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**Foundation Health v. Westside EKG Associates Docket Number: SC05-870 | SC05-871 | SC05-872**

CHIEF JUSTICE: ALL RIGHT. WE HAVE QUITE A CREW HERE FOR THE LAST CASE. THE LAST CASE ON THIS MORNING'S DOCKET IS FOUNDATION HEALTH VERSUS WESTSIDE EKG ASSOCIATES. AS YOU SEE, JUSTICE CANTERO IS RECUSED ON THIS CASE. AND I SEE THAT -- LET ME BE SURE WE HAVE THIS. YOU ARE SPLITTING YOUR TIME. WHY DON'T YOU COME UP, MISS GREGOIRE, AND THE NIKEL FIGURE THE TIME THING OUT.

GOOD MORNING, YOUR HONOR. NANCY GREGOIRE HERE ON BEHALF OF HEALTH OPTIONS, AND MR. ANDREW BERMAN HERE ON BEHALF OF HUMANA. I WILL BE SPEAKING FOR NINE MINUTES. MR. BERMAN WILL BE SPEAKING FOR SIX MINUTES AND WE WILL RESERVE FIVE MINUTES MAKING IT HIGHLY COMPLEX.

CHIEF JUSTICE: THE YELLOW LIGHT WILL COME ON AT 15 MINUTES. SO I WILL REMIND YOU WHEN YOU ARE FINISHED WITH NINE MINUTES.

THANK YOU, AND I WOULD ALSO LIKE TO INTRODUCE GLEN WALDMAN WHO IS HERE ON BEHALF OF FOUNDATION AND VISTA AND EDWARD MCENTIRE, MY PARTNER WHO IS ALSO HERE ON BEHALF OF HEALTH OPTIONS. THIS IS A CERTIFIED QUESTION FROM THE 4TH DISTRICT COURT OF APPEAL, AND THE QUESTION IS WHETHER THE PROMPT PAY PROVISION IN FLORIDA'S HMO ACT IS ENFORCEABLE BY A HEALTH CARE PROVIDER THROUGH THE INCORPORATION OF CONTRACT PRINCIPLES THAT BRING INTO THE CONTRACT THE STATUTE.

CHIEF JUSTICE: DOES THE THIRD PARTY BENEFICIARY HAVE CONTRACTUAL RIGHTS?

THIS THIRD-PARTY BENEFICIARY DOES NOT HAVE -- OUR POSITION, YOUR HONOR, IS THAT THIS THIRD-PARTY BENEFICIARY DOES NOT HAVE CONTRACTUAL RIGHTS. THE WAY THE HMO ACT IS STRUCTURED AND THE WAY THE HMO ACT INTENDS FOR HMO PLANS TO BE STRUCTURED IS THAT THERE IS A CONTRACT PROVIDER, A DOCTOR, A HOSPITAL, THERE IS A LSO AN EMPLOYER AND THEN THERE IS THE PLAN. THE PLAN CONTRACTS WITH THE EMPLOYER AND WITH THE PROVIDER, AND THE PROVIDER BY VIRTUE OF ITS CONTRACT WITH THE PLAN PROVIDES MEDICAL SERVICES TO A SUBSCRIBER. USUALLY THE SUBSCRIBER IS THE EMPLOYEE.

CHIEF JUSTICE: I GUESS JUST SORT OF CUTTING TO THE CHASE, IF THEY WEREN'T TRYING TO GET THE ADVANTAGE OF THE PROMPT PAY PROVISION, IS THERE ANY CAUSE OF ACTION THAT THE WESTSIDE EKG ASSOCIATES WOULD HAVE OR NOT RECEIVING PAYMENT FOR SERVICES RENDERED A GAINST SOMEBODY WITHIN THE HMO? >> WESTSIDE IS OUTSIDE THAT TRIANGLE. WESTSIDE IS WHAT IS CALLED A NON PARTY PROVIDER SO IT HAS NO CONTRACT THAT IT CAN ENFORCE WITH THE PLAN.

JUSTICE: COULD THEY HAVE PURSUED THE SUBSCRIBER?

WESTSIDE CAN PURSUE THE SUBSCRIBER, EXCEPT FOR THE PROVISIONS OF 641.3154. BUT THIS IS THE WAY IT WORKS: WESTSIDE HAS NO CONTRACT AND WESTSIDE DIDN'T TAKE AN ASSIGNMENT. WESTSIDE IS VEHEMENT THAT IT HAS NO ASSIGNMENT. YOU KNOW, IN THE WAY THE PROVIDERS ARE HERE IS BECAUSE THEY TAKE AN ASSIGNMENT OF THE CONTRACT

RIGHTS OF THE INSURED.

JUSTICE: IS THERE ANY PROHIBITION AGAINST THE NONCONTRACT PROVIDER FROM TAKING AN ASSIGNMENT OF BENEFITS?

IN THIS RECORD THERE IS NO SUCH PROHIBITION. THIS RECORD -- ONE OF THE ISSUES HERE WAS WHETHER BLUE CROSS' PLAN WAS BEFORE THE COURT. IT, IN FACT, WAS BEFORE THE COURT BUT THE COURT, THE LOWER COURT IN THE 4TH DISTRICT DIDN'T DECIDE ON THE BASIS OF THE PLAN. IT DECIDED ON THE BASIS OF THE ALLEGATIONS.

CHIEF JUSTICE: YOU DON'T MEAN BLUE CROSS, DO YOU?

HEALTH OPTIONS.

CHIEF JUSTICE: I THOUGHT YOU SAID BLUE CROSS.

BLUE CROSS IS THE PARENT COMPANY, HEALTH OPTIONS IS THE HMO ARM OF BLUE CROSS.

JUSTICE: HOW ABOUT GIVING US A SIMPLE SCHEMATIC OF WHAT HAPPENS ON THE GROUND? GIVE US A WORD PICTURE OF, YOU KNOW, A PATIENT GOES TO HEALTH CARE PROVIDER, HEALTH CARE PROVIDER DOES SOMETHING, CHARGES A FEE FOR IT. THE FEE CHARGED IS REPORTED TO WHOM AND WHO PAYS WHO? GIVE US THE SIMPLE SCHEMATIC OF WHAT ACTUALLY HAPPENS ON THE GROUND HOPEFULLY THAT HAS SOME COMMONALITY TO ALL THREE OF THESE SITUATIONS, BUT GIVE US A SIMPLE SCHEMATIC, YOU KNOW, BEFORE WE GET INTO THE CONTRACT PROVISION.

ABSOLUTELY, JUSTICE.

JUSTICE: WOULD YOU DO THAT FOR US?

SUBSCRIBER GOES TO CONTRACT PROVIDER FOR SERVICES. CONTRACT PROVIDER PROVIDES SERVICES THAT ARE WITHIN THE PLAN, REMEMBER THIS IS A CONTRACT. THAT ARE WITHIN THE PLAN. FROM THAT POINT, SUBSCRIBER MAY PAY A COPAY, \$25, \$30 COPAY. SUBSCRIBER IS OUT OF THE PICTURE. IF PROVIDER, CONTRACT PROVIDER HAS A PROBLEM WITH THE PLAN, CONTRACT PROVIDER HAS A CONTRACT ACTION AGAINST THE PLAN. POSSIBLY AGAINST THE EMPLOYER, BUT USUALLY AGAINST THE PLAN. SO THAT'S SCHEMATIC ONE. SCHEMATIC 2 IS WHERE FOR SOME REASON THE SUBSCRIBER GOES OUTSIDE THE PLAN.

JUSTICE: HAS THIS BEEN AUTHORIZED IN THIS CASE?

THIS HAS BEEN AUTHORIZED.

JUSTICE: SO THEY HAVE BEEN AUTHORIZED TO GO TO SOMEONE OUTSIDE THE PLAN?

ABSOLUTELY.

JUSTICE: PLEASE KEEP GOING BECAUSE I NEEDED THAT CLARIFICATION.

FOR INSTANCE, WITHIN THE COMMUNITY WHERE THE SUBSCRIBER LIVES THERE IS NOT THIS SPECIALTY. SUBSCRIBER CAN BE AUTHORIZED TO GO OUTSIDE. SUBSCRIBER HAS TO GO TO A HOSPITAL FOR EMERGENCY SERVICES, AND PART OF THE EMERGENCY SERVICES ARE PROVIDED BY NONCONTRACT PROVIDERS. SO THEN THE STATUTE, 641.3154 PROVIDES THAT THE PROVIDER, EVEN NONCONTRACT PROVIDER AND THE PLAN WILL DECIDE WHAT THE PROVIDER IS GOING TO BE PAID, BUT IF THE PROVIDER IS FOR ANY REASON UNHAPPY ABOUT WHAT THE PROVIDER IS GOING TO BE PAID, THEN THE QUESTION IS WHAT IS THE PROVIDER'S

REMEDY, AND THAT'S WHAT BRINGS US HERE TODAY. THIS PROVIDER CLAIMS THAT BECAUSE IT TREATED A SUBSCRIBER, IT IS A THIRD-PARTY BENEFICIARY OF THAT SUBSCRIBER'S CONTRACT, AND IT CAN SUE ON THE CONTRACT TO ENFORCE THE STATUTE BECAUSE THE STATUTE IS BROUGHT INTO THE CONTRACT. THIS COURT HAS SAID NOT WITH THE HMO ACT. >> CHIEF JUSTICE: AGAIN I WANT TO MAKE SURE. SO YOU GET THE SCHEMATIC OF WHERE THE CONTRACT PROVIDER CAN SUE THE PLAN, THEY HAVE A CAUSE OF ACTION.

EXACTLY.

CHIEF JUSTICE: IN THAT SITUATION WOULD THEY BE ABLE TO TAKE ADVANTAGE OF THE PROMPT PAY PROVISIONS?

NO, OUR POSITION IS THERE IS NO INCORPORATION OF THE HMO.

CHIEF JUSTICE: ANYWAY?

FOR ANYONE.

CHIEF JUSTICE: SO THEN THE SCHEMATIC, WHAT IS A NONCONTRACT PROVIDER WHO IS AUTHORIZED BY THE HMO? WHO DO THEY GET TO SUE?

FIRST OF ALL IF THE NONCONTRACT PROVIDER TAKES AN ASSIGNMENT, WHICH IS DONE IN PIP, THE FOURTH DISTRICT LIKENED THIS TO PIP, BUT YOU WON'T FIND A CASE IN PIP THAT USES A THIRD-PARTY BENEFICIARY THEORY. YOU FIND CASES IN PIP THAT SAY THE INSURED GIVES THE PROVIDER AN ASSIGNMENT. THEN THE PROVIDER SUES ON THE CONTRACT. THAT'S NOT THIS CASE. >> JUSTICE: BUT THE FACTS THAT THE HMO HAS GIVEN AUTHORITY TO THIS NONCONTRACT PERSON TO, IN FACT, GIVE SERVICES TO THE PROVIDER, DOESN'T CHANGE? I MEAN, I COULD SEE YOUR POINT IF THE SUBSCRIBER WENT TO A NONCONTRACT PERSON ON THEIR OWN BUT IF THE HMO ACTUALLY AUTHORIZES THEM TO DO THAT, DOESN'T THAT CHANGE THIS SCENARIO?

BUT THE AUTHORIZATION, YOUR HONOR, IS JUST, YES, THIS PERSON IS COVERED BY THE PLAN OR, YES, THIS SERVICE IS COVERED BY THE PLAN. THE AUTHORIZATION IS NOT, AND YOU CAN CHANGE WHATEVER YOU WANT AND YOU CAN DO WHATEVER YOU WANT.

JUSTICE: BUT THE AUTHORIZATION IS THAT YOU CAN GO TO THIS PERSON?

YOU CAN TREAT THIS PERSON, YES. >> CHIEF JUSTICE: SO AGAIN FINISH THE -- SO THERE IS NO ASSIGNMENT SO WHAT REMEDY DOES THE NONCONTRACT PROVIDER HAVE?

ACCORDING TO THE ACT ITSELF, AND THIS BECAME VERY MEDITATED SOME FOR THE FOURTH DISTRICT. ACCORDING TO THE ACT ITSELF, A SUBSCRIBER COULD SUE THE PLAN BECAUSE A SUBSCRIBER HAS RIGHTS UNDER THE PLAN. A CONTRACT PROVIDER CAN SUE THE PLAN BECAUSE A CONTRACT PROVIDER HAS ITS OWN RIGHTS UNDER ITS CONTRACT. A NONCONTRACT PROVIDER, AND THAT IS WESTSIDE, WITHOUT AN ASSIGNMENT, AND THAT IS WESTSIDE, HAS TO GO THROUGH MAXIMUS. THAT IS THE LEGISLATIVE REMEDY. YOUR HONORS IN THE LAST ARGUMENT WERE TALKING --.

JUSTICE: LET'S REDUCE IT DOWN IS THAT THE HEALTH CARE PROVIDER HAS NO DIRECT CAUSE OF ACTION AGAINST EITHER THE CITIZEN WHO GOES IN, THE PATIENT, OR THE HMO UNDER SOME COMMON LAW THEORY. THAT'S WHAT THAT STATEMENT, WHAT YOU JUST SAID, CORRECT?

AS LONG AS THE SUBSCRIBER IS COVERED BY THE PLAN. IF YOU LOOK AT 3154 IT GIVES YOU A --

YOU DON'T HAVE TO GO FURTHER. >> THAT'S EXACTLY RIGHT. THERE IS THIS NON PAR PROVIDER MAY NOT GO INTO COURT AND SUE ON THE SUBSCRIBER'S CONTRACT UNDER A THIRD-PARTY BENEFICIARY THEORY. BECAUSE --.

JUSTICE: SO THEN THE PROVIDERS HAVE NO REMEDY AT ALL? IF THEY CAN'T SUE THE PATIENT FOR THE BILL AND THEY CAN'T SUE THE HMO FOR THE BILL THEN THEY HAVE LOST THEIR RIGHTS TO GO INTO COURT FOR RECOVERY, AND YOU ARE SAYING THAT THERE IS SOME OTHER REMEDY IN ITS PLACE?

I'M SAYING IF THE SUBSCRIBER IS NOT COVERED BY THE PLAN FOR SOME ODD REASON, THERE IS NO COVERAGE UNDER THE PLAN, THE PROVIDER CAN DO WHATEVER THE PROVIDER WANTS.

JUSTICE: WELL, HERE THEY ARE COVERED, CORRECT?

OKAY. IF THERE IS COVERAGE UNDER THE PLAN BUT THE PROVIDER IS A NON PAR PROVIDER THEN THAT PROVIDER MUST GO THROUGH MAXIMUS, BECAUSE THAT'S WHAT THE LEGISLATURE HAS SAID.

JUSTICE: AND THAT'S THE ALTERNATIVE TO A COMMON LAW ACTION, CORRECT?

EXACTLY. THERE ARE COMMON-LAW ACTIONS THAT PROVIDERS MAY HAVE. IF THERE WERE FRAUD PROBABLY THE PROVIDER WOULD HAVE AN ACTION FOR FRAUD. BUT NOT TO ENFORCE THE PROMPT PAY STATUTE.

CHIEF JUSTICE: WELL, AGAIN, I THINK YOU SAID EARLIER EVEN IF IT WAS A CONTRACT PROVIDER, YOUR POSITION IS THAT THEY COULD SUE BREACH OF CONTRACT, YOUR POSITION IS PROMPT PAY PROVISION IS NOT INCORPORATED INTO ANY CAUSE OF ACTION?

UNLESS THE PROVIDER HAS CHOSEN TO PUT EXACTLY THAT LANGUAGE IN ITS STATUTE IN WHICH CASE IF I WERE THE CONTRACT PROVIDER I COULD ENFORCE IT.

CHIEF JUSTICE: SO YOU HAVE TWO PROBLEMS WITH THE FOURTH DISTRICT. ONE IS YOU DON'T THINK THAT THIS PLAIN TIFF OR APPELLATE SHOULD BE IN COURT AT ALL.

THAT'S RIGHT.

CHIEF JUSTICE: THAT SHE SHOULD BE IN COURT AT ALL, THEY CAN'T TAKE ADVANTAGE OF THE STATUTORY PROVISION?

THAT'S EXACTLY RIGHT, YOUR HONOR. I'M SAYING THAT YOU CANNOT -- YOU CANNOT TAKE AN ACT THAT HAS NO PRIVATE RIGHT OF ACTION, INCORPORATE IT INTO A CONTRACT AND CREATE IT PRIVATE RIGHT OF ACTION.

CHIEF JUSTICE: THERE ISN'T A CONSTITUTIONAL ARGUMENT BEING MADE BY WESTSIDE EKG ASSOCIATES THAT SOME REMEDY WAS TAKEN A WAY WITHOUT A PROPER ALTERNATIVE? THAT'S NOT BEFORE US?

NO, AND IN FACT THE OPINION RECOGNIZES THAT AND IN THE FOOTNOTE IT MENTIONS KLUGE VERSUS WHITE AND CONSTITUTIONALITY. THAT WAS NEVER RAISED. THAT'S NOT AN ISSUE BEFORE THE COURT. THE TWO ISSUES ARE CAN YOU TAKE THIS ACT THAT HAS NO PRIVATE RIGHT OF ACTION AND PUT IT INTO A CONTRACT AND CREATE A PRIVATE RIGHT OF ACTION AND THEN MAKE A THIRD-PARTY BENEFICIARY.

JUSTICE: IT IS AN IMPLIED CONTRACT IF AT ALL. I MEAN, CERTAINLY EVERYONE AGREES THERE IS NO WRITTEN CONTRACT OR SPECIFIC AGREEMENT, CORRECT? >> THERE IS NO W

RITTEN CONTRACT THAT WAS BEFORE THE COURT IN DECIDING THIS CASE OR BEFORE THE 4TH DISTRICT.

JUSTICE: THAT'S WHAT I MEAN THE HEALTH CARE PROVIDER IS NOT OPERATING PURSUANT TO SOME WRITTEN EXPRESS CONTRACT TO THE PATIENT? THEY ARE PROVIDING SERVICES TO A PATIENT PURSUANT TO SOME KIND OF AUTHORIZATION FROM A HMO SAYING, YES, THEY ARE A MEMBER OF THIS HMO AND IT IS GOING TO BE AN IMPLIED CONTRACT IF ANYTHING, IT IS NOT AN EXPRESS WRITTEN CONTRACT THAT CONTROLS THIS, CORRECT?

THAT'S EXACTLY RIGHT AND OUR POSITION IS YOU CANNOT APPLY THE CONTRACT.

CHIEF JUSTICE: YOU NOW HAVE 8:20 LEFT TOTAL.

I SEE THAT, YOUR HONOR. I WOULD LIKE TO CALL ON MR. BERMAN.

CHIEF JUSTICE: AND MR. BERMAN IS GOING TO CONTINUE WITH ANSWERING OUR QUESTIONS BECAUSE YOU HAVE THE SAME INTEREST, RIGHT?

MAY IT PLEASE THE COURT, ANDREW BERMAN FOR HUMANA. THE COURT IS OBVIOUSLY CONCERNED WITH WHETHER OR NOT THIS PROVIDER IS SOMEHOW BOXED INTO A CORNER AND UNABLE TO EFFECT ANY REMEDY AND I THINK WHAT YOU NEED TO UNDERSTAND IS SOME OF THE HISTORY OF THIS CASE. THIS CASE BEGAN WITH THE ACTION FILED IN BROWARD COUNTY CIRCUIT COURT. THE DEFENDANTS THEN WERE MOVED TO FEDERAL COURT ON THE BASIS OF ARISSA ARGUING THAT THE REMOVE PAPERS WITHOUT AN ATTACHMENT ARE IN THE RECORD BUT THE PLAINTIFF MAKES CLEAR THAT IT APPEARED THAT AS TO CIGNA AND AS TO HUMANA AS WELL, WESTSIDE EKG TOO K ASSIGNSMENTS UNDER THESE ARRANGEMENTS WHICH MEANS THAT BECAUSE OF THAT THEY ARE BASICALLY STEPPING INTO THE SHOES OF THE SUBSCRIBER.

CHIEF JUSTICE: MISS GREGOIRE WAS SAYING THERE WERE NO ASSIGNMENTS.

THE CIGNA PAPERS SAY THERE WERE ASSIGNMENTS. IN ORDER TO GET THE FEDERAL JUDGE TO REMAND THE STATE TO STATE COURT BECAUSE THERE WOULD BE NO ARISSA JURISDICTION UNLESS THEY WERE STEPPING INTO THE SHOES OF THE SUBSCRIBERS SO THEY HAVE BOXED THEMSELVES INTO CORNER SAYING THEY DON'T WANT TO BE IN FEDERAL COURT SO WE ARE GOING TO DISTANCE OURSELVES FROM THESE ASSIGNMENTS. THEY HAVE THEREFORE LEFT THEMSELVES WITH WHAT DO WE HAVE LEFT? WE TRIED THE THIRD-PARTY BENEFICIARY THEORY, THEY TRIED DIRECT ACTION UNDER THE STATUTE, THEY'VE TRIED DECLARATORY JUDGMENT. THE OVERARCHING ISSUE HERE IN OUR JUDGMENT IS WHETHER OR NOT THE HMO ACT, IF IT DOESN'T HAVE TO STRETCH AND STRAIN THE LAW TO FIND A REMEDY FOR THESE PEOPLE. THEY CAN BRING A DIRECT ACTION UNDER STATUTE.

JUSTICE: I DIDN'T THINK THAT THE 4TH DISTRICT WAS APPLYING A SEPARATE STATUTORY CAUSE OF ACTION. IT SEEMS AS THOUGH THEY WERE APPLYING A COMMON LAW KIND OF THEORY IN LOOKING TO THE STATUTE FOR WHAT THE PARAMETERS OF THE RELATIONSHIP NEEDED TO BE; IS THAT INCORRECT?

THAT'S WHAT THEY WERE DOING, BUT THEY DID THAT BECAUSE THEY STRETCHED AND STRAINED TO FIGURE OUT TO TRY TO FIND A REMEDY FOR THESE PEOPLE.

JUSTICE: BUT THE COURT DID PROCEED ON A COMMON LAW THEORY, THAT'S THE THEORY, AND LOOK TO THE STATUTE FOR WHAT THE REQUIREMENTS MAY BE BETWEEN THESE PARTIES, IS THAT A FAIR STATEMENT?

YES.

JUSTICE: YOU SAY THEY CAN'T LOOK TO THAT STATUTE?

THE PRINCIPLE WE ARE TRAVELING UNDER IS YOU NEED TO LOOK AT LEGISLATIVE INTENT TO DETERMINE WHETHER OR NOT THERE IS A PRIVATE RIGHT OF STATUTE. YOU SAID SO IN MURTHY AND RECENTLY IN A RAMARK .

JUSTICE: YOU ARE AGAIN ASSUMING THAT THE COURT WENT ON A STATUTORY CAUSE OF ACTION AND THEY DID NOT.

I'M GETTING TO THAT POINT. I APOLOGIZE. IF YOU CONCLUDE THAT THERE IS NO LEGISLATIVE INTENT FOR A PRIVATE RIGHT OF ACTION YOU CANNOT GO THROUGH THE BACK DOOR UNDER A THIRD-PARTY BENEFICIARY THEORY IN ORDER TO BE ABLE TO DO INDIRECTLY THAT WHICH YOU CANNOT DO DIRECTLY. A NUMBER OF CASES WE HAVE CITED FROM OUT OF STATE WHERE THERE WERE A NUMBER OF DIFFERENT STATUTES ACROSS THE COUNTRY, BOTH FEDERAL AND STATE DESIGNED TO PROTECT INDIVIDUALS AND IN EACH ONE OF THOSE CASES THEY TRIED BECAUSE THEY KNEW THEY COULDN'T BRING A DIRECT ACTION UNDER THE STATUTE TO BRING A THIRD-PARTY BENEFICIARY CLAIM. IN EACH INSTANCE THE COURT HELD YOU COULD NOT DO INDIRECTLY THAT WHICH YOU CANNOT DO DIRECTLY BECAUSE THE THEORY AND THE THESIS OF THIRD-PARTY BENEFICIARY IS INCONSISTENT WITH THE CONCLUSION THAT YOU CAN'T SUE DIRECTLY UNDER THE STATUTE.

JUSTICE: LET ME ASK YOU A QUESTION. IN VILAZON THERE WAS NO INTENT FOR PRIVATE LAW CAUSE OF ACTION, BUT IF THERE WAS COMMON LAW, YOU COULD BRING IT. COULD YOU SPEAK TO THAT PART OF IT?

THE COMMON LAW CAUSES OF ACTIONS WE DON'T BELIEVE INCORPORATED THE PROVISIONS OF THE STATUTE . THE COMMON LAW STATUTES SPOKEN IN VILAZON OR WERE GENERAL CONTRACT CLAIMS. THEY ARE SAYING TYPICALLY IN THESE ARRANGEMENTS BECAUSE THE HMO MODEL CONTRACTS AN NETWORK OF PROVIDERS, TYPICALLY YOU HAVE A CONTRACT AND THIS DOESN'T ARISE .

JUSTICE: LET'S ASSUME THAT YOU COULD INCORPORATE THE STATUTORY PROVISIONS , DO YOU ALSO INCORPORATE ALL OF THE CONTRACTUAL PROVISIONS OF THE PLAN, ALL OF THE STATUTES , THE RIGHTS AS WELL AS THE AVAILABLE REMEDIES ADMINISTRATIVELY AND OTHERWISE IF YOU WERE TO DO THAT?

IF YOU CAN INCORPORATE THE STATUTE INTO THIS CONTRACT WHERE IT IS NOT THERE ITSELF YOU WOULD INCORPORATE EVERYTHING AND WE CONSIDER INCLUDING THE PROVISION BECAUSE OF LACK OF LEGISLATIVE INTENT TO BE ABLE TO AVAIL YOURSELVES OF THE PROVISIONS OF THE STATUTE IN ORDER TO GIVE RISE TO -- .

JUSTICE: MY POINT IS IF YOU BRING ACTION AS A THIRD PARTY BENEFICIARY AM I INCORRECT THAT A THIRD PARTY BENEFICIARY IF THEY ARE SUIING UNDER THE CONTRACT IS LIMITED TO THE RIGHTS AND OTHERS AVAILABLE UNDER THE CONTRACT?

YES.

JUSTICE: AND IF THEY DO THAT THE HMO PLAN , THE CONTRACT ITSELF AND THE STATUTE DEALS WITH THE REMEDIES OF THE SUBSCRIBER?

WELL, I DISAGREE THERE. I THINK THE CONTRACT DEALS WITH THE REMEDIES OF THE PROVIDER. THE HMO ACT , THE LEGISLATURE MADE A POLICY JUDGMENT THAT WE ARE GOING TO LEAVE IT TO THE REGULATORY AGENCIES TO KEEP THE HMO'S IN COMPLIANCE WITH ALL PROVISIONS OF THE ACT . >> CHIEF JUSTICE: YOU ARE IN YOUR COMBINED REBUUTTAL

AND I DON'T WANT TO STOP THE QUESTIONING BUT IF YOU WANT TO SAVE SOMETHING FOR REBUTTAL.

I THINK THE SOLOMAN CASE OUT OF PENNSYLVANIA IS THE CLOSEST ON POINT HERE BECAUSE THEY HAD THEIR HMO ACT AND IN THAT CASE THE PLAINTIFF Sought BOTH A DIRECT ACTION UNDER THE ACT AS WELL AS A THIRD-PARTY BENEFICIARY CLAIM AND IN BOTH INSTANCES THEY SAID THEY COULDN'T DO IT SO WE WILL RESERVE THE REST OF THE TIME FOR REBUTTAL.

MAY I PLEASE THE COURT, I'M PHILLIP BURLINGTON, I'M LEER FOR THE RESPONDENT, WESTSIDE EKG. WITH ME IS STEPHANIE ALEXANDER WHO REPRESENTS SOME AMICI WHO IS GOING TO SHARE THE TIME WITH ME AND OVER THE RE IS MR. LI DPCHLT GIO WHO IS TRIAL COUNSEL. I WANT TO CLARIFY THERE ARE NO ASSIGNMENTS IN THIS CASE, THERE NEVER HAVE BEEN, WE NEVER ALLEGE THAT AS A BASIS. IT IS A THIRD PARTY BENEFICIARY IN A BREACH OF CONTRACT ACTION. THE HMO ACT IS VERY CLEAR THAT REGARDLESS OF WHETHER YOU ARE A CONTRACTOR OR NON CONTRACT PROVIDER IF YOU PROVIDE SERVICES TO THE SUBSCRIBER THAT ARE AUTHORIZED THE HMO IS LIABLE FOR PAYMENT TO THE PROVIDER.

JUSTICE: LET ME ASK YOU A QUESTION. DO YOU AGREE OR DISAGREE THAT IF YOU PURSUE A THIRD-PARTY BENEFICIARY'S CAUSE OF ACTION THAT YOU STEP IN THE SHOES OF THE SUBSCRIBER IN THIS CASE? TO THE RIGHTS AND REMEDIES AVAILABLE TO THE SUBSCRIBER?

YES, YOU ARE SUBJECT TO THE WRITTEN CONTRACT, WHICH INCORPORATES THE ACT, AND WE BELIEVE THAT IS CLEAR FROM THE ACT ITS SELF WHICH SPECIFICALLY SAYS THAT THE CONTRACT HAS TO COMPLY WITH THE ACT AND IF IT DOES NOT IT HAS TO BE CONSTRUED AS THOUGH IT DID. >> JUSTICE: AND UNDER THE ACT WHAT RIGHTS WOULD A SUBSCRIBER HAVE UNDER THE SE CIRCUMSTANCES?

THE PROMPT PAY PROVISION IS VERY CLEAR THAT THEY ARE ENTITLED TO HAVE THOSE CLAIMS PAID ACCORDING TO A SET SCHEDULE OR INTEREST TO BE DUE ON PAYMENTS THAT ARE LATE.

JUSTICE: IF I LOOK AT 641.185 WHEN IT TALKS ABOUT THE RIGHTS OF SUBSCRIBERS IT SAYS THAT THE SUBSCRIBER SHOULD RECEIVE PROMPT PAYMENT FROM AN ORGANIZATION PURSUANT TO THE SECTION THAT YOU ARE TALKING ABOUT. THAT SUBSECTION 1E. SUBSECTION 2 OF THAT SECTION SAYS THIS SECTION SHALL NOT BE CONSTRUED AS CREATING A CIVIL CAUSE OF ACTION BY ANY SUBSCRIBER OR PROVIDER AGAINST ANY HEALTH MAINTENANCE ORGANIZATION. SO IF THE ACT ITSELF SAYS THAT THE RIGHT IS THE SUBSCRIBER'S TO RECEIVE PROMPT PAYMENT UNDER THIS PROVISION, AND IT SPECIFICALLY SAYS THAT SECTION SHALL NOT BE CONSTRUED TO CREATE THE CIVIL CAUSE OF ACTION BY A SUBSCRIBER OR PROVIDER, THEN DOESN'T THAT LOCK YOU INTO THE ADMINISTRATIVE --

NO, BECAUSE THAT IS LIMITED TO THAT PARTICULAR STATUTE. THE PROMPT PAY STATUTE IS 3154, AND CASE LAW IS VERY CLEAR THAT PROVIDERS ARE THIRD PARTY BENEFICIARIES OF HEALTH INSURANCE CONTRACTS, BECAUSE OF THE VERY NATURE OF THE CONTRACT IS TO PROVIDE PAYMENT TO THEM ON BEHALF OF THE SUBSCRIBER. THE SUBSCRIBER DOES NOT GET PAYMENT IN THESE SITUATIONS AS THE ACT MAKES CLEAR, THE SUBSCRIBER AND IT IS TO THE BENEFIT OF THE SUBSCRIBER TO WHERE THERE IS COVERAGE TO BE OUT OF THE ENTIRE FIGHT AND IT IS BETWEEN THE HMO AND THE PROVIDER. AND THE PROVIDER IS ENTITLED, UNDER THE ACT, TO BE PAID WITHIN A SET PERIOD OF TIME AND THERE IS --.

JUSTICE: SO THE STATUTE IS IN ERROR WHEN IT SAYS THE SUBSCRIBER SHOULD RECEIVE PROMPT PAYMENT FROM THE ORGANIZATION PURSUANT TO 641.3155?

WELL, THERE IS NO SITUATION WHERE IT APPEARS UNDER THE ACT THAT THE SUBSCRIBER IS

S ENTITLED TO BRING AN ACT IO N I F THE P ROVIDER IS THE ONE WHO I S PROVIDING THE S ER VICE S AND I T IS AUTHORIZED.

CHIEF JUSTICE: BECAUSE BASICALLY THE WHOLE OR FROM THE SUBSCRIBER'S POINT O F V IEW THE BEAUTY OF THE H MO S YS TE M IS THAT THEY P AY - - T HE Y KNO W WHAT THEY ARE GOING TO P AY A ND THEN THEY DON'T HAVE TO W ORRY ABOUT ANYONE SUING THEM FOR ADDITIONAL SERVICES SO WHAT YOU ARE SAY ING IS T HA T I F T HE P ROVIDER D OE SN 'T H AV E A REM ED Y , BAS ICALLY NO ONE HAS A R EM ED Y?

CORRECT. AND WHEN THEY TALK ABO UT A N A DMIN ISTRATIVE REMEDY AS WE HAVE MADE CLEAR AND THEY HAV E NEVER ADDRESSED , M AX IMUS UND ER THE STATUTE IS V OL UN TA RY , I T IS NOT I N A R EQ UIRE D A DMINISTRATIVE PRO CEEDING. NUMBER TWO, I T S PECI FICALL Y DOES NOT APPLY TO LAT E PAYMENTS. IT SPECIFICALLY DOES NOT A PPLY TO INTEREST PAYMENTS. SO IT COULD NOT A DDRESS T HE SE CLAIMS, AND T HE RE I S N O EXPLANATION EVE R BEE N G IV EN AND IN FACT THEY INC LUDED THE 2004 ANNUAL REPOR T O F M AXIM US IN THEIR A PP EN DIX , N UM BER 8 FOR H EALTH O PTIONS , AND I T SPECIFICALLY SAYS T HEY HAVE N O AUTHORITY TO HANDLE CLA IM S REGARDING LATE PAYMENTS OR INTEREST PAYMENTS.

CHIEF JUSTICE: IF THE STATUTE DOESN'T APPLY , A GA IN LET ME UNDERSTAND WHAT THE UND ERLYING C AUSE O F A CT IO N THAT YOU HAVE. WHAT IS THE C OM MON- LA W C AU SE OF ACTION?

WELL , A DDRE SS IN G THE STATUTE HE MENTIONED I T IS N OT A STA TUTORY CAUSE OF ACT IO N , AND WE BELIEVE THAT'S THE WAY THAT STATUTE IS CON STRU ED . IT IS A C ONTR AC T ACT IO N , COMMON LAW CONTRACT A CT IO N. >> CHIEF JUSTICE: BUT YOU H AV E NO CONTRACT?

BUT VIA H AV E A T HIRD -PAR TY B ENEFICIARY S TATU S W HI CH FRANKLY HAS NOT SERIOUSLY BEEN CHALLENGED IN THE SENSE OF EXISTING CASE L AW C ON SI ST ENT LY H OLDS THERE IS THE O RION INS URANCE CASE THAT WAS A HMO PROVIDER CASE AND THEY SPECIFICALLY SAID THERE WERE THIRD-PARTY B ENEFICIARIES. WE HAD T HE V EN CO R H OS PITA L CASE THAT SPECIFI CALL Y SAY S HEALTH CARE PROVIDERS ARE THIRD PARTY BENEFIC IARY !!IES UNDER HEALTH INSUR ANCE POLICIES BECAUSE THEY ARE THE PERSONS WHO ARE S UPPPOSED TO BENEFIT FROM THE P AYMENT OF THE MONEY A ND ULT IM AT EL Y BENEFITS THE INSURED OR THE SUBSCRIBER. THAT CASE LAW IS V ERY , V ERY CLEAR, AND THEY H AV EN 'T C ITED ANY CASE TO THE C ON TR AR Y. WHAT THEY ARE TRYING TO DO I S TO CREATE AN I MM UN IT Y FOR THEMSELVES AS T O N ON CONTRA CT PROVIDERS.

JUSTICE: W HAT ABOUT THIS PENNSYLVANIA CASE?

EXCUSE ME?

JUSTICE: WHAT A BOUT THE PENNSYLVANIA CASE HE JUST CITED?

THE PENNSYL VANIA CASE, THERE IS NO DISCUSSION IN THERE A S TO W HE THER T HERE I S ANY PROVISION SUCH A S I N THE HMO ACT FOR THE C ON SENT - - CONTENTS OF THE CON TRACT TO INCORPORATE THE STATUTORY PROVISIONS AND THERE IS NO DISCUSSION IN THERE REGAR DI NG WHE THER P EN NS YL VANIA RECOGNIZES THAT FLO RIDA HAS FOR 75 YEA RS T HAT C ONTRAC TS THAT ARE REGULATED B Y S TA TU TE S NECESSARILY INCOR PORA TE THE PROVI SIONS OF THE STATU TE INT O THE C ONTRAC T .

JUSTICE: WHAT P THE THIRD-PARTY BENEFICIARY ISSUE , WHETHER OR NOT THE PRO VIDER IS A T HI RD-P ARTY B EN EFICIA RY O F A HEALTH INSURANCE CONTRACT?

THAT IS THE ONLY CASE T HAT GOES TO THE CONTR ARY A ND T HEY DID IT STRICTLY UNDER T HE IR HMO ACT.

CHIEF JUSTICE: S O B U T T H E Y C O N T E N D T H A T E V E N I F T H I S W A S A C O N T R A C T P R O V I D E R , A N D T H E Y A G R E E T H E R E W O U L D B E A C A U S E O F A C T I O N U N D E R T H E P L A N , T H A T T H A T C A U S E O F A C T I O N W O U L D N O T A L L O W T H E M T O O R A L L O W T H E C O N T R A C T P R O V I D E R T O A V A I L I T S E L F O F T H E S T A T U T O R Y P R O M P T P A Y P R O V I S I O N , W O U L D Y O U S P E A K T O T H A T ?

WELL, THERE IS A P R O V I S I O N T H A T W A S A D D E D I N 2 0 0 2 T O T H E P R O M P T P A Y S T A T U T E T H A T S P E C I F I C A L L Y S A Y S T H A T T H E P R O V I S I O N S O F T H A T S T A T U T E C A N N O T B E W A I V E D B Y C O N T R A C T A G R E E M E N T A N D C A N ' T B E V O I D E D A N D N U L L I F I E D . I T H I N K T H E L E G I S L A T U R E H A S M A D E I T C L E A R T H A T I T I N T E N D S T H O S E R I G H T S T O E X I S T F O R B O T H C O N T R A C T A N D N O N C O N T R A C T P R O V I D E R S , A N D T H E Y D I D N O T I N T E N D T O E N A C T A M E A N I N G L E S S S T A T U T E T H A T C O U L D B E E N F O R C E D B Y N O B O D Y B E C A U S E T H E D E P A R T M E N T O F I N S U R A N C E H A S N O A U T H O R I T Y T O E N F O R C E P A Y M E N T . W H A T T H E Y H A V E A U T H O R I T Y T O D O I S I M P O S E F I N E S , W H I C H A S T H E F L O R I D A P H Y S I C I A N S U N I O N C A S E N O T E D H A V E B E E N E N T I R E L Y I N E F F E C T I V E A N D I N F A C T T H E B R E A K D O W N O F T H E H M O S Y S T E M I S N O T D U E T O H E A L T H C A R E P R O V I D E R S W H O A R E A T T E M P T I N G T O H A V E T H E S T A T U T E C O M P L I E D W I T H .

JUSTICE: WELL , A S S U M I N G T H A T ' S T R U E . A N D W E I N C O R P O R A T E T H E S T A T U T O R Y P R O V I S I O N S I N T H E R E . D O Y O U , A N D L E T ' S S A Y T H E P L A N A G R E E M E N T S A Y S T H A T I F T H E R E I S A C O M P L A I N T T H A T T H E S U B S C R I B E R H A S T O G O T H R O U G H A G R I E V A N C E P R O C E D U R E S E T U P B Y T H E O R G A N I Z A T I O N O R P R O V I D E O T H E R R E M E D I E S O T H E R T H A N C I V I L , D I R E C T L Y F I L I N G A C I V I L S U I T . T H E N I F Y O U S T E P I N T O T H E S H O E S O F T H E S U B S C R I B E R , W O U L D N ' T Y O U H A V E T O A T L E A S T A L L E G E E X H A U S T I O N O R C O M P L E T I O N O F T H O S E G R I E V A N C E P R O C E D U R E S A N D O T H E R R E M E D I E S B E F O R E Y O U W O U L D H A V E S T A N D I N G T O B R I N G T H E C I V I L C A U S E O F A C T I O N ?

T H A T ' S N E V E R B E E N A N I S S U E I N T H I S C A S E , A N D - - .

JUSTICE: I M E A N I F Y O U C O N T R A C T B E T W E E N T H E S U B S C R I B E R A N D T H E P R O V I D E R S A Y S Y O U H A V E T O D O X , Y , Z B E F O R E Y O U C A N B R I N G A C I V I L S U I T , W H Y W O U L D N ' T Y O U A S A P R O V I D E R H A V E T O D O T H O S E S T E P S A L S O ?

W H A T I O F F T H E T O P O F M Y H E A D W H A T I A M S A Y I N G I S T H A T A C O M M O N L A W C O N T R A C T A C T I O N , Y E S , Y O U W O U L D H A V E T O C O M P L Y W I T H C O N T R A C T U A L P R O V I S I O N . A S S U M I N G T H E Y D I D N ' T I N T E R F E R E W I T H T H E S T A T U T O R Y S C H E M E A N D I C A N ' T T E L L Y O U O F F T H E T O P O F M Y H E A D W H E T H E R T H E R E W A S A N Y T H I N G I N T H E S T A T U T O R Y S C H E M E T H A T M I G H T B E I N C O N S I S T E N T W I T H C R E A T I N G S H A L L W E S A Y H U R D L E S T O A C O N T R A C T A C T I O N ? S O I T H I N K I B E L I E V E Y O U A R E R I G H T B U T I D O N ' T W A N T T O S T A N D H E R E A N D T E L L Y O U .

JUSTICE: P A R T O F M Y C O N C E R N I S R E A D I N G T H E C O M P L A I N T T H E R E I S N O A L L E G A T I O N I N T H E C O M P L A I N T A S I R E A D T H E M T H A T A L L C O N D I T I O N S P R E C E D E N T T O T H E C O N T R A C T W E R E F I L E D A N D A L L P R O C E D U R E S F O L L O W E D P R I O R T O B R I N G I N G T H I S A C T I O N S O I F Y O U A R E B R I N G I N G I T A S A T H I R D P A R T Y B E N E F I C I A R Y A B S E N T T H O S E A L L E G A T I O N S T H E N T H E S U M M A R Y J U D G M E N T W A S C O R R E C T ?

N O , I T W A S N O T B E C A U S E I T W A S N E V E R R A I S E D A S A N I S S U E B Y T H E D E F E N S E A N D T H I S W A S A J U D G M E N T O N H A D T H E P L E A D I N G S , N O T A J U D G M E N T , E X C U S E M E , A S U M M A R Y J U D G M E N T . B U T B A S E D O N T H E P L E A D I N G S T H A T W A S N E V E R R A I S E D A S A N I S S U E S O W E N E V E R H A D A N O P P O R T U N I T Y T O A D D R E S S I T N O R W A S A N Y E V I D E N C E E V E R P R E S E N T E D .

JUSTICE: B U T Y O U A G R E E U N D E R T H E C O M M O N L A W I F Y O U A R E P R O C E E D I N G U N D E R T H E C O M M O N L A W T H A T W O U L D B E A C O N D I T I O N P R E S E N D E N T ?

I T C O U L D B E A C O N T R A C T U A L C O N D I T I O N P R E S E N D E N T . W H E T H E R I T W O U L D B E C O N S I S T E N T W I T H T H E A C T I C A N ' T T E L L Y O U .

CHIEF JUSTICE: WHAT'S THE CRUX, JUST REFRESH MY RECOLLECTION ON WHAT WAS IT IN ALL OF THESE CASES THAT THE HMO IS NOT DOING? I MEAN DID THE YEVEN TUA LL Y PAY?

THEY ARE NOT TIMELY PROCESSING THE CLAIMS. THEY ARE NOT PAYING INTEREST WHEN THEY ARE LATE, AND THEY ARE NOT TREATING CLAIMS THAT ARE NOT RESPONDED TO ONE WAY OR ANOTHER IN 120 DAYS AS UNCONTESTABLE. AND WE HAVE ABSOLUTELY NO REMEDY THAT THE, YOU KNOW, THE DEPARTMENT OF INSURANCE HAS NO AUTHORITY OTHER THAN TO SANCTION THEM AND, IN FACT, HEALTH OPTIONS WAS ONE OF THE HMO'S SANCTIONED IN 1999.

CHIEF JUSTICE: WHEN YOU GO INTO THESE, AND THIS MAY BE, BEYOND THE SCOPE OF THE PLEADING, BUT JUST TRYING TO UNDERSTAND ABOUT WHETHER YOU'VE BEEN DEPRIVED OF YOUR REMEDIES. YOU COULD DECIDE AND SAY I'M NOT GOING TO DEAL WITH THIS HMO ANY MORE, BECAUSE THEY DON'T PAY PROMPTLY. I MEAN, YOU COULD MAKE THAT DECISION THAT WE DON'T LIKE THE WAY, WHAT THEIR PAYMENT PRACTICES ARE SO IN THE FUTURE WE'RE NOT GOING TO -- YOU KNOW, I MEAN YOU ARE NOT A CAPTIVE AUDIENCE LIKE THE SUBSCRIBER IS. CORRECT?

CORRECT.

CHIEF JUSTICE: AND WHEN YOU ENTER -- IS THERE ANYTHING THAT HAPPENS? I MEAN WHEN THE SUBSCRIBER COMES TO EKG, WESTSIDE EKG, HAS THERE A LREADY BEE N, I MEAN THERE IS NO CONTRACT, BUT WHAT HAPPENS SO THAT EKG, WESTSIDE EKG KNOWS THAT IT IS GOING TO HAVE TO LOOK TO THE HMO FOR PAYMENT? IS THERE SOME --

THERE IS AN AUTORIZATION PROCESS THAT HAS TO OCCUR PRIOR TO THE PATIENT BEING TREATED. AND TO BE HONEST WITH YOU SINCE WE NEVER GOT PAST THE PLEADINGS THERE IS NOTHING IN THE RECORD AND I COULDN'T TELL YOU EXACTLY HOW THAT IS PROCESSED, BUT THE LEGISLATURE OBVIOUSLY RECOGNIZED THAT THE ONLY WAY FOR THIS SYSTEM TO WORK EFFECTIVELY WAS TO HAVE TIMELY PAYMENTS AS INDICATED IN THE PROMPT PAYS TATUTE AND WHAT THEY ARE TELLING YOU IS THAT WE HAVE ABSOLUTELY NO REMEDY.

JUSTICE: WHY WAST HERE NO ASSIGNMENTS?

EXCUSE ME?

JUSTICE: WHY ARE THERE NO ASSIGNMENTS? I MEAN YOU MAKE A BIG THING -- >> THERE ARE NO ASSIGNMENTS IN THE RECORD. I'M NOT SURE WHY THERE ARE NONE.

JUSTICE: WELL, I'M TRYING TO UNDERSTAND, AS JUSTICE PARIENTE SAID, THAT THE FULL RAMIFICATION OF ALL OF THIS. AND WHY WOULD N'T THE PROVIDER TAKE AN ASSIGNMENT?

WHY WOULD A PROVIDER TAKE ONE?

JUSTICE: WHY NOT?

OH, WHY NOT? I HONESTLY DONOT KNOW. PERHAPS THEY BELIEVE THEY WEREN'T NECESSARY BECAUSE THE CASE LAW HAS LONG EXISTED HOLDING THE THIRD PARTY BENEFICIARIES ENTITLED TO ENFORCE THE UNDERLYING CONTRACT.

JUSTICE: WELL, WE DON'T KNOW IN THESE INSTANCES WHETHER ASSIGNMENTS WERE TAKEN OR NOT, DO YOU?

WELL, WE HAVENOT ALLEGED IT. >> JUSTICE: I REALIZE YOU ARE NOT RELYING ON AN ASSIGNMENT, YOU KNOW. I GUESS ALL OF US PROBABLY HAVE THE IMAGE THAT IT WOULD BE

HIGHLY UNUSUAL THAT ANY PROVIDER WOULD NOT JUST AS PART OF STANDARD OPERATING PROCEDURE AND FORMS AND ALL OF THAT KIND OF THING HAVE WHOEVER IS COMING FOR THE SERVICE ALSO ASSIGN THE IR LIVES AWAY AS FAR AS ASSIGNMENTS ARE CONCERNED. THE POINT HERE IS THAT WHAT YOU ARE SAYING IS THAT YOU ARE IN NO WAY RELYING ON AN ASSIGNMENT AS A LEGAL BASIS FOR THE CLAIMS YOU ARE ASSERTING.

THAT IS CORRECT AND I'M SURE IF WE HAD OBTAINED ASSIGNMENTS THEY WOULD BE UP HERE MAKING THE SAME ARGUMENT THAT THERE IS NO RIGHT TO ENFORCE THE CONTRACT BECAUSE ALL WE ARE DOING IS A BACK DOOR STATUTORY RIGHT OF ACTION.

CHIEF JUSTICE: THE QUESTION I HAVE FOLLOWING UP ON JUSTICE ANSTEAD IS THAT ARE YOU IN THE EXACT SITUATION AS YOU WOULD BE, I MEAN YOU ALLEGELY YOU WOULD BE IN THE EXACT SAME SITUATION AS IF THERE WERE ASSIGNMENTS, AND SINCE THERE ARE NO ATTORNEYS, I DON'T KNOW, CAN YOU GET ATTORNEYS FEES?

THERE IS A STATUTORY PROVISION THAT A PARTY THAT PREVAILS IN A HMO CONTRACT IS ENTITLED, IT IS A TWO-WAY STREET TO ATTORNEY'S FEES.

CHIEF JUSTICE: BUT NOT 627.428 FEES. IN OTHER WORDS SO YOU ARE SAYING THERE IS NO DIFFERENCE IN YOUR STATUS VIS-A-VIS THE HMO WHETHER YOU HAVE AN ASSIGNMENT OR NOT?

CORRECT.

CHIEF JUSTICE: IT IS AN IDENTICAL RIGHT?

BECAUSE THE EXISTING CASE LAW HOLDS THAT WE ARE A THIRD-PARTY BENEFICIARY, AND THAT IS REALLY THE COMMON LAW BASIS AND WHETHER OR NOT ASSIGNMENTS ARE EVEN PERMITTED UNDER THEIR CONTRACTS WE DON'T KNOW.

JUSTICE: SO WHAT IS THE CASE YOU ARE RELYING UPON FOR THE PROPOSITION THAT YOU ARE A THIRD-PARTY BENEFICIARY AND PAYMENT FROM THE INSURANCE COMPANY? >> EXCUSE ME?

JUSTICE: ENTITLED TO PAYMENT FROM A HMO INSURANCE COMPANY, NOT ANOTHER TYPE OF INSURANCE COMPANY?

WELL, THE ORION INSURANCE COMPANY CASE OUT OF THE 3RD SPECIFICALLY SAID THAT IN A HMO SITUATION A PROVIDER WAS SUING THAT THEY WERE A THIRD PARTY BENEFICIARY AND FRANKLY THEY DID IT WITHOUT ANY LENGTHY DISCUSSION I THINK BECAUSE IT IS SO OBVIOUS AND TO CONSISTENT WITH THE COMMON LAW.

JUSTICE: UNDER THE COMMON LAW OR ANY OF THIS STATUTE IF YOU ARE THE PHYSICIAN AND YOU PROVIDE ME SERVICES, AND YOU BILL ME AND I DON'T PAY IT, WHO DO YOU SUE?

YOU CAN SUE THE INSURANCE COMPANY.

JUSTICE: UNDER THE COMMON LAW YOU WOULD TYPICALLY SUE ME BECAUSE I'M THE RECIPIENT OF THE SERVICES RENDERED, CORRECT?

I COULD SUE YOU OR THE INSURANCE COMPANY. IT IS QUITE LIKELY THE CLIENT, THE PATIENT MIGHT NOT BE RECOVERABLE BUT YOU WOULD GO OF THE INSURANCE COMPANY AND THE VENCOR HOSPITAL CASE HAS APPROPRIATE DISCUSSION OF HOW IT IS CRYSTALLIZED THAT A GA INVENCOR IS A TYPICAL MEDICAL INSURANCE SITUATION THAT THE HEALTH CARE PROVIDERS ARE THIRD PARTY BENEFICIARIES AND THEY SAY THAT IT IS CRYSTALLIZED AND THAT'S THE WAY THE SYSTEM IS SUPPOSED TO WORK. I AM INVADING THE TIME OF MIAMI C

USS HER E . > > CHIEF JUSTICE: -- O F M Y AMICUS H ER E .

CHIEF JUSTI CE : MIS S A LEXANDER?

STEPHANIE ALE XA NDER F OR T HE FLORIDA H OSPITAL ASSOCIATION, THE FLORIDA MEDICAL ASSOCIATION, THE FLORIDACOLLEGE OF EMERGENCY PHYSICIANS, THE AMERICAN COLLEGE OF EMERGENCY PHYSICIANS AND THE A ME RI CAN MEDICAL ASS OCIATION. I JUST WANT TO RESPOND T O A FEW OF THE QUEST IONS BY THE COURT . THERE WAS AN ISSUE O F WH ET HE R OR NOT THE PROMPT PAY PROVISIONS IN THE STATUTE W ER E INCORPORATED INTO CONTRACT. A ND AS C O-COUN SE L POI NT ED OUT IN SUBSECTION 9 O F 6 41 .315 5 , T HESE P ROTECT IONS CANNO T B E CONTRACTED AROUND W HI CH M EANS THAT THE LEGISLA TURE H AS DETERMI NED THAT THEY HAVE T O GOVERN THE REL AT IO NSHI P BETWEEN THE HMO'S AND T HE PROVIDERS. THAT'S NUMBER ONE. AND NUMBER T WO A S A PRA CTIC AL MATTER IF YOU NEGOTIA TE A CONTRACT WITH A HMO, B AKEL Y NOW WHAT EVERY BO DY S AY S I S , WELL, WE CAN'T C ONTRACT AROUND THE STATUTE AND T HE PROVISIONS GENERALLY COME IN. THAT'S THE FIRST THING. AND THERE WAS A Q UEST IO N F RO M JUSTICE BELL, I THINK, ABO UT WHETHER OR NOT T HE PRO MP T PAY PROTECTIONS RAN TO THE SUBSCRIBER AND HE WAS QUO TI NG 641.185. THERE IS A PROVISION IN 641 .3155, THE P ROMP T P AY STATUTE THAT SAYS FOR A C LA IM S FOR EXAMPLE THA T A SUBSCRI BE R SUBMITS DIRECTLY , Y OU K NO W , LIKE YOU MAY HAVE GONE T O A PROVIDER THAT DOESN'T ACCEPT INSURANCE AND YOU GET THE RECEIPT AND YOU HAVE TO SEND IT IN , T HA T T HOSE A RE GOV ER NED BY THE SAME PROMP T P AY STATUTES. THEY WOULD JUST RUN TO T HE STRIBER IN THAT INSTANC E AN D NOT TO THE P ROVI DE R. W ITH RESPECT TO 6 41 --.

CHIEF JUSTICE: I'M NOT SURE I UNDERST OOD Y OUR L AST EXP LANATION.

OKAY. THE QUEST ION W AS W HE N WOU LD S UBSCRIBERS EVER HAVE PRO MP T PAY RIGHTS? IF THE I SSUE WAS PAYIN G THE PROVIDER. AND I N T HOSE I NS TA NC ES W HE N SUBSCRIBERS SUB MI T T HE CLAIM TO THE INSURANCE C OMPANY DIRECTLY, BECAUSE THEY HAVE GONE TO A P RO VI DE R THA T DOESN'T TAKE I NSURANCE FOR EXAMPLE , O R D OE SN 'T F IL E INSURANCE CLAIMS FOR THEM , THEY WOULD FILE THE C LAIM WITH THE INSURANCE COMPANY AND THE INSURANCE COMPANY, THE H MO WOULD HAVE TO COMPLY WITH T HE SAME STATU TORY P ROVISI ONS. IN TIME IN TERMS O F I NT EREST AND THINGS LIKE THAT .

CHIEF JUSTICE: SO THERE A RE CIRCUMSTANCES WHERE A SUBSCRIBER I S STI LL O N T HE HOOK?

RIGHT.

CHIEF JUSTICE: EVEN THOUGH THEY ARE AUTHORIZED THEY ARE GOING TO AN A UTHO RIZE D PROVIDER?

WELL, THE P OI NT WAS S IM PL Y THAT IF THE Y SEND IT I N DIRECTLY , THE N I N T HE HMO VIOLATES THE STATUTE T HE N T HE SUBSCRIBER MIGHT HAVE A REMEDY THAT DOESN'T HAPPEN VERY O FTEN , BECAUSE 9 9. 9% O F THE CLA IM S G O T THROUGH.

JUSTICE: NOW, IS I T Y OUR POSITION THAT YOU CAN TOTALLY IGNORE THE MED IA TI ON PROVISIONS WITHIN THE ACT? PRIOR TO FIL IN G CIVIL SUIT?

IF YOU A RE R EFERRING TO T HE MAXIMUS PROCEEDING , YES, I THINK IT IS P RE TTY CLE AR THAT THE MAX IMUS P ROCE ED IN G WAS INT ENDED TO BE V OLUN TA RY PROCEEDING. OFFERED AS A METHO D FOR T HE HMO AND THE PROVIDE R T O G O T O AN A LTER NATE DIS PUTE RESOLUTION. IT WAS E NACTED . > > JUSTICE: IF T HA T' S T RUE HOW DO YOU RELATE TO THE 100 % LIABILITY VERSUS THE 5 % DIF FERENTIAL ? > > I T HI NK T HA T THE Y A RE COMPLETELY DIFFERENT ISSUES. IN TERMS OF T HE E NFOR CE MENT SCHEME, THA T' S S ET O UT FOR T HE OFFICE OF I NS UR ANCE REG UL ATIO N , WHAT THE STATUTE SAYS IS THAT A 5% M ARGI N O F E

RROR I S OKAY. THAT THEY ARE NOT GOING T O G O AND FIND A H M O I F I T IS W ITHIN A C ERTA IN D IM INIM US PRO CE SSIN G OF CLAIMS. IT DOESN'T SAY AT ALL AND I THINK WE ARE ALL MISSING T HE ISSUE IN THAT THE PROMP T P AY STATUTE SAYS CLEARLY AFTER 120 DAYS, T HE CLA IM S B EC OM E UNCONTESTABLE OBLIGATIONS O F THE HMO. THE L EGISLATURE W AS V ER Y C LE AR , UNCONTESTABLE OBLIGATIONS MEANS THAT IT IS BASIC AL LY A C ONFESSION OF J UDGMENT AND IT IS A CLAIM THAT CAN N O L ON GE R BE DISPUTED. IN ADDITION, THE STA TUTE PROVIDES THAT T HERE I S 1 2% I NTEREST ON T HOSE CLA IM S THAT ARE PAID LATE . THERE IS NO DEF ENSE. NOW, THE ISSUE T HE N FUNDAMENTALLY THAT WE HAVE TO TRY TO RESOLVE I S T HE N I F T HE LEGISLATURE SAYS THAT THESE CLAIMS HAVE TO BE PAID O R T HA T THEY BEC OM E INC ONTEST AB LE A ND INTEREST HAS TO B E PAID , T HE N HOW A RE WE GOING T O C OLLECT THEM? R IGH T? AND THEY ARE SAY ING THAT T HERE IS ABSOLUTELY NO MECHANI SM AT ALL.

JUSTICE: LET M E PUT THE OTHER SHOE ON THAT FOOT. IF W E A CC EPT Y OU R POS ITIO N THEN YOU ARE IN A BET TE R POSITION THAN THE S UB SCRIBER A S FAR AS THE ABILITY T O IMMEDIATELY FILE A CIVIL SUIT?

ME AS WHO, YO UR H ON OR ?

JUSTICE: THE N ON CO NT RACTIN G PROVIDER.

NO , THE S TATUTE , 3 61.3 45 5 PUTS THE CONTRACTED AND THE NONCONTRACTED P ROVIDERS ON AN EVEN BASIS, A ND SO O UR POSITION IS T HA T T HE LEGISLATURE WAS V ER Y CLEAR T HE ACT WAS ENACT ED I N 1 99 8. IT WAS AMENDED IN 199 9. TO FURTHER PRO HI BI T HMO PRA CTICES IN 2 00 0 , I N FAC T , THE IN C ON TE ST ABLE L AN GUAGE COMES IN AND THE INTERES T R AT E I S INCRE ASED. AND IN 2 00 2 , T HE L EG ISLATU RE SAYS THESE ARE S O I MPOR TA NT THAT THEY C AN NO T B E W AI VE D . YOU CAN'T W AIVE THEM , N ULLI FY T HEM BY CONTRACT SO THE I SSUE IS CLEARLY T O M E R EA DIN G THE V ER Y P LAIN TERMS OF THA T STATUTE THAT CLEARLY THE LEGISLATURE CONTEMPLATES T HA T THOSE CLAIM S ARE G OING TO B E PAID, THE INTEREST IS GOING TOBE COLLECTABLE , A ND T HE IR ARGUMENT HERE TODAY IS T HA T THEY ARE BASICALLY IMMUN E UNDER THAT STATUTE. THERE WOULD BE NO REASON F OR THESE CLAIMS TO BE INCONTESTABLE. NO REASON FOR THE CLAIMS NOT TO BE WAIVE ABLE I F I T W AS N'T E NFORCEABLE.

J USTICE: DO YOU A GREE O R DISAGREE THEY WOULD BE SUBJECT TO \$ 25,000 F IN ES P ER VIO LA TION UNDER ADMINIS TRATIVE R EMEDY B Y THE E XECUTIVE BRANC H? IT MAY NOT SOLVE YOUR PROBLEM WITH INTEREST FEES I N GET TI NG PAID BUT T HEY WOULD BE S UB JE CT TO S IGNIFICANT F IN ES AND LOS S OF CERTIFICATE, CORRECT?

I THINK THAT'S VER Y CLEAR. IN FACT, IN 1 99 9 , T WO O F T HE PARTIES HERE WERE, IN FACT , THE SUBJECT O F PROMP T P AY VIOLATIONS AND THEY W ER E FIND BY THE OFFICE OF INS UR AN CE.

JUSTICE: SO THERE ARE REMEDIES AVAILABLE. THE QUESTION IS WHETHER IT IS A PRIVATE REMEDY?

RIGHT. THERE A REN'T ANY R EMED IE S T O US. IT IS V ER Y CLEAR IN THE STATUTES THAT THE OFFICE OF INSURANCE REGULATION DOESN'T HAVE THE AUTHORITY TO C OL LE CT I NDIVIDUAL C LAIMS O N B EHAL F O F PROVIDERS OR INTEREST. SO T HE O NL Y P ARTI ES W ITH A NY A BILITY T O C OL LE CT T HE SE CLAIMS HAS T O B E T HE PROVIDERS.

CHIEF JUSTICE: YOU ARE SUBSTANTIALLY OUT OF TIME. THANK YOU VERY MUCH , MISS ALEXANDER.

THANK YOU.

CHIEF JUSTICE: NOW M IS S G REGOIRE.

THANK YOU, YOUR HONOR. FIRST OF ALL, I WOULD LIKE TO DISCUSS THE IMMUNITY UNDER THE STATUTE THAT WE JUST HEARD. IN VILLAZON THIS COURT SAID THERE IS IMMUNITY UNDER THIS STATUTE.

IT DIDN'T SAY THERE IS IMMUNITY UNDER THE STATUTE. EXCUSE ME. IT SAID THAT A NONDELEGABLE DUTY ASPECT OF THE STATUTE CANNOT CREATE A SEPARATE TORT CAUSE OF ACTION.

THAT THE ACT DOES NOT EITHER IMPLY OR STRONGLY -- EXPRESSLY PROVIDE FOR A NON CAUSE OF ACTION.

JUSTICE: A CAUSE OF ACTION AND TORT, RIGHT. EXCEPT FOR SAYING THAT, PLEASE CONTINUE.

IF A PARTY CANNOT SUE DIRECTLY UNDER THE ACT WHICH I BELIEVE IS WHAT VILLAZON SAYS THEN WHAT WE ARE SAYING HERE, WHAT WESTSIDE IS SAYING HERE I CAN'T SUE UNDER THE ACT BUT I CAN BACK DOOR INTO THE ACT BECAUSE EVERY PROVIDER IN THE STATE OF FLORIDA TO EVERY SUBSCRIBER IN THE STATE OF FLORIDA WILL HAVE A BACK DOOR CAUSE OF ACTION.

JUSTICE: LET'S RAISE THIS. WE REGULATE INSURANCE TREMENDOUSLY IN FLORIDA, HAVE ALL KINDS OF REGULATIONS, AND NONE OF THOSE STATUTES CREATE A DIRECT CAUSE OF ACTION. AT THE SAME TIME, OUR LAW IS CONSISTENTLY HELD THAT THE CONTRACTS ENTERED INTO THAT ARE TOUCHED UPON BY THOSE, THOSE REQUIREMENTS BECOME PART OF THE CONTRACTUAL RELATIONSHIP. SO IT IS NOT GOING BEHIND THE DOOR. I MEAN THAT'S BEEN CONSISTENTLY THE LAW AS LONG AS I HAVE BEEN IN FLORIDA.

BUT IF YOU COMPARE CHAPTER 627 WITH 641 YOU WILL SEE STARK DIFFERENCES, CHAPTER 641 REFERS REPEATEDLY TO ADMINISTRATIVE ENFORCEMENT. IF THERE IS --

JUSTICE: WHAT WOULD YOU DO WITH THAT? I'M A LITTLE PERPLEXED WHEN THEY SAY IT DOESN'T DEAL WITH THE LATE PAYMENTS OR INTEREST. THAT IS NOT REMEDIED. IT IS ONLY SOME KIND OF -- IS THAT CORRECT? DO YOU ALL -- ARE YOU ALL IN DISPUTE ON THAT FACT? THEY MAKE A BLANK STATEMENT.

WE AGREE THERE ARE RIGHTS INCORPORATED INTO 641 AND THERE ARE ENFORCEMENT VEHICLES AVAILABLE.

JUSTICE: BUT NOT IF YOU COLLECT THE LATE PAYMENTS OR INTEREST?

NOT A PRIVATE CAUSE OF ACTION IN THE COURTS.

JUSTICE: CAN THEY COLLECT IT -- THEY CAN COLLECT ADMINISTRATIVELY ALL LATE PAYMENTS AND ALL INTEREST?

ABSOLUTELY, JUSTICE, BECAUSE IF YOU LOOK AT THE 2000 REPORT THAT WE PUT IN THE RECORD WHAT IT SAYS IS THAT LATE PAYMENTS AND INTEREST ARE ENFORCEABLE BY DFS, NOT BY MAXIMUS BUT DFS. SPECIFICALLY SAYS THAT IN A HCA'S REPORT. NOW, HOW DOES THAT WORK? DOES THAT PUT MONEY IN EACH PROVIDER'S POCKET? NO. BUT DOES IT PROVIDE FOR SIGNIFICANT FINES OR SUSPENSION OF HOMES?

JUSTICE: SO YOU ARE SAYING IT IS REMEDIATED THROUGH FINES. THEY DO NOT PROVIDE THE PAYMENT OR THE INTEREST TO THOSE WHO PROVIDE A SERVICE?

I'M SAYING IT IS ENFORCEMENT THROUGH FINES , AND , IN FACT , WE ESTABLISH REFERRED TO WHAT HAPPENED A FEW YEARS AGO WITH THE HMO'S , AND YOU BETTER BELIEVE THAT THEY PAID WHATEVER THEY WERE SUPPOSED TO PAY TO THE RECEIPTS THAT WERE SUPPOSED TO RECEIVE THOSE BECAUSE THOSE ENFORCEMENT REMEDIES THROUGH DFS AND THE OFFICE HAVE THEM AND NO HMO IS GOING TO TAKE A CHANCE AND I'D LIKE TO GO TO ONE MOMENT TO THE ASSIGNMENTS.

CHIEF JUSTICE: SINCE WE WENT A LITTLE OVER , YOU ARE OUT OF TIME BUT I WILL JUST IF YOU WANT TO ADDRESS THAT.

HAD THIS WENT TO FEDERAL COURT IT WENT ON THE BASIS OF THE ASSIGNMENTS AND THE ASSIGNMENTS WERE JUST ABOUT TO VOID ARISING PROCEEDINGS . WE BELIEVE THAT THIS OPINION SHOULD BE QUASHED AND THIS MATTER RETURNED TO THE 4TH DISTRICT FOR AN APPROPRIATE OPINION. THANK YOU.

CHIEF JUSTICE: THANK YOU VERY MUCH. IT IS ALWAYS A PLEASURE TO HAVE EXCELLENT APPELLATE ADVOCATES , AND THE PEOPLE FROM PALMBEACH AND BROWARD COUNTY , THE COURT WILL TAKE THIS MATTER UNDER ADVISEMENT AND WE WILL BE IN RECORDS .

THE MARSHAL: ALL RISE : ,, ,, ,, ,,