Macola v. Government Employees Insurance Co. Docket Number: 05-1021

CHIEF JUSTICE: THE NEXT CASE ON THIS MORNING'S DOCKET IS MACOLA VERSUS GOVERNMENT EMPLOYEES INSURANCE COMPANY. WE HAVE APPEARANCES FOR BOTH APPELLANT, MICHELLE MACOLA AND APPELLANT INGE QUIGLEY AND OF COURSE FOR GEICO. AS I UNDERSTAND YOU ARE GOING TO SPLIT YOUR TIME FOR THE FIRST ARGUMENT TEN MINUTES AND FIVE, BUT YOU WILL HAVE TO KEEP TRACK OF YOUR TIME ALTHOUGH I WILL REMIND YOU AFTER YOU ARE INTO TEN MINUTES. SO MR.^MOXON?

THANK YOU. MAY IT PLEASE THE COURT. I'M SHEA MOXON. I REPRESENT THE APPELLANT, MICHELLE MACOLA. SHE WAS INJURED IN AN AUTOMOBILE ACCIDENT INVOLVING APPELLANT FRANCIS QUIGLEY. WELL, IT IS HER DECEASED HUSBAND.

CHIEF JUSTICE: I UNDERSTAND NEITHER OF YOU HAVE ALLEGED STATUTORY CAUSE OF ACTION.

THAT'S CORRECT. BOTH OF US HAVE FILED COMPLAINTS ALLEGING THAT IT IS ENTIRELY UNDER THE COMMON LAW.

CHIEF JUSTICE: SO DO YOU THINK THAT WE NEED TO ANSWER THE QUESTION THE 11TH CIRCUIT HAS ASKED US, THAT IS, WHETHER THERE IS A CURE -- WHETHER A CURE WAS EFFECTED FOR THE STATUTORY CAUSE OF ACTION?

WELL, MY POSITION, I BELIEVE THAT IT IS NOT ENTIRELY NECESSARY TO ANSWER THAT FIRST QUESTION, BECAUSE UNDER THE SECOND QUESTION EVEN IF GEICO'S POSITION WERE ACCEPTED BY THE COURT AS FAR AS WHAT CONSTITUTES A CURE UNDER THE STATUTE, THAT CURE, IF IT IS TO BE SET AT JUST THE POLICY LIMITS, THAT COULD NEVER CONSTITUTE THE SATISFACTION OF THE COMMON LAW CLAIM FOR THIRD-PARTY BAD FAITH.

WELL, LET ME -- I KNOW THAT'S THE ARGUMENT HERE, BUT LET ME SEE IF WE HAVE AN AGREEMENT THAT THE CASES THAT ARE REALLY IMPLICATED HERE ARE THE COPE CASE, THE SIMBROSKI CASE AND THE REASON THOSE CASES ARE IMPLICATED HERE IS BECAUSE THEY SET OUT WHERE THE DUTY IN A BAD FAITH SITUATION GOES TO. CORRECT?

CORRECT.

AND THOSE CASES SET OUT THAT THE INSURER DUTY GOES TO THE INSURED, CORRECT?

THAT'S CORRECT.

AND THAT THE THIRD-PARTY CLAIM ONLY FLOWS THROUGH THE DUTY THAT IS OWD TO THE INSURED AND THAT'S WHAT COPE SAID, RIGHT?

YES.

AND SO DOESN'T IT FOLLOW THEN THAT IF THERE IS A SATISFACTION OF THE CLAIM OF THE INSURED THAT THEN THAT ENDS THE MATTER? THERE ISN'T ANY FURTHER CLAIM FOR BAD FAITH?

WELL, WHAT I WOULD SUBMIT IS THAT IF THE INSURED'S CLAIM UNDER THE COMMON LAW IS

SATISFIED THEN LIKEWISE THE INJURED THIRD-PARTY'S CLAIM UNDER THE COMMON LAW --.

CHIEF JUSTICE: BUT I THINK THAT IN THIS REALLY, I QUESTION WHAT WAS BEING DONE WHEN BEFORE THERE WAS AN EXCESS JUDGMENT AND AFTER THE TIME FOR THE PAYMENT OF THE POLICY LIMITS HAD EXPIRED THE LAWYER FOR THE INSURED FILES A STATUTORY OR FILES A NOTICE UNDER THE STATUTORY BAD FAITH. WHAT WERE THEY SEEKING TO HAVE CURED AT THAT TIME?

I THINK IT WAS A FAILURE TO SETTLE THE CLAIM. I DON'T THINK THE RECORD IS FULLY DEVELOPED ON THAT, BUT I THINK JUST BASED ON WHAT IS ALLEGED IN THE CIVIL REMEDY NOTICE AND THE CIRCUMSTANCES AT THE TIME WHAT HE WANTED WAS FOR THE INSURED'S RISK OF EXCESS LIABILITY TO BE PUT A STOP TO.

CHIEF JUSTICE: SO YOUR POSITION WOULD FIRST BE THAT THERE WAS NEVER A CURE SIMPLY BY PAYING THE INSURED. THE POLICY LIMITS, YOU GO DO WHATEVER YOU WANT WITH THIS 300,000. WE'RE SORT OF TAKING A HIKE HERE?

CORRECT.

CHIEF JUSTICE: BUT IF, AND GOING BACK, IF THAT WAS A VALID CURE, THEN IS THE STATUTORY CAUSE OF ACTION FOR BAD FAITH WAS THEN ELIMINATED, HOW COULD THE PERSON THEN ALSO PURSUE A COMMON LAW CAUSE OF ACTION? SO IN OTHER WORDS DOESN'T IT REALLY TURN ON WHETHER THE CURE THAT BY JUST TENDERING THE POLICY LIMIT THAT THE TIME HAD EXPIRED WAS EVEN A VALID CURE OF THE STATUTORY THIRD PARTY BAD FAITH CLAIM?

YES, THE ANSWER TO THE SECOND QUESTION IS GOING TO DEPEND ON HOW THIS COURT -- WHAT THIS COURT DETERMINES TO BE A SUFFICIENT CURE.

CHIEF JUSTICE: IT JUST SEEMS TO ME THIS IS A VERY ODD SITUATION. I MEAN I KNOW THERE ARE PLAINTIFF LAWYERS THAT MAY FILE A STATUTORY NOTICE AT THE TIME THEY ARE FILING THEIR DEMAND FOR THE POLICY LIMITS OR MAYBE AFTER THE JUDGMENT IS ENTERED, YOU KNOW, FILE A STATUTORY CAUSE OF ACTION BUT I'M TRYING TO FIGURE OUT WHO IN THEIR RIGHT MIND WOULD BE FILING A BEFORE THERE IS A JUDGMENT AND AFTER THE TIME IS EXPIRED A STATUTORY CAUSE OF ACTION. SO THIS IS SORT OF AN UNUSUAL SITUATION.

IT MAY BE UNUSUAL FACTUALLY. I THINK THE CIRCUMSTANCES, I THINK THE TIMING OF IT IF ANYTHING IT EXPRESSES THAT WHAT QUIGLEY WANTED DONE AT THAT TIME IS TO HAVE SOME PROTECTION FROM THIS RISK OF EXCESS LIABILITY THAT SHE WAS FACING AT THAT TIME.

ARE YOU GOING TO ADDRESS THE FIRST QUESTION?

WELL, YOUR HONOR, YES. UNDER THE FIRST QUESTION OUR POSITION IS THAT TENDERING ONLY A POLICY LIMITS IN RESPONSE TO THE CIVIL REMEDY NOTICE IS NOT GOING TO BE A SUFFICIENT CURE BECAUSE IT DOES NOTHING TO PROTECT THE INSURED FROM EXCESS LIABILITY. AND THE WHOLE POINT OF THIRD-PARTY BAD FAITH IS TO PROVIDE PROTECTION TO THE INSURED FROM THE EXCESS LIABILITY, AND IN THIS SITUATION.

WHAT IS YOUR POSITION AS TO WHAT THE INSURER NEEDS TO DO IN ORDER TO CURE?

WELL, IF THEY HAD BEEN ABLE TO ENTER INTO A NEGOTIATION AND REACH A SETTLEMENT AGREEMENT WITHOUT AT THAT POINT PERHAPS THEY WANTED TO LIMIT IT TO THE POLICY LIMITS. IF THEY HAD BEEN ABLE TO DO THAT, THAT WOULD HAVE CURED IT. FAILING THAT --

BUT THEN YOU ARE PUTTING IT OUT OF CONTROL OF THE INSURER. IT SEEMS LIKE THE STATUTE IS DESIGNED TO MAKE A CURE WITHIN THE CONTROL OF THE INSURER ONCE YOU SAY, WELL, IF

YOU WOULD HAVE NEGOTIATED WITH THE INSURED OF THE THIRD PARTY THEN THERE WOULD HAVE BEEN A CURE. THEN YOU ARE TAKING IT OUT OF THE CONTROL OF THE INSURER.

I UNDERSTAND THAT CONCERN AND THAT'S WHY AS AN ALTERNATIVE POSITION, THAT WE DEVELOP MORE FULLY IN OUR REPLY BRIEF IS THAT AT LEAST THE INSURANCE COMPANY SHOULD TENDER UP THE FULL VALUE OF THE INJURED PARTY'S CLAIM.

WILL IS NO WAY TO KNOW THAT, KNOW, AT THE POINT IN TIME. WHAT WE ARE REALLY DOING IS TRYING AND FROM MY POINT OF VIEW THIS STATUTE WAS PRIMARILY DESIGNED FOR FIRST -- TO FIRST-PARTY BAD FAITH CLAIMS, AND THERE AS WE SAID IN TALENT THE IDEA THAT BEFORE THE FIRST PARTY IS GOING TO HAVE THIS CLAIM FOR EXCESS AND THEY HAVE ALL OF THE CONTROL BECAUSE THEY ARE GETTING ALL OF THE MONEY THAT THEY OUGHT TO GIVE THE INSURER A CHANCE TO PAY THE CONTRACTUAL DAMAGES. IT JUST DOESN'T FIT WELL IN THE CONTEXT OF A THIRD PARTY WHERE YOU HAD ALL OF THESE, YOU KNOW, THESE RIGHTS OR AT LEAST AT COMMON LAW TO BE PROTECTED FROM AN EXCESS JUDGMENT.

WELL, IF I UNDERSTAND WHAT YOU ARE SAYING THERE IS SOME DIFFICULTY IN APPLYING THIS CURE PROVISION TO A THIRD-PARTY CONTACT. TO ADDRESS A POINT THAT THE INSURANCE COMPANY WOULDN'T BE ABLE TO KNOW WHAT THE FULL VALUE OF THE CLAIM IS. I WOULD SUBMIT THAT IT IS REALLY PART OF THE REGULAR COURSE OF BUSINESS FOR INSURANCE COMPANIES TO EVALUATE CLAIMS AND MAKE JUDGMENTS ABOUT WHAT THEY ARE WORTH AND TO TENDER OUT PAYMENTS.

BUT THE THIRD PARTY DOESN'T HAVE A CLAIM. THE THIRD PARTY DOESN'T HAVE A CLAIM AT THE POINT IN TIME THAT THIS NOTICE WAS SENT AND THE CURE, THE SENDING OF THE $300,000 CHECK, THE THIRD PARTY DIDN'T HAVE A CLAIM TO SETTLE AT THAT POINT AS FAR AS ANY CLAIM OF BAD FAITH, BECAUSE UNDER OUR CASE LAW THAT CLAIM DOESN'T ARISE UNTIL THERE IS AN EXCESS JUDGMENT.

WELL, THAT'S CORRECT. THE THIRD PARTY DOESN'T HAVE ANY CLAIM AGAINST THE INSURANCE COMPANY FOR BAD FAITH. WHAT I REFERRED TO BY THE FULL VALUE OF THE CLAIM I MEANT THE INJURED PARTY'S CLAIM AGAINST THE INSURED AT THAT POINT.

CHIEF JUSTICE: THAT'S WHAT I AM TRYING TO FIGURE OUT WHAT THIS LAWYER WHO I GUESS ISN'T APPEARING IN THE COURTROOM WAS TRYING TO GET CURED AT THE POINT WHEN THE DEMANDED ALREADY BEEN, TIME HAD EXPIRED, I ASSUME THE INSURANCE COMPANY EVEN AFTER THEY TENDERED THE POLICY LIMITS TO THE INSURED THEY DIDN'T WALK AWAY FROM THE DEFENSE OF THE THIRD-PARTY CLAIM, DID THEY? DID THEY CONTINUE TO DEFEND THE THIRD-PARTY CLAIM?

THEY DID CONTINUE TO DEFEND THAT.

CHIEF JUSTICE: KNOWING IT MIGHT BE AN EXCESS JUDGMENT?

YES.

CHIEF JUSTICE: I MEAN THERE IS NO WAY THE INSURANCE COMPANY ACTUALLY THOUGHT THAT THE CLAIM WAS GOING TO GO AWAY BY GIVING $300,000 TO THE INSURED AND SAYING GO TRY TO SETTLE THIS CASE?

CORRECT. AND THAT'S WHY I SUBMIT THAT THERE IS NO WAY THAT THEY ACTUALLY CORRECTED THE CIRCUMSTANCES GIVING RISE TO THE VIOLATION BY SIMPLY GOING THROUGH THAT GESTURE WHICH WASN'T GOING TO DO ANYTHING TO PROTECT THE INSURED.

CHIEF JUSTICE: WHAT I AM TRYING TO FIND OUT IS WHAT WAS THE INSURED TRYING TO DO AT

THAT POINT?

I HONESTLY DON'T KNOW AT THAT POINT, YOUR HONOR.

YOU ARE SAYING IN ORDER TO CURE, THE SURER HAS TO GUESS ABOUT WHAT THE EXCESS JUDGMENT IS GOING TO BE AND THEN PAY THAT GUESS?

WELL, IT WOULD BE BASED ON AN INVESTIGATION OF THE CIRCUMSTANCES, THE FACTS THAT ARE AVAILABLE TO THEM.

I UNDERSTAND, BUT THEY ARE GOING TO HAVE TO PREDICT WHAT A JURY WOULD DO IN THAT PARTICULAR CASE?

YES. YES.

AND WHAT IF IT GETS WRONG? IS IT THEN BAD FAITH? IT IS NOT A CURE IF THEY GUESS WRONG?

WELL, IF THEY GUESS HIGHER THAN THE JURY LIMIT THERE IS NOT GOING TO BE ANY BAD FAITH.

IN THIS CASE IF THEY WOULD HAVE TENDERED 600,000 THEY STILL WOULD NOT HAVE CURED?

THAT'S CORRECT. I THINK THAT WOULD BE --

SO THEN HOW IS AN INSURER EVER GOING TO ATTEMPT TO COMPLY WITH A STATUTE IN THESE KINDS OF CIRCUMSTANCES WHERE WHEN THEY ARE NOT CERTAIN IF THEY PAY OVER THE POLICY LIMITS THEY ARE GOING TO HAVE AFFECTED A CURE UNTIL AN EVENTUAL JUDGMENT IS RENDERED. WHY WOULD THEY EVER TAKE THAT RISK?

WELL, THEY WOULD TAKE THE RISK, SOMETHING I WANT TO EMPHASIZE IS THAT THIS CURE PROVISION IS REALLY INTENDED FOR INSURANCE COMPANIES THAT HAVE ALREADY COMMITTED BAD FAITH. SO THE REASON TO TAKE THAT WOULD BE TO AVOID THE POTENTIAL LIABILITY THEY FACE UNDER THE STATUTE.

CHIEF JUSTICE: I WANT TO REMIND YOU THAT YOU ARE INTO MR.^WASSON'S TIME.

CORRECT. IF I CAN FINISH ANSWERING THE QUESTION.

CHIEF JUSTICE: MAYBE THAT WOULD BE BETTER ANSWERED OR HE CAN ADDRESS THAT POINT. YOU ARE REPRESENTING THE INSURED.

QUIGLEY, YES, YOUR HONOR. ROY WASSON.

CHIEF JUSTICE: SO CAN YOU ANSWER JUSTICE CANTERO'S QUESTION ABOUT WHAT WAS THE INSURANCE COMPANY TO DO IN THAT CIRCUMSTANCE WHEN YOUR CLIENT FILED THIS NOTICE?

WELL, FIRST I WILL BE GLAD TO ANSWER THAT. FIRST I THINK THEY COULD HAVE EITHER AS COUNSEL FOR MACOLA SAID EITHER USED THEIR CLAIMS HANDLING, ADJUSTING SKILLS AND SO FORTH AND ANTICIPATED THE AMOUNT OF THE JUDGMENT WHICH WOULD NOT BE ALL TOGETHER A SHOT IN THE DARK SINCE THEY ARE GOING TO BE KNOWING WHAT THE, YOU KNOW, INJURIES ARE, DAMAGES ARE, WHAT THE CLAIM OF THE PLAINTIFF IS. BUT NUMBER TWO THEY COULD CURE THE CIRCUMSTANCES GETTING RISE TO BAD FAITH WHICH MEANS SETTLE THE CASE. BUT I DON'T THINK WE EVER GET THERE, BECAUSE I THINK THAT THE FIRST QUESTION IS TO RESPOND TO JUSTICE PARIENTE'S QUESTION, IT IS BASED ON THE FAULTY PREMISE THAT IT STATUTE APPLIES TO COMMON LAW BAD FAITH CASES. IT DOES NOT.

AND YOU ARE ARGUING THERE IS NO STATUTORY BAD FAITH CLAIM HERE?

THE STATUTE, LET ME ANSWER IT IN A ROUNDABOUT WAY. NUMBER ONE, THE STATUTE DOES NOT APPLY TO LIKE PREEMPT OR KNOCK OUT A COMMON LAW BAD FAITH CASE.

DID YOU MAKE A STATUTORY BAD FAITH CLAIM IN THIS CASE?

THERE COULD BE. YOU KNOW, I SEE PEOPLE FILING AND MAYBE THAT'S WHAT THE TRIAL LAWYER DID HERE TO TRY TO GET AN ADDITIONAL STATUTORY REMEDY IN ADDITION TO WHAT THEY WOULD ALREADY HAVE UNDER THE BAD FAITH, THE COMMON LAW BAD FAITH.

DID YOU FILE A MOTION FOR ATTORNEY'S FEES IN THIS COURT?

I HAVE. I REPRESENT THE INSURED.

DID YOU FILE A MOTION FOR ATTORNEY'S FEES?

WELL, I THINK I HAVE. I THINK I HAVE REPRESENTING THE INSURED UNDER THE STATUTE HERE.

CHIEF JUSTICE: BUT THE LAWYER THAT FILED THIS STATUTORY BAD FAITH, WHICH WAS AFTER THE TIME LIMIT FOR THE PAYMENT HAD EXPIRED AND BEFORE THERE WAS A JUDGMENT, WAS THIS THE INSURED'S PERSONAL COUNSEL OR WAS THIS COUNSEL THAT WAS ASSIGNED TO HIM BY THE INSURANCE COMPANY?

IT WAS A PERSONAL COUNSEL FOR THE INSURED.

CHIEF JUSTICE: WELL, I MEAN, IT WOULD SEEM TO ME IF BECAUSE THE LOGICAL FACT ABOUT THIS IS THAT IF IT HAD THE EFFECT OF CURING THE STATUTORY BAD FAITH, WHICH UNDER COPE MIGHT ELIMINATE THAT YOU CAN'T GO TO JUDGMENT ON BOTH STATUTORY BAD FAITH AND COMMON LAW AND HAS THE EFFECT OF WIPING OUT THE STATUTORY THEN IT MIGHT BE A MALPRACTICE ACTION AGAINST THE LAWYER FOR HAVING DONE SUCH A, YOU KNOW, A THING THAT HAD NO POSSIBLE HELP FOR HIS CLIENT, OTHER THAN THAT ELIMINATE HIS ABILITY TO GET THE INSURANCE COMPANY TO PAY THE EXCESS JUDGMENT.

WELL, LET ME BEFORE WE GET THERE LET ME GO BACK TO JUST MAKE TWO POINTS ON THE ARGUMENT THAT THIS STATUTE 624.155 DOES NOT HAVE ANYTHING TO DO WITH A COMMON LAW BAD FAITH CASE FOR TWO REASONS. NUMBER ONE, UNDER SUBSECTION 8 IT SAYS THE CIVIL REMEDY UNDER THIS SECTION DOES NOT PREEMPT ANY OTHER REMEDY OR CAUSE OF ACTION.

BUT YOU CAN'T GO TO JUDGMENT. IF YOU FILED TWO -- A LAWSUIT AFTER, SAY THEY DIDN'T PAY ON THE -- AFTER THE 60 DAYS, WELL, STATUTORY IN COMMON LAW AND YOU DECIDED THAT YOU WERE GOING TO GO TO JUDGMENT. YOU WERE GOING TO TRY TO GO TO TRIAL ON THE STATUTORY AND THERE WAS A JUDGMENT FOR THE INSURED, INSURER, I'M SORRY, YOU COULDN'T THEN GO AHEAD AND FILE A COMMON LAW CAUSE OF ACTION. THEY ARE BOTH COMING FROM THE SAME NUCLEUS OF OPERATIVE FACTS.

IF THERE IS ANY STATUTORY CAUSE OF ACTION THAT WOULD BE SPLITTING YOUR CAUSE OF ACTION. I WOULD AGREE WITH YOUR HONOR.

CHIEF JUSTICE: SO THEN THERE IS ONLY A TECHNICAL ISSUE ABOUT WHETHER IF THIS WAS A VALID CURE WHETHER THAT OPERATES UNDER COPE AS A SATISFACTION OF THE UNDERLYING BAD FAITH CLAIM. THAT'S WHERE THE TECHNICAL ARGUMENT THAT THE TRIAL JUDGE, THE DISTRICT COURT JUDGE BOUGHT IN THIS CASE, CORRECT?

YES. AND I WILL INTRODUCE YOU TO THE STATUTE BY ITS TERMS NOT APPLYING TO A COMMON LAW CAUSE OF ACTION. NUMBER TWO, IT -- THE COMMON LAW CAUSE OF ACTION WAS THOUGHT

RIGHT HERE AS I BELIEVE JUSTICE LEWIS POINTED OUT. MAYBE IT WAS JUSTICE WELLS, I APOLOGIZE. THAT UNTIL THERE IS AN EXCESS JUDGMENT ENTERED, THERE IS NO RIGHT, COMMON LAW CAUSE OF ACTION FOR BAD FAITH. HOW CAN YOU CURE --.

CHIEF JUSTICE: DOESN'T CUNNINGHAM ALLOW THAT TO BE DONE, THOUGH, TO TRY THE BAD FAITH BEFORE YOU GET THE JUDGMENT?

IF EVERYBODY AGREES TO IT AND THAT'S WHAT YOU STIPULATE TO DO WHICH WAS NOT DONE HERE. THERE WAS KNOLL RIPE.

CHIEF JUSTICE: WOULD IT BE DIFFERENT IF THE PLAINTIFF HAD FILED THIS IF THE STATUTORY NOTICE, AFTER AT THIS POINT IN TIME?

THAT WOULD TAKE US TO THE NEXT ITEM, BECAUSE THERE, YOU KNOW, THE PLAINTIFF BEFORE AN EXCESS JUDGMENT DOES NOT ORDINARILY HAVE A COMMON LAW CAUSE OF ACTION FOR BAD FAITH. I THINK THAT'S PRETTY CLEAR. SO IF YOU ASSUME THAT THEY DO HAVE A STATUTORY CAUSE OF ACTION THAT DOES TAKE US TO THE MERITS OF THE NEXT QUESTION OF WHETHER OR NOT THE PAYMENT OF THE POLICY LIMITS COULD BE A CURE. OF COURSE THAT WAS NOT DONE HERE SO EVEN IF THEY COULD, THAT WOULD NOT BE A CURE OF THE CLAIM HERE.

CHIEF JUSTICE: MR.^WASSON, YOU ARE SUBSTANTIALLY IN YOUR REBUTTAL. YOU ARE WELCOME TO GO ON.

YES, YOUR HONOR. I WILL JUST CONCLUDE BY SAYING HERE, YOU KNOW, THE CIRCUMSTANCES ARE EXPOSING THE INSURED, MY CLIENT, TO EXCESS JUDGMENT THEY DID NOT CURE THOSE CIRCUMSTANCES. THEY DID NOT PAY THE DAMAGES. THE DAMAGES, REAL QUICK, IN TALAT, THIS COURT IN TALAT SAID THAT THE DAMAGES, QUOTE, THAT THE CURE AND TO AVOID AN ACTION THE INSURED MUST PAY THE CLAIMS SOMETIMES IN EXCESS OF POLICY LIMITS.

CHIEF JUSTICE: THAT IS CITING TO THE DISTRICT COURT ORDER IN THAT CASE.

THAT WOULD BE TRUE IF THERE WAS AN EXCESS JUDGMENT. BUT THIS WAS CURED PRIOR TO THAT TIME.

SO THAT'S WHY THE STATUTE DOESN'T APPLY SO WE DON'T HAVE TO GET INTO WHETHER OR NOT --

AND WE RECENTLY SAID IN RUIZ THIS STATUTE APPLIES TO BOTH FIRST PARTY AND THIRD-PARTY ACTS. THIS COURT JUST SAID THAT WITHIN THE PAST TWO MONTHS.

I THINK THE CURE IS NOT A CURE UNLESS YOU PAY THE DAMAGES OR RESOLVE THE CIRCUMSTANCES. IN OTHER WORDS SETTLE THE CASE WITH THE PLAINTIFF AND KEEP THE INSURED, MY CLIENT, FROM BEING EXPOSED TO THE EXCESS JUDGMENT THAT THEY CAN'T CURE OTHERWISE. THAT'S WHAT THE COURT ANSWERED THE QUESTION APPROPRIATELY EVEN IF YOU HAVE TO REPHRASE THEM. THANK YOU.

CHIEF JUSTICE: MR.^YOUNG?

THANK YOU, YOUR HONOR. MAY IT PLEASE THE COURT, I'M RICHARD YOUNG ON BEHALF OF GOVERNMENT EMPLOYEES INSURANCE COMPANY. THE FIRST QUESTION PRESENTED TODAY IS WHAT IS THE MEASURE OF A CURE WHEN THE CIVIL REMEDY NOTICE STATUTE HAS BEEN INVOKED IN A THIRD-PARTY CONTEXT BEFORE ANY EXCESS JUDGMENT IS ENTERED? THAT QUESTION HAS ALREADY BEEN ANSWERED. FILES VERSUS HAS ANSWERED THAT QUESTION AND THE COURT DECLARED THAT THE PAYMENT OF THE POLICY LIMITS WAS A PROPER REMEDY IN THAT CASE.

CHIEF JUSTICE: THAT'S THE 5TH DISTRICT CASE?

YES, MA'AM. THAT IS THE 5TH DISTRICT CASE.

THE THIRD DISTRICT HELD DIFFERENTLY IN A DIFFERENT CONTEXT SIGNIFICANTLY. IN CLAUSE THERE WAS NO CIVIL REMEDY JUDGMENT AT THE TIME IT WAS FILED. THE ONLY THING THEY HAD WAS THE POLICY LIMIT.

CHIEF JUSTICE: LET'S SORT OF TO THE REAL LIFE REALITY HERE WHICH IS THAT FIRST OF ALL AND I MUST SAY THIS AS A FRIENDLY QUESTION. I'M PERPLEXED TO SEE WHERE THE ACTUAL BAD FAITH IS IN THIS CASE OF YOUR CLIENT IN TERMS OF THEY OFFERED THE 300, THE PROPERTY DAMAGE WASN'T PURSUED, BUT I GUESS WE HAVE BEEN THERE.

WE SHARE YOUR HONOR'S VIEW.

CHIEF JUSTICE: I JUST DON'T SEE IT. SO I DON'T WANT TO BE ENGAGING IN AN ACADEMIC EXERCISE, BUT I SURE DON'T SEE WHERE THIS BAD FAITH IS, BUT ASSUMING THERE IS ONE AFTER THEY DIDN'T PAY THE WHATEVER THEY WERE SUPPOSED TO PAY WITHIN THE TIME LIMIT, THE PLAINTIFF THEN WAS IN A SITUATION WHERE THEY WERE PURSUING AN EXCESS JUDGMENT. THE DEFENDANT, THE INSURED, NEED WAS NOT TO GET THE POLICY LIMITS PAID BUT TO ELIMINATE THE RISK OF THE EXCESS JUDGMENT. NOW, IF THE INSURED HAD FILED AFTER THE EXCESS JUDGMENT AND WHAT WOULD IT HAVE TAKEN THEN TO CURE THE BAD FAITH AFTER THE EXCESS JUDGMENT HAD TAKEN PLACE?

THAT WOULD DEPEND ENTIRELY ON THE VIEW WE TAKE OF THE STATUTE. IF YOU TAKE THE VIEW THIS COURT EXPRESSED IN TALAT, WHICH SHOW THE POLICY LIMITS STILL. IF YOU TAKE THE VIEW THE 3RD DISTRICT EXPRESSED IN HOLLER THEN IT WOULD BE THE EXCESS JUDGMENT ITSELF.

CHIEF JUSTICE: SINCE WE KNOW THAT THIS STATUTE CREATED A CAUSE OF ACTION FOR FIRST PARTY BAD FAITH CASES, WAS IT INTENDED TO LIMIT THE CAUSE OF ACTION FOR COMMON LAW BAD FAITH. I TRYING TO SEE HOW, YOU KNOW, IT WOULD BE REALLY A TRAP, I MEAN IF WE DECIDED THIS IN THIS CASE, YOU WOULD AGREE THAT NO GOOD LAWYER REPRESENTING AN INSURED WOULD EVER HAVE A STATUTORY, WOULD EVER FILE A STATUTORY CAUSE OF ACTION BECAUSE AGAIN THEY ARE GOING TO STILL REMAIN EXPOSED TO THE EXCESS JUDGMENT BUT IS THAT CORRECT?

WELL, JUDGE, I DON'T KNOW THAT I WOULD AGREE THAT NO LAWYER WOULD EVER DO IT. IT WOULD BE A RISKY GAMBLE NO QUESTION ABOUT IT, BUT I THINK WE HAVE TO START WITH THE PREMISE WHY IS THE PLAINTIFF PURSUING THIS EXCESS? WHY IS THE PLAINTIFF REFUSING TO SETTLE? WHAT IS HIS PURPOSE HERE? IT IS EXACTLY AS JUSTICE ALDERMAN INDICATED IN THE THOMPSON CASE, NO GUITERREZ, HE SAID THE INJURED PARTY BENEFITS IF HE CLAIMS THE INSURER BREACHED THE DUTY SO THE INJURED PARTY IS ATTEMPTING TO GET AN EXCESS JUDGMENT. IF THE INSURED INVOKES THIS REMEDY THE INJURED THIRD PARTY IS COMPLETELY NOT INCENTIVED TO PURSUE THIS. NOW HE CAN'T GET AN EXCESS JUDGMENT TO COLLECT AGAINST THE INSURER.

FROM A STATUTORY?

COMMON LAW.

WHY DOES THE COMMON LAW FALL IF THE STATUTE CONTAINS A PROVISION THAT THIS DOES NOT LIMIT THE COMMON LAW?

COPE AND ZUBRASKI BOTH STAND FOR THE PROPOSITION THAT 624.155.155 IS A COD IF I

INDICATION OF THE COMMON LAW THIRD-PARTY RIGHT OF BAD FAITH. IF YOU ELIMINATE OR CURE THE BREACH OF DUTY UNDER THE STATUTE UNDER THAT SUBSECTION YOU ARE CURING THE VERY SAME DUTY YOU OWE UNDER THE COMMON LAW.

NOT SECURING THE SAME DUTY AT ALL BECAUSE THEY OFFERED TO SETTLE FROM THE PLAINTIFF'S SIDE HAS EXPIRED SIX MONTHS AGO SO YOU ARE NOT AT ALL ADDRESSING WHAT HAS OCCURRED AND WHAT WAS DEMANDED. ALL YOU ARE SATISFYING IS WHAT IS DEMANDED UNDER THE STATUTE SIX MONTHS, A YEAR LATER, TWO YEARS LATER. YOU ARE NOT ADDRESSING THE SAME ONE. I WANT YOU TO ADDRESS THE STATUTORY PROVISION. DOES THIS STATUTE SPECIFICALLY STATE THAT IT DOES NOT IMPACT THE THIRD PARTY CLAIMS, COMMON LAW CLAIMS?

I THINK THE STATUTE IS CLEAR WHEN IT SAYS YOU CANNOT GET A REMEDY UNDER BOTH THE STATUTE AND THE COMMON LAW.

IS THAT ALL IT SAYS?

THAT IS A CLEAR INTENT.

IS THAT ALL IT SAYS, COUNSEL?

NO, SIR.

WHAT DOES IT SAY ABOUT COMMON LAW ACTIONS AND STATUTORY ACTIONS? WHAT DOES IT SAY?

IT INDICATES THROUGH THE CASE LAW HERE AND THE LEGISLATURE --

WHAT DOES THE STATUTE SAY?

IT EMBODIES THE EXACT STANDARD AS THE COMMON LAW AND IT'S ONLY REFERENCE TO THE COMMON LAW CLAIM IS YOU CANNOT HAVE A REMEDY UNDER BOTH. IT DOES SAY IT DOES NOT PREEMPT THE COMMON LAW.

DOES IT TALK IN TERMS OF JUDGMENTS UNDER BOTH? YOU CAN'T HAVE A JUDGMENT UNDER BOTH?

IT INDICATES YOU CANNOT OBTAIN A JUDGMENT UNDER BOTH, UNDER THE COMMON LAW AND UNDER THE STATUTE.

BUT IT DOESN'T SAY YOU CAN'T PURSUE THE COMMON LAW REMEDY, IT JUST SAYS EVENTUALLY YOU CAN'T GET A JUDGMENT FOR BOTH?

CERTAINLY. BUT WE HAVE A LOT OF DECISIONAL LAW THAT'S BEEN DECIDED ALREADY THAT TALKS ABOUT THAT VERY ISSUE AND I THINK JUDGE LEZARA COMMENTED ON THIS AS WELL. I THINK THIS IS WHAT THEY WERE SAYING WHEN THEY SAID IT MAKES NO SENSE WE WOULD ESTABLISH THESE NOTICE AND CURE PROVISIONS THAT THE INSURANCE COMPANY WOULD CURE THE ALLEGED BAD FAITH AND THEN BE SUED ANYWAY ON THE VERY SAME ALLEGATIONS IN A COMMON LAW CLAIM.

CHIEF JUSTICE: THE PROBLEM IS, I SEE IT AS A PROBLEM THIS ALL WORKS VERY WELL IN THE FIRST PARTY CONTEXT WHICH AGAIN IF YOU READ SUBSECTION 8 THE VERY NEXT SENTENCE SAYS WHEN THEY SAID THEY CAN'T GET A JUDGMENT UNDER BOTH REMEDIES, IT SAYS THIS SECTION SHALL NOT BE CONSTRUED TO CREATE A COMMON LAW CAUSE OF ACTION SO WE KNOW THERE WAS NO FIRST-PARTY BAD FAITH CAUSE OF ACTION. COMMON LAW. SO THIS STATUTE IS

GRANTING RIGHTS TO A FIRST-PARTY AGAINST AN INSURANCE COMPANY AND IT MAKES A LOT OF SENSE THAT THE STATUTE THEN IS GIVING THE INSURANCE COMPANIES SORT OF THIS 60-DAY PERIOD TO PAY UP OR BE SUBJECT TO SOME ADDITIONAL REMEDIES. BUT WE ALSO KNOW THAT THERE WAS BEFORE THIS STATUTE A CLEAR COMMON LAW CAUSE OF ACTION FOR BAD FAITH. SO OF WHAT YOU ARE SAYING IS THAT THE INSURANCE, THAT WHAT THE LEGISLATURE WAS INTENDING TO DO WAS LET AN INSURED FILE ONE OF THESE 624.155 NOTICES, AND THEN IF THE POLICY LIMITS WERE PAID AGAIN WIPE OUT BOTH THE CAUSE OF ACTION FOR -- AGAINST THE INSURED AND THE INSURED PARTY IT WOULD ACTUALLY BE TAKING AWAY RIGHTS THAT EXISTED IN COMMON LAW. WOULD YOU AGREE WITH THAT?

NO, I WOULDN'T, YOUR HONOR.

CHIEF JUSTICE: I MEAN, IN OTHER WORDS THERE IS NO -- I DON'T HAVE TO UNDER THE COMMON LAW AFTER I HAVE GIVEN THE DEFENDANT A CHANCE TO SETTLE, I DON'T HAVE TO THEN REOPEN IT FOR ANOTHER 60 DAYS, DO I?

NO, YOU DON'T HAVE TO, JUDGE, BUT YOU CAN WHICH IS EXACTLY WHAT THE STATUTE ALLOWS YOU TO DO.

CHIEF JUSTICE: BUT I DIDN'T DO THAT. THE INJURED PARTY DIDN'T DO THAT. THE INSURED WHO WAS IN A POSITION OF KNOWING THAT THE POLICY LIMITS TIME PERIOD HAD EXPIRED AND FOR SOME REASON FILED THIS STATUTORY BAD FAITH, AND NOW YOU ARE SAYING THAT THAT WOULD ACTUALLY PROTECT THIS DEFENDANT FROM ANY EXCESS JUDGMENT; IS THAT CORRECT?

WELL, YOUR HONOR, I DON'T THINK WE CAN START FROM THE PREMISE THAT THE INSURER'S OBLIGATION IS TO ALWAYS PREVENT THE ENTRY OF EXCESS JUDGMENT. THAT'S NOT AN ATTAINABLE STANDARD UNDER ANY SET OF CIRCUMSTANCES. THERE ARE CASES I HAVE PERSONALLY HANDLED MANY, I'M SURE THE COURT HAS SEEN THEM, IN WHICH AN INJURED THIRD PARTY WILL NOT SETTLE A CASE, NO AMOUNT OF MONEY WILL SUFFICE BECAUSE YOU HAVE KILLED THEIR ONLY CHILD, YOU HAVE CAUSED HARM.

CHIEF JUSTICE: THAT'S A QUESTION UNDER GUITERREZ WHETHER A REASONABLE INSURER UNDER ALL OF THE CIRCUMSTANCES WOULD HAVE SETTLED THE CASE IF THEY HAD AN OPPORTUNITY TO DO SO. I SORT OF AGREE WITH THE BASIC PREMISE THAT I THOUGHT GEICO LOOKED REASONABLE. THEY TENDERED THAT 300,000 RIGHT AT THE BEGINNING BUT NOW WE ARE GOING TO THIS ISSUE OF WHETHER SINCE THIS IS APPLYING TO ALL CASES THIS IDEA THAT IF A SUBSEQUENT NOTICE IS FILED AND THEY PAY THE POLICY LIMITS, SAY IT IS FILED A YEAR LATER, THEN THERE IS NO EXPOSURE TO A COMMON LAW CAUSE OF ACTION BROUGHT BY EITHER THE INSURED OR THE INJURED PARTY, AND YOU ARE SAYING THERE WOULDN'T BE -- YOU WOULD BE INSULATED FOR ALL TIMES BECAUSE YOU PAID THE POLICY LIMITS WHEN THE NOTICE WAS FILED?

PREJUDGMENT, ABSOLUTELY WE WOULD SAY THAT, YOUR HONOR. THE STATUTE ITSELF DOES NOT DISTINGUISH BETWEEN A THIRD-PARTY AND A FIRST-PARTY IN TERMS OF WHO FILES THE NOTICE. THE NOTICE CAN BE FILED BY EITHER. ONCE THE NOTICE IS FILED THE CURE PROVISIONS ARE INVOKED IN THE STATUTE. NOW, WE WILL AGREE WITH YOUR HONOR THAT WHEN THIS STATUTE WAS EXTENDED TO THE THIRD PARTY CONTEXT IN AUTO OWNERS VERSUS CONQUEST IT WAS NOT A PERFECT FIT BY ANY STRETCH. IT STILL HAS BEEN EXTENDED. THE CURE PROVISIONS MUST BE IN EFFECT. THE STATUTE CAN'T BE IGNORED. IT DOES NOT SAY THAT A THIRD PARTY CAN'T USE IT. IT DOESN'T SAY A THIRD PARTY CAN'T USE IT. IT DOESN'T SAY IN A THIRD-PARTY CONTEXT ONLY THE THIRD-PARTY CAN USE IT. ANYONE CAN INVOKE IT. THE QUESTION I HEARD SEVERAL TIMES WHY WOULD ANYONE INVOKE IT? WELL, WE CAN'T START WITH THE PREMISE I WOULD HOPE THAT THE INJURED THIRD PARTY NEVER REALLY WANTS TO SETTLE, AND ALL THEY ARE TRYING TO DO IS COME UP WITH A SCENARIO WHERE, OKAY, WE GAVE YOU YOUR ILLUSARY

OPPORTUNITY, NOW WE'VE GOT YOU IN BAD FAITH AND YOU'VE GOT TO PAY WHATEVER WE CLAIM WHICH IS WHAT QUIGLEY WANTS YOU TO SET THE STANDARD AT IN ORDER TO CURE. WHY WOULDN'T AN INJURED THIRD PARTY WHO WANTS TO SETTLE AND BELIEVES THE COMPANY DID NOT DO WHAT IT SHOULD HAVE DONE FILED THIS NOTICE TO SAY, OKAY, HERE'S A 60-DAY OPPORTUNITY TO DO IT. WHY WOULDN'T THEY DO THAT? AND THE INSURED HAS THE RIGHT TO DO THE SAME THING. WHETHER IT IS A SMART MOVE ON THE INSURED'S PART OR NOT SHOULD NOT BE THE REASON TO SETTING THE POLICY.

CHIEF JUSTICE: THAT IS THE DIFFERENCE IS THAT WHEN THE FIRST PARTY FILES, THEY REALLY ARE THE PERSON THAT IS GOING TO BE GETTING THE MONEY. HOW DID IT HELP MR.^QUIGLEY TO GET THE $300,000 IN THE POLICY LIMITS WITH THE GEICO SAYING JUST DO WITH IT WHAT YOU CAN, SEE IF YOU CAN GO SETTLE WITH THE INSURED? WE COULDN'T DO IT. I MEAN, I WOULD THINK YOU COULD USE IT IN A COMMON-LAW BAD FAITH CASE TO SHOW AGAIN HOW TOTALLY REASONABLE YOU WERE NOT ONLY THAT YOU TENDER IT THE FIRST TIME BUT YOU TENDERED IT THE SECOND TIME AND AS EVIDENCE OF YOUR GOOD FAITH, BUT AS FAR AS IT ACTUALLY BEING A BAR TO THE COMMON LAW BAD FAITH CLAIM SEEMS TO ME IF WE INTERPRET THE STATUTE THAT WAY WE HAVE ACTUALLY CONSTRUED THE STATUTE TO TAKE AWAY RIGHTS THAT BOTH THE INSURED AND THE INJURED PARTY HAD PRIOR TO THE INITIAL ASIAN OF THE STATUTE.

FINALLY I BELIEVE IN THIS CASE WHEN THE TENDER WAS MADE AT THE CURE WAS EFFECTED THE CASE WOULD HAVE ENDED AND THE CASE WOULD HAVE SETTLED FOR THE POLICY LIMITS BECAUSE THE PLAINTIFF NOW WOULD KNOW BY OPERATION OF THE LAW OF THIS COURT THAT PURSUING A BAD FAITH CLAIM BASED ON I THINK AS THE COURT IS COMMENTING VERY, VERY SLIM FACTS IS NOT GOING TO BE SUCCESSFUL.

CHIEF JUSTICE: SO LET ME ASK YOU THIS SCENARIO. THIS TIME IT WAS THE PRIVATE COUNSEL. WHAT IF NEXT TIME AND AS THE POLICY LIMITS HAVE BEEN, THE TIME PERIOD HAS EXPIRED, SAY IT WAS A $10,000 AND THEN IT WAS A MILLION DOLLAR CASE AND THESE 0 DAYS FOR THE POLICY LIMITS MAY HAVE EXPIRED, WHAT WOULD STOP THE INSURANCE COMPANY FROM HIRING SEPARATE COUNSEL AND SAYING TO THE INSURED, GO AHEAD AND FILE ONE OF THESE WITH US, WE'LL PAY YOU THE TEN AND THEN WE ARE ALL CLEAR? WOULDN'T THAT BE -- I MEAN I CAN'T IMAGINE WHY YOU WOULDN'T DO THAT?

I THINK ETHICAL -- ETHICAL OBLIGATIONS WOULD BE THE ONE NONE THING. I THINK IF THE INSURANCE COMPANY INSTRUCTED THE LAWYER TO LEAD HIM DOWN THE GARDEN PATH.

CHIEF JUSTICE: YOU ARE AGREEING THAT FILING THIS 624.155 NOTICE WAS CONTRARY TO THE INSURED'S INTEREST?

NO, MA'AM. I'M SUGGESTING THAT IF IN YOUR QUESTION YOU PREMISED THAT IT WOULD BE CONTRARY TO THEIR INTERESTS. SO I'M AGREEING THAT IF THAT'S THE PREMISE.

CHIEF JUSTICE: NO, YOU ARE SAYING IT WOULD ELIMINATE THE BAD FAITH CASE SO I'M SAYING IT WOULD ALWAYS BE IN THEIR INTEREST TO DO IT. IF WHAT THE LEGISLATURE AND I DON'T KNOW, MAYBE THEY COULD DO THIS, INTENDED TO DO IS TO REALLY SAY, YOU KNOW, WE'RE NOT LETTING PLAINTIFFS CONTROL THIS TIME PERIOD. WE'RE GOING TO GIVE ANOTHER TIME PERIOD AND IT IS GOING TO BE EITHER 60 DAYS OR 30 DAYS AND AFTER THAT TO SETTLE AGAIN, AND IF THAT WERE WHAT THE LEGISLATURE WAS INTENDING TO DO, MAYBE IT WOULD OR WOULDN'T, YOU KNOW, MEET CONSTITUTIONAL MUSTER.

WELL, YOUR HONOR, I CAN'T NECESSARILY SPEAK FOR EVERY INSURANCE COMPANY THAT IS OUT THERE BUT I DO REPRESENT A NUMBER, AND THE INSURED ULTIMATELY MAKES THE DECISION WHETHER TO FILE THAT NOTICE IF IT IS THE INSURED FILING. IT WON'T BE THE LAWYER FOR THE INSURED. HE WILL HAVE TO HAVE HIS CLIENT'S PERMISSION. THE INSURED IS IN EVERY CASE IN WHICH I HAVE BEEN INVOLVED COUNSELED ABOUT THE RIGHT TO OBTAIN ADVICE FROM

PERSONAL COUNSEL. I DON'T THINK THERE IS A REAL DANGER OF INSURANCE COMPANIES ATTEMPTING TO USE THIS STATUTE IN A WAY THAT IS GOING TO CAUSE MORE HARM TO THEIR INSUREDS.

CAN WE WALK THROUGH YOUR INTERPRETATIONS SO I CAN UNDERSTAND THE PARAMETERS?

YES, YOUR HONOR.

IN THIS CASE IT WAS A DEMAND BY THE INSURED AFTER THE TIME HAD EXPIRED BUT BEFORE ANY KIND OF JUDGMENT?

YES, WHAT HAD HAPPENED ACTUALLY.

THAT'S FINE. LET'S GO THROUGH THE PARAMETERS NOW. WHAT IF A JUDGMENT HAD ALREADY BEEN ENTERED ON THE CLAIM BUT NO BAD FAITH JUDGMENT? IF HAD INSURED HAD DONE THIS WOULD THAT THEN TERMINATE EVERYTHING ACCORDING TO YOUR VIEW?

WELL, JUDGE, I THINK THAT AFTER THE EXCESS JUDGMENT IS ENTERED THERE IS LANGUAGE IN TALAT WHICH THIS COURT QUOTED TO THAT SUGGESTS SOMETIMES IN EXCESS OF THE JUDGMENT IN THE THIRD-PARTY CONTEXT.

AND YOUR THEORY AS TO THE OPERATION ONLY AFTER THE JUDGMENT AGAINST THE INSURED HAS BEEN ENTERED THEN?

I BELIEVE AT THAT POINT IT IS A MUCH TOUGHER AND CLOSER QUESTION AND I THINK THAT THE COURT CERTAINLY COULD HAVE A BASIS FOR SAYING IT WOULD BE THE EXCESS AFTER THE ENTRY OF THE EXCESS BUT CERTAINLY NEVER BEFORE. THE COURT STILL WOULD HAVE JUST AS SOLID A BASIS FOR SAYING, NO, IT REMAINS THE CONTRACTUAL AMOUNT DUE BECAUSE OF THE FACT THAT BAD FAITH STILL IS NOT PROVEN. THE EXCESS JUDGMENT ESTABLISHES THE DAMAGES BUT NOT THE BAD FAITH HAS OCCURRED. IN A PREJUDGMENT CONTEXT, THOUGH, WHICH IS WHAT WE HAVE HERE TO ANSWER THE INSURANCE COMPANY, THEIR CONTRACTUAL OBLIGATION UNDER POWELL VERSUS PRUDENTIAL IS WHEN LIABILITY IS CLEAR AND DAMAGES ARE ARE CERTAIN TO INITIATE SETTLEMENT NEGOTIATIONS. THEIR DUTY IS NOT TO SETTLE, BECAUSE THAT REQUIRES TWO SIDES. THAT REQUIRES THE PLAINTIFF TO AGREE TO SETTLE. SO THE COMPANY'S OBLIGATION IS TO TRY TO SETTLE. ONCE THE COMPANY DISCHARGES THAT OBLIGATION THEY'VE DISCHARGED THEIR COMMON LAW DUTY AND NOW THEY HAVE TO DEFEND IF THE OTHER SIDE WON'T SETTLE.

ARE YOU SAYING THAT UNDER THE STATUTE THAT HAD THE INSURED MADE A DEMAND THAT NOT FOR A NUMBER, BUT THAT YOU ENGAGE IN NEGOTIATIONS WITH THIS PERSON WHO IS SUING ME, AND LEFT OUT THE NUMBER, THAT WOULD HAVE BEEN A DIFFERENT SCENARIO?

I THINK, JUDGE, THAT WOULD ACTUALLY FRUSTRATE THE CURE PROVISION OF THIS STATUTE COMPLETELY.

BUT THAT'S WHAT IS OUT THERE.

THAT'S WHAT THE SUGGESTION IS FROM MISS MACOLA AND MISS QUIGLEY WE SHOULD GO BACK AND NEGOTIATE A SETTLEMENT BUT THAT BEGS THE QUESTION. IF WE WERE ABLE TO NEGOTIATE A SETTLE IT WOULD HAVE BEEN DONE. MR.^ROSE SPENT 120 DAYS AVOIDING GEICO'S REPRESENTATIVES. HE WAS TOLD, MIND YOUR OWN BUSINESS.

WHAT DO WE KNOW ON THIS RECORD, YOU HEARD REALLY AN INITIAL STATEMENT BY THE CHIEF JUSTICE WITH REFERENCE TO CONCERN ABOUT THIS EARLIER NEGOTIATIONS. DO WE KNOW ANYTHING ON THIS RECORD AS FAR AS ANY ATTEMPT TO DECIDE AS A MATTER OF LAW BY

SUMMARY JUDGMENT OR OTHERWISE THE RESOLUTION OF THE UNDERLYING COMMON LAW BAD FAITH CLAIM? THAT IS, THAT, YOU KNOW, THE NORMAL THING ABOUT ALLEGING AN EMOTION -- IN A MOTION FOR SUMMARY JUDGMENT THAT THERE WAS A DEMAND FOR THE POLICY LIMITS, POLICY LIMITS WERE TENDERED, BUT NOW THE POLICY LIMITS WERE REJECTED AND THE CASE WENT ON. WAS THERE ANY ATTEMPT TO RESOLVE THAT ISSUE AS A MATTER OF LAW WHICH THEN WOULD SORT OF MOOT THESE LEGAL ISSUES AND I'M NOT SURE IN THE CIRCLE, YOU KNOW, HOW THAT ALL WORKS OUT, BUT TELL ME ABOUT THAT.

SURE. I WOULD BE HAPPY TO, JUDGE.

IT WASN'T AN ISSUE OF BAD FAITH. THE BAD FAITH ISSUES WEREN'T TRIED WHETHER THE COMPANY ACTED IN GOOD FAITH OR BAD FAITH. THE QUESTION WAS, WAS THERE A SETTLEMENT AND THE COURT RULED THAT BECAUSE THERE WASN'T A MIRROR IMAGE ACCEPTANCE OF THE DEMAND THEN YOU DIDN'T HAVE A SETTLEMENT. THERE WAS NO TO MY UNDERSTANDING THERE WAS NO JUDGMENT PASSED ON WHETHER OR NOT ANYBODY HAD ACTED IN GOOD FAITH, BAD FAITH, ANYTHING LIKE THAT.

CHIEF JUSTICE: BUT WASN'T THERE -- DIDN'T THE 11TH CIRCUIT REMAND THIS TO THE DISTRICT COURT TO SEE IF THERE WERE ISSUES OF FACT ON THE BAD FAITH?

HE DID. AND THE DISTRICT COURT CONCLUDED THAT THERE WERE SUFFICIENT MATERIAL ISSUES OF FACT TO GO TO A JURY BUT NOT MAKING DECISIONS AS I THINK MY COLLEAGUES HAVE SUGGESTED ON WHETHER THERE WAS OR WAS NOT BAD FAITH.

THAT'S WHERE THAT WAS?

YES, SIR. SO IT WENT BACK UP TO THE 11TH AND THAT'S THE REASON THEY SENT IT THERE.

THANK YOU VERY MUCH.

THAT WAS WHAT I WAS GOING TO POINT OUT, BUT AS I UNDERSTAND YOUR ARGUMENT AND YOUR BRIEFS IS THAT YOUR ARGUMENT HONES IN ON WHAT THIS COURT STATED IN COPE THAT WE DID NOT EXTEND THE DUTY OF GOOD FAITH BY AN INSURER TO ITS INSURED TO DUTY OF AN INSURER TO A THIRD PARTY?

ABSOLUTELY, YOUR HONOR, AND THE FACT THAT THE DUTIES AND THE STANDARDS ARE EXACTLY THE SAME IN BOTH TYPES OF ACTION. IF YOU CURE A 624.1551B1 ALLEGATION. I BELIEVE IF WE LOOK AT ZEBROWSKI IT SAYS 1B 1 IS A CODIFICATION OF THE THOMPSON AND COPE STANDARDS SO WE ARE BASICALLY TALKING ABOUT THE SAME ALLEGATION OF BRIEF OF DUTY IN BOTH CIRCUMSTANCES. THEREFORE, IF THE COURT RULES AS I THINK THAT IT CERTAINLY SHOULD THAT A CURE WAS EFFECTED BY TENDERING THE POLICY LIMITS IT NECESSARILY CURED THE COMMON LAW CLAIM AS WELL. OTHERWISE, WE HAVE ENTERED THE REALM AND I THINK THE JUDGE PUT IT THE BEST WHEN HE SAID IT MAKES NO LOGICAL SENSE THAT THE FLORIDA LEGISLATURE WOULD AS STATED IN ZEBROWSKI CODIFY A CAUSE OF ACTION AGAINST AN INSURANCE COMPANY BASED ON THOMPSON AND COPE AND THEN PROMULGATE A PROCEDURE BY WHICH AN INSURANCE COMPANY WOULD CURE THE UNDERLYING FACTS AND CIRCUMSTANCES GIVING RISE TO SUCH CAUSE OF ACTION BUT STILL ALLOW THE INSURANCE COMPANY TO BE SUBJECTED TO A CIVIL ACTION FOR DAMAGES UNDER THE COMMON LAW BASED ON THE CURED UNDERLYING FACTS AND CIRCUMSTANCES AND THAT'S REALLY WHAT WE HAVE TO ANSWER HERE TODAY. ARE WE GOING TO SAY THAT THE CURE UNDER THE STATUTE IS AN ILLUSION.

THIS CASE REALLY IS ON A VERY NARROW SET OF FACTS AND THAT IS UNDER THE CIRCUMSTANCE IN WHICH THERE IS A CURE NOTICE PRIOR TO THE TIME THAT THERE IS AN EXCESS JUDGMENT?

YES, YOUR HONOR.

CHIEF JUSTICE: BUT I GUESS I'M THINKING IF WE HOLD THAT THE CURE OPERATES AS A SATISFACTION UNDER COPE, THEN THERE WOULD BE NO REASON IN THE WORLD THAT INSUREDS, YOU KNOW, UPON GOOD ADVICE WOULDN'T ALWAYS FILE THESE BEFORE JUDGMENT, BECAUSE IT WOULD ELIMINATE THEIR EXPOSURE TO A COMMON-LAW BAD FAITH CASE.

I THINK CERTAINLY THERE WOULD BE GOOD REASONS FOR THIRD PARTIES TO FILE THESE IF THEY TRULY WANT TO SETTLE.

CHIEF JUSTICE: I'M TALKING ABOUT THERE WOULD BE NO REASON FOR AN INSURED, I MEAN IF I WERE THE LAWYER, IF THAT'S WHAT WE HAVE DECIDED, THAT IS THAT THE CURE OPERATES AS A SATISFACTION, A LAWYER ADVISING AN INSURED WOULD SAY, OF COURSE FILE ONE OF THESE, BECAUSE, YOU KNOW, MOST LIKELY THE INSURANCE COMPANY IS, YOU KNOW, IF THEY PAY IT YOU ARE -- THERE IS NO BAD FAITH.

WELL, CERTAINLY, JUDGE. I THINK ONE THING I WOULD LIKE TO POINT OUT THERE IS NO PRESUMPTION THAT THERE IS GOING TO BE AN EXCESS HERE. THERE SHOULD NOT BE A PRESUMPTION OF THAT. IN ZEBROWSKI A NOTICE WAS FILED.

AND BY FILING A NOTICE UNDER THIS STATUTE, THE INSURED DOESN'T ELIMINATE THE EXPOSURE TO THE THIRD PARTY FOR AN EXCESS JUDGMENT?

NOT THEIR EXPOSURE. THEY DISINCENTIVE A PLAINTIFF TO CONTINUE PURSUING BECAUSE THE PLAINTIFF CAN'T COLLECT AGAINST THE INSURANCE COMPANY IN THAT SITUATION. WE WOULD SUGGEST THAT BOTH CERTIFIED QUESTIONS SHOULD BE ANSWERED IN THE AFFIRMATIVE.

CHIEF JUSTICE: ARE YOU GOING TO DIVIDE YOUR REBUTTAL TIME?

I BELIEVE I WILL PROBABLY USE IT ALL, YOUR HONOR.

CHIEF JUSTICE: WITH ONE OF OUR QUESTIONS YOU WILL USE IT ALL, BUT GO AHEAD.

GEICO'S ARGUMENT AS TO THE SECOND QUESTION THEY ARGUE THAT BECAUSE THE DUTIES OF WITH RESPECT TO THIRD-PARTY CLAIMS ARE THE SAME UNDER THE STATUTE AND THE COMMON LAW THAT IF THERE HAS BEEN A CURE UNDER THE STATUTE THAT NECESSARILY MEANS THAT THE COMMON LAW ACTION HAS BEEN SATISFIED. AND THERE ARE TWO FLAWS WITH THAT. FOR ONE THING IT IS NOT REALLY CLEARLY ESTABLISHED THAT THE DUTIES ARE THE SAME UNDER BOTH BECAUSE THERE ARE A NUMBER OF DUTIES RECOGNIZED UNDER THE COMMON LAW THAT ARE NOT MENTIONED IN THE STATUTE. THEY ARE ENUMERATED IN THE GUTIERREZ DECISION, SUCH AS DUTIES TO ADVISE INSURERS WHAT STEPS CAN BE TAKEN TO AVOID AN EXCESS JUDGMENT.

UNDER THE CIRCUMSTANCES OF THIS CASE, IF WE FIND THAT THE CURE UNDER THE STATUTE WOULD ALSO CURE THE COMMON LAW CAUSE OF ACTION, DOES THAT MEAN THEN THAT AS FAR AS THE EXCESS JUDGMENT IS CONCERNED, THEN THE INSURED IS STUCK PAYING THE EXCESS JUDGMENT, ONLY THE INSURANCE COMPANY IS REALLY OFF THE HOOK?

THAT'S CORRECT, YOUR HONOR.

SO WHY WOULD THE INSURED HAVE FILED THIS STATUTORY ACTION?

WELL, WHY WOULD THE INSURED HAVE FILED --.

FILED THE ACTION UNDER 624?

WELL, THAT'S BEEN AN OPEN QUESTION. WE DON'T KNOW WHAT THE MOTIVE IS, BUT, WELL, IT WOULD CERTAINLY BE THE INSURED'S DISADVANTAGE TO FILE CIVIL REMEDY NOTICE IF THE COURT AGREES WITH GEICO'S POSITION AS TO BOTH QUESTIONS WHICH I THINK IT SHOWS ONE OF THE UNDERLYING FLAWS OF THEIR POSITION IS THAT IT WOULD MAKE CIVIL REMEDY NOTICES A TERRIBLE IDEA IN THE CASE OF A LIABILITY CLAIM THAT COULD GO EXCESS. BY FILING THE CIVIL REMEDY NOTICE IT WOULD DO NOTHING BUT BENEFIT THE INSURANCE COMPANY BY GIVING THEM A FREE TEST. AND THE OTHER FLAW WITH THEIR ARGUMENT WITH REGARDS TO THE SECOND QUESTION IS THAT THE STANDARD FOR WHAT CONSTITUTES THE SATISFACTION HAS NOTHING TO DO WITH WHETHER THE DUTIES UNDERLINING THE TWO REMEDIES ARE THE SAME. IT JUST GOES TO SHOW THAT THE TWO REMEDIES ARE CONSISTENT BUT THE RULE OF LAW THAT GOES BACK TO 1908 OR SO IS THAT WHEN TWO REMEDIES ARE CONSISTENT THE PARTY CAN PURSUE EITHER OF THEM OR BOTH OF THEM UNTIL THEY OBTAIN FULL SATISFACTION OF THE INJURIES AND THE CASES I CITE IN MY BRIEF I CONSTRUE WHAT FULL SATISFACTION LANGUAGE MEANS. THEY SHOW THAT IT MEANS THAT THE PARTY CAN KEEP GOING UNTIL THEY HAVE COLLECTED ALL OF THE DAMAGES THAT THEY CAN POSSIBLY GET UNDER ALL REMEDIES. THERE IS A LITTLE BIT OF A LIMITATION PUT ON THAT BY THE STATUTE WHICH SAYS YOU CAN'T GET A JUDGMENT UNDER BOTH REMEDIES, BUT IT DOES --

BUT YOUR OPPOSITION SAYS THAT THAT SATISFIES THE DUTY. THERE IS NO OTHER DUTY.

WELL, I DON'T FULLY UNDERSTAND WHAT THEIR ARGUMENT MEANS BY SATISFYING THE DUTY.

CHIEF JUSTICE: WELL, YOU ARE OUT OF YOUR TIME.

I'M SORRY, YOUR HONOR.

CHIEF JUSTICE: THANK YOU VERY MUCH.