Louis R. Menendez, Jr. v. Progressive Express Insurance Co.

SC08-789

>> THE NEXT MATTER ON THE

COURT'S AGENDA IS MENENDEZ

VERSUS PROGRESSIVE EXPRESS

INSURANCE COMPANY.

THE PARTIES READY TO PROCEED?

>> YES, WE ARE.

>> YOU MAY PROCEED.

>> THANK YOU.

MY NAME IS NATHAN EDEN.

I PRACTICE LAW IN KEY WEST.

AND ALONG WITH ME IS

CO-COUNSEL, MR.^BOB

TILGHMAN.

WE'LL BE SPLITTING THE

ARGUMENT.

IF IT IS OKAY WITH THE COURT.

I WILL TAKE THE FIRST 13

MINUTES AND HE WILL TAKE THE

LAST SEVEN IN REBUTTAL.

>> IF YOU'D SPEAK DIRECTLY INTO

THE MIKE?

>> YES, MA'AM. IS THAT BETTER?

OKAY.

TODAY UNDER THE FACTS OF THIS

CASE, IS ONLY ONE ITEM OF
DAMAGE THAT WE REALLY NEED TO
CUSS ON, AND THAT ITEM OF
DAMAGE IS THE WORKMAN'S
COMPENSATION PAYMENT THAT MY
CLIENT, THE MENENDEZES WAS
REQUIRED TO PAY TO HER EMPLOYER
TO REIMBURSE FOR BENEFITS PAID.
AND THAT AROSE OUT OF A
SUCCESSFUL PROSECUTION OF A
CASE.
>> WHY DOES IT MATTER IN TERMS
OF HOW WE ANALYZE THIS WHETHER
WE ARE LOOKING AT YOUR CLAIM
FOR THE $7,000 PLUS,
SUPPLEMENTAL INCOME, OR THE
$2,000 PAYMENT FOR THE LIEN?
I THOUGHT, AND THE POSITION
SEEMS TO BE SHIFTING, BUT IF THE
AND OBLIGATION ARISES -- THE
RIGHTS.
AND THE TIME THE INSURANCE
POLICY IS ISSUED AND THE LAW IN
EFFECT AT THE TIME OF THE
INSURANCE POLICY, WHAT IS, WHAT
ARE YOU SAYING ABOUT WHY WE'RE
GOING TO FOCUS ON THE $2,000
PAYMENT, WHICH WASN'T EVEN THE

SUBJECT OF A STIPULATED FINAL
JUDGMENT THAT FINALLY OCCURRED
2006?
>> YES, MA'AM.
YOUR HONOR, OUR MOTION FOR
SUMMARY JUDGMENT WHICH IS
BEFORE YOU TODAY, WAS A MOTION
FOR SUMMARY JUDGEMENT WE ASKED
FOR LIABILITY ONLY, NOT
AMOUNT.
THE $2,000 THAT MY CLIENT WAS
REQUIRED TO REPAY IN SETTLEMENT
OF A WORKMAN'S COMPENSATION
LIEN, HAS BEEN, NOR COULD IT
EVER BE DISPUTED BY ANYONE.
THAT SUM WAS OWED BY MY CLIENT,
NEGOTIATED AND PAID BY MY
CLIENT AND AT THAT POINT, IT
WAS OWD UNDER FLORIDA STATUTE
440 AND EXISTING CASE LAW.
>> WHAT POINT ARE YOU -- WE'RE
HERE ON A CONFLICT ISSUE.
YOU'RE GIVING US SOME
SPECIFICS.
I'M JUST GOING TO ASK YOU A
QUESTION ABOUT THAT $2,000,
WHICH IS, WAS THAT THE PART OF
THE, SINCE NO QUESTION IT
WAS OWED, WAS IT, WAS IT PAID

AT SOME POINT?

>> YES, MA'AM.

>> BEFORE --

>> YOU MEAN BY THE INSURANCE COMPANY?

>> YES.

>> NO, MA'AM, NEVER.

>> THE STIPULATED FINAL JUDGMENT THAT WAS ENTERED, 2006, DIDN'T EVEN INCLUDE THE $2,000.

>> WELL, ACTUALLY THEY, ALL I CAN SAY IT KIND OF DID.

IT --

>> WHAT IS THE POINT YOU'RE MAKING ABOUT THE $2,000 AND WHY WE SHOULD BE FOCUSING ON $2,000 IN THIS CASE?

>> OKAY. BECAUSE THIS, THIS IS WHERE THE CONFLICT ARISES.

THE INSURANCE POLICY WAS ENTERED INTO BY THE MENENDEZES IN JUNE OF 2001.

>> ACTUALLY APRIL, IT WAS APRIL TO OCTOBER.

>> THE ACCIDENT OCCURRED IN JUNE.

>> JUNE 14th.

>> OF 2002.

>> 2001.

>> I'M SORRY, 2001.

AT THAT POINT IN TIME IT IS
OUR POSITION, NUMBER ONE, THE
CONTRACT RIGHTS WERE FIXED AND
VESTED AT TIME THE CONTRACT OF
INSURANCE WAS ENTERED INTO.
SECONDLY, EVEN BEYOND THAT, THE
MOMENT THAT THAT ACCIDENT
OCCURRED, AND MISS MENENDEZ WAS
INJURED, HER RIGHTS AND
ENTITLEMENT TO THE BENEFITS
UNDER THAT INSURANCE POLICY,
THAT CONTRACT OF INSURANCE WERE
ABSOLUTELY VESTED.
THE AMOUNT MAY HAVE BEEN IN
DISPUTE AT SOME POINT, BUT AT
THAT POINT IN TIME, HER RIGHTS
WERE FIXED.
THE CONFLICT OCCURS IS BECAUSE
THE THIRD DISTRICT HAS SOMEHOW
RULED THAT THEY WEREN'T FIXED.

>> BUT, SHE DIDN'T HAVE A FIXED
RIGHT TO RECOVER AN AMOUNT AT A
PARTICULAR TIME?
SHE HAD A RIGHT TO BRING A
LAWSUIT.

THAT WAS, THAT WAS A FIXED
RIGHT.
BUT IN TERMS OF WHEN SHE WOULD
ACTUALLY RECOVER, I MEAN THAT
IS JUST SUBJECT TO THE
VAGUERIES OF THE JUDICIAL
SYSTEM.
ANYONE WOULD UNDERSTAND THAT
DEPENDS ON A LOT OF DIFFERENT
THINGS, WHEN A RECOVERY COULD
ACTUALLY BE OBTAINED.
SEEMS LIKE TO ME HERE, WHAT
THAT STATUTE DOES, IT SIMPLY
DELAY FOR A BRIEF PERIOD OF
TIME, WHEN SOMEONE CAN ACTUALLY
FILE A LAWSUIT IN ORDER TO
ENCOURAGE SETTLEMENT.
AND, BUT IF THERE IS NOT A
SETTLEMENT FORTHCOMING AND THE
LAWSUIT GOES FORWARD AND THE
RIGHTS TO RECOVER IS STILL
THERE.
SO JUST THAT IT IS A,
ADMITTEDLY, THIS EFFECTS WHEN,
THE DATE ON WHICH SOMEONE CAN
ACTUALLY GO INTO COURT AND FILE
A LAWSUIT.
BUT IT SEEMS TO ME THAT IS A

FAIRLY, THAT DOESN'T ACTUALLY
IMPAIR A RIGHT OF RECOVERY.
IT IS JUST IT HAS A RELATIVELY
MINOR IMPACT ON THE TIMING.
AND OF COURSE THERE IS INTEREST
AVAILABLE TO COMPENSATE FOR THE
DELAY IN TIMING.
SO I AM TRYING TO UNDERSTAND
WHY THIS IS SUCH A SIGNIFICANT
THING THAT WE WOULD SAY THAT IT
IS IMPAIRING A VESTED RIGHT?
>> UNLIKE ALL OF THE OTHER
CASES THAT HAVE CONSIDERED
PRESUIT REQUIREMENTS IN MEDICAL
MALPRACTICE AND SO FORTH AND SO
ON, THE REMEDY HAS ALWAYS BEEN
FOR ABATEMENT OR WHATEVER TO
CURE THE PROBLEM IF IT EXISTED.
THIS PARTICULAR PROBLEM,
REMEMBER, THE CONTRACT IS
ENTERED INTO APRIL.
THE ACCIDENT OCCURS IN JUNE.
THEN WE HAVE THIS STATUTE, AND
THE STATUTE JUST DOESN'T DELAY,
I MEAN THAT'S NOT WHAT IT
DOES.
THIS IS EXACTLY THE POINT THAT
THE SHENENDOAH CASE OUT OF THE
SOUTHERN DISTRICT OF FLORIDA

ADDRESSED AND THEY SAID THIS
WAS IMPAIRMENT OF SUBSTANTIVE
RIGHT.
LET ME TELL YOU WHAT THE
STATUTE REQUIRED AFTER THIS
STATUTE.
NOT JUST THE DELAY, NOT JUST
HERE'S YOUR NOTICE BECAUSE THAT
GAVE THEM FIVE NOTICES BEFORE I
EVER FILED SUIT AND ONE OF THEM
I WAITED AFTER THE LAST NOTICE
SIX MONTHS BEFORE WE EVER FILED
SUIT AND THEY DID NOTHING.
THE BUT HERE'S WITH WHAT THE
STATUTE NOW REQUIRES.
YOU HAVE TO LABEL IT
SPECIFICALLY, QUOTE, UNQUOTE,
DEMAND LETTER UNDER 627.726(11}.
TWO, YOU HAVE TO INCLUDE THE
NAME OF THE INSURED FOR WHICH
BENEFITS ARE SOUGHT.
THREE, THE CLAIM NUMBER OR THE POLICY
NUMBER UPON WHICH CLAIM WAS, IT
WAS ORIGINALLY SUBMITTED TO THE
INSURANCE COMPANY.
FOUR, THE NAME OF ANY AND ALL
MEDICAL PROVIDERS.
EVER TRY TO GET MEDICAL

RECORDS?

WHEW.

FIVE, AN ITEMIZED STATEMENT OF

EACH EXACT AMOUNT, THE DATE OF

TREATMENT OF THE PROVIDERS OR

THE SERVICES.

NUMBER SIX, THE TYPE OF BENEFIT

CLAIMED DUE.

SEVEN, IT HAS TO BE BY CERTIFIED.

>> I UNDERSTAND ALL THOSE

THINGS.

BUT THOSE ARE, THOSE SEEM TO BE

THE PARTICULAR THINGS YOU WOULD

HAVE TO DO TO SHOW WHAT IS

OWED.

>> THE PIP STATUTE --

>> AND TO IDENTIFY, THERE'S A

POLICY AND THE INSURER COULD

KNOW WHO THEY ARE DEALING WITH.

>> FIRST OF ALL, THE DUTY WAS

ALWAYS ON THE INSURANCE COMPANY

UNDER PIP STATUTE TO COLLECT

THIS INFORMATION THEMSELVES.

>> [INAUDIBLE].

>> NO, SIR.

JUST THE ONES THAT EFFECT --

>> [INAUDIBLE]

>> THOSE ARE.

>> IS THAT IT?

>> I MEAN THERE ARE SOME OTHERS

THAT GO TO THE ISSUES.

>> [INAUDIBLE].

>> YOU KNOW, TO BE HONEST WITH

YOU I CAN'T THINK OF THEM

OFFHAND.

UNDER 11, UNDER SUBSECTION 11,

THAT'S ALL OF THEM.

THE PIP STATUTE IS SUPPOSED TO

BE SELF-CUTING.

THE LAW IS SUPPOSED TO BE READ

BY COMMON MAN AND BE UNDERSTOOD BY

COMMON MAN.

>> THE PIP LAW IS SUPPOSED TO

BE WHAT THE LEGISLATURE SAYS

THE PIP LAW IS.

IT IS LEGISLATIVE ENACTMENT.

THE QUESTION WHETHER THEY HAVE

INTERFERED WITH A VESTED RIGHT.

THIS IS SOMETHING THAT A

PARTICULAR PROVISION THAT THE

LEGISLATURE ADOPTED, SO IT IS

PART OF THE LAW.

>> YES, SIR.

BUT THIS COURT HAS -- OF THE

PIP LAW.

THIS COURT HAS SAID THIS PIP

LAW IS

SUPPOSED TO BE INTERPRETED AT
ALL STATUTES IN LIGHT OF THE
COMMON MAN'S UNDERSTANDING.
>> BUT ISN'T THE REAL
DISCUSSION HERE WE NEED TO BE
FOCUSED ON, IS A QUESTION OF
PRELITIGATION REQUIREMENTS AND
WHETHER THOSE KINDS OF THINGS
ARE PROCEDURAL OR SUBSTANTIVE,
AND THAT TELLS US WHETHER IT
APPLIES RETROACTIVELY OR
PROSPECTIVELY, AND THAT IS
REALLY WHAT OUR DISCUSSION
NEEDS TO BE?
>> YES, SIR.
YOU'RE ABSOLUTELY RIGHT.
>> HAVE THERE BEEN FLORIDA
CASES ADDRESS THESE SUCH AS
MEDICAL MALPRACTICE CASES?
>> YES.
>> THESE PRESUIT
IMPEDMENTS ARE SUBSTANTIVE IN
NATURE AND COURTS SO HELD.
>> ABSOLUTELY.
>> ISN'T THAT THE DISCUSSION WE
NEED TO BE TALKING ABOUT?
>> YES.
>> AND IN THOSE OTHER CASES
LIKE, MEKRAS, THAT IF YOU FILED

YOUR LAWSUIT, YOU JUST LET THE

TIME GO?

THIS IS LIKE, THIS DISMISSAL IS

JUST IMPROPER, NO MATTER

WHETHER IT IS PROSPECTIVE OR

RETROSPECTIVE, THAT THE

DISMISSAL SUCH AS THIS, UNDER

CASES LIKE MEKRAS WOULD SUGGEST

THAT YOU HAVE, YOU HAVE

COMPLIED?

THAT THERE IS, I MEAN THERE IS

DENIALS HERE.

THE DENIALS WENT ON FOR HOW

LONG?

HOW LONG DID THE DENIALS GO ON

FOR?

I MEAN, THEY HAD THE

INFORMATION.

>> TO THIS DAY.

>> I MEAN -- STARTED SO ISN'T

THAT THE DISCUSSION?

ISN'T THAT THE DISCUSSION WE

NEED TO BE YOU CAN TALKING

ABOUT, TALKING ABOUT THIS

MORNING RATHER THAN, RATHER

THAN JUST COMMON LAW, COMMON

MAN INTERPRETATIONS?

SO WHAT ARE YOUR THOUGHTS OR

ARGUMENTS WITH REGARD TO THOSE
SUBJECTS?
>> THERE IS NO CASE WHATSOEVER,
THAT HAS EVER DENIED SOMEBODY
ACCESS TO THE COURTS ON THE
BASIS OF A PRESUIT REQUIREMENT
THAT WAS LATER, ONCE ASSUMING
THE STATUTE OF LIMITATIONS
HADN'T, NO CASE WHATSOEVER,
THAT THROUGH A PERSON, NOT A
COURT, TAKE AWAY THEIR ACCESS
TO THE COURTS BECAUSE THEY DID
NOT COMPLY WITH A PRESUIT
REQUIREMENT, NOT ONE.
AND THAT'S WHAT WE'RE FACED
WITH IN THIS CASE.
AND WE BROUGHT IT UP ON THE
SUMMARY JUDGMENT THAT IF THERE
WAS ANYTHING WRONG WITH THE
NOTICES WE GAVE, THAT THE
PROPER REMEDY WOULD HAVE BEEN
ABATEMENT.
>> NOW YOU'RE GETTING, SO THE
FIRST ISSUE WE HAVE TO ADDRESS
IS WHETHER THIS IS A
SUBSTANTIVE STATUTE.
AND IF IT IS SUBSTANTIVE, THEN
WE HAVE HELD IT CAN'T BE
APPLIED RETROACTIVELY.

>> YES, MA'AM.

>> AND WE HELD IT AS TO THE DATE THE INSURANCE CONTRACT IS ENTERED INTO AS BEING THE DATE.

THAT'S WHY I WAS CONFUSED ABOUT WHAT YOU WERE SAYING ABOUT THE $2,000.

BUT THE SECOND ISSUE WHICH WOULD HAVE A BROADER IMPACT REALLY BECAUSE I GUESS THE STATUTE HAS BEEN IN EFFECT FOR SEVEN YEARS, IS THE CURE.

HOW, WHETHER SOMETHING CAN BE CURED.

IN OTHER WORDS, A PLAINTIFF WHO IS REPRESENTED AND NOW SEE A SITUATION, THIS IS A PRETTY DIFFICULT NOTICE OF INTENT TO ACTUALLY PUT TOGETHER.

SO, LET'S ASSUME THEY TRIED TO PUT IT TOGETHER ON THEIR OWN AND THERE IS SOME DEFECT IN THE NOTICE, AND THEY FILED A LAWSUIT.

THEN AN ATTORNEY GETS INVOLVED SO, WE'VE GOT TO GET DIFFERENT NOTICE TO COMPLY.

AND THEY DO THAT, THEY SAY SIX

MONTHS INTO THE STATUTE, INTO

THE LAWSUIT.

WOULD THE ATTORNEYS FEES, SINCE

AT THIS POINT THIS IS WHAT THIS

CASE IS ABOUT, WHETHER IT IS

ABOUT RECOVERY AND ATTORNEY

FEES.

WOULD THE ATTORNEYS FEES ONLY

RUN WHEN PROPER NOTICE IS

FILED?

IN OTHER WORDS, IF WE AGREE

WITH YOU, THAT THE PROPER, THIS

CAN BE CURED, IF IT IS NOT SUCH

A BIG DEAL, THEN IT OUGHT TO BE

SOMETHING THAT, THAT COULD BE

CURED AND NOT --

>> YES, MA'AM.

>> AND NOT CAUSE A DISMISSAL OF

A LAWSUIT.

WOULD THE ATTORNEYS FEES RUN

THEN FROM WHEN THE NOTICE WAS

PROPERLY GIVEN, WHICH WAS,

NOVEMBER OF 2003?

>> NO, MA'AM.

MY READING OF THE STATUTE THE

ATTORNEYS FEES WOULD RUN FROM

THE FILING OF THE ACTUAL

LAWSUIT.

>> THEN HOW, WHAT WOULD

PREVENT, TODAY, IF WE HAD A
CASE AND SOMEBODY, A
PLAINTIFF'S LAWYER SAYS, I'M
NOT FOLLOWING NOTICE.
SEE IF I CAN GET AWAY WITH IT.
FILES THE LAWSUIT.
AND THE AFFIRMATIVE DEFENSE IS
RAISED THAT YOU DIDN'T COMPLY
AND A YEAR GOES BY AND THEN THE
NOTICE IS FILED.
ARE YOU SAYING THAT AN ATTORNEY
WOULD BE ENTITLED TO ATTORNEYS
FEES FROM THE TIME THEY FILED
THE LAWSUIT?
>> I'M SORRY, I MISUNDERSTOOD
YOUR QUESTION.
NO, ABSOLUTELY NOT.
WHAT ATTORNEY WORTH HIS SALT,
WOULD GO TO A JUDGE, I FILED THIS
PREMATURELY BUT I WANT ATTORNEY
FEES FOR ALL THIS TIME ANYWAY?
NO JUDGE IN THE WORLD WOULD
AWARD ATTORNEY FEES UNDER THAT
SITUATION AND PROBABLY WOULD BE
ETHICAL VIOLATION TO ASK FOR
IT.
>> DID YOU RAISE THE ISSUE,
THAT IN FACT, PROGRESSIVE BY NOT

RAISING THE FAILURE TO COMPLY
WITH THE STATUTE, IN THE
INITIAL ANSWER, ACTUALLY WAIVED
THE RIGHT TO HAVE PRESUIT
NOTICE AGAIN?
BECAUSE ON ONE HAND, EITHER
IT'S A BIG DEAL AND IT'S
SUBSTANTIVE, BUT IF IT IS NOT
AS BIG A DEAL SEEMS LIKE IT IS
WAIVEABLE.
I WAS STRUCK BY THE FACT NOT
UNTIL THEIR AMENDED ANSWER
WHICH THEY SEEK TO AMEND THEIR
ANSWER THAT THEY FIRST RAISED
THE NON-COMPLIANCE WITH THE
STATUTE?
>> YES, MA'AM.
AND THAT WAS SOME SEVEN MONTHS
LATER.
SEVEN MONTHS AFTER THE SUIT WAS
FILED.
>> WAS THAT RAISED AS AN
ARGUMENT THAT ACTUALLY
PROGRESSIVE WAIVED THE
COMPLIANCE WITH THE PRESUIT
NOTICE BY NOT RAISING IT UNTIL
MONTHS AFTER THE LITIGATION HAD
BEEN FILED?
>> TO BE CANDID, I DON'T

REMEMBER THAT ISSUE EVER BEING ADDRESSED.

>> PRETTY IMPORTANT TO ME. BECAUSE TO BENEFIT THE INSURANCE COMPANY YOU WOULD THINK THAT THEY, THEY WOULD MOVE TO DISMISS ON THAT BASIS, RIGHT, WHEN THE LAWSUIT WAS FILED?

>> YES. AND THEY NEVER DID. THEY NEVER ONCE SAID, JUDGE, STOP THE LAWSUIT, MAKE THEM DO THIS.

>> I'M ASKING YOU, WAS IT, DID YOU RAISE THAT AS AN ISSUE, NOT WHETHER --

>> YES, MA'AM. IF YOU LOOK AT THAT MOTION FOR SUMMARY JUDGMENT, FOOTNOTE RIGHT THERE, IT SAYS HEY, IF ANYTHING IS WRONG, JUDGE BY ANY OF THE NOTICES YOU THINK WE'VE GIVE, THE PROPER REMEDY IS ABATEMENT.

>> ISN'T THAT THEIR ARGUMENT? THAT YOU NEVER ASKED FOR ABATEMENT YOURSELF?

>> WELL --

>> THEY RAISED IT AND YOU NEVER FILED A MOTION TO ABATE THE LAWSUIT, UNLESS YOU DO THAT NOTICE?

>> CORRECT, SIR.

BUT OUR POSITION ON THAT IS NUMBER ONE, THE NOTICES WE GAVE ARE SUFFICIENT.

TWO, EVEN AFTER SUIT WAS FILED WE GAVE AN ADDITIONAL NOTICE, AND EXACTLY AS, CLOSE AS WE COULD GET IT TO WHAT THE STATUTE REQUIRES.

AND THIS WAS ALL BEFORE THE SUMMARY JUDGEMENT HEARING.

AND, AT THE SUMMARY JUDGMENT HEARING, WE SAID, JUDGE, IF THERE'S ANYTHING WRONG, TELL US TO GO DO THIS AND WE'LL GO DO IT.

>> DID YOU INDICATE AT THE BEGINNING OF THIS ARGUMENT THAT YOUR CO-COUNSEL WAS GOING TO HAVE SEVEN MINUTES OF THIS ARGUMENT.

>> YES, MA'AM.

>> I BELIEVE YOU'RE WELL INTO HIS TIME, NOW.

>> OH, I'M VERY SORRY.

ONLY THING I WOULD SAY, ASK
YOURSELVES THIS, AS FAR AS
COMMON MAN AND ACCESS TO THE
COURTS ARE CONCERNED, HOW IS
PROGRESSIVE EVER HURT?
HOW IS PROGRESSIVE EVER, EVER
PREJUDICED IN THIS MATTER?
WHY SHOULD THE MENENDEZES BE
THROWN OUT OF COURT THANK YOU
VERY MUCH.
>> ARE YOU GOING TO MAKE YOUR
ARGUMENT NOW?
>> I'M SORRY, YOUR HONOR.
[INAUDIBLE]
>> ALL RIGHT. OKAY.
>> MAY IT PLEASE THE COURT.
MY NAME IS DOUG STEIN.
I REPRESENT PROGRESSIVE EXPRESS
INSURANCE COMPANY.
>> MR.^STEIN, ON THE COMMON
PRACTICE -- YOU'VE BEEN DOING
THIS FOR 100 YEARS.
STILL HAVE NO FAULT FORMS THAT
THE COMPANIES REQUIRE THAT YOU
FILL OUT?
>> CORRECT.
>> YOU GOT TO HAVE, IT'S GOT ALL
THE STUFF ON THE FORM, DOESN'T

IT?

>> THE REQUIREMENT FOR DEMAND

LETTER?

>> NO. IT HAS GOT ALL

THE INFORMATION

THAT THIS DEMAND LETTER

REQUIRES ON THE BASIC FORMS

THAT ARE USED IN THIS KIND OF

WORK?

>> I DON'T THINK SO.

>> POLICY NUMBER?

POLICY NUMBER IS NOT ON THERE?

>> ON THE FORM SUBMITTED TO THE

INSURANCE COMPANY?

>> YEAH.

>> WHAT HAPPENS --

>> WAIT A MINUTE. IT IS NOT ON

THERE?

YOU DON'T HAVE TO GIVE THEM A

POLICY NUMBER?

HOW ABOUT THE NAME OF INSURED,

IS THAT ON THERE.

>> THE NAME OF INSURED, THE

NAME OF CLAIMANT IS THERE.

>> DON'T THEY HAVE TO GIVE YOU

ALL THE MEDICAL INFORMATION ON

THAT FORM?

>> THEY WOULD, YOUR HONOR,

EXCEPT IN THIS PARTICULAR CASE,

WHAT NEEDS TO BE SUBMITTED IS

THE HCFA FORM.

THAT IS WHAT TYPICALLY HAPPENS

THE CLAIMANT GOES TO THE

DOCTOR.

AND DOCTOR SUBMIT AS HCFA FORM

TO START THE CLAIM PROCESS.

IN THIS CLAIM THERE WAS NO

CLAIM FOR MEDICAL SERVICES.

>> DID PROGRESSIVE KNOW THERE

WAS A LOSS OF WAGES?

>> LOSS OF WAGES.

>> DID PROGRESSIVE KNOW THERE

WAS COMP INVOLVED?

>> YES, YOUR HONOR.

>> AND DID PROGRESSIVE KNOW

THAT THE LAW OF FLORIDA SAYS

YOU GOT TO PAY COMP LIENS BACK?

>> YES, YOUR HONOR.

>> THEY KNEW ALL THAT.

DID PROGRESSIVE KNOW THAT, THIS

IS HOW THESE THINGS OPERATE?

THIS TO ME SEEMS TO BE A LIKE A

TOTAL TEMPEST IN A TEAPOT

GENERATED UNNECESSARILY AND

THIS KIND OF THING THAT CLOGS

THE COURTS.

NOT SOMEBODY JUST SUBMITTING,

HERE IS MY LOST WAGE.

YOU DO PAY THEM.

I'M TRYING TO UNDERSTAND WHAT

IT IS THAT THIS STATUTE

REQUIRES, AFTER LOOKING AT ALL

THIS STUFF, THAT WAS NOT GIVEN

TO PROGRESSIVE WAY BACK BEFORE

THIS THING EVEN STARTED?

>> WELL, YOUR HONOR, WHAT WE

NEED TO DO, FIRST OF ALL WE

NEED TO FIGURE OUT WHAT

HAPPENED IN THIS PARTICULAR

CASE.

BECAUSE YOU MADE THE COMMENT TO

OPPOSING COUNSEL, HOW LONG DID

THE DENIALS GO ON?

THERE HAS NEVER EVER BEEN A

DENIAL.

>> THAT IS IN THE EYE OF THE

BEHOLDER.

IF A CITIZEN OF FLORIDA SENDS A

LETTER TO AN INSURANCE COMPANY,

SAYS I'VE HAD THESE LOSSES AND,

THE INSURANCE COMPANY JUST

SAYS, I NEED MORE, I NEED MORE.

THAT IS A COMMON TACTIC TO

NEVER PAY A CLAIM.

I NEED MORE INFORMATION.

>> THEN, YOUR HONOR, BUT THE ONLY

REASON I BRING THAT UP BECAUSE
YOU ALSO ASKED ME, DID
PROGRESSIVE KNOW THEY HAD TO
PAY THE WORKERS' COMP LIEN.
THEY KNOW THE LAW HOWEVER.
DOCUMENTS THEY WERE REQUESTING
ABOUT VERIFICATION ABOUT THE
WORKERS' COMP LIEN?
>> WHAT VERIFICATION?
>> WHAT WAS PAID AND WHAT
WASN'T PAID.
>> THAT WAS NEVER IN A LETTER.
>> IT WAS NOT FORTHCOMING?
>> IT WAS NEVER IN A LETTER
THAT PROGRESSIVE KNEW IN THIS
RECORD HOW MUCH HAD BEEN PAID
FOR LOST WAGES?
>> WHAT WAS SENT WAS A LETTER
FROM PLAINTIFF'S COUNSEL WHICH
WAS INSUFFICIENT FOR
PROGRESSIVE.
NOW, THIRD DISTRICT, THAT IS
ISSUE OF FACT WHETHER THERE
BEEN ACTUAL DENIAL OR NOT,
DENIAL AND THAT IS GOING BACK
TO THE COURT.
GOING BACK TO THE TRIAL COURT.
>> WE DON'T NEED TO TALK

ABOUT THAT.

WHAT WE NEED TO TALK ABOUT

WHETHER THIS IS RETROACTIVE

APPLICATION, SPECULATIVE

APPLICATION.

>> CORRECT.

>> AND WHETHER AFTER FILING A

LAWSUIT LIKE IN THE MEDICAL

MALPRACTICE ARENA, THAT THE

LAWSUIT'S FILED, UNDER I

BELIEVE IT IS MERAS, SOMETHING

LIKE THAT.

YOU'RE FAMILIAR WITH IT.

>> CORRECT.

>> WHAT HAPPENS YOU DON'T JUST

DISMISS THESE CLAIMS.

>> YOUR HONOR, THIS STATUTE IS

COMPLETELY DIFFERENT.

THIS STATUTE, ALTHOUGH IT

REFERS TO THE, CALLS IT NOTICE.

THE WORD IS NOTICE.

IT IS NOT JUST A NOTICE

STATUTE.

IT IS UNLIKE THE MALPRACTICE

STATUTE.

IT IS UNLIKE THE PRESUIT NOTICE

STATUTES IN REGARD TO SOVEREIGN

IMMUNITY.

BY THE TIME THAT THE CLAIMANT

IS ENTITLED TO, EVEN ENTITLED
TO SEND A DEMAND LETTER UNDER
SUBSECTION 11 OF THE NO-FAULT
STATUTE, THE CLAIM HAS BEEN
MADE.
AND THE INSURANCE COMPANY HAS
BEEN PUT ON NOTICE.
THE INSURANCE COMPANY HAS HAD
30 DAYS TO INVESTIGATE THE
CLAIM.
HAS HAD THAT OPPORTUNITY TO PAY
THE CLAIM, AND OBVIOUSLY SINCE
THE DEMAND LETTER IS BEING SENT
THE CLAIM HAS NOT BEEN PAID AND
THE STATUTE AT THAT POINT,
AFTER THE EXPIRATION OF THE 30
DAYS, DEEMS THE CLAIM TO BE
OVERDUE.
IT IS OVERDUE.
SO AT THAT POINT IN TIME THE
INSURANCE COMPANY HAS ALL THE
NOTICE IT NEEDS TO PAY THIS
CLAIM.
ADMITTEDLY THAT IS THE PURPOSE
OF THE STATUTE.
UNLIKE, THE MALPRACTICE STATUTE
WHICH IS TO WEED OUT FRIVOLOUS
CLAIMS.

UNDERLYING THE SOVEREIGN
IMMUNITY STATUTE WHICH IS TO
PUT THE GOVERNMENT ON FIRST
NOTICE OF A CLAIM.
THE SOLE PURPOSE OF SUBSECTION
11 IS TO PROVIDE THE INSURANCE
COMPANY WITH ONE LAST CHANCE,
TO PAY THE CLAIM WITHOUT HAVING
TO PUT ITSELF AND THE PLAINTIFF
THROUGH PROTRACTED LITIGATION
AND THE EXPENSE OF THAT
LITIGATION.
>> WHY IS THAT -- THAT IS KIND
OF A SAFE HARBOR PROVISION,
RIGHT?
>> CORRECT.
>> WHY AREN'T THOSE SAFE
HARBOR PROVISIONS AND ACCOMPANYING
STATUTE OF LIMITATIONS ALTERATION
OR A SUBSTANTIVE CHANGE?
>> YOUR HONOR,
A SUBSTANTIVE CHANGE WE HAVE TO
DISTINGUISH BETWEEN WHAT IS
SUBSTANTIVE AND PROCEDURAL.
SUBSTANTIVE CHANGE IS
OBVIOUSLY, A GRANT OF RIGHTS
OR A DENIAL OF RIGHTS.
WHAT'S PROCEDURAL IS THE MEANS
TO ENFORCE THOSE RIGHTS.

SUBSECTION 11, AS YOUR HONOR
POINTED OUT, I THINK HAS NO,
NO EFFECT WHATSOEVER ON THE
CLAIMANT'S ABILITY TO SEEK FULL
COMPENSATION FROM THE INSURANCE
COMPANY.
YOUR HONOR MADE A COMMENT AND
SAID --
>> I DON'T UNDERSTAND THAT.
IF YOU CAN'T SUE TO FORCE THEM
TO PAY YOU AND THEY WON'T PAY
YOU, HOW IS THAT NOT A
LIMITATION?
>> YOU CAN SUE, YOUR HONOR.
ALL YOU NEED TO DO IS FOLLOW
THE PROCEDURE JUST LIKE ANY
OTHER PROCEDURE.
>> I GUESS, WE WOULD HAVE TO GO
THROUGH ABOUT 50 CASES OUT OF
THIS COURT AND THE APPELLATE
COURT, INCLUDING RECENT CASES
WHERE THEY SAID THE AMENDMENT
TO THE FIRST DISTRICT, THAT THE
AMENDMENT TO THE ATTORNEY FEES
STATUTE AND WORKERS' COMP WHICH
ALLOWS EMPLOYER CARRIER 30
DAYS, RATHER THAN 14 DAYS WHICH
TO PROVIDE BENEFITS BEFORE

BEING RESPONSIBLE FOR PAYMENT
OF ATTORNEY FEES IS THE
SUBSTANTIVE CHANGE IN THE
STATUTE.
OVER AND OVER, WHETHER WE DON'T
THINK IT'S A BIG DEAL YOU KNOW,
TO REQUIRE THIS ADDITIONAL
PIECE OF PAPER, THE CASE LAW,
AND THAT'S, THIS CASE WAS
TAKEN, HAS SAID THAT THESE ARE
SUBSTANTIVE PROVISIONS IN TERMS
OF THAT, I DON'T KNOW HOW WE
WOULD NOT BE CONTRADICTING MANY
CASES FROM THIS COURT AND FROM
THE APPELLATE COURTS BY SAYING,
THIS STATUTE IS ACTUALLY JUST
PROCEDURAL.
AND THE FURTHER QUESTION IS,
ONCE YOU SAY, WELL IT IS JUST
PROCEDURAL, THEN MY QUESTION
TO YOU IS, HOW CAN IT BE THAT
WHEN A, THEY HAVE ALL THIS
NOTICE, THE LAWSUIT IS FILED,
WOULDN'T THE FIRST THING BACK
IN 2003 WHEN THERE IS AMPLE
TIME, THE STATUTE OF
LIMITATIONS HASN'T RUN, FOR
PROGRESSIVE TO HAVE FILED A
MOTION TO DISMISS FOR FAILURE

TO COMPLY WITH THE PRESUIT

NOTICE?

SINCE THEY DON'T WANT TO BE

SUED AND THAT'S THE PURPOSE,

WOULDN'T THAT BE THE THING TO

DO RATHER THAN WAIT OVER, TILL

JUNE AND THEN SEEK TO AMEND THE

ANSWER, TO RAISE THIS

NON-COMPLIANCE?

THAT'S WHAT CONCERNS ME.

IT IS EITHER AN IMPORTANT

PROVISION FOR INSURANCE

COMPANIES, AND THEN IF IT'S

IMPORTANT, THEY OUGHT TO HAVE,

YOU KNOW, SAY, LISTEN, I DON'T

WANT TO BE SUED.

I WANT THIS DISMISSED.

AT THAT POINT THEN THE JUDGE

WOULD DECIDE, EITHER I'LL

DISMISS IT, REQUIRE THIS

PLAINTIFF TO HAVE TO REFILE,

AND FILE THE NOTICE.

OR, ABATE IT.

THAT'S TO ME IS, SO I DON'T

KNOW HOW YOU HAVE IT BOTH WAYS.

I DON'T KNOW HOW YOU HAVE IT

THAT IT IS PROCEDURAL AND IT'S

NOT, IT'S RETROACTIVE, AND

THEN THAT IT'S NOT WAIVED BY
PROGRESSIVE BRINGING IT UP
BECAUSE IT'S FOR YOUR, YOU KNOW
FOR YOU NOT TO BE SUED AT THE
TIME THE LAWSUIT'S FILED.
>> WELL, YOUR HONOR, NUMBER
ONE, LET'S START WITH HOW IT'S
PROCEDURAL.
AGAIN, THIS STATUTE DOES NOT
PRECLUDE THE CLAIMANT FROM
FILING A LAWSUIT.
WHAT IT DOES IS PUT ANOTHER
STEP IN FRONT OF FILING THE
LAWSUIT.
WE CAN, EXCUSE ME, THIS IS AKIN
TO, IT IS JUST PART OF THE
PROCEDURE.
THE RULES OF CIVIL PROCEDURE
REQUIRE AM PLAINTIFF TO FILE
A COMPLAINT.
AND IF THEY FILE A COMPLAINT
PURSUANT TO THE RULES, THEN IT
CAN'T GO FORWARD WITH ITS
SUBSTANTIVE CLAIM.
>> IF THE COMPLAINT HAS A
DEFECT IN IT, THEN A DEFENDANT
SAYS, I'M MOVING TO DISMISS.
>> CORRECT.
>> BECAUSE IT DOESN'T COMPLY.

AND THE JUDGE LOOKS AT IT AND
WITHIN THE STATUTE OF
LIMITATIONS -- I THINK THE
THING THAT IS SO, TO ME,
OFFENSIVE HERE ABOUT THIS
DIDN'T, NOT ONLY THAT THIS
STATUTE, IF IT WAS MEANT TO
STOP PLAINTIFFS FROM FILING THE
LAWSUIT, THEN AT LEAST BRING BY
THE TIME THE PROPER LETTER WAS
FILED UNDER YOUR, UNDER YOUR
THEORY, IN NOVEMBER OF 2003, IF
YOU HAD, YOU, PROGRESSIVE, HAD
PAID THE CLAIM, THEN WITHIN,
WHAT, SEVEN DAYS AFTER THAT,
THIS IS END OF THE STORY.
>> I DON'T THINK IT IS THAT
SIMPLE, JUDGE.
>> BUT THEY DIDN'T DO IT, DID
THEY?
>> THEY COULDN'T DO IT.
WHAT HAPPENED AS WE ARGUED IN
OUR BRIEF, AT THAT POINT IN
TIME I WORK BACKWARDS --
>> YOU SEE FROM OUR POINT OF
VIEW IT LOOKS KIND OF LIKE
GOTCHA.
BY 2008 WHEN THE THIRD

DISTRICT DECIDES THAT WHOLE
THING SHOULD BE DISMISSED, THE
STATUTE OF LIMITATIONS HAS NOW
RUN ON MISS MENENDEZ'S PIP CLAIM
AND THE STIPULATED JUDGMENT
WHICH BY 2006 WAS OVER $10,000 IS
WIPED OUT.
>> YOUR HONOR, THAT'S CORRECT.
WHAT I'M GETTING THE FEELING HERE
IS THE PERSPECTIVE YOUR HONOR IS
TALKING ABOUT, THAT IT WAS THE
INSURANCE'S RESPONSIBILITY TO
INSURE THAT THE PLAINTIFF
COMPLIED WITH THE STATUTE.
THE STATUTE WAS IN PLACE.
THE FIRST THING THAT
PROGRESSIVE DID IN RESPONSE TO
THE COMPLAINT THAT WAS FILED
WAS RAISE AN AFFIRMATIVE
DEFENSE THEY ALLEGED THAT ALL
CONDITIONS PRECEDENT HAD BEEN
SATISFIED.
PROGRESSIVE RAISED THE
AFFIRMATIVE DEFENSE -- THEY
DENIED THAT THEY DIDN'T RAISE
AFFIRMATIVE DEFENSE.
THEY DENIED --
>> THAT IS NOT RAISING
AFFIRMATIVE DEFENSE.

AFFIRMATIVE DEFENSE MUST
SPECIFICALLY STATE, TALK ABOUT
CONDITIONS, NOT
PLAYING PLEADING GAMES. YOU HAVE
TO SAY EXACTLY WHAT IT IS.
>> YOU'RE ABSOLUTELY CORRECT.
THEY DIDN'T RAISE THAT HOWEVER,
YOUR HONOR.
THEY DIDN'T MOVE TO STRIKE THAT
ANSWER.
>> IT WASN'T RAISED BY, JUST
DENIAL DOESN'T RAISE
AFFIRMATIVE DEFENSE.
>> ONE YEAR LATER THAT IS WHEN
PROGRESSIVE MOVED TO AMEND ITS
ANSWER AND RAISED VERY
SPECIFICALLY THAT AS AN
AFFIRMATIVE DEFENSE,
NON-COMPLIANCE WITH SUBSECTION
11.
AT THAT POINT IN TIME THE
PLAINTIFF DID NOTHING.
THEY DIDN'T ASK FOR AN
ABATEMENT.
THEY DIDN'T ASK FOR ANY RELIEF
FROM THE COURT AT THAT TIME.
THEY DID NOTHING.
>> SOUNDS LIKE WE'RE TALKING

ABOUT PROCEDURAL NICETIES.
THAT'S WHERE I'M, THAT'S
MY CONCERN AND THAT'S WHY THE
COURTS HAVE SAID IN SITUATIONS
WHERE THERE'S COMPLIANCE WITHIN
THE STATUTE OF LIMITATIONS,
THEN IT'S CURED.
AND THE CURE WOULD BE, THAT YOU
DON'T GET, YOU KNOW, PROGRESSIVE
HAD A CHANCE TO WIPE OUT
ANY ATTORNEYS FEES THAT WOULD
HAVE BEEN INCURRED UP TO THE
TIME THE PROPER NOTICE IS
FILED.
THAT'S, I MEAN, THAT IS THE WAY
IT IS SOLVED.
>> WHEN I SAID, IT IS NOT THAT
SIMPLE, JUDGE, WITH ALL DUE
RESPECT I THINK WHAT HAPPENS AT
THAT POINT THERE IS A THING IN
INSURANCE LITIGATION CALLED A
CONFESSION OF JUDGMENT.
ONCE THE CLAIM IS MADE AND THE
INSURANCE COMPANY,
AND A LAWSUIT IS
FILED AND THE INSURANCE COMPANY
PAYS THAT CLAIM EVEN THOUGH NO
JUDGMENT ENTERED AT THAT TIME,
THIS COURT HELD THAT IS

CONFESSION OF JUDGMENT.

>> YOU WERE SAYING THAT THE NOTICE WAS A CONDITION PRECEDENT AND THEY DIDN'T COMPLY WITH THE NOTICE, THEN THAT STATUTE, I WOULD SUGGEST, AND I THINK COUNTY COURTS HAVE HELD THIS, WOULD TRUMP THE JUDGMENT.

THAT THERE WOULD NOT BE AN ABILITY TO CLAIM ATTORNEY FEES IF THE STATUTE WAS NOT COMPLIED WITH.

>> I DON'T KNOW ANY CASE THAT HOLDS THAT, YOUR HONOR.

>> WELL I THOUGHT THAT MR.^EDEN EVEN CONCEDED THAT'S HOW IT WOULD WORK.

>> THEN WHAT HAPPENS, JUDGE, WHAT I WAS TRYING TO DESCRIBE BEFORE HOW THIS SUBSECTION 11 IS DIFFERENT THAN ANY OTHER NOTICE PROVISION.

THE SOLE PURPOSE AGAIN OF SUBSECTION 11 IS TO PROVIDE THE INSURANCE COMPANY WITH ONE LAST OUT TO AVOID THE TIME AND EXPENSE OF LITIGATION.

SO, NOT ONLY ARE WE TALKING
ABOUT FROM THE PERSPECTIVE OF
THAT, IF, POSTSUIT COMPLIANCE
IS SUFFICIENT, THAT MAYBE, OR
MAYBE NOT THE INSURANCE COMPANY
WILL BE LIABLE FOR THE
PLAINTIFF'S ATTORNEY'S FEES, AT
THAT POINT IN TIME THE
INSURANCE COMPANY HAS ALREADY
INCURRED ITS OWN EXPENSE AND
ITS OWN TIME HAS BEEN SPENT IN
THE CASE.
AND THE PURPOSE OF SUBSECTION
11 IS TO AVOID THAT, UNLIKE ALL
OF THE OTHER NOTICE PROVISIONS
THAT YOU MIGHT FIND IN THE
FLORIDA STATUTES.
THIS IS DIFFERENT.
>> I'M MISSING THAT TOTALLY.
THAT IS JUST, THAT IS REALLY
GOING RIGHT OVER MY HEAD.
BECAUSE ANY TIME, ANY TIME A
CLAIM IS MADE, SOMEBODY HAS TO
PICK UP A PIECE OF PAPER, LOOK
AT IT, PROCESS IT, DO SOMETHING
WITH IT.
SO I FIND THAT IS A
NON-ARGUMENT.
>> THAT NEVER HAPPENED, YOUR

HONOR.

IF THEY HAD COMPLIED WITH THE

STATUTE WE NEVER WOULD HAVE HAD

TO PICK UP THAT PIECE OF PAPER.

>> THAT IS ABSOLUTELY ABSURD

BECAUSE YOU HAVE TO PICK UP THE

PIECE OF PAPER WHEN THEY FIRST

NOTIFY YOU BENEFITS ARE DUE.

MAY NOT BE A SECTION 11, BUT

IT DOES HAVE THE RIGHT WORDS ON

IT, SEND YOU SAME DOCUMENT, AS

SOON AS THERE ARE HEARD, GOT TO

TELL YOU ABOUT IT AT THAT TIME OR

YOU DON'T HAVE TO PAY.

>> SURE BUT --

>> TO SAY SOMEBODY DOESN'T HAVE

TO PICK UP THE PIECE OF PAPER

WHEN THEY OPEN THE FILE IS AN

ABSURD ARGUMENT.

>> WHEN I SAY SOMEBODY, I'M

TALKING ABOUT LAWYERS.

AT THAT POINT IN TIME THERE IS

NO LITIGATION PENDING THAT IS

PART OF THE CLAIM PROCESS.

IT IS PART OF THE CLAIM

PROCESS.

THAT IS WHAT THE PIP STATUTE

PROVIDES IS A PROCESS, A

PROCEDURE FOR MAKING THE CLAIM.

IT DOESN'T DENY THEIR ABILITY

TO BE FULLY COMPENSATED IN FACT

IT FACILITATES THEIR ABILITY TO

BE FULLY COMPENSATED.

>> NO, IT DOESN'T, NOT UNDER

THESE CIRCUMSTANCES WHERE

DISMISSED AFTER STATUTE OF

LIMITATIONS RUN.

SAME THING AS PRESUIT NOTICE

REQUIREMENT.

FOR MEDICAL MALPRACTICE YOU

EITHER COMPLY AND IF YOU DON'T

COMPLY, INSURANCE COMPANIES

ARGUE YOU CAN'T MAKE A CLAIM

BECAUSE YOU DIDN'T COMPLY WITH IT.

THIS COURT HAD TO SAY IN MEKAS

NO, THAT IS NOT WHAT HAPPENS.

IF YOU FILED YOUR LAWSUIT

WITHIN THE STATUTE OF

LIMITATIONS AS HAS OCCURRED

HERE, THEN IT IS CONSIDERED

ABATED AND EVERYTHING IS, YOU

DON'T DISMISS IT.

THIS CASE IS THE ANTITHESIS OF

THAT.

IT SAYS YOU DISMISS IT.

>> THAT IS BECAUSE THE INTENT

OF THE LEGISLATURE IN THOSE

OTHER TYPE OF NOTICE
PROVISIONS, IT CAN BE COMPLIED
WITH BY ALLOWING THIS POST SUIT
COMPLIANCE BY NOT DISMISSING
CASE.
INTENT OF THE LEGISLATURE HERE
WHICH IS TO ALLOW THE INSURANCE
COMPANY TO AVOID
LITIGATION THAT CAN'T BE
SATISFIED --
>> DIDN'T THE INSURANCE
COMPANY, THEY BROUGHT IT ON
THEMSELVES.
AS SOON AS LAWSUIT IS FILED
THEY DON'T SAY ANYTHING.
THEY LITIGATE IT FOR A YEAR I
GUESS.
NOW YOU'RE SAYING WE'RE GOING
TO VEST THIS ON THE PUBLIC OF
FLORIDA BECAUSE THIS INSURANCE
COMPANY DECIDED ON ITS OWN,
WE'RE GOING TO LITIGATE THIS
FOR A YEAR. THEN AT THE END WE'RE
SAYING IT IS YOUR FAULT WE YOU
DID THIS.
WE DIDN'T TELL YOU AT BEGINNING
YOU DIDN'T GIVE US ONE LITTLE
PIECE OF PAPER.

>> WE CAN DEBATE WHETHER THE INSURANCE COMPANY IN THIS PARTICULAR CASE WAS AT FAULT OR NOT AT FAULT FOR WAITING OR NOT WAITING.

>> BUT ISN'T IT UNDENIABLE THAT WHEN THE COMPLAINT WAS FILED, THAT MADE THE GENERAL, AGREEMENT ALL CONDITIONS PRECEDENT HAD BEEN PERFORMED, THAT YOUR DENIAL OF THE PERFORMANCE OF THIS CONDITION PRECEDENT, WAS NOT MADE SPECIFICALLY AND WITH PARTICULARITY AS IS REQUIRED BY RULE 1.120-C?

>> THAT IS CORRECT.
IT WAS NOT.

>> WHY SHOULDN'T THAT CAUSE YOU PROBLEMS?

>> WELL, IT IS.

>> WELL, WHY ISN'T IT RIGHT NOT TO CAUSE YOU PROBLEMS?

>> YOUR HONOR --

>> PARTICULARLY IN CIRCUMSTANCES WHERE THE CLAIM IS ULTIMATELY GOING TO GET BARRED BY THE STATUTE OF LIMITATIONS, I MEAN, YOU HAD

THAT, YOU HAD THAT OPPORTUNITY
THERE, YOU HAD THE REQUIREMENT
OF THE RULE, BEFORE YOU, BUT,
WHY DIDN'T YOU COMPLY WITH IT?
>> JUDGE, THAT I CAN'T ANSWER.
JUDGE, I THINK WE'RE TALKING
ABOUT TWO DIFFERENT THINGS
HERE.
NUMBER ONE, IS THERE A LEGAL
COMPLIANCE WITH PROVIDING THEM
WITH NOTICE AS TO WHAT OUR
AFFIRMATIVE DEFENSE WAS.
ANOTHER ONE IS PUTTING THEM ON
NOTICE.
WHAT WE'RE TALKING ABOUT WITH
YOUR HONOR, YOU'RE TALKING
ABOUT FAIRNESS HERE.
WHY DID THE INSURANCE COMPANY
LITIGATE FOR A YEAR WITHOUT
INFORMING THEM?
WELL, THEY WERE INFORMED THERE
WAS A PROBLEM WITH THEIR
ALLEGATION --
>> YOU'RE TALKING ABOUT, OKAY,
YOU'RE TALKING ABOUT INFORMING
INFORMING.
BUT HERE, THERE IS A SPECIFIC
OPPORTUNITY, AND THIS PROCESS

WHERE YOU WERE REQUIRED TO TELL
THEM THAT THEY HAD NOT COMPLIED
WITH THAT CONDITION PRECEDENT.
AND YOU DID NOT DO IT.
THERE ARE DIFFERENT STEPS HERE
THAT DIFFERENT PEOPLE FAILED TO
COMPLY WITH, BUT TEAMS SEEMS
LIKE TO THIS IS CRITICAL, THIS
IS AN IMPORTANT PART OF THE WAY
THIS PROCESS WORKS, AND THEN
FOR, IT SEEMS TO UNDERMINE YOUR
POSITION WHEN YOU'RE POINTING
FINGERS AT THEM FOR THEIR
FAILURE TO FOLLOW THE VARIOUS
REQUIREMENTS WHEN THIS ONE WAS
THERE, AND YOU CERTAINLY SHOULD
HAVE KNOWN THAT WHAT THEY HAD
GIVEN YOU OR NOT GIVEN YOU?
>> JUDGE, WHEN, WHEN WE DID
RAISE AN APPROPRIATE
AFFIRMATIVE DEFENSE, THE
PLAINTIFF'S RESPONSE WAS WHAT
THEY COULD HAVE DONE, WAS TAKE
A VOLUNTARY DISMISSAL AND FILE.
THEY HAD PLENTY OF TIME UNDER
THE STATUTE OF LIMITATIONS.
>> JUST THINK ABOUT THAT AGAIN.
MAYBE THEY COULD HAVE DONE THAT
BUT WE'RE TRYING TO TALK ABOUT

MAKING, YOU KNOW, I DON'T THINK
THAT HAVING ALL THIS LITIGATION
IN THE COUNTY COURTS WHICH END
UP BOILING TO AMOUNTS OF
ATTORNEYS FEES IS GOOD FOR THE
INJURED PEOPLE OR GOOD FOR THE
SYSTEM OR GOOD FOR THE STATE OF
FLORIDA.
BUT IN TERMS OF THE SANITY OF
THIS, I'VE GOT TO ASK YOU, WHEN
THEY FINALLY, SENT WHAT APPEARS
TO BE THE KIND OF NOTICE THAT
IS REQUIRED, THIS NOVEMBER
21st, 2003 NOTICE, I THINK THAT
IF WE ATTACH THIS TO AN
OPINION, THE PUBLIC MIGHT FIND
IT A LITTLE LUDICROUS THAT
THAT'S, YOU KNOW, WHETHER IT
IS A BIG DEAL OR NOT A BIG
DEAL, THAT ALL THEY SAID, THIS
IS NOTICE OF INTENT UNDER THIS
STATUTE AND THEN THEY SAID,
LOST WAGE STATEMENT, SEE
ATTACHED AND IT WAS, PROBABLY
THE SAME LOST WAGE STATEMENT
THAT THEY HAD ALREADY PUT
TOGETHER IN THE PIP CLAIM,
WHICH AS YOU SAID IS THE FIRST

STEP THAT HAS TO BE, HAS TO BE

MADE.

SO THIS IS, IN ONE SENSE IT

SEEMS LIKE A GOOD INTENT FOR

THE STATUTE TO GIVE ONE MORE

CHANCE TO THE INSURANCE COMPANY

BUT IN TERMS OF HOW IT WORK IN

THIS CASE, ONCE THIS GOT FILED,

WHY DIDN'T IT CURE THE PROBLEM?

>> AGAIN, JUDGE, TWO REASONS.

NUMBER ONE, IF THE INSURANCE

COMPANY HAD PAID AT THAT TIME,

IT WOULD HAVE, I BELIEVE, IT

WOULD HAVE BEEN CONSIDERED TO

BE A CONFESSION OF JUDGMENT.

I KNOW THEY WOULD HAVE ARGUED

IT WOULD BE A CONFESSION OF

JUDGEMENT.

>> BUT YOU ENDED UP STIPULATING

TO A JUDGMENT IN 2006.

>> CORRECT.

BUT AT THAT TIME, BECAUSE WE

HAD LOST THE ARGUMENT IN FRONT

OF THE TRIAL COURT.

BUT AT THAT TIME IT WAS OUR

BELIEF THEY HAD TO COMPLY WITH

DEMAND LETTER STATUTE WHICH

THEY HADN'T COMPLIED WITH.

SECONDLY, I GO BACK AGAIN, THAT

UNLIKE ANY OTHER NOTICE
PROVISION, THIS ONE'S
DIFFERENT.
THIS ONE, BY ALLOWING POSTSUIT
COMPLIANCE, WHICH, NUMBER ONE,
IS ABSOLUTELY CONTRARY TO THE
UNAMBIGUOUS LANGUAGE OF THE
STATUTE, DOES NOT ALLOW
SATISFACTION IN ADDITION OF THE
LEGISLATIVE INTENT.
>> LET ME ASK YOU THIS.
COULD YOU GO BACK TO JUSTICE
PARIENTE'S QUESTION THAT SHE
JUST ASKED YOU.
IT JUST SEEMS LUDICROUS TO ME
THAT YOU COULDN'T HAVE JUST
PAID THAT CLAIM, EVEN AFTER
THEY HAD FILED THEIR DEMAND
LETTER, YOU ARE SAYING THAT IS
CONFESSION OF JUDGMENT.
IF THAT MONEY WAS RIGHTFULLY
OWED TO THEM, WHAT DIFFERENCE
DOES IT MAKE?
THE LAWSUIT WOULD HAVE THEN
BEEN DISMISSED, AND WE COULD
HAVE ALL GONE HOME AND NEVER
HAD TO DEAL WITH THIS?
WE'RE HERE, TO ME ON SOMETHING

THAT IS REALLY MINUSCULE.

>> THIS IS PIP.

THINGS ARE MINUSCULE EXCEPT

WHEN WE GET TO ATTORNEYS FEE

PORTION.

>> I HEAR THAT, AND, IT

TROUBLES ME BECAUSE THERE ARE A

LOT OF FAMILIES IN FLORIDA, A

LOT OF FAMILIES IN FLORIDA AND

PARTICULARLY TODAY, THAT, YOU

KNOW, A COUPLE OF THOUSAND

DOLLARS MAKES A DIFFERENCE

BETWEEN PEOPLE EATING OR NOT HE

EATING OR GETTING MEDICATION

AND NOT.

I UNDERSTAND YOU'RE WONDERFUL

APPELLATE LAWYER AND SOMETIMES

MESSENGER GETS HIT WITH THESE.

PLEASE GO AHEAD AND ANSWER

JUSTICE QUINCE'S QUESTION.

I JUST HAVE A DIFFICULT TIME,

MR.^STEIN, THAT THIS IS NOTHING.

IT IS SOMETHING.

>> WELL, I AGREE. I WAS JUST

RESPONDING TO JUDGE QUINCE'S --

>> IN THE SCHEME OF THINGS, IF

YOUR COMPANY OWED THESE PEOPLE,

THEY PAID A PREMIUM, FOR PIP

COVERAGE, AND YOUR COMPANY WAS

OBLIGATED TO PAY THEM, EVEN
AFTER THIS DEMAND CAME IN,
YOU'RE SAYING THEY COULDN'T
HAVE PAID IT THEN BECAUSE IT
WAS A CONFESSION OF JUDGMENT.
SO WHAT?
IF THEY OWED THAT MONEY.
>> WE DIDN'T KNOW IT AT THAT
TIME.
AT THAT POINT IN TIME WE STILL
HAD NOT RECEIVED THE
DOCUMENTATION WHICH WOULD HAVE,
INSURER'S MIND, WOULD, PURSUANT
TO THEIR CLAIM PROCESS WOULD
ESTABLISH THAT THAT MONEY
WAS --
>> IT IS HARD TO BELIEVE AFTER
MONTHS OF LITIGATION, THAT THE
DOCUMENTATION, WHICH IS ONE
PAGE THAT WASN'T, REQUESTED IN
DISCOVERY?
YOU THEY, MAYBE THEY OBFUSCATED
THE PROCESS AND REFUSED TO GIVE
YOU THE DOCUMENTATION.
MAYBE THAT IS WHAT ACTUALLY
HAPPENED BUT THERE IS NOTHING
IN THE RECORD TO SHOW THAT.
>> YOUR HONOR.

I'M WAY OVER TIME.

>> YOU'RE WAY OVER YOUR TIME.

MAKE ONE CONCLUDING STATEMENT.

>> IN THE BIG PICTURE WHETHER THIS IS SUBSTANTIVE STATUTE OR PROCEDURAL STATUTE, I THINK THAT IN MY MIND IT IS CLEAR THAT THIS IS A PROCEDURAL STATUTE.

IT IS JUST A RULE TO, FORCING THE MANNER IN WHICH CAN ENFORCE THE SUBSTANTIVE RIGHT TO BE PAID UNDER THE PIP STATUTE.

AFTER THIS PARTICULAR CASE AS TO WHETHER IT CAN BE CURED LATER, I THINK THAT IS SEPARATE ISSUE.

AND I UNDERSTAND THE PROBLEMS THAT IS COURT'S HAVING WITH WHAT THE INSURANCE COMPANY DID OR DIDN'T DO IN THIS CASE BUT ON THE BIG ISSUE I THINK THAT IS PRETTY CLEAR THIS IS PROCEDURAL STATUTE AND IT CAN BE RETROACTIVELY APPLIED.

>> THANK YOU VERY MUCH.

>> YOUR HONORS I WILL BE BRIEF.

YOU TOUCHED ON ALL THE MAJOR

ISSUES.

>> I JUST HAVE A SPECIFIC

QUESTION ON THIS CASE.

MR.^EDEN STARTED OUT SAYING ONE

THING THAT IS CLEAR THERE WAS A

$2,000 MEDICAL LIEN, I MEAN,

$2,000 THAT YOU HAD REIMBURSED

BACK AND THEREFORE REPRESENTED

THE SUPPLEMENTAL MEDICAL.

WHEN YOU FILED OR WHEN THE

NOTICE OF INTENT TO LITIGATE

WAS FILED, IN NOVEMBER OF 2003

IT ONLY INCLUDES A CLAIM FOR

THE LOST WAGES OF THE $7080.

AND THEN WHEN, WHICH IS, VERY

SPECIFIC AMOUNT, AND THEN WHEN

THE STIPULATED FINAL JUDGMENT

WAS ENTERED, IT WAS FOR THE

$7080.

SO IT LOOKS LIKE THE OWN CLAIM

THAT ACTUALLY WAS PURSUED, AND

I DON'T KNOW, UNDER THE FACTS

OF THIS CASE THAT MIGHT HELP OR

HURT YOU, WAS THE CLAIM FOR

LOST WAGES? IS THAT CORRECT?

>> NO. THE WAY THE --

>> THAT IS NOT CORRECT THAT THE

NOTICE ACTUALLY INCLUDED A

CLAIM FOR MEDICAL BENEFITS?

>> YOU'RE RIGHT.

THAT'S WHAT THE NOTICE SAID.

>> AND ISN'T THE AMOUNT OF THE

FINAL JUDGMENT THE EXACT AMOUNT

WHAT WAS IN THE NOTICE OF

INTENT TO LITIGATE?

>> IT IS BUT THE REASON WE

SETTLED AGREED TO SETTLE THE

CASE FOR THAT STIPULATED AMOUNT

BECAUSE THE ONLY REMAINING

BENEFITS DUE UNDER THE POLICY,

BECAUSE PROGRESSIVE PAID 2100

AND SOME DOLLARS RIGHT OFF THE

BAT, WHEN THE ACCIDENT

HAPPENED, THEY PAID PART OF THE

MEDICAL BILLS BEFORE THE WORK

COMP CARRIER CAME IN.

>> YOU COULD ONLY GET 10,000?

>> THERE WAS ONLY $7800 LEFT IN

THE PARTNERSHIP COVERAGE.

AS COMPROMISE THEY OFFERED THAT

AMOUNT AND WOULDN'T GO ANY

HIGHER AND WE AGREED TO IT.

>> THE FACT WHY WASN'T THE

MEDICAL ASPECT INCLUDED IN

NOTICE OF INTENT TO LITIGATE?

>> I THINK WHAT HAPPENED, I

WASN'T INVOLVED IN THE CASE AT

THAT TIME. I DIDN'T DRAFT THE
NOTICE OF INTENT BUT BEST I CAN
FIGURE OUT --
>> YOU'RE COPIED ON THE NOTICE.
>> YOUR RIGHT. I APOLOGIZE.
I GOT INVOLVED LATER. I APOLOGIZE.
WHAT HAPPENED WAS THE WORKERS'
COMPENSATION LIEN $2,000 AMOUNT
WAS SOUGHT AFTER.
THE STATEMENT WAS MADE BY
PROGRESSIVE THEY WOULD NOT PAY
IT BECAUSE WORK COMP PAID SO
THEREFORE THEY HAD NO
OBLIGATION TO PAY.
AND SO THEY HAD ALREADY DENIED
IT.
I THINK THAT WAS THE THINKING
AT THE TIME THAT WE DIDN'T NEED
TO THROW IN THERE BECAUSE THEY
HAD ALREADY DENIED THAT ASPECT
OF THE CLAIM.
THEY HAD NOT BEEN GIVEN THE
CHANCE TO DENY THE TOTAL AMOUNT
OF THE LOST WAGE CLAIM.
SO WHEN WE AGREED ON A NUMBER,
IT JUST WAS COINCIDENCE THAT
WAS WHAT WAS OFFERED.
IT IS CERTAINLY THE

PETITIONER'S POSITION THAT THAT

$2000 WAS OWED.

THERE WAS NO DISPUTE ABOUT IT.

IT SHOULD HAVE BEEN PAID.

>> [INAUDIBLE].

>> THAT IS CORRECT.

THAT IS CORRECT.

AND I'D LIKE TO ADDRESS THE

STATEMENT WE'VE HEARD OVER AND

OVER AGAIN ABOUT THE FACT THAT

THIS NOTICE STATUTE IS SOMEHOW

SIGNIFICANTLY DIFFERENT THAN

ALL OTHER PRESUIT NOTICE

STATUTES.

I JUST DON'T UNDERSTAND

ARGUMENT.

WHILE THE AMOUNT OF TIME AND

MONEY THAT ONE MAY HAVE TOO

SPEND PUTTING TOGETHER THIS

PARTICULAR DEMAND LETTER TO AN

INSURANCE COMPANY MAY NOT BE AS

SIGNIFICANT SAY, AS THE PRESUIT

INVESTIGATION ONE IS REQUIRED

TO DO IN MEDICAL MALPRACTICE

CASE WHERE YOU HAVE TO HIRE AN

EXPERT AND SO FORTH,

NONETHELESS, IT IS BURDEN FOR

SOMEBODY TO GO OUT THERE AND

PUT THIS INFORMATION TOGETHER.

THE WAY PIP WAS STRUCTURED
BEFORE ALL THE COMMUNICATION
WAS BETWEEN THE INSURANCE
CARRIER AND MEDICAL PROVIDERS.
WHEN I GET A PERSONAL INJURY
CASE AND I TRY TO GATHER
MEDICAL RECORDS AND BILLS, IT IS
VERY HARD.
THE CLIENT DOESN'T HAVE THEM
BECAUSE ALL THE COMMUNICATIONS
IS BETWEEN THE CARRIER AND THE
MEDICAL PROVIDERS.
SO WE HAVE TO GO OUT, OFTEN
TIMES HAVE TO PAY FOR THESE
BILLS AND FOR SOMEBODY TO PUT
TOGETHER A DEMAND LETTER AN
COMPLY WITH ALL THE THINGS THAT
ARE LISTED IN THE STATUTE IT IS
A BURDEN TO THE AVERAGE PERSON
TO DO THIS, ESPECIALLY THEY
DON'T HAVE COUNSEL.
IN ADDITION, THERE WAS A
QUESTION ABOUT WHETHER OR NOT
THERE WERE OTHER SUBSTANTIVE
ISSUES, THAT WERE RAISED BY
STATUTE.
AND YES, THERE ARE.
AND AGAIN, IN THE OVERALL

SCHEME OF THINGS THEY MAY NOT
BE HUGE, BUT I THINK THEY MAKE
A DIFFERENCE.
AND I THINK THEY ARE
SUBSTANTIVE NONETHELESS.
THE PENALTY, THERE IS PENALTY
NOW IMPOSED IF THE INSURANCE
CARRIER PAYS LATE.
>> BUT ISN'T THAT TO THE
ADVANTAGE OF THE PLAINTIFF?
>> IT IS, IT IS.
BUT ONCE AGAIN THIS IS A
STATUTE THAT HAS A LOT OF
THINGS ATTACH THE TO IT.
SOME OF THEM ARE SUBSTANTIVE.
IN ORDER FOR THIS COURT TO SAY,
AS YOU POINTED OUT IN ORDER FOR
THIS COURT TO SAY THIS
STATUTORY SCHEME IS SOMEHOW
DIFFERENT THAN ALL THE OTHERS.
>> IS IT YOUR VIEW UNDER THE
LAW IT MAKES A DIFFERENCE
WHOSE BENEFIT IT GOES TO?
>> I DON'T THINK SO.
YOU GOT BOTH SIDES TO THE
CONTRACT.
IT IS SUBSTANTIVE, I DON'T
THINK YOU CAN SAY, WELL, WE'LL
PICK AND CHOOSE.

WE'LL TAKE IT, IF, IT IF IT IS

TO THE ADVANTAGE OF INSURANCE

COMPANY WE'LL APPLY IT OR

ADVANTAGE OF THE CLAIMANT WE'LL

APPLY IT.

ONCE YOU SAY A STATUTORY SCHEME

IS SUBSTANTIVE, YOU HAVE TO SAY

YOU CAN'T APPLY IT TO

PREEXISTING CONTRACTS.

WITH THAT, YOUR HONOR, I APPRECIATE

YOUR TIME AND THANK YOU VERY

MUCH.

>> ALL RIGHT.

THANK YOU BOTH FOR YOUR ARGUMENTS.

THE COURT WILL TAKE ITS MORNING

RECESS FOR 10 MINUTES.

>> PLEASE RISE