WAS THIS, YOU HAD A DISPUTE AGAINST THE INSURANCE COMPANY AND THERE IS A CLAIMS MANAGER WHO HAS AUTHORITY TO NEGOTIATE AND SETTLE THE CLAIM, AND THE CLAIMS MANAGER WORKS WITH THE ATTORNEY REPRESENTING THE INSURED, AND EVENTUALLY SAYS, WELL, I WILL GIVE YOU $100,000, AND I HAVE GOT AUTHORITY TO DO THAT. HERE IS A COPY OF THE AUTHORIZATION THAT SHOWS I HAVE AUTHORITY TO SETTLE UP TO $1 MILLION. WHATEVER. AND WRITES UP A LITTLE THING SAYING I HAVE AGREED TO SETTLE THIS FOR $100,000 AND PROVIDES IT TO THE ATTORNEY. OKAY. AND THEN THE NEXT DAY, THE CLAIMS MANAGER IS

FIRED. OKAY. NOW, HE IS FIRED BECAUSE HE IS RUNNING AROUND WITH THE BOSS'S WIFE OR SOMETHING, NOTHING TO DO WITH THE -- AND THE NEW CLAIMS MANAGER DECIDES HE IS REALLY GOING TO HIT THE GROUND RUNNING, AND HE HAS SORT OF A SCORCHED EARTH POLICY. HE WILL BE DARNED, IF HE IS GOING TO PAY A PENNY OF THE INSURANCE COMPANY'S MONEY, SO HE JUST SITS ON IT, AND THE LAWYER IS WAITING FOR THE CHECK TO COME FOR HIS CLIENT. AND HE CALLS, AND HIS CALLS AREN'T RETURNED, AND HE WRITES, AND HIS INQUIRIES AREN'T, YOU KNOW. OF COURSE ALL THE TIME HE HAS GOT THIS AGREEMENT ABOUT THE PAYMENT. NOW, EVENTUALLY HE HAS GOT TO GO TO COURT TO GET THAT. AND HE HAS EXPENDED HUND HE REDS OF HOURS TO TRY TO -- HUNDREDS OF HOURS TO TRY TO COLLECT THAT, AND IT IS YOUR POSITION, I TAKE IT, THAT ATTORNEYS FEES WOULD NOT BE RECOVERABLE IN ENFORCING THAT PATENTLY, YOU KNOW, OBVIOUSLY, CLEARLY, AND I AM PUTTING THAT IN THE HYPOTHETICAL, ENFORCEABLE AGREEMENT TO PAY, UNDER THE POLICY. IS THAT YOUR POSITION?

IT IS NOT AND I HAVE TWO RESPONSES TO THAT AND THEY ARE ABSOLUTELY CRITICAL. WHAT YOU HAVE JUST DONE, YOUR HONOR, AND WHAT COUNSEL IS ASKING THIS COURT TO DO IS TO ACT AS A SUPER LEGISLATURE, TO TODAY HOLD A HEARING ON HOW LIKELY THAT IS TO HAPPEN. YOUR HONOR, I AM A CLAIMS ADJUSTER. I WILL TELL YOU RIGHT NOW IT DOESN'T WORK THAT WAY.

WHAT I AM ASKING YOU IS ARE ATTORNEYS FEES RECOVERABLE IN THAT HYPOTHETICAL I DESCRIBED? ARE THEY?

THE FIRST RESPONSE IS THEY ARE. I WILL TELL YOU HOW THEY ARE. HERE IS WHY. NOT UNDER 627.428, BECAUSE WHAT WILL HAPPEN IS, IN THAT SCENARIO, THERE IS A AGREEMENT.

LET ME STOP MY HYPOTHETICAL THEN. MY QUESTION IS ARE ATTORNEYS FEES RECOVERABLE UNDER THAT STATUTE IN THAT HYPOTHETICAL?

THEY ARE NOT, UNDER 627.428.

SO THEY ARE NOT IN THAT HYPOTHETICAL THAT I HAVE GIVEN YOU.

BUT IT IS CRITICAL TO UNDERSTAND THAT SCENARIO, BECAUSE WHAT WILL HAPPEN IN YOUR HYPOTHETICAL IS THE POLICYHOLDER WILL GO TO COURT AND WILL SUMMARILY GET THAT SETTLEMENT EFFECTUATED AND ENFORCED. WE ARE NOT TALKING ABOUT TEN YEARS OF LITIGATION. THIS CASE IS EXTRAORDINARY, BECAUSE THEY REFUSE TO HONOR THE INDEMNIFICATION PROVISIONS UNDER THE SETTLEMENT.

I DESCRIBED TO YOU IN MY HYPOTHETICAL THAT THERE IS LETTERS WRITTEN, TELEPHONE CALLS THAT ARE MADE, THAT LIKE I SAID, THERE IS HOURS UPON HOURS OF ATTORNEYS FEES, TIME DEVOTED TO THAT, BEFORE FINALLY --

RIGHT.

-- THERE IS A PAYMENT TO THAT. AND IF YOU ARE, IF I UNDERSTAND WHAT YOU ARE SAYING, ATTORNEYS FEES UNDER THE STATUTE WOULD NOT BE PAID.

BECAUSE IT IS NOT A DISPUTE UNDER THE POLICY, IF I UNDERSTAND YOUR HYPOTHETICAL, BUT THAT HYPOTHETICAL CANNOT POSSIBLY HAPPEN. IN ANY NORMAL CIRCUMSTANCE, IF AN INSURANCE COMPANY SAYS WE HAVE SETTLED THIS CASE. IT WILL PAY THE CLAIM. AND IF IT DOES NOT, THE POLICYHOLDER CAN GO TO COURT AND WILL SUMMARILY GET THAT ENFORCED. THERE WILL BE SOME FEES, BUT WE ARE NOT TALKING ABOUT THE NORMAL SITUATION OF TEN YEARS, BECAUSE HERE --.

SOME FEES BUT THEY WON'T BE RECOVERABLE UNDER THE STATUTE.

UNDER 627.428, BUT I WILL TELL YOU HOW THEY WILL BE RECOVERABLE. IF THE INSURANCE COMPANY DARES TO FILE AN ANSWER, REFUSING TO PAY UNDER THE HYPOTHETICAL, THEY ARE GOING TO PAY RULE 11 FEES, BECAUSE THEY HAVE GOT A LEGITIMATE BASIS TO OPPOSE PAYING THAT SETTLEMENT.

LET'S GET BACK FOR A SECOND. SO WHAT I THINK I HIM HEARING YOU SAY IS THAT -- WHAT I THINK I AM HEARING YOU SAY IS THAT, IF A SETTLEMENT HAS BEEN REACHED, THEN ANYTHING AFTER THE SETTLEMENT WOULD NOT BE UNDER 627.428. IN THIS CASE, THOUGH, IF WE ACCEPT THE ELEVENTH CIRCUIT'S FACTS, WHICH, NOW, I WILL GO BACK AGAIN AND LOOK AND SAY THAT FEES WERE, THAT THE SETTLEMENT WAS NOT AGREED TO AFTER IT HAD BEEN OFFERED, AND THEN IT WAS RESCINDED. AND THAT THE FEES THAT ARE BEING CLAIMED, ARE BE WILLING CLAIMED IN ORDER TO GET THE SETTLEMENT ENFORCED. NOW, YOU ARE SAYING THAT THEY ACTED UNREASONABLY, BECAUSE THEY WERE ASKING FOR CONDITIONS THAT WEREN'T IN THE SETTLEMENT, AND IT DIDN'T NEED TO GO ON FOR ELEVEN YEARS, BUT ISN'T THE ANSWER TO THAT NOT WHETHER THERE IS A THRESHOLD ENTITLEMENT UNDER 627.428, BUT AS TO THE REASONABLENESS AND THE AMOUNT OF FEES, AND SO THAT IF THE FEES THAT WERE BEING SPENT WERE BEING SPENT ON TRYING TO ENFORCE SOMETHING THAT THE ELEVENTH CIRCUIT DIDN'T UPHOLD, OR THEY SPENT ALL THIS TIME WHEN ALL ALONG, THE AGREEMENT WAS, SAY, IF YOU TOOK A CASE WHERE THE INSURANCE COMPANY OFFERED THE $10,000 ON DAY ONE AND THE INSURANCE, THE LAWYER JUST KEPT ON GOING ON, THAT GOES TO WHETHER IT IS REASONABLE, BUT NOT TO ENTITLEMENT. DO YOU AGREE THAT THAT IS A REMEDY FOR YOU, IN TERMS OF LIMITING HOW MUCH FEES THEY WOULD GET, AS OPPOSED TO WHETHER THEY WOULD GET ANYTHING AT ALL?

WE CERTAINLY CAN RAISE WHETHER OR NOT THEY ARE SUCCESSFUL, WHETHER IT IS REASONABLE, BUT STILL IT GOES TO ENTITLEMENT IN THIS WAY. THE LITIGATION WAS NOT UNDER A U.S. F AND G POLICY. WE -- A U.S. SF AND G POLICY. I DON'T THINK -- A USF&G POLICY. WHAT WAS LITIGATED FROM '93 FORWARD WAS AN OFFER AND ACCEPTANCE AND WHAT THE TERMS OF THE DISPUTED ORAL SETTLEMENT. THE STATUTE 627.428 SAYS THAT THE DISPUTE HAS TO ARISE UNDER A POLICY. THAT DISPUTE, FROM 1983 BACK IN TIME TO 1983 WAS SETTLED. 627.428 FEES WERE SETTLED IN THIS CASE. THAT WAS FOUND AND HELD BY THE ELEVENTH CIRCUIT, REJECTING THEIR POSITION. IN 1996, THE LEFT CIRCUIT SAID ANY FEES, UNDER 627.428 TO LITIGATE COVERAGE FROM '83 TO '93 ARE RELEASED.

I AM STILL HAVING TROUBLE WITH HOW THIS IS NOT CONNECTED WITH THE PROSECUTING OF A CLAIM ON THE U.S. F AND G POLICY. HOW IS IT -- I MEAN, IS IT, THAT --

I HIM SORRY, YOUR HONOR. THAT WAS RELEASED, AND THERE ARE MANY CASES IN FLORIDA THAT GO EXACTLY TO THIS POINT. BOLLINGER VERSUS --

APPARENTLY THERE ARE STILL SOME LINGERING QUESTIONS THAT HAVE BEEN LITIGATED FOR TEN YEARS AS TO THE SUBSTANCE OF THE RELEASE.

OF THE SUBSTANCE OF THE SETTLEMENT AND THE TERMS, WHICH HAS NOTHING TO DO WITH COVERAGE, UNDER A POLICY OF INSURANCE, WHICH IS WHAT 627.428 REQUIRES. WHAT THIS COURT SAID IN PALMA, THE COURT SAID THAT WE ARE NOT GOING TO LET SOMEBODY RECOVER FEES TO LITIGATE THE AMOUNT OF FEES, BECAUSE THAT IS NOT WITHIN THE INSURANCE POLICY. LET IT GO TO THE FLORIDA LEGISLATURE. THAT IS WHAT THIS COURT SAID IN PALMAT MAY BE RELATED.

DOES IT SAY ALSO, THAT YOU ARE ENTITLED TO GET ATTORNEYS FEES FOR ENTITLEMENT TO ATTORNEYS FEES, AND THE ISSUE OF ENTITLEMENT, TO ME, DOESN'T SEEM TO BE SOMETHING THAT YOU, THAT IS UNDER THE POLICY. IT IS UNDER THE STATUTE. SO YOU ARE NOT LITIGATING A POLICY PROVISION THERE.

BUT THAT IS THE, PALMA IS THE KEY HERE. IT IS THE BEST CASE TO UNDERSTAND THIS, AND COUNSEL QUOTED THE KEY PROVISION. THIS COURT SAID, IN PALMA, 627.428 IS INCORPORATED. IT IS IMPLIED IN THE POLICY. IT IS A TERM OF THE POLICY. SO WHEN YOU LITIGATE ENTITLEMENT, UNDER 627.428, AS PART OF THE COVERAGE DISPUTE, IT ARISES UNDER THE POLICY, BUT AS SOON AS YOU START TALKING ABOUT AMOUNT, IT IS NO LONGER MR. CHIEF JUSTICE

JUSTICE SHAW HAS A QUESTION.

I AM SORRY, YOUR HONOR. PARDON ME.

ARE YOU SAYING THAT 627.428 IS LIMITED BY 627.427, AND YOU KEEP TALKING ABOUT COVERAGE. AS I READ,.428, UPON THE RENDITION OF A JUDGMENT OR DECREE BY ANY OF THE COURTS OF THIS STATE AGAINST AN INSURED IN FAVOR, AND IT DOESN'T LIMIT IT TO COVERAGE.

CHIEF JUSTICE: YOUR TIME IS EXPIRED, BUT YOU CAN RESPOND TO THAT QUESTION BEFORE YOU --

THANK YOU, YOUR HONOR. IT IS LIMITED TO A CLAIM, A DISPUTE THAT ARISES UNDER A POLICY OF INSURANCE. EVERY SINGLE CASE IN THIS STATE HAS INTERPRETED THAT TO MEAN IT MUST BE A DISPUTE REGARDING THE TERMS OF THE POLICY. MORRIS, HIGG ENBOTH A.M. -- --- HIGGENBOTHAM, ALL OF THE OTHER CASES CUT THE COVERAGE OFF.

CHIEF JUSTICE: HOW MUCH TIME, MR. MARSHAL? ALMOST THREE MINUTES.

THANK YOU. YOUR HONOR, JUSTICE ANSTEAD, THE HYPOTHETICAL YOU POSED ISN'T SO HYPOTHETICAL. I WOULD CALL THE COURT'S ATTENTION TO BRADY, THE FIFTH CIRCUIT, THE FIFTH DISTRICT DECISION THAT IS CITED IN OUR BRIEF THAT IS CITED IN THE ELEVENTH CIRCUIT OPINION, AND IN BRADY, THE FIFTH, UNDER CIRCUMSTANCES VERY SIMILAR TO YOURS THAT YOU POSED, AND, OF COURSE, THE INSURANCE COMPANY RENEGED, NOT HYPOTHETICAL AT ALL, THE COURT HELD, HAD BRADY FILED A BREACH OF CONTRACT ACTION AND PREVAILED, HE WOULD CLEARLY BE ENTITLED TO FEES UNDER SECTION 627.428. IT IS UNREASONABLE TO DENY FEES TO BRADY FOR WHAT IS IN ESSENCE THE SAME ACTION. IS IT NOT THE SAME TO SAY TO AN INSURED, OH, YEAH, WE WILL SETTLE YOUR CLAIM AND PAY YOU $2 MILLION THE HOLD THE $2 MILLION AND DON'T PAY IT AND SAY COME SUE FOR US THE $2 MILLION. ISN'T THAT IN ESSENCE, ALTHOUGH THE ISSUE IS DIFFERENT, THE SAME ACTION, INSURED LITIGATING, INSURED LITIGATING AGAINST AN INSURANCE COMPANY, UNDER A POLICY? IS IT NOT EX-ULTIMATING FORM OTHER SUBSTANCE -- IS IT NOT EXULTING FORM OTHER SUBSTANCE, THE ARGUMENT YOU ARE HEARING? CERTAINLY IT IS. AN ARGUMENT EXULTING FORM OVER SUBSTANCE.

LET'S SAY THE $2 MILLION WAS ISSUED, AND THE FEES ARE AT ISSUE WHETHER TO BE INCLUDED OR EXCLUDED FROM THE $2 MILLION. IN OTHER WORDS WHETHER YOU CAN CLAIM 627.428 FEES OR NOT, FORGETTING THAT $2 MILLION, AND YOU ENDED UP WHERE THE INSURANCE COMPANY SAID, WELL, WE ARE NOT GOING TO PAY THE $2 MILLION, UNLESS YOU AGREE TO RELEASE YOUR CLAIM FOR ATTORNEYS FEES. AND ULTIMATELY, THE INSURANCE COMPANY PREVAILS, AS TO SAYING THAT THOSE, THE FEES HAVE TO BE INCLUDED IN THE $2 MILLION THAT IS BEING PAID. AND THEN YOU GO TO COURT BECAUSE THERE IS SOME OTHER DISPUTE THAT ARISES OVER THAT $2 MILLION SETTLEMENT. AT WHAT POINT IS THE FACT THAT IT IS A, THAT THE INSURED IS MAKING, IS QUESTIONING THE TERMS OF THE SETTLEMENT, AS TO, AS OPPOSED TO WHETHER THERE ACTUALLY IS A SETTLEMENT, DO FEES UNDER 627.428, DO THE FEES STOP RUNNING? AND I GUESS WHAT I AM HEARING FROM YOUR OPPONENT IS HE IS SAYING IT IS MORE AFTER SITUATION WHERE, YOU KNOW, THEY HAD AGREED TO PAY, BUT NOW IT WAS THE INSURED THAT WAS PUTTING SOME OTHER TERMS ON THAT WERE NEVER AGREED TO. HOW DO YOU RESPOND TO THAT?

AGAIN, JUDGE, WE ARE NOT SEEKING ANY FEES PRIOR TO OCTOBER 23, 1993. WE LOST THAT, AND WE ACCEPT THAT.

BUT YOU WERE.

YES.

THAT IS ONE --

YOU, CERTAINLY, THEN COULDN'T GET FEES FOR UNSUCCESSFULLY TRYING TO GET FEES.

NO. OF COURSE NOT. AND WE ARE NOT ASKING FOR FEES FOR UNSUCCESSFULLY TRYING TO GET FEES AT ALL, SO IN THAT SITUATION THE FEES CUT OFF AT THAT POINT IN TIME. BUT, JUDGE, IT WOULD DEPEND ON WHO WON THAT DISPUTE, AND THE HYPOTHETICAL YOU POSED, JUSTICE PARIENTE, IF THE INSURANCE COMPANY LOST THAT DISPUTE ABOUT THE RELEASE, WELL, THEN, THEY SHOULD HAVE TO PAY THOSE FEES OBVIOUSLY, BECAUSE THAT IS ANY DISPUTE UNDER THE POLICY.

CHIEF JUSTICE: YOUR TIME HAS EXPIRED.

CAN I SAY ONE LAST THING, YOUR HONOR?

CHIEF JUSTICE: IF IT IS VERY QUICK.

THIS IS A VERY CRITICAL POINT FOR INSUREDS IN FLORIDA TO BORROW FROM A NOTED PHILOSOPHER, IF NOT NOW, WHEN? IF NOT HERE, WHERE, AS TO THIS ISSUE.

CHIEF JUSTICE: THANK YOU ALL VERY MUCH. WE ARE GOING TO STAND IN RECESS FOR FIVE MINUTES BEFORE WE HEAR THE NEXT CASE.

MARSHAL: PLEASE RISE.