>> PLEASE RISE OF.
LADIES AND GENTLEMEN, THE
FLORIDA SUPREME COURT.
PLEASE BE SEATED.
>> MORNING.
THE NEXT CASE ON THE DOCKET IS
THE PERERA VERSUS UNITED STATES
FIDELITY AND GUARANTY COMPANY.
YES?
>> GOOD MORNING.
MAY IT PLEASE THE COURT.
I'M CHARLES SCHROPP, AND I
REPRESENT THE APPELLANT, PAMELA
PERERA.
WITH ME IS CO-COUNSEL.
DENNIS DIECIDUE.
AS AN INITIAL MATTER IS
IMPORTANT TO ADDRESS AN
ERRONEOUS LEGAL PRESUMPTION
THAT UNDERLIES BOTH CERTIFIED
QUESTIONS IN USF&G ARGUMENT AND
WILL SUBSTANTIALLY SIMPLIFY
THEM.
THAT ERRONEOUS ASSUMPTION IS
THAT THE EXISTENCE OF UNPAID
EXCESS COVERAGE IS MATERIAL TO
THE ISSUE OF WHETHER A BAD
FAITH CLAIM EXISTS ON THE PART
OF AN INSURED.
IT ISN'T.
>> WELL IT COULD BE AND
COULDN'T BE.
BUT LET'S TRY, LET'S TAKE THE
FACTS OF THIS CASE.
>> THAT'S WHAT I WAS TRYING TO
DO.

I'M TRYING TO ESTABLISH THE
PRINCIPLE, JUDGE.
THAT, FROM THE PERSPECTIVE OF
AN UNDERLYING CARRIER, EXCESS
COVERAGE IS NOTHING MORE THAN
AN ASSET OF THE INSURED THAT
THE INSURED IS ENTITLED TO USE
FOR ANY PURPOSES THAT IT DEEMS
IN ITS BEST INTERESTS SO THAT
THERE IS NO, THERE IS NO CASE
LAW THAT I'M AWARE OF ANYWHERE,
THAT HAS HELD THAT, YOU KNOW,
THAT AN INSURED OWES AN
UNDERLYING CARRIER A DUTY TO
BUY EXCESS COVERAGE, TO
MAINTAIN IT OR TO USE IT FOR A
PARTICULAR PURPOSE.
>> ISN'T THE ISSUE HERE,
WE CAN REPHRASE CERTIFIED
QUESTIONS, WHETHER THE INSURED
EVER FACED A RISK OF INCREASED
EXPOSURE?
AND I THINK IN USF&G'S ANSWER
BRIEF OR ON THE ONE OF THE
QUESTIONS THEY PHRASED IT THAT
WAY.
BECAUSE PUNITIVE DAMAGES, WHICH
THERE WAS EXPOSURE TO
HAS BEEN TAKEN OUT BY THE 11th
CIRCUIT.
>> WELL --
>> THEY HAVE TAKEN IT OUT.
THIS IS JUST HERE ON VERY
LIMITED PURPOSE.
AND IN TERMS OF CHUBB, THEY
HAVE MADE A DETERMINATION THAT

CHUBB WAS WILLING TO SETTLE
WITHOUT USF&G'S CONTRIBUTION.
AND NO ASSIGNMENT BY CHUBB TO
PERERA WAS MADE.
SO IN THIS, YOU KNOW, I'VE BEEN
THINKING ABOUT THIS CASE A LOT.
WITH THOSE TWO FACTORS --
>> WE SEE, THAT'S WHAT THEY SAY
THE FACTS ARE, BUT THAT
ACTUALLY QUITE WASN'T WHAT THE
11th CIRCUIT SAID.
AND IT DID SAY THAT PUNITIVE
DAMAGES WEREN'T INVOLVED BUT OF
COURSE THAT WAS NEVER AN EXCESS
EXPOSURE.
THAT IS UNINSURED EXPOSURE.
>> THAT IS WHY I ASKED YOU --
>> I DON'T THINK THAT HAD
ANYTHING TO DO WITH IT.
WHAT THE 11th CIRCUIT ACTUALLY
SAID --
>> EXCUSE ME, JUSTICE PARIENTE
IS TRYING TO ASK YOU A
QUESTION.
IF YOU COULD WAIT FOR A MOMENT
AND LET HER FINISH THE
QUESTION.
>> I'M SORRY, JUDGE.
>> WERE YOU HEARING MY
QUESTION?
>> I THOUGHT I DID.
>> WELL, I'M ASKING YOU,
DOESN'T THERE AT LEAST, THERE
DOESN'T HAVE TO BE EXCESS
JUDGEMENT.
THERE DOESN'T HAVE TO BE A RISK

OF EXPOSURE TO AN EXCESS OF $25 MILLION FOR THERE TO BE AN ACTION FOR BAD FAITH.
OKAY.
I'M SAYING, LET'S ASSUME THAT YOU'RE CORRECT THAT, IN EVERY SITUATION THAT DOES NOT HAVE TO OCCUR.
WHAT I'M ASKING YOU AT THE VERY LEAST, DOESN'T THE BAD FAITH CONDUCT OF THE INSURANCE COMPANY, THE PRIMARY, HAVE TO INCREASE THE RISK OF EXPOSURE TO EITHER UNINSURED LIABILITY, OR EXCESS LIABILITY, OR PERSONAL LIABILITY?
>> SEE THAT'S WHAT I'M SAYING.
IN OTHER WORDS, IF YOU DON'T TAKE THE UNPAID CHUBB COVERAGE INTO ACCOUNT, THE CONDUCT OF USF&G CLEARLY EXPOSED THEM TO LIABILITY.
THERE IS FIVE MILLION DOLLAR JUDGEMENT OUT THERE TO THIS DAY REMAINING UNSATISFIED AGAINST ESTES.
THE CLEAR INTENT OF THE SETTLEMENT DOCUMENTS WAS THE SOLE-SOURCE OF RECOVERY FOR THAT $5 MILLION WAS A BAD FAITH CLAIM AGAINST USF&G.
>> LET'S SEE IF WE CAN GET DOWN TO THE BOTTOM OF THIS.
THIS APPEARS TO ME, YOU CORRECT ME IF I'M WRONG, THIS APPEARS

TO ME, AT LEAST STRUCTURED, AS
A ATTEMPT TO BE COBLENTZ TYPE
ARRANGEMENT BUT WE HAVE ADDED
FACTOR OF EXCESS CARRIER
INVOLVED.
THAT IS EXACTLY WHAT WE HAVE
HERE.
IS THAT A FAIR ANALYSIS.
>> THAT'S WHAT I'M TRYING TO
SAY, JUDGE.
>> LET ME FOLLOW ON THROUGH.
WHAT WE'RE STRUGGLING WITH
BECAUSE YOU DO HAVE THE EXCESS
CARRIER, THAT'S ABOVE THE USF&G
COVERAGE, IS THAT THAT CLAIM
MAY MORE PROPERLY BELONG TO
CHUBB.
IF YOU HAD AN ASSIGNMENT HERE
FROM CHUBB TO EITHER ESTES, OR
SOMEHOW, BACK TO PERERA, THAT
THIS WOULD HAVE, THIS WOULD
HAVE MAYBE BEEN ACCOMPLISHED
BECAUSE THAT RIGHT IS VESTED IN
CHUBB IN ITS POSITION AS AN
EXCESS CARRIER.
WHY IS THAT WRONG?
>> THAT'S WRONG BECAUSE CHUBB
DIDN'T PAY IT.
YOU SEE, IN FLORIDA LAW, A BAD
FAITH CLAIM BELONGS TO THE
INSURED.
IN OTHER WORDS, IT IS
PREDICATED ON VIOLATION OF
DUTIES TO THE INSURED.
THE ONLY TIME THAT AN EXCESS
CARRIER, CLAIM, BAD FAITH CLAIM

IS TRANSFERRED TO AN EXCESS
CARRIER IS WHEN IT PAYS THE
CLAIM.
>> BUT IT DID PAY PART, DID IT
NOT?
>> SEE THAT IS NOT PART OF THE
BAD FAITH CLAIM.
>> JUST A MINUTE THOUGH.
IT DID PAY PART, DID IT NOT?
>> IT DID.
>> EXCESS YOU'RE LOOKING AT
WHAT EXCESS OF WHAT USF&G WOULD
HAVE OWED, WHAT YOU'RE TALKING
ABOUT, NOT EXCESS OF WHAT CHUBB
MAY HAVE OWED.
>> BUT WHAT I'M SAYING, YOUR
HONOR, IS THAT, WE GOT BACK TO
THE POINT I WAS TRYING TO MAKE
AT THE INITIAL THING.
IS THE INSURED HAS THE RIGHT TO
USE ITS EXCESS COVERAGE IN ITS
BEST INTERESTS.
HERE IT DETERMINED THAT ITS
BEST INTEREST WERE SERVED BY
ONLY HAVING THE EXCESS CARRIER
RESPOND ON A LIMITED BASIS TO
THIS CLAIM, $3.75 MILLION IT
PAID AND NOT TO RESPOND TO THE
REMAINING $5 MILLION.
SINCE CHUBB DIDN'T PAY THAT,
AND UNDER NO CIRCUMSTANCES
WOULD BE OBLIGATED TO BECAUSE
ESTES ENTERED INTO AN AGREEMENT
WITH PERERA THAT THE
SOLE-SOURCE OF, RECOVERY WAS
GOING TO BE A CLAIM AGAINST

USF&G, WHICH BY DEFINITION
PRECLUDES, YOU KNOW, LOOKING TO
CHUBB FOR THE MONEY.
>> BUT DOESN'T THERE HAVE TO BE
A CAUSAL RELATIONSHIP?
IF WE TOOK A SITUATION WHERE
CHUBB WAS BRINGING THIS CLAIM,
CHUBB WOULD HAVE TO PROVE THAT
IT PAID MORE THAN IT SHOULD
HAVE BECAUSE OF THE ACTIONS OF
THE UNDERLYING CARRIER.
AND YOU ARGUE IN YOUR BRIEF
THAT CHUBB ELECTED TO, QUOTE,
CASH OUT BY PAYING MOST OF THE
SUM THAT USF&G WOULD HAVE PAID.
BUT THE 11th CIRCUIT AND IT
SEEMS TO ME, LOOKING AT ALL THE
SETTLEMENT NEGOTIATIONS THAT
PRECEDED THIS INCLUDING CHUBB'S
OFFER OR SECOND OFFER OR THIRD
TO PAY 4.25 MILLION FOR A
GLOBAL SETTLEMENT IS THAT THEY
FOUND, AND THE FACTS DON'T SEEM
TO BE ASK US TO BE IN DISPUTE
THAT CHUBB WAS COMMITTED TO
SETTLING EVEN WITHOUT USF&G'S
CONTRIBUTION AND THAT ANY CLAIM
FOR EQUITABLE SUBROGATION HAD
NOT BEEN MADE AND WAS DEEMED
ABANDONED.
SO THAT'S THE FACT THE AS WE'RE
ASKED TO THEN DECIDE THE
CERTIFIED QUESTION, HOW DID
USF&G'S CONDUCT IN BAD FAITH,
REFUSING TO SETTLE, RESULT IN
ESTES BEING EXPOSED TO A $10

MILLION JUDGEMENT, FIVE MILLION
OF WHICH WASN'T BEING PAID
IMMEDIATELY?
THAT'S THE QUESTION I HAVE.
>> OKAY.
THE FIRST THING IS, LET ME READ
TO YOU WHAT THE 11th CIRCUIT
ACTUALLY SAID ABOUT THIS.
ALSO THE RECORD EVIDENCE IS
CLEAR THAT AT RELEVANT TIMES
CHUBB WAS COMMITTED TO SETTLING
THE CASE AND WAS NOT DELAYING
SETTLEMENT NEGOTIATIONS WITH
THE PLAINTIFF'S ATTORNEY AND
WAS NOT REFUSING TO MAKE THE
NECESSARY COVERAGE AVAILABLE TO
SETTLE THE CASE AWAITING
PAYMENT OF USF&G'S ONE MILLION.
ON THE CONTRARY, CHUBB WAS
CONTRIBUTING SUBSTANTIAL
FUNDING FOR THE OFFERS BEING
MADE TO PLAINTIFF'S ATTORNEY AS
WELL AS NECESSARY FUNDING FOR
THE FINAL SETTLEMENT.
NOW, THAT'S CORRECT AS FAR AS
IT GOES BUT WHAT IT DOESN'T SAY
IS THAT CHUBB'S POSITION WAS
THAT IT WOULD NOT STEP IN AND
PAY THE ONE MILLION DOLLARS
THAT HAD TO BE PAID PER USF&G
IN ORDER TO TRIGGER, ESTES
EXCESS COVERAGE.
IN OTHER WORDS THE CHUBB POLICY
ATTACHED EXCESS OF ONE MILLION.
>> THE PROBLEM WE HAVE WHEN A
CASE COMES TO US FROM THE 11th

CIRCUIT, BAD FAITH WAS FOUND
BUT THEY EXPRESSLY TELL THE
JURY, THE ISSUE OF DAMAGES
ISN'T BEFORE IT.
SO, YOU'RE GOING TO TELL US OR
YOU'RE TRYING TO ARGUE THERE
WAS A CAUSAL CONNECTION BETWEEN
USF&G'S FAILURE TO PAY THE ONE
MILLION DOLLARS THAT IT SHOULD
HAVE PAID AND THE
RESPONSIBILITY OF ESTES FOR A
$10 MILLION CONSENT JUDGMENT.
I'M HAVING, AND I GIVING YOU
BENEFIT OF EVERY DOUBT ON THIS,
A HARD TIME SEEING HOW WHAT
USF&G DID IN THIS CASE, UNLIKE
THE NORTH AMERICAN CASE, CAUSED
THE HARM THAT RESULTED IN THE
COBLENTZ AGREEMENT?
>> WHAT I'M SAYING IS, IS THAT
ESTES, HAD A ONE MILLION DOLLAR
UNDERLYING THAT HAD TO BE
SATISFIED SOMEWHAT.
CHUBB SAID, WE'RE NOT WILLING
TO STEP IN AND PAY THAT MILLION
DOLLARS.
HOWEVER, WE WILL LOWER OUR
ATTACHMENT POINT TO ZERO, YOU
KNOW, PAY WITHOUT USF&G'S MONEY
HAVING BEEN PAID FIRST AS IT
REQUIRED, PROVIDED, THAT
THERE'S AN AGREEMENT THAT OUR
MAXIMUM LIABILITY IS $3.75
MILLION.
>> BUT YOU IGNORE THE FACT THAT
A WEEK OR TWO WEEKS BEFORE THAT

THEY HAD SAID THEY WOULD PAY
4.25 MILLION AS A GLOBAL
SETTLEMENT AND THERE IS NO
EVIDENCE THAT PERERA WAS EVER
WILLING TO SETTLE FOR LESS
THAN, YOU KNOW, WAY OVER
USF&G'S LIABILITY LIMITS.
>> YOU GOT TO REMEMBER THAT THE
GLOBAL SETTLEMENT INVOLVED MORE
THAN JUST CHUBB.
IN OTHER WORDS, CIGNA HAD
MONEY.
YOU KNOW, ESTES ACTUALLY PUT
$250,000 DEDUCTIBLES INTO THE
SETTLEMENT.
ESTES DID PAY OUT-OF-POCKET
MONEY.
>> HE PAID MORE.
HE PAID 750.
>> 4.25 MILLION, YOU SEE WHEN
YOU SUBTRACT THE OTHER THINGS,
AROUND THREE AND THEY ENDED UP
PAYING 3.75 OUT OF CHUBB'S POCKET
FOR A TOTAL OF FIVE MILLION.
WHAT HAPPENED BECAUSE USF&G
WOULDN'T COOPERATE THEY WEREN'T
ABLE TO SETTLE THE CASE ON THE
BASIS OF AN ALL-CASH OFFER.
INSTEAD THEY HAD TO SETTLE ON A
PART CASH, PART CLAIM OFFER
WHERE --
>> THAT'S WHAT I'M HAVING THE
TROUBLE BECAUSE THEN USF&G DID
PAY ITS ADDITIONAL MILLION.
ACTUALLY PERERA HAS GOT $6
MILLION.

I'M HAVING TROUBLE SEEING WHAT
THE SETTLEMENT WITH WOULD HAVE
BEEN IF USF&G HAD OFFERED ITS
MILLION DOLLARS AT THE SAME
TIME THAT CIGNA HAD OFFERED,
YOU KNOW, ITS MILLION LESS THE
DEDUCTIBLE?
TELL ME WHAT EVIDENCE THERE IS
THAT THERE WOULD HAVE --
>> PLAINTIFF'S DEMAND WAS 7
MILLION IN CASH.
THAT WAS NEVER ABLE TO BE PUT
TOGETHER BECAUSE CHUBB WASN'T
WILLING TO PUT --
>> THEY WEREN'T WILLING TO PAY
MORE THAN, THEY WOULD HAVE HAD
TO PAY AT LEAST 5 MILLION OUT
OF THEIR OWN POCKET.
I MEAN UNDER THE WAY I'M
SEEING THIS, IF THE DEMAND WAS
FOR 7 MILLION, ALL RIGHT, MY
MATH IS, YOU GOT CIGNA HAD A
MILLION, LESS 500,000.
USF&G HAD A MILLION, LESS,
SELF-RETAINED OF 350,000 AND
THEN, CHUBB HAD $25 MILLION.
IT WASN'T, THERE WASN'T ANY
EVIDENCE THAT CHUBB WAS WILLING
TO FORK OVER $5 MILLION AS LONG
AS, OR 6 MILLION AS LONG AS
USF&G PAID ITS MILLION DOLLARS.
>> WELL THE ANSWER IS BECAUSE
USF&G NEVER PAID IT.
YOU KNOW, WHO KNOWS WHAT
NEGOTIATIONS WOULD HAVE GONE.
MAYBE THEY EVEN WOULD HAVE COME

DOWN FROM 7 MILLION.
YOU ASKED ME WHAT THE EVIDENCE WAS. IT WAS $7 MILLION.
THE THING IS IF USF&G HAD PAID ITS MILLION, CHUBB WOULD BE IN THE POSITION WHERE IT EITHER HAD TO PAY WHAT WAS NECESSARY TO SETTLE THE CASE OR ELSE RUN THE RISK OF AN EXCESS VERDICT AGAINST ITSELF THAT IT WOULD BE LIABLE FOR.
>> AND ESTES WOULD HAVE HAD, AS JUSTICE LEWIS SAID, AT LEAST 10 MINUTES AGO, WOULD HAVE HAD A CLAIM POTENTIALLY AGAINST CHUBB BECAUSE IF CHUBB PLAYED AROUND WITH NOT SETTLING THIS CASE, AND AGAIN, IF IT HAD BEEN ARGUED THE WAY I MIGHT HAVE ARGUED IT, YOU KNOW, ESTES WOULD BE WORRIED ABOUT A PUNITIVE DAMAGE EXPOSURE AND MIGHT BE WORRIED THAT THE JURY WOULD FIND INTENTIONAL ACT AND THEN THERE WOULD BE AN ISSUE OF COVERAGE.
SO THERE WERE OTHER ISSUES BUT CHUBB DIDN'T ALLOW, UNLIKE NORTH AMERICAN, CHUBB ACTED IN A WAY THAT CAST CONSCIENTIOUS BUT I DON'T SEE HOW, WE'RE GOING BACK TO WHETHER USF&G'S ONE MILLION DOLLAR REFUSAL ENDED UP HAVING ESTES MORE EXPOSED THAN IT WOULD HAVE BEEN IF THEY HADN'T PAID, OFFERED TO

PAY IT.
>> THE ANSWER IS USF&G'S
FAILURE, REFUSAL TO PAY ITS ONE
MILLION DOLLARS CREATED A
SITUATION WHERE EITHER CHUBB
HAD TO PAY WHATEVER WAS
NECESSARY, EVEN IF IT WAS MORE
THAN THE 3.57 MILLION, OR, RUN
THE RISK OF BEING IN BAD FAITH
ITSELF.
>> SO CHUBB HAD, WOULD HAVE A
CAUSE OF ACTION?
>> IF THAT HAD HAPPENED, YOU
SEE.
WHAT I'M SAYING, WHEN USF&G
DIDN'T PAY IT, IT PUT CHUBB IN
A SITUATION WHERE IT COULD COME
TO ESTES AND SAY LOOK, I WILL
MAKE A DEAL WITH YOU WHERE YOU
DON'T HAVE TO PAY THE MILLION
DOLLARS, THAT YOU WOULD
OTHERWISE HAVE TO PAY IN ORDER
FOR OUR COVERAGE TO PAY DOLLAR
ONE.
YOU GOT TO REMEMBER, CHUBB OWED
ZERO UNTIL A MILLION DOLLARS
WAS PAID ON BEHALF OF ESTES.
WE'LL DO THAT IF YOU'LL AGREE,
YOU KNOW, THAT WE'LL PAY 3.75
MILLION AND THE $5 MILLION
UNINSURED VERDICT.
IN OTHER WORDS, IS ESTES,
EXCUSE ME, IS USF&G'S BAD FAITH
PUT CHUBB IN THE DRIVER'S SEAT
WHERE IT WAS ABLE TO, YOU KNOW,
TO DO THAT.

IN OTHER WORDS, WHAT, IT'S
CLEAR THAT, USF&G WAS COUNTING
ON HERE WAS IT ANTICIPATED THAT
WHAT CHUBB WAS GOING TO DO WAS
TO PAY USF&G'S MILLION, YOU
KNOW ALONG WITH WHATEVER CHUBB
NEEDED TO PAY TO SETTLE THE
CASE AND COME BACK AGAINST
USF&G.
THEREFORE THEY GET A PUT ON
THEIR QUESTION WHETHER THEY HAD
COVERAGE FOR THE, YOU KNOW, THE
SUBSTANTIAL CERTAINTY TEST.
>> WHY WOULD THAT NOT BE THE
WAY THIS WOULD BE A CORRECT
FLOW?
BECAUSE UNDER THOSE
CIRCUMSTANCES, THEN CHUBB WOULD
BE IN THE POSITION TO SAY, I
WOULD NOT HAVE HAD TO HAVE PAID
X-WHATEVER, IF USF&G HAD ACTED
APPROPRIATELY AND CHUBB COULD
HAVE KEPT THAT ITSELF OR COULD
HAVE ASSIGNED THAT TO EITHER
THE CLAIMANT OR THE INSURED.
>> WHAT I'M SAYING, INSTEAD
CHUBB DECIDED IT WOULD ACT
BASICALLY MORE LIKE AN INSURED
THAN --
>> I UNDERSTAND THAT BUT I MEAN
IT SEEMS TO ME THESE THINGS
HAVE TO BE, THERE HAS TO BE
SOME STRUCTURE TO THEM THAT'S
RECOGNIZED IN LAW FOR CAUSES OF
ACTION AND THE FLOW OF
RESPONSIBILITY.

AND WHILE, YOU KNOW, THIS SIDE
OF THE EQUATION MAY HAVE
ATTEMPTED TO DO THAT, THERE'S
SOME HOLES IN IT.
AND THAT'S WHERE IT SEEMS TO ME
IS THE PROBLEM.
WE'VE BEEN TALKING ABOUT,
THERE'S HOLES HERE HOW IT WAS
ULTIMATELY STRUCTURED.
IT IS NOT THAT IT CAN NOT BE
STRUCTURED BUT THIS ONE SEEMS
TO HAVE FALLEN APART AND DOES
NOT FOLLOW LEGAL THEORY AS TO
RIGHTS AND OBLIGATIONS UNDER
OUR CURRENT LAW.
THAT'S THE PROBLEM.
>> SEE, THAT'S WHERE I GUESS, I
RESPECTFULLY --
>> RIGHT. CONVINCE US.
>> WHAT I'M SAYING, MAYBE YOU
NUTSHELLED THIS, IF THERE HAD
BEEN NO EXCESS COVERAGE HERE,
THERE IS NO QUESTION THAT ESTES
COULD HAVE ENTERED INTO THIS
DEAL.
>> RIGHT.
>> OKAY? SO MY POINT IS,
IS THAT, IF
THEY HAD THE RIGHT TO USE THEIR
EXCESS COVERAGE IN THEIR OWN
PEST INTEREST, THERE IS
ACTUALLY A STATUTE IN FLORIDA
SAYS UNDERLYING CARRIER DOESN'T
HAVE ANY INTEREST IN EXCESS
POLICY, IF THEY HAD THAT RIGHT,
THEN THEY HAD THE RIGHT TO

ENTER INTO THIS AGREEMENT.
SO IT DOES FOLLOW THE FLOW.
IN OTHER WORDS, THAT, SINCE
ESTES, IF, IT HAD NO SUCH
COVERAGE, COULD HAVE DONE
EXACTLY WHAT IT DID, IT HAD THE
RIGHT TO MAKE A DEAL WITH CHUBB
TO DO THIS INDIRECTLY WHERE
CHUBB PUT SOME MONEY UP BUT WAS
EXONERATED ABOVE THAT LEVEL.
IN OTHER WORDS, IF YOU WILL,
USE THE WORDS, CASH OUT THE
CHUBB POLICY FOR LESS.
AND IT CLEARLY MADE SENSE FROM
ESTES POINT OF VIEW BECAUSE IT
SAVED IT A MILLION DOLLARS THAT
IT WOULD OTHERWISE HAVE HAD TO
PUT UP.
THAT TO ME IS ESSENCE BEING
ALLOWED TO USE YOUR EXCESS
COVERAGE FOR YOUR BEST
INTEREST.
AND THE REASON THAT ESTES WAS
ENTITLED TO DO THAT WAS BECAUSE
OF USF&G'S BAD FAITH.
IN MY MIND RESPECTFULLY, THAT,
THAT SOLOGISM DOES FLOW.
THE ONLY THING THAT WAS
DIFFERENT THERE WAS AN EXCESS
POLICY.
AND SO IN ORDER FOR THAT TO
MAKE A LEGAL DIFFERENCE, JUDGE
LEWIS, YOU HAVE TO CONCLUDE
THERE WAS SOME DUTY ON ESTES
ESTES' HE IS PART TO COWS
EXCESS COVERAGE TO THE BENEFIT

OF USF&G OR NOT TO
THE BENEFIT OF USF&G.
THAT DUTY DID NOT EXIST.
ESTES HAD THE RIGHT TO USE THE
COVERAGE IT BOUGHT AND PAID FOR
IN SUCH A WAY IT MAXIMIZED,
MINIMIZED ITS LIABILITY AND
MAXIMIZED, YOU KNOW, THIS BAD
CASE FOR ITSELF.
>> WHAT LIABILITY, YOU SAID IT
HAD THIS ONE MILLION DOLLAR
LIABILITY.
IF THERE WAS NO COVERAGE FOUND
BUT WHAT OTHER LIABILITY DID,
WAS ESTES CONCERNED THAT IT
HAD?
IT HAD $25 MILLION IN EXCESS
COVERAGE AND THE DEMANDS WERE
ALWAYS WAY, WAY WITHIN THE
POLICY LIMITS.
I APPRECIATE ANOTHER CASE MIGHT
SUPPORT WHAT YOU'RE SAYING.
I JUST DON'T SEE IT UNDER THE
FACTS OF THIS CASE.
>> I'LL PUT IT THIS WAY.
JUDGE, I DON'T KNOW WHAT,
THEORY WOULD SAY THAT THIS
COULDN'T HAVE EXCEEDED THE
LIMITS OF COVERAGE.
IN FACT THERE IS A CASE IN
TEXAS JUST RECENTLY AGAINST
U-HAUL ON VERY SIMILAR FACTS
THAT RESULTED IN $84 MILLION
VERDICT.
I GUESS WHATEVER --
>> THERE WOULD HAVE TO BE FACTS

LIKE THERE WERE IN NORTH
AMERICAN.
FACTS TO SHOW SOMEBODY WAS
CONCERNED ABOUT A VERDICT IN
EXCESS OF $25 MILLION.
AT THAT POINT YOU HAVE A WHOLE
DIFFERENT CASE.
FIRST OF ALL THEN YOU WONDER
WHY PERERA, IF THE CASE WAS
OVER $25 MILLION, WOULD HAVE
SETTLED TO FOR FIVE WHEN THERE
IS THAT MUCH COVERAGE?
>> AS I SAID -- YOU'RE IN.
>> YOU'RE IN REBUTTAL.
>> STIPULATED $10 MR.^THE CASE
WAS SETTLED FOR WAS REASONABLE
AMOUNT TO SETTLE IT FOR.
THAT WAS PART OF THE BAD FAITH
TRIAL WAS STIPULATION TO THAT
EFFECT.
SO CERTAINLY WAS NOT
UNREASONABLE.
IN FACT THAT THE STEEL VERSUS
FLORIDA INSURANCE RECIPROCAL
LINE OF CASES PROTECTION FOR
UNDERLYING CARRIER IN THIS TYPE
OF SITUATION BECAUSE IT CAN
CHALLENGE REASONABLENESS OF
SETTLEMENT IN GOOD FAITH.
HERE THEY STIPULATED AMOUNT WAS
REASONABLE AND GOOD FAITH WAS
LOST, WAS LOST IN THE BAD FAITH
TRIAL THAT OCCURRED IN DISTRICT
COURT.
SO, YOUR HONOR, I GUESS WHAT
I'M SAYING IS, THAT, YOU KNOW,

WHILE THE CASE COULD HAVE MAYBE
BEEN SETTLED FOR 7 MILLION OR A
LITTLE LESS FOR CASH, WHEN IT
ISN'T CASH, THE DISCOUNT THAT A
PLAINTIFF IS SWILLING TO TAKE
IS SUBSTANTIALLY LESS.
BUT AND HERE THE AMOUNT WAS
STILL WITHIN, BY EVERYBODY'S
AGREEMENT, WITHIN THE
REASONABLE AMOUNT FOR THIS CASE
TO BE SETTLED FOR.
THAT IS THE ESSENCE OF A
COBLENTZ AGREEMENT.
ESSENTIALLY, THERE IS THE
UNDERLYING CARRIER WHEN IT ACTS
IN BAD FAITH TAKES THE RISK,
THAT YOU KNOW, THAT THE
SOMETHING MORE TOWARD THE
MAXIMUM IF THE CASE COULD BE
WORKED IS GOING TO BE PAID,
RATHER THAN IF IT VIGOROUSLY
DEFENDS THE CASE AND, --
>> WITH THAT YOU HAVE EXCEEDED
YOUR TIME FOR ARGUMENT.
THANK YOU VERY MUCH.
>> THANK YOU VERY MUCH.
>> GOOD MORNING.
MAY IT PLEASE THE COURT.
JACK REITER AND GORDON CAUTIOUS
ON BEHALF OF APPELLEE.
YOUR HONOR --
>> AT OUTSET YOU HEARD MY
CONCERNS AND THOSE FROM THE
BENCH WITH REGARD TO YOUR
OPPOSITION.
MY CONCERN WITH REGARD TO YOUR

POSITION IS, THAT IT SEEMS TO
ME THAT WE CAN'T ESTABLISH A
RULE OF LAW THAT WHEN A
BUSINESS IN THE STATE OF
FLORIDA PROTECTS ITSELF WITH
DIFFERENT LAYERS OF COVERAGE,
THAT IS NOT UNCOMMON AND ONE
WITHIN THAT CHAIN JUST
UNILATERALLY, SAYS I'M NOT
GOING TO PAY, THAT THERE IS NO
RELIEF TO EITHER THE INSURED OR
THE EXCESS CARRIER.
NOW IN THIS CASE, IF THIS
ALLEGED COBLENTZ, USE MODIFIED
COBLENTZ AT
OUR APPROACH, PLACED CHUBB AT
THEORETICAL RISK, THE JUDGMENT
WE'LL ASSESS IT AGAINST CHUBB
BUT WE'LL NOT EXECUTE ON IT
UNTIL WE SEE WHAT HAPPENS,
WOULD THAT HAVE BEEN, PLACED
USF&G AT RISK?
>> NO, YOUR HONOR.
>> FROM CHUBB?
>> YOUR HONOR, I LIKE TO ANSWER
THE FIRST PART OF YOUR QUESTION
FIRST, BECAUSE I THINK IT IS A
VERY SIGNIFICANT POINT AND FROM
A POLICY PERSPECTIVE THE LAW AS
IT EXISTS NOW ALREADY HAS IN
PLACE MECHANISMS TO AVOID THE
VERY CONCERN THAT YOUR HONOR
RAISES.
BECAUSE AS YOUR HONOR POINTS
OUT UNDER THE RANGER AND
MORRISON CASE --

>> YOU'RE GOING FAR AFIELD.
RESPOND TO THE QUESTION AND
GIVE A SPEECH LATER.
>> YES, YOUR HONOR.
>> IF THEY HAD STRUCTURED IT IN
THAT FASHION WOULD THAT HAVE
PLACED USF&G AT RISK?
>> YOUR HONOR --
>> IF THIS HAD BEEN STRUCTURED,
SO THAT IT WAS A JUDGEMENT
ENTERED AGAINST BOTH THE
INSURED AND CHUBB, YET CHUBB
WAS GOING TO ASSIGN, RATHER
THAN ENFORCING IT AGAINST
CHUBB, CHUBB WAS GOING TO
ENFORCE THAT EITHER THROUGH AN
ASSIGNMENT TO THE INSURED OR
CLAIMANT OR CHUBB ITSELF
AGAINST USF&G WOULD --
>> YOUR HONOR, THE ANSWER TO
YOUR QUESTION YOUR HONOR WAS
ROOTED IN WHAT I WAS SAYING
ABOUT EQUITIABLE SUBROGATION.
CHUBB HOLDS THAT RIGHT.
>> CHUBB WOULD HAVE THE RIGHT
TO ASSIGN IF THAT STRUCTURED
THAT WAY.
>> YES.
>> YOU HAVE ANSWERED IT.
DON'T GO ANY FURTHER.
>> LET ME FOLLOW UP ON THAT,
THOUGH.
CHUBB, IF USF&G DID WHAT IT DID
HERE AND DIDN'T OFFER ITS ONE
MILLION DOLLARS AND ALREADY
BEEN FOUND TO BE IN BAD FAITH

AND USF&G AND CHUBB HAD ENTERED
INTO THIS $10 MILLION
SETTLEMENT, AND, THEN, HAD
EITHER HAD ASSIGNED THIS RIGHT,
WOULDN'T EITHER, WHOEVER,
EITHER CHUBB OR WHOEVER
ASSIGNED IT, WOULD STILL HAVE
TO SHOW A CAUSAL CONNECTION
BETWEEN THE ACTIONS OF THE
PRIMARY CARRIER AND ANY
INCREASED DAMAGE TO THE EXCESS
CARRIER?
>> ABSOLUTELY, YOUR HONOR.
AND THAT WAS NOT SHOWN HERE.
>> TO ME THAT'S WHAT REALLY, I
DON'T KNOW IF YOU DISAGREE WITH
NORTH AMERICAN BUT I THINK IT'S
A WHOLE DIFFERENT SET OF FACTS
THERE BECAUSE NEITHER THE
PRIMARY, NOR THE EXCESS WERE
WILLING TO PAY.
THEY WERE FACING, IT WAS AN
INDEMNITY POLICY WHICH MEANS
THE INSURED IS PAYING ITS WAY
AND THEY WERE VERY WORRIED
ABOUT A VERDICT IN EXCESS BOTH
OF CARRIER'S AND PRIMARY AND
EXCESS CARRIER'S LIMITS.
YOU SEEM, THERE IS SOME
SUGGESTION THAT NORTH
AMERICAN'S NOT CORRECT BUT
THAT'S WHY WE DON'T WANT TO
JUST HINGE THIS ON, THERE HAS
TO BE EXCESS VERDICT BEFORE
THERE'S BAD FAITH.
SO TELL ME YOUR POSITION ON

THAT.
>> ABSOLUTELY, YOUR HONOR I AGREE WITH YOUR HONOR'S OBSERVATION COMPLETELY.
NORTH AMERICAN VAN LINES CAN BE COMPLETELY DISTINGUISHED AND LIMITED TO ITS FACTS THE REALITY IN NORTH AMERICAN VAN LINES THE FOURTH DISTRICT CHARACTERIZED THE CIRCUMSTANCES AS PRESENTING AN EXCESS SITUATION BECAUSE THERE IT WAS CLEAR AND IT WAS BASED ON AN ORDER DISMISSING A COMPLAINT, SO IT WAS TAKING AN ALLEGATION OF A COMPLAINT AS TRUE,
THERE WERE ALLEGATIONS THAT AN INSURED PAID $7 MILLION OUT OF ITS OWN POCKET.
THAT THEY ALLEGED SHOULD HAVE BEEN THE RESPONSIBILITIES OF BOTH A PRIMARY AND AN EXCESS CARRIER.
SO THAT WAS FOURTH DISTRICT --
>> BREACH OF CONTRACT ACTION.
>> THAT'S RIGHT.
OF COURSE IN FLORIDA WE EXAMINE THE DUTY OF GOOD FAITH UNDER CONTRACT PRINCIPLES WHICH IS CRITICAL BECAUSE IT THEN HELPS NARROW THE FOCUS IN TERMS OF DAMAGES.
WE KNOW THAT DAMAGES IN A BREACH, IN A BAD FAITH CASE ARE LIMITED TO THOSE WITHIN THE CONTEMPLATION OF THE PARTIES IN

ACCORDANCE WITH THE CONTRACT
PRINCIPLE.
IN NORTH AMERICAN VAN LINES
THERE WAS BOTH DUTIES TO DEFEND
AND INDEMNIFICATION.
THE INSURED HAD TO PAY $7
MILLION OUT OF ITS OWN POCKET.
>> THERE WAS NO DUTY TO DEFEND.
THAT WAS INDEMNITY POLICY.
THE INSURED HAD TO PROVIDE ITS
OWN DEFENSE JUST LIKE HERE.
>> YES, YOUR HONOR, I BELIEVE
THAT IS RIGHT.
I THOUGHT THAT MAYBE THE
PRIMARY IN THAT CASE HAD SOME
DUTY TO DEFEND, BUT FOR THE
PURPOSES OF ANALYSIS IT DOESN'T
CHANGE MY ANSWER.
THE POINT IS IN NORTH AMERICAN
VAN LINES THERE WAS AN EXCESS
SITUATION.
WE KNOW HERE THAT THERE WAS
NOT.
HERE THERE WAS TESTIMONY,
TAKING ASIDE, TAKE FIRST OF ALL
THE 11th CIRCUIT ESTABLISHED AS
FACTUAL FINDINGS SHOULD REALLY
NOT BE REVISITED.
THEY ESTABLISHED AT FACTUAL
FINDINGS AT NO POINT AT ANY
TIME ANYTHING USF&G DID IN ANY
WAY INCREASE EVEN THE RISK OF
UNINSURED EXPOSURE HERE.
>> SEEMS TO ME WHEN THEY SAID
THAT I DON'T KNOW WHY THEY
ASKED US TO ANSWER THAT

QUESTION.
THAT SEEMS TO BE ONE OF THOSE,
YEAH, IF IT DIDN'T INCREASE
RISK OF EXPOSURE, WHAT ARE WE
DOING HERE?
>> I AGREE, YOUR HONOR.
>> BUT, WELL THEY ASKED US TO
SOMEHOW ANSWER SOME QUESTIONS.
MY, LET ME ASK IT IN THIS
SITUATION AND MAYBE A VARIATION
OF WHAT JUSTICE LEWIS ASKED.
IF IN THIS CASE BOTH USF&G AND
CHUBB HAD NOT AGREED TO HAD
BOAT DENIED COVERAGE AND OR
REFUSED TO TRY TO SETTLE THE
CASE, WE ONLY HAD USF&G DOING
IT BUT LET'S SAY CHUBB ALSO HAD
SOME REASON WITHIN ITS POLICY
TO CLAIM COVERAGE, AT THAT
POINT AGAIN, I JUST WANT TO
MAKE SURE, YOU WOULD AGREE
UNDER COBLENTZ THAT THE ESTES
AND PERERA COULD HAVE ENTERED
INTO THIS, REALLY $10 MILLION
JUDGMENT BECAUSE THAT WAS
WITHIN, FOUND TO BE A
REASONABLE AMOUNT, AND AT THAT
POINT THEN THE BAD FAITH WELL
WOULD REALLY BE ALMOST A BREACH
OF CONTRACT BECAUSE UNDER
COBLENTZ, AN ACTION ON THE
COBLENTZ AGREEMENT THEY COULD
RECOVER THE $10 MILLION FROM
BOTH CHUBB AND USF&G?
>> I WOULD AGREE THAT IS A
DIFFERENT CIRCUMSTANCE, YOUR

HONOR.
YES --
>> WE WANT TO MAKE SURE WE'RE NOT SITTING HERE THINKING, BECAUSE THAT'S NOT, WHY I'M, WHY THAT'S IMPORTANT BECAUSE THAT'S NOT AN EXCESS JUDGMENT IN THE SENSE THAT IT'S NOT OVER $25 MILLION.
AND I THINK THE 11th CIRCUIT'S FIRST QUESTION, DOES THERE NEED TO BE EXCESS JUDGMENT AND SAYING IT HAD TO BE OVER $25 MILLION THAT WOULDN'T HAVE BEEN NECESSARY IF, IF THE CASE, FACTS WERE DIFFERENT HERE WHERE USF&G AND CHUBB HAD NOT AGREED TO SETTLE THIS CASE?
>> THE REASON IT WOULD BE DIFFERENT THERE, YOUR HONOR, IS BECAUSE IT WOULD BE AN EXCESS JUDGMENT IN THE FACTS AS DEFINED THEM.
>> BUT THEY'RE WITHIN UNDER THIS THEORY THAT THE 11th CIRCUIT WAS GIVING THE STIPULATED $10 MILLION JUDGMENT WOULD BE WITHIN CHUBB'S COVERAGE AND COBLENTZ WOULD NOT BE APPLICABLE.
>> THE REASON, THE DISTINCTION, YOUR HONOR, IF I MAY POINT IT OUT, IS THAT THERE IS, IN YOUR HYPOTHETICAL, CHUBB, I WON'T USE THE TERM BUT IN YOUR HYPOTHETICAL, INSURANCE A AND

B, PRIMARY AND EXCESS BOTH
REFUSED TO PROVIDE COVERAGE.
THEREFORE ANY ENTRY OF JUDGMENT
IS IN EXCESS BECAUSE THEY
REFUSED TO PROVIDE COVERAGE.
THE REASON WHY THE
CIRCUMSTANCES HERE ARE
DIFFERENT BECAUSE IT IS
UNDISPUTED AT ALL TIMES CHUBB,
COVERAGE WAS AVAILABLE.
>> LET ME ASK ONE FOLLOW-UP
QUESTION THEN.
YOUR OPPOSITION SAYS WE OUGHT
NOT TREAT ESTES DIFFERENTLY,
SIMPLY BECAUSE ESTES HAD THE
FORESIGHT TO BUY EXCESS
COVERAGE.
THAT'S THEIR POSITION.
THAT IT OUGHT NOT CHANGE THE
LAW.
AND THAT THE LAW WOULD BE, THAT
IS JUST CONSIDERED AS THOUGH
THAT'S A BANK ACCOUNT OR
SOMETHING ELSE.
WHERE IS THE FALLACY OR THE
ERRONEOUS POINT IN THAT
DISCUSSION?
>> THERE ARE TWO REASONS, YOUR
HONOR.
THE REASON NUMBER ONE, IS THAT
THE PRINCIPLE OF INSURANCE
COVERAGE, THE PRINCIPLE OF AN
EXCESS JUDGMENT, THE REASON WHY
WE REQUIRE, LICENSED FIDELITY
VERSUS COBLENTZ AND IN MACOLA
VERSUS GOVERNMENT EMPLOYEES,

REASON WE REQUIRE EXCESS JUDGMENT AS REQUISITE THRESHOLD CLAIM IT GIVES MARK OF DAMAGES TO INSURED.
BACK IN 1951 HANNAH VERSUS MARTIN THIS COURT TALKED ABOUT THE NECESSITY OF DAMAGES, OF INJURY TO ON A INSURED AS A PREREQUISITE TO A BAD FAITH CLAIM.
THE REASON WHY WE DON'T DISPENSE WITH EXISTENCE OF EXCESS COVERAGE AND THE REASON WHY THE 11th CIRCUIT DIDN'T DISPENSE WITH THE EXCESS COVERAGE BECAUSE WHEN THERE IS EXCESS POLICY IN PLACE, IT PROTECTS AND INSULATES THE INSURED.
THAT'S WHY IT'S IMPORTANT TO MAINTAIN, WHEN YOU ASKED, AS YOUR HONOR SAID, WHY SHOULD WE NOT, LOOK AT IT ONLY FROM THE PERSPECTIVE AS IF THERE WAS ONLY ONE POLICY?
IF THERE WAS ONLY ESTES AND PRIMARY? IN REALITY WHEN THERE IS EXCESS POLICY IN PLACE AND THIS GOES BACK TO THE DOCUMENT OF EQUITABLE SUBROGATION WHICH WILL FEED INTO THE SECOND REASON I WAS GOING TO POINT OUT.
AS THRESHOLD MATTER YOU NEED DAMAGES.
IF THERE IS EXCESS CARRIER

THERE ARE NO DAMAGES.
UNDER EQUITABLE SUBROGATION THE EXCESS CARRIER IS SUBROGATED, IS SUBSTITUTED FOR THE INSURED FOR PURPOSES OF ADVANCING A BAD FAITH CLAIM AGAINST A PRIMARY CARRIER.
IN RANGER AND MORRISON, THE FIRST DISTRICT TALKED ABOUT THE FACT UNDER THE DOCTRINE OF EQUITIABLE SUBROGATION BECAUSE THE EXCESS CARRIER STEPS INTO THE SHOES OF THE INSURED AS IF THE INSURED SUBSTITUTED HIMSELF THROUGH THE EXCESS CARRIER FOR PURPOSES OF BRINGING A BAD FAITH CLAIM.
THERE HAS NEVER BEEN A CASE, WE HAVE AMICUS BRIEFS FILED IN THIS MATTER, THERE HAS NEVER BEEN A CASE ANYWHERE IN THE UNITED STATES THAT OF AMICUS BRIEFS POINTED OUT OR CITED BY MY OPPOSING SIDE SUGGESTING THAT WHEN AN INSURED HAS AN EXCESS LAYER OF COVERAGE THAT STEPS IN AND ACTUALLY PAYS A CLAIM, WHERE THERE IS ACTUALLY COVERAGE AVAILABLE THAT THE INSURED NONETHELESS HAS THE RIGHT TO THEN SUE FOR BAD FAITH WHEN THERE IS NO DAMAGES.
>> SO YOU WOULD, AGAIN I WANT TO MAKE SURE WE'RE ON THE SAME PAGE.
IF IN THIS CASE AND FACTS OF

THIS CASE TURN ON CHUBB BEING
THE GOOD INSURER SO TO SPEAK, I
MEAN, INSURER THAT DID WHAT, IN
OTHER CASES MAY BE THE EXCESS
INSURER WOULDN'T DO, WHICH IS
EITHER INSIST ON THE ATTACHMENT
POINT BEFORE THEY WERE WILLING
TO SETTLE, OR, SAY, WE'RE NOT,
WE'RE JUST WALKING AWAY FROM
THE SETTLEMENT.
I FIRST ASKED IF THERE WAS NO
COVERAGE.
REALLY, IF THEY HAD SIMPLY
REFUSED TO SETTLE THIS CASE,
ESTES COULD HAVE
BEEN GENUINELY CONCERNED, FIRST
OF ALL EXPENDING ITS OWN MONEY
TO DEFEND THE CASE SO ITS
INSURERS GO, LISTEN, DON'T
WORRY, YOU GO, SPEND MILLIONS
OF DOLLARS, WE DON'T CARE, THAT
WOULD BE A DIFFERENT SITUATION?
>> YOUR HONOR, THAT WOULD BE
DIFFERENT.
AND OF COURSE, JUSTICE TO POINT
OUT FROM THE FACTS OF THIS CASE
THERE WERE NO DUTIES TO DEFEND
BY ANY OF THE CARRIERS.
IT IS UNDISPUTED INSURED HERE
HAD ITS OWN DUTY TO DEFEND
AND --
>> UNDER THE INDEMNITY POLICY,
WHAT JUSTICE PARIENTE IS
SUGGESTING THAT A CARRIER
FORCING AN INSURED TO GO ALL
THE WAY THROUGH THE CASE WHEN

IT SHOULD HAVE BEEN SETTLED
DOES SUSTAIN THE IN FACT
SUSTAIN DAMAGES THROUGH THE
DEFENSE OF THE CASE.
AND THAT'S A DAMAGE THAT IS
COVERED BY THAT, IS IT NOT?
>> YOUR HONOR, UNDER AN
INDEMNITY POLICY I DON'T
BELIEVE THAT IT NECESSARILY
WOULD BE.
I BELIEVE AN INDEMNITY POLICY --
>> YOU'RE SAYING THERE IS NO
OBLIGATION TO SETTLE AT ANY
POINT IN TIME.
YOU HAVE TO LET IT RUN TO THE,
TO THE OUTSIDE?
IF YOU CAN SETTLE A CASE WITH
AN INDEMNITY POLICY, REFUSE TO
DO SO AND YOU FORCE THE INSURED
TO DEFEND THIS CASE UP THROUGH,
I MEAN MILLIONS OF DOLLARS IN
DEFENSE COSTS, YOU'RE
SUGGESTING THAT'S NOT AN
ELEMENT OF DAMAGES IF THEY
COULD HAVE SETTLED THIS CASE
FOR THE POLICY AT THE OUTSET?
>> I THINK UNDER THE FACTS
AGAIN AS YOU HAVE OUTLINED IT
THAT MAY POTENTIALLY BE
WRONGFUL DAMAGE.
>> AGAIN IN NORTH AMERICAN THAT
WAS PART OF THE POINT.
THAT THEY BOTH HAD REFUSED TO
SETTLE, THERE WERE THREE LAYERS
OR SOMETHING.
THERE WAS ANOTHER EFFORT HAD

SOME MONEY IN IT.
BUT IN A FOOTNOTE THEY TALK
ABOUT INCREASED DAMAGES, BY THE
WAY OF MORE ATTORNEY'S FEES.
LET'S BE PERFECTLY CLEAR HERE,
THE ISSUE WHETHER YOU COULD
COVER EXCESS ATTORNEY'S FEES IS
NOT BEFORE US BECAUSE THAT WAS
NOT PART OF THE STIPULATE THE
SETTLEMENT.
ONLY FOR THE FOUR OR FIVE
MILLION DOLLARS.
>> THAT'S RIGHT.
>> WE DON'T HAVE TO REACH THE
ISSUE --
>> THAT'S CORRECT, YOUR HONOR.
>> WHETHER OTHER DAMAGES COULD
HAVE BEEN RECOVERED IN FACTS
WERE DIFFERENT?
>> THAT'S CORRECT, YOUR HONOR.
IN A JOINT PRETRIAL STIPULATION
IT WAS ESTABLISHED BY PERERA,
THE $4 MILLION WAS THE EXTENT OF
DAMAGES THEY WERE SEEKING.
>> I HAVE A RELATED QUESTION.
IT IS SIMPLY THIS.
THE JURY WENT AND FOUND BAD
FAITH BUT WAS TOLD THAT THEY
WERE NOT TO DISCUSS, THEY DID
NOT NEED TO DECIDE THE ISSUE OF
DAMAGES.
I LOOKED AT THE JURY
INSTRUCTIONS CAREFULLY.
IS THERE ANY ARGUMENT TO BE
MADE, AT LEAST YOU AND I BOTH
AGREE THERE HAS TO BE CAUSAL

RELATIONSHIP BETWEEN THE BAD FAITH CARRIER'S CONDUCT AND THE ULTIMATE DAMAGES, THAT THIS SHOULD BE THE SUBJECT OF A JURY TRIAL?
THAT IS THE RELATIONSHIP BETWEEN 10 MILLION, THE THINGS WE'RE ARGUING ABOUT TODAY, WHY IT'S NOT, THAT THEY WEREN'T EXPOSED TO EXCESS OF 25, THAT CHUBB AGREED TO COME IN.
ALL THESE THINGS WE'RE ARGUING SHOULD BE A DETERMINATION BY A JURY?
OR IS THAT A, SOMETHING THAT IS ALWAYS DETERMINED BY A JUDGE IN THIS TYPE OF SITUATION?
>> I THINK, YOUR HONOR, IF I CAN TALK ABOUT THIS CASE, I MEAN I'M NOT SURE HOW IN OTHER SITUATIONS, IT MAY BE THE CASE THAT THOSE TYPES OF ELEMENTS OF DAMAGES WOULD BE WITHIN THE RUBRIC OF A JURY CONSIDERATION UNDER THE CONTEXT OF BAD FAITH GENERALLY.
HERE OF COURSE, WE HIM VERY UNIQUE CIRCUMSTANCES.
LIMITED REMAND ON THE QUESTION OF BAD FAITH.
NONE OF THE ISSUES YOU MENTIONED WERE ADVANCED BY PERERA DURING THE FACT-FINDING BAD FAITH TRIAL.
IT WAS ALWAYS AGAIN, PURELY TO DECIDE WAS CONDUCT OF USF&G BAD

FAITH.
WE WOULD SAY --
>> I GUESS I WOULD SAY, GOING TO ANSWERING THE QUESTION, WE WOULD HAVE TO SAY WE ARE ASSUMING BECAUSE WE'RE NOT THE FACT FINDERS, THAT THESE ARE FACTS IN THIS CASE.
>> THAT'S CORRECT, YOUR HONOR.
>> IF ANY OF THESE FACTS ARE EITHER NOT THE CASE OR IN DISPUTE WE DON'T COMMENT ON WHETHER THE RESULT WOULD BE DIFFERENT?
>> THAT'S CORRECT, YOUR HONOR. THAT WOULD BE THE POSITION WE WOULD TAKE.
THE 11th CIRCUIT MADE, AND THEY USED WORDS FACTUAL FINDINGS NO LESS THAN THREE OR FOUR TIMES IN THE OPINION.
THEY WERE VERY SPECIFIC IN THE OPINION THAT CERTIFIED THE QUESTION TO THIS COURT AS TO FINDINGS OF FACT.
ONE OF THOSE FINDINGS OF FACT BEING OF COURSE, THIS IS TO DISCUSS AND REALLY DISPENSE WITH THE ARGUMENT BEING MADE BEFORE, THE NOTION THAT CHUBB CASHED OUT, REDUCED ITS AVAILABLE LIMITS.
NONE OF THAT IS SUPPORTED BY THIS RECORD.
THE 11th CIRCUIT REJECTED THAT AGAIN, USING THE TERM, FACTUAL

FINDING.
IN FACT IT IS UNDISPUTED THAT
THE INSURED NEVER RELEASED THE
EXCESS CARRIER.
IT IS UNDISPUTED THAT THE $21
MILLION WAS ALWAYS AVAILABLE.
IN FACT THE LAWYER FOR THE
INSURED TESTIFIED IN HIS
DEPOSITION, IT IS IN THE RECORD
WHICH I KNOW WAS TRANSMITTED TO
THIS COURT, AT R-151-159.
HE WAS ASKED, ONE OF THE
DRAFTERS OF STIPULATION TO
SETTLE, HE WAS ASKED WHETHER OR
NOT HE BELIEVED THE CHUBB
POLICY WAS STILL AVAILABLE TO
THE INSURED AND HE SAID HE
BELIEVED IT WAS.
>> IN THAT ONE I'M HAVING
TROUBLE.
IN REALITY, AT THIS POINT, ARE
YOU SAYING THAT NOW, IF IT'S
AVAILABLE CAN ESTES NOW ASSIGN
THAT INTEREST THAT IT HAS IN
THE EXTRA $21 MILLION BACK TO
PERERA?
>> NO, YOUR HONOR.
>> SO HOW WOULD IT BE
AVAILABLE.
>> HERE'S HOW, HERE'S HOW.
THE PROBLEM WITH THE
STIPULATION, JUSTICE LEWIS YOU
HIT THE NAIL RIGHT ON THE HEAD
YOU SAID THERE ARE HOLES IN
THIS STIPULATION.
MUCH LIKE THE KELLY VERSUS

WILLIAMS CASE WHERE IN THAT CASE THEY ATTEMPT ATTEMPTED TO CREATE A STIPULATION THAT ASSIGNED A BAD FAITH CLAIM BUT IN DOING SO SET UP A SITUATION WHERE THE AMOUNT OF DAMAGES WOULD NEVER BE GREATER THAN THE AVAILABLE POLICY LIMITS.
AS THE COURT THERE NOTED THEY THREW THE BABY OUT WITH THE BATH WATER IN CRAFTING THE STIPULATION.
SAME THING HAPPENED HERE, YOUR HONOR.
YOU ASKED HOW THE LIMITS OF CHUBB COULD POSSIBLY BE AVAILABLE WHEN THE JUDGMENT WILL NEVER BE EXECUTED UPON IN THE FIRST INSTANCE?
IT CREATES A LEGAL FICTION, YOUR HONOR.
THE PROBLEM THAT THEY HAVE WITH THEIR STIPULATION IS MULTIFOLD.
FIRST AND FOREMOST THEY CREATED A SITUATION WHERE THEY CREATED THIS JUDGMENT THAT IS COMPLETELY WITHIN AVAILABLE COVERAGE LIMITS BECAUSE AS A POINT IN FACT, CHUBB'S LIMITS WERE STILL AVAILABLE.
THAT IS FACTUAL MATTER ADDRESSED AND DECIDED BY THE 11th CIRCUIT, NUMBER ONE.
NUMBER TWO, THEY CREATED A STIPULATION THAT SAID THE INSURED WOULD NOT COME

OUT-OF-POCKET ANYTHING OTHER
THAN ITS SELF-INSURED RETENTION
AND DEDUCTIBLE, UNDISPUTED.
THEY CAME OUT-OF-POCKET WHAT
THEY WERE OBLIGATED TO PAY
UNDER THE CONTRACTS OF
INSURANCE.
>> I GUESS, CAN I, THE FIRST
PART THAT YOU SAY THAT THE
JUDGMENT WAS WITHIN LIMITS,
THERE WAS STILL $21 MILLION, MY
CONCERN IN RESTING ON THAT ONE
AGAIN IF THIS HAD BEEN A
SITUATION IF BOTH CHUBB AND
USF&G HAD NOT PAID, AND THE
CONSENT HAD BEEN FOR THE $10
MILLION, SOMEBODY, I DON'T WANT
THIS TO BE USED TO SAY IT IS
STILL WITHIN THE $25 MILLION
BECAUSE THE COVERAGE ISSUE
HADN'T BEEN DETERMINED.
THAT'S THE PROBLEM WITH
BEING TOO QUICK TO USE CERTAIN
TERMS ABOUT, THAT AT A POINT
THE SETTLEMENT WAS ENTERED
INTO, CHUBB MADE A DECISION,
THAT IT WASN'T GOING TO PAY
ANYMORE MONEY AND IF CHUBB HAD
FELT IT WAS AT RISK FOR MORE
MONEY BECAUSE OF WHAT USF&G
DID, AGAIN THE WAY THIS
SETTLEMENT WOULD HAVE WORKED IT
COULD HAVE STILL BEEN THE $10
MILLION BUT CHUBB SHOULD HAVE
THEN ASSIGNED ITS INTEREST.
WE ALREADY AGREED AT THE

OUTSET, THAT IS THE HOLE, THAT
IS WHAT'S MISSING HERE.
MAYBE THAT'S ALL THAT'S
MISSING.
>> I DO THINK THAT IS MISSING.
ONE OF A FEW THINGS ARE
MISSING.
ONE OTHER THING I THINK IS
MISSING HERE YOU HAVE A
SITUATION HERE WHERE NOT ONLY
AT THE TIME OF THE EXECUTION OF
THE STIPULATION WHICH AS I
MENTIONED IN OUR BRIEFS WAS
DONE WITHOUT USF&G'S KNOWLEDGE
OR PARTICIPATION --
>> THAT'S NOT REQUIRED.
>> UNDERSTOOD.
>> AGREED? YOU CAN SEE THAT?
>> UNDERSTOOD, YOUR HONOR.
>> OKAY.
>> AT THE TIME OF ENTRANCE INTO
THE STIPULATION THE CHUBB
POLICY WAS IN FACT IN PLACE.
NOTHING WAS DONE TO RELEASE
THOSE LIMITS AND, --
>> MAYBE I DON'T UNDERSTAND THE
AGREEMENT THAT THEY ENTERED
INTO BUT I THOUGHT THE
AGREEMENT SAID THAT CHUBB IS
GOING TO PAY THE $3.75 MILLION,
AND THAT THE ONLY WAY THAT THE
PLAINTIFF, THE ONLY RECOURSE
FOR THE PLAINTIFFS WAS, TO
UNITED STATES FIDELITY, AND SO,
DOESN'T THAT TAKE CHUBB OUT
THAT EQUATION AS FAR AS THAT $5

MILLION IS CONCERNED?
>> WELL, YOUR HONOR, IT DOES NOT UNDER THIS LOGIC.
THE STIPULATION TO SETTLE ALSO SAID THAT REGARDLESS OF WHAT HAPPENS IN THE BAD FAITH CASE AGAINST USF&G, PERERA WILL EXECUTE A FULL SATISFACTION AND RELEASE TO THE INSURED.
>> NOW WE'RE GETTING INTO ROSEN ISSUES.
YOU'RE ON A STRONGER, AT LEAST FROM MY POINT OF VIEW YOU'RE STRONGER WHEN YOU TALK ABOUT SOME OF THESE OTHER QUESTIONS.
WHEN WE GET INTO, CAN YOU ANSWER WHAT JUSTICE QUINCE IS ASKING THOUGH ABOUT HOW DO YOU TAKE THAT AND ALSO SAY CHUBB REALLY DID REDUCE ITS EXPOSURE TO 3.57 MILLION AND THERE WASN'T $21 MILLION AVAILABLE AFTER THE SETTLEMENT?
>> I THINK, YOUR HONOR, THE WAY I ANSWER THE QUESTION IS TO POINT OUT THAT AS A FACTUAL MATTER, IT WAS ACKNOWLEDGED, INCLUDING BY THE LAWYER FOR THE INSURED, THAT IF IN SOME WAY THE INSURED COULD BE HELD ACCOUNTABLE, SOMEHOW FOR THESE FUNDS, THE INSURED, THEN THERE WAS STILL COVERAGE AVAILABLE.
AND WE HAVE TO LOOK AT THE CONCEPT OF BAD FAITH AS IT STOOD BECAUSE PERERA TOOK AS

ASSIGNMENT, ASSIGNEE OF THE INSURED.
AS ASSIGNEE OF THE INSURED HER RIGHTS WERE NO GREATER OR LESS THAN INSURED.
IF INSURED HAS AVAILABLE COVERAGE PROTECTING IT AND INSULATING IT FROM DAMAGE THERE IS NO HARM.
IF THERE IS COVERAGE AND NO HARM, THERE IS NO BAD FAITH CASE.
AS THIS COURT, AGAIN IF WE LOOK AT THE QUESTIONS AS CERTIFIED FROM THE 11th CIRCUIT, ACCEPTING AS JUSTICE PARIENTE YOU NOTED FACTS BY THE 11th CIRCUIT THROUGH MULTIPLE JURY TRIALS, MULTIPLE BRIEFING SCHEDULES BOTH BEFORE AND AFTER THE JURY PROCEEDINGS IF WE ESTABLISH THOSE AND TAKE THOSE FACTS AS I BELIEVE THE COURT SHOULD UNDER THOSE CIRCUMSTANCE THE QUESTION TO THE ANSWER BECOMES VERY STRAIGHTFORWARD.
CLEARLY THIS COURT HELD OVER AND OVER AND OVER AGAIN WITHOUT EXCESS JUDGEMENT THERE IS NO BAD FATE THAT IS THE ESSENCE OF A BAD FAITH CLAIM.
AND HERE THE COURT, THE 11th CIRCUIT OFFERED UP THE SECOND QUESTION.
IF THE INSURED'S CONDUCT DID NOTHING TO INCREASE THE RISK OF

EXPOSURE, CAN THERE BE BAD
FAITH?
I THINK THE ANSWER SHOULD BE
CLEARLY NO.
>> WHAT IF THERE HAD BEEN
PUNITIVE DAMAGES WERE AT ISSUE?
11th CIRCUIT TOOK IT OUT OF
THIS CASE BUT ASSUME IT WAS
STILL IN PLAY.
>> IN A PURELY HYPOTHETICALLY
SPEAKING, YOUR HONOR?
>> YES.
>> IF PUNITIVES HAD BEEN IN
PLACE, IT IS A DIFFERENT
CIRCUMSTANCE.
OF COURSE THEY WERE WAIVED
HERE.
IT WOULD NOT HAVE MADE A
DIFFERENCE IN THIS KATE.
EVEN IF THERE WAS THREAT OF
PUNITIVES IT WOULD NOT HAVE
PAID MADE A DIFFERENCE HERE.
REASON BEING THERE WERE
DOCUMENTS IN EVIDENCE, EXHIBITS
55 AND 57, IN THE LOWER COURT
THAT SHOWED PLAINTIFF'S COUNSEL
AT ALL TIMES PREPARED TO SETTLE
THIS CASE BETWEEN 5 AND $8.5
MILLION AND CHUBB WAS COMMITTED
TO SETTLING THE CASE.
SO THE THREAT OF PUNITIVES --
>> WHAT I'M REALLY TRYING TO
ASK IS, IS THE FIRST CERTIFIED
QUESTION, WOULD THE ANSWER
STILL BE NO IN YOUR VIEW IF
PUNITIVE DAMAGES WERE IN PLAY?

>> YES THEY WOULD, YOUR HONOR.
I BELIEVE SOME, HERE'S WHY.
I THINK PUNITIVE DAMAGES ARE
UNINSURED RISK IN FLORIDA.
AND IF WE STARTED TO, I
BELIEVE, AGAIN THIS IS PURELY
HYPOTHETICAL BECAUSE IT DIDN'T
HAPPEN IN THIS CASE, THERE WAS
NEVER RISK OF PUNITIVES HERE
DESPITE THE FACT THEY ARE
WAIVED.
I WOULD SUGGEST TO THE COURT IF
WE START ALLOWING PUNITIVE
DAMAGES FACTORED INTO THE
INSURANCE COVERAGE OBLIGATION
IT IS WOULD BE TANTAMOUNT TO
INSURING OVER PUNITIVE DAMAGES
WHICH I THINK IS COMPLETELY
CONTRADICT AT THIS TO PUBLIC
POLICY.
>> ARE YOU SAYING WHEN EVEN A
PRIMARY INSURER DECIDES WHETHER
THEY'RE GOING TO SETTLE AND
ACTING IN THE INTEREST OF THE
INSURED, THAT THE THEY ARE FREE
TO DISREGARD A SUBSTANTIAL
EXPOSURE THAT THE INSURED MIGHT
FACE?
>> NO, I'M NOT SAYING THAT,
YOUR HONOR.
IF I SOUNDED LIKE THAT I
CERTAINLY WOULD APOLOGIZE.
THAT'S NOT WHAT I INTENDED TO
SAY.
WHAT I INTENDED TO SAY WAS JUST
THAT PUNITIVE DAMAGES WE SHOULD

NOT DO ANYTHING THAT MAKES
PUNITIVE DAMAGES AN INSURED
LIABILITY.
>> WITH THAT -- YOU HAVE FAR
EXCEEDED YOUR TIME.
YOU HAVE EXCEEDED YOUR TIME.
BUT I WILL GIVE YOU ONE MINUTE
FOR REBUTTAL.
>> I RESPECTFULLY REQUEST THAT
THE COURT ANSWER THE CERTIFIED
QUESTIONS IN THE NEGATIVE,
THANK YOU.
>> LET ME FIRST SAY WITH
RESPECT TO WHY THERE SHOULDN'T
BE A DIFFERENCE HERE BECAUSE
THERE IS EXCESS COVERAGE.
NOT ONLY IS IT DEFENSE COSTS
AND ALL OTHER THINGS WE TALKED
ABOUT BUT REMEMBER EXCESS
COVERAGE IS AN ASSET ONCE USED
IS GONE.
SO AN INSURED IS INDEED HARMED
BY THE FACT IT HAS TO RELY ON
EXCESS COVERAGE WHETHER IT
OTHERWISE WOULD NOT.
BECAUSE TO THE EXTENT IT'S USED
IT IS GONE.
THERE IS LOT OF TALK HERE ABOUT
FACTUAL FINDINGS.
THIS ISSUE WAS DECIDED ON
SUMMARY JUDGMENT.
I DON'T UNDERSTAND HOW THE 11th
SIR KIT IS MAKING FACTUAL
FINDINGS ON A SUMMARY JUDGMENT,
PARTICULARLY WHEN THE EVIDENCE
IS, THAT BOTH CHUBB AND ESTES

THOUGHT THAT THE MAXIMUM AMOUNT
THAT CHUBB WAS GOING TO PAY WAS
$3.5 MILLION.
IT WAS IN MY BRIEF.
AND CHUBB'S REPRESENTATIVE
TESTIFIED THEY HAD SPECIFICALLY
MADE THE DECISION THAT THEY
WERE NOT GOING TO PAY THE ONE
MILLION DOLLARS IN EXCESS, IN
UNDERLYING COVERAGE THAT WAS
THE CASE BECAUSE THEY DIDN'T
LIKE TO SUE OTHER INSURANCE
COMPANIES.
SO, YOUR HONOR, I RESPECTFULLY
SUGGEST THAT THE CERTIFIED
QUESTION BE ANSWERED IN
ACCORDANCE WITH --
>> THANK YOU BOTH FOR YOUR
ARGUMENT.