David R. May vs Illinois National Insurance Co.

THE NEXT CASE IS DAVID MAY VERSUS ILLINOIS NATIONAL INSURANCE COMPANY. MR. ROSENBLUM.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS LOUIS ROSENBLUM FROM PENSACOLA, AND I REPRESENT THE APPELLANT, DAVID MAY, FROM TAMPA. THIS COURT IS A INSURANCE BAD FAITH CASE FROM THE ELEVENTH CIRCUIT, WHICH, I THINK, PROBABLY TO THE CHAGRIN OF THE TRIAL LAWYERS, HAS TURNED INTO A DISPUTE ABOUT TRIAL LAW AND A LITTLE UNFAMILIAR TERRITORY FOR US, BUT IN ANY EVENT THE ELEVENTH CIRCUIT HAS CERTIFIED THE QUESTION WHETHER SECTIONS 733.702 AND 733.710 OPERATE AS STATUTES OF LIMITATIONS OR JURISDICTIONAL STATUTES OF NONCLAIM, WHICH, ALSO, I THINK, HAVE BEEN CATAGORIZED BY THE COURTS AS STATUTES OF REPOSE, AND THE ISSUE IS SIGNIFICANT IN THIS CASE, BECAUSE THERE IS A JUDGMENT AGAINST THE ESTATE, ENTERED IN REGULAR CIVIL CIRCUIT COURT IN ESCAMBIA COUNTY, FLORIDA, FOR APPROXIMATELY $1 MILLION, WELL IN EXCESS OF THE POLICY LIMITS OF THE DECEDENT'S AUTOMOBILE LIABILITY INSURANCE POLICY, AND IT IS A JUDGMENT THAT EXISTS ON THE PUBLIC RECORDS. HOWEVER --

WOULD YOU DESCRIBE FOR US, AS YOU SEE IT, THE DIFFERENCE BETWEEN WHAT IS KNOWN AS A STATUTE OF NONCLAIM AND A STATUTE OF REPOSE. WHAT IS THE MAGIC LANGUAGE THAT DISTINGUISHS ONE FROM ANOTHER AND SECONDLY, WHAT AUTHORITY DO YOU RELY ON THAT WOULD HELP US ESTABLISH THAT, BECAUSE WE HAVE GOT THE BARNETT BANK CASE, THAT TALKS IN TERMS OF WHAT A STATUTE OF NONCLAIM IS, AND COULD YOU ASSIST US A LITTLE BIT IN THAT, IN DRAWING THOSE LINES.

BY DEFINITION, AS I UNDERSTAND THE DEFINITIONS, A STATUTE OF LIMITATIONS ESTABLISH ES A TIME FRAME TO BRING AN ACTION MEASURED FROM THE DATE THE CAUSE OF ACTION ACCRUES, AND AS IMPORTANT TO THIS INQUIRY IS GENERALLY SUBJECT TO EQUITABLE DEFENSES, SUCH AS FRAUD AND ESTOPPEL.

WHICH 702 NOW PROVIDES FOR EXTENSIONS.

YES AND ACCORDING TO THE DECISIONS OF THIS COURT, 702 WOULD BE A STATUTE OF LIMITATIONS. THE STATUTE OF NONCLAIM, THAT TERM HAS BEEN USED SOMEWHAT LOOSELY OVER THE YEARS, BY COURTS, TO ENCAMPUS BOTH STATUTES OF -- TO ENCOMPASS BOTH STATUTES OF LIMITATIONS AND STATUTES OF REPOSE, BUT I THINK, AS WE ARE USING IT TODAY, A STATUTE OF NONCLAIM WOULD BE MORE AKIN TO A STATUTE OF REPOSE, WHICH, BY DEFINITION, CUTS OFF AN ACTION A CERTAIN PERIOD OF TIME AFTER AN EVENT, NOT FROM THE ACCRUAL OF THE CAUSE OF ACTION, SUCH AS A MEDICAL MALPRACTICE STATUTE OF REPOSE OR THE RECENTLY REENACTED PRODUCT LIABILITY STATUTE OF REPOSE. AS I UNDERSTAND IT, STATUTES OF REPOSE, UNLIKE STATUTES OF LIMITATIONS, ARE NOT SUBJECT TO EQUITABLE DEFENSES, SUCH AS FRAUD AND ESTOPPEL.

HOW ABOUT COMPARING THE STATUTE OF REPOSE AND A STATUTE OF NONCLAIM. THOSE TWO THINGS.

I HAVE BEEN UNABLE TO DISCERN A DISTINCTION, AND IN FACT, IN ONE OF THE CASES, AND I CAN'T CALL IT BY NAME, ACTUALLY EQUATES A STATUTE OF NONCLAIM TO A STATUTE OF REPOSE. I SUPPOSE THE QUESTION IS, IS THERE A THIRD CATEGORY. IS THERE A STATUTE OF

LIMITATIONS? IS THERE A STATUTE OF REPOSE? IS THERE A STATUTE OF NONCLAIM? I AM NOT SURE THERE IS A DIFFERENCE, FRANKLY. IF 710, FOR EXAMPLE, IS A TRUE STATUTE OF REPOSE, WE HAVE AN ARGUMENT THAT PROBABLY TREATS IT A LITTLE DIFFERENTLY THAN THE MEDICAL MALL PRACTICE STATUTE -- MALPRACTICE STATUTE OF REPOSE, SO MAYBE TO THAT EXTENT IT IS A STATUTE OF NONCLAIM, BUT IF YOU LOOK AT THE DECISIONS FROM THIS COURT AND THE DISTRICT COURTS OF APPEAL, HISTORICALLY, ESPECIALLY THE OLDER CASES, THEY REFER TO PROBATE FILING STATUTES AS STATUTES OF NONCLAIM, WHEN, IN FACT, IT IS VERY CLEAR FROM THOSE CASES THAT THE COURT WAS DEALING WITH WAIVEABLE STATUTES OF LIMITATION. SO THERE IS OBVIOUSLY SOME CONFUSION, AND PERHAPS THE COURT COULD CLEAR IT UP, ABOUT THE DEFINITIONAL PROCESS.

DOES THE STATUTE OF NONCLAIM, DOES IT ADVANCE A DIFFERENT PUBLIC POLICY PURPOSE THAN A STATUTE OF LIMITATION, WHICH IS GENERALLY TO PUT SOMEONE ON NOTICE, AND A STATUTE OF REPOSE SAYS NO MATTER WHAT HAPPENS, THIS IS THE END. IS THERE A DIFFERENT, A SECOND, A DIFFERENT PURPOSE THAT MAYBE DOESN'T FIT INTO EITHER PRECISE CATEGORY THAT IS -- WOULD BE IMPORTANT FOR OUR ANALYSIS HERE?

AS I UNDERSTAND IT, THE OVERRIDING PURPOSE OF ALL OF THESE STATUTES IS TO PROVIDE FOR THE PROMPT AND SPEEDY ADMINISTRATION OF THE STATES, AND I SUPPOSE ALL THREE OF THEM COULD ACCOMPLISH THAT, AND I AM NOT TRYING TO AVOID YOUR HONOR'S QUESTION, BUT THERE SEEMS TO BE, AT LEAST IN MY MIND, A BLURRING OF THIS TERM STATUTE OF REPOSE AND STATUTE OF NONCLAIM.

THOSE HAVE TWO LEGALLY UNDERSTANDABLE -- LEGALLY RECOGNIZED DEFINITION. A STATUTE OF NONCLAIM, IS THAT SOMETHING UNIQUE, JUST TO THE PROBATE FIELD OR TO OTHER -- IS THERE OTHER STATUTORY SCHEMES THAT USE --

I HAVE NOT SEEN IT USED OUTSIDE THE PROBATE CONTEXT. I CERTAINLY DON'T HOLD MYSELF OUT AS A PROBATE EXPERT, BUT I HAVE NOT SEEN IT OUTSIDE THE PROBATE CONTEXT, AND, AGAIN, I HAVE SEEN, REPEATEDLY, THE TERM NONCLAIM STATUTE, APPLIED BY THE COURTS, TO STATUTES THAT ARE DEFINITELY JUST REGULAR STATUTES OF LIMITATION.

I MEAN, IT MEANS, BASICALLY, IF YOUR CLAIM ISN'T IN WITHIN A SPECIFIED PERIOD OF TIME, EITHER FROM THE DATE OF DEATH OR FROM THE DEBATE OF PUBLICATION, YOU ARE IN AND OUT.

-- YOU ARE OUT.

S ON -- OSTENSIBLY, YES, BUT IN THIS CASE THE COURT HAS CONSTRUED 702 AND 710 IN THAT MANNER, AND WE UNDERSTAND THE DECISIONS FROM THIS COURT, OR AT LEAST THE MOST RECENT DECISION, THIS COURT CONSIDERS 702 A STATUTE OF LIMITATIONS, WHICH COULD BE SUBJECT TO EQUITABLE DEFENSE, AND AS CRITICAL TO THIS CASE, COULD BE WAIVEABLE.

BUT HOW DO WE -- SPECIFICALLY SAYS, DOES IT NOT, IN 702, THAT IT IS NOT WAIVEABLE, BUT THEN GOES ON TO PROVIDE FOR EXTENSIONS. IS THAT NOT A FAIR READING OF 7.02, SAYING THAT IT IS AN EXACT STATUTE OR NOT, THAT TIMELYNESS IS IN THERE, OR NOT IS THAT A FAIR READ SOMETHING.

-- IS THAT A FAIR READ SOMETHING.

IT DOES SAY THAT FOR FRAUD. WE CONTEND THAT, IF EXTENSIONS ARE ALLOWED, IT CANNOT BE A STATUTE OF REPOSE.

BUT HOW DO WE GET INTO THIS CASE, BECAUSE ONLY THE PROBATE COURT CAN MAKE THAT DETERMINATION. DO YOU BELIEVE THAT TO BE A CORRECT STATEMENT?

THAT IS OUR POSITION.

ONLY THE PROBATE COURT CAN MAKE THAT DETERMINATION, AND HERE WE DON'T HAVE ANYONE GOING BACK INTO THE PROBATE COURT TO ASK FOR THAT EXTENSION, BECAUSE OF THE AGREEMENT OF RELIABILITY OR WE ARE GOING TO AGREE ON REDRESS. HOW HAS THERE BEEN AN EXTENSION OF THOSE TWO?

WE CONCEDE THAT. THE CLAIM THAT WAS FILED WITH THE ESTATE WAS NOT TIMELY. WE HAD AN ARGUMENT IN THE ELEVENTH CIRCUIT THAT THERE WERE SOME DOCUMENTS THAT WERE THE EQUIVALENT OF A CLAIM, BUT THAT IS BEHIND US. WE HAVE LOST THAT ISSUE.

DO YOU CONCEDE THAT THAT IS A CORRECT STATEMENT? THE FEDERAL COURT --

WE CERTAINLY CONCEDE THAT THE PROBATE COURT DID NOT GRANT AN EXTENSION. THERE WAS NO MOTION FOR ONE.

BUT DO YOU, ALSO, CONCEDE THAT THE DOCUMENTS COULD NOT STAND AS A STATEMENT OF CLAIM?

WELL, WE CONCEDE THAT IS THE LAW OF THE CASE IN THE ELEVENTH CIRCUIT. WE CERTAINLY WOULDN'T MIND A FOOTNOTE FROM THIS COURT, TELL TELLING US THE LAW.

IS THERE I -- IS THERE ANY FLORIDA CASE THAT YOU HAVE FOUND THAT SUPPORTS THAT STATEMENT?

OUR POSITION ON THAT?

NO. NO. THAT SUPPORTS THE PETITION THAT YOU CAN NOT USE IT AS A VALID STATEMENT OF CLAIM. IS THERE A FLORIDA CASE? I HAVEN'T FOUND ONE.

I DON'T THINK THAT YOU CAN. THERE IS A DCA CASE, AND I AM NOT FULLY PREPARED TO ARGUE THIS, TODAY, BUT I WILL BE HAPPY TO. IT IS A CASE CALLED NO-TAR, FROM ONE OF THE CASES THAT WE CITED, THAT HELD THAT A PETITION, FOR THE APPOINTMENT OF A PERSONAL REPRESENTATIVES, CONSTITUTED A VALID CLAIM.

IT HAS TO BE A CERTAIN TIME, BECAUSE IT HAS TO BE FILED AFTER THE NOTICE OF JUDICIAL ADMINISTRATION, CORRECT?

THERE WERE TWO FILINGS WITHIN THE TIME FRAMES OF BOTH STATUTES. ONE WAS THE ORIGINAL PETITION TO APPOINT MR. MAY AS THE ADMINISTRATOR AD LITEM TO BE THE DEFENDANT, IF YOU WILL, IN THE WRONGFUL-DEATH CASE, AND, TWO, AFTER A COUPLE OF FAMILY MEMBERS OF THE DECEDENT PETITIONED TO BE APPOINTED COPERSONAL REPRESENTATIVES, MR. PROCUP, WHICH IS THE MAIN CLAIMANT, FILED A COUNTER-PETITION WITH THE STATE TO HAVE MR. MAY APPOINTED THE PERSONAL REPRESENTATIVE. BOTH OF THOSE ARGUMENTS, WE ARGUED IN THE ELEVENTH CIRCUIT AND IN FEDERAL DISTRICT COURT, STATED THE NATURE OF THE CLAIM. BOTH WERE WITHIN THE TIME FRAME REQUIRED BY 702 AND 710. NOW, THE ELEVENTH CIRCUIT HAS RULED AGAINST US ON THAT, BUT WE FEEL BOTH THOSE PAPERS WERE SUFFICIENT CLAIMS AND THEY WERE TIMELY.

WE ARE GOING, EXCUSE ME, WE ARE GOING BACK TO JUSTICE PARIENTE'S QUESTION TO SET THE POLICY, HERE, BEHIND A STATUTE OF NONCLAIM. REALLY, THOSE STATUTES ARE SOMEWHAT POLICY WISE, UNIQUE TO THE PROBATE AREA, BECAUSE THE INTENT, HERE, IS TO GET SOME FINALITY WITHIN THE DISTRIBUTION OF ASSETS OF AN ESTATE. ISN'T THAT CORRECT?

THAT'S CORRECT.

AND SO IT IS AN AREA WHICH THE COURTS HAVE RECOGNIZED IS PECULIARLY A LEGISLATIVE-TYPE OF DEVELOPMENT. WE ARE NOT TALKING ABOUT A COMMON LAW OF THE DISTRIBUTIONS OF AN ESTATE. THAT IS SOMETHING THAT IS HANDLED BY A STATUTE. CORRECT?

THAT IS CORRECT, ALSO.

SO WHY ISN'T THE WHOLE AREA, HERE, SOMETHING THAT OUGHT TO BE DIRECTED INTO WHAT HAPPENS IN THE PROBATE COURT AND AND MATTER OF STATUTORY CONSTRUCTION, AS OPPOSED TO TRYING TO DRAW SOME TYPE OF EQUITABLE VALUE INTO IT THAT ISN'T SELF-CONTAINED WITHIN THE STATUTE, LIKE WAIVER.

WELL, I CERTAINLY CONCEDE THAT THIS IS PURELY A LEGISLATIVE CONCERN, THAT THESE ARE MATTERS THAT ARE HANDLED IN THE PROBATE COURT, BUT EQUITY HAS ALWAYS, IT SEEMS, IN THE CASE LAW, EQUITY HAS ALWAYS HAD A PLACE, BECAUSE YOU HAVE, FOR EXAMPLE, IN THE REID, I BELIEVE IT WAS FROM THIS COURT, WHERE YOU HAD A WIDOW OF A DECEDENT THAT MADE SOME FRAUDULENT STATEMENTS TO THE BANK. DON'T WORRY ABOUT FILING A CLAIM. I WILL PAY IT. THE ESTATE DOESN'T HAVE ANY ASSETS AND WE ARE NOT GOING TO GO TO PROBATE, ET CETERA, AND THAT WAS NOT TRUE, AND EQUITY HAD TO INTERVENE.

BUT THAT IS TAKEN CARE OF, WITHIN THE FRAMEWORK OF THE STATUTE.

IT IS TAKEN CARE OF IN 702, BUT IF 710 IS FOUND TO BE AN AUTOMATIC BAR, NOT SUBJECT TO ANY KIND OF EQUITABLE DEFENSES, THEN IT WON'T BE TAKEN CARE OF, AND THAT IS ONE OF FEARS, IS THAT IT WILL BE OPEN SEASON ON CREDITORS, THAT IF YOU DRAW THE LINE AT TWO YEARS AND THERE IS ABSOLUTELY NO EQUITABLE WAY OUT OF IT, AND THAT IS THE INTERPRETATION THAT THE RESPONDENT AND THE AMICUS ARE ASKING THIS COURT TO TAKE.

IF WE GIVE A PLAIN MEANING READING TO THESE STATUTES, THAT IS THE STATUTORY SCHEME. IS IT NOT?

THIS QUESTION, WHEN YOU GET DOWN TO THE TWO CASES THAT ARE IN CONFLICT, THE BAPTIST HOSPITAL CASE AND THE COME AMERICA CASE. -- AND THE COMERICA CASE. COMERICA SAYS IT IS A PLAIN STATUTE THAT OUGHT TO BE ENFORCED, BUT BAPTIST RECOGNIZES THAT, WHEN YOU ARE TALKING ABOUT STATUTES OF REPOSE, THEY GENERALLY HAVE ABSOLUTE LANGUAGES OF FINALITY, AND THE MALPRACTICE ONE WOULD BE A GOOD EXAMPLE. AND AT LEAST IN THE OPINION OF THE COMERICA COURT, YOU DON'T HAVE THAT SAME LANGUAGE OF FINALITY IN 710. NOW, IT MAY HAVE BEEN THE LEGISLATIVE -- MAYBE THAT IS WHAT THEY WERE TRYING TO ACCOMPLISH, BECAUSE WE HAVE THIS POPE DECISION OUT OF THE U.S. SUPREME COURT, WHERE JUSTICE O'CONNOR SUGGESTED THAT, IF YOU HAD A SELF EXECUTING STATUTE, YOU WOULDN'T GET THE COURT INVOLVED, AND YOU WOULDN'T RUN INTO DUE PROCESS PROBLEMS, BUT YOU KNOW, THE LEGISLATURE MAY HAVE FAILED IN THEIR ATTEMPT, AT LEAST AS TO BOPTIS HOSPITAL -- AT LEAST AS TO BAPTIST HOSPITAL READS IT, BECAUSE WE CONTEND THAT THE STATUTE COULD BE READ TO CUTOFF CLAIMS AT THE END OF TWO YEARS, IT DOES NOT HAVE THE LANGUAGE OF FINALITY THAT WOULD MAKE IT A CLASSIC STATUTE OF REPOSE, AND THEREFORE IT IS STILL SUBJECT TO EQUITABLE DEFENSES.

WELL, THE STATUTORY SCHEME REALLY DOESN'T CONTEMPLATE SITUATIONS LIKE THIS, DOES IT, THAT THE STATUTORY SCHEME IS SET OUT FOR WHAT WE CAN USUALLY DESCRIBE AS THE ORDINARY SITUATION THAT ARISES WHEN SOMEBODY DIES AND AN ESTATE IS ESTABLISHED, AND THERE IS AN ORDERLY SCHEME FOR PRESENTING CLAIMS AND AN ORDERLY SCHEME FOR RESPONDING TO CLAIMS AND WHATEVER. CERTAINLY THE STATUTORY SCHEME, REALLY, DOESN'T KOBT PLATO-DOESN'T CONTEMPLATE HAVING AN ESTATE CREATED JUST FOR THE SPECIAL PURPOSE OF HAVING LITIGATION, AND YOU KNOW, HAVING -- DOES IT?

NO, BUT THAT DOES HAPPEN. A THIS GOES BACK TO THE QUESTION THAT JUSTICE LEWIS ASKED ABOUT THIS ISSUE OF HERE YOU HAVE CREATED AN ESTATE, IN ESSENCE, AND OBVIOUSLY THE ESTATE THAT YOU HAVE CREATED THERE, IN THE PERSONAL REPRESENTATIVE, YOU KNOW, AS FAR AS THE REPRESENTATIVE AD LITEM FOR THE LITIGATION HERE, IS FULLY AWARE OF WHAT THE CLAIM IS AND IS SERVING -- THAT IS THE WHOLE PURPOSE OF HAVING THAT, TO BEGIN WITH.

THAT IS TRUE. IN THIS CASE, IT IS ESPECIALLY INTERESTING, BECAUSE AFTER THE ESTATE WAS CREATED FOR LITLATION -- FOR LITIGATION PURPOSES, AND THERE IS NOTHING WRONG WITH THAT. YOU HAVE TO HAVE A REPRESENTATIVE TO SUE, BUT AFTER THAT HAPPENED, TWO FAMILY MEMBERS PETITIONED THE PROBATE COURT TO BECOME CO PERSONAL REPRESENTATIVES. THEY WERE APPOINTED AS COPERSONAL REPRESENTATIVES. THEY DIDN'T ASK FOR THE GUARDIAN AD LITEM TO BE DISCHARGED AND THEIR WILLINGNESS TO PAY IT THEY ACKNOWLEDGED, AND, OF COURSE, THE ESTATE DIDN'T HAVE ANY ASSETS, OTHER THAN THE INSURANCE. SO THIS IS A SITUATION THAT IS NOT CONTEMPLATED AT ALL, WE THINK, BY JUST A NORMAL PROBATE PROCESS, AND VERY BRIEFLY, WE HAVE GOT THIS JUDGMENT, NOW, THAT WAS ENTERED IN THE REGULAR CIRCUIT COURT, FOR A MILLION DOLLARS, AND NO ONE EVER SAID A WORD ABOUT THE STATUTE OF NONCLAIM OR THE STATUTE OF REPOSE, AND IT IS STILL THERE, SO YOU KNOW, EVEN IF WE HAVE WHAT IS CONSTRUED AS AN ABSOLUTE BAR, THE JUDGMENT STILL REMAINS OUTSTANDING, AND --

WERE THERE ANY OTHER ASSETS IN THE ESTATE?

THERE WAS A FEW. HE HAD AN OLD CAR, AND SOME VERY SMALL --

ESSENTIALLY IF SOMEBODY HAS GOT A CASE, OF COURSE, IF THERE ARE NO ASSETS IN THE ESTATE, THAT YOU ARE GOING AFTER, OTHER THAN THIS SITUATION WHERE YOU HAVE A BAD FAITH CLAIM, THERE IS NO -- THERE IS NO REASON THAT YOU DO HAVE TO GO THROUGH AND FILE THAT CLAIM, BECAUSE ALL THAT 710 DOES IS IT LIMITS OR CUTS OFF CLAIMS AGAINST THE ESTATE ASSETS AND THE BENEFICIARIES, SO IF YOU ARE JUST TALKING ABOUT INSURANCE PROCEEDS, YOU DON'T REALLY -- YOU HAVE TO GET THE PERSONAL REPRESENTATIVE TO HAVE SOMEBODY TO SUE OR THE ADMINISTRATOR, BUT YOU DON'T REALLY NEED TO GO THROUGH THE PROCESS, CORRECT?

IF YOU ARE SATISFIED WITH THE LIMITS OF COVERAGE.

HERE THE ISSUE BECOMES VERY RELEVANT FOR THE BAD FAITH CLAIM, BECAUSE THE ISSUE IS WHETHER THERE IS EXPOSURE. IF THERE WAS NO EXPOSURE TO AN EXCESS VERDICT, THEN THERE IS NO BAD FAITH CASE.

THAT'S CORRECT. THAT IS WHY IT IS IMPORTANT HERE. I AM INTO MY REBUTTAL TIME.

LET ME ASK YOU ONE QUESTION, BEFORE YOU SIT DOWN. I CAN UNDERSTAND HOW YOUR ARGUMENT ABOUT 702, BEING A STATUTE OF LIMITATIONS, VERSUS A STATUTE OF REPOSE, BECAUSE WE HAVE EXCEPTIONS, ET CETERA, IN IT, BUT WHEN YOU LOOK AT 733.710, IT SAYS NOTWITHSTANDING ANY OTHER PROVISION OF THE CODE, YOU KNOW, NO CLAIM CAN BE BROUGHT, ET CETERA, ET CETERA. HOW -- AREN'T THEY SAYING, DESPITE THE FACT THAT YOU HAVE GOT THE STATUTE OF LIMITATIONS, THIS SECTION IS AN ABSOLUTE BAR TO ANYTHING AFTER TWO YEARS?

WELL, FIRST OF ALL, ACCORDING TO THE BAPTIST HOSPITAL CASE, THE TITLE ALONE GIVES YOU A HINT. IT SAYS LIMITATIONS ON CLAIMS. THE WORD LIMITATIONS, AT LEAST ACCORDING TO THE THIRD DISTRICT, IS SUGGESTIVE OF A LIMITATIONS, BUT YOU NOTICE IT SAYS THE ESTATE -- NO ESTATE SHALL BE LIABLE. THAT IS NOWHERE NEAR, FOR EXAMPLE, AS STRONG, IN MY OPINION, AS THE LANGUAGE YOU HAVE, FOR EXAMPLE, IN THE PRODUCTS LIABILITY STATUTE OF REPOSE THAT SAYS, UNDER NO CIRCUMSTANCES MAY A CLAIMANT COMMENCE AN ACTION, ET CETERA.

WELL, THAT IS A LITTLE BIT DIFFERENT THAN SHALL NOT BE LIABLE. MAYBE IT IS A SEMANTICAL DISPUTE HERE, BUT WE CONTEND THAT, AS STRONG AS IT MAY SOUND, IT DOES NOT HAVE THE WORDS OF FINALITY THAT YOU HAVE IN THE PRODUCT LIABILITY OR THE MEDICAL MALPRACTICE STATUTE OF REPOSE.

THANK YOU. YOU MAY RESERVE WHATEVER TIME YOU HAVE AVAILABLE. MR. YOUNG.

THANK YOU, YOUR HONOR. MAY IT PLEASE THE COURT. GOOD MORNING, YOUR HONORS. MY NAME IS RICHARD YOUNG, AND I AM HERE ON BEHALF ILLINOIS NATIONAL INSURANCE COMPANY. THIS CASE IS BEFORE THE COURT ON A CERTIFIED QUESTION FROM THE UNITED STATES CIRCUIT COURT, FOR THE ELEVENTH CIRCUIT. THE NARROW ISSUE PRESENTED IS WHETHER SECTIONS 733.702 AND 733.710 OF THE FLORIDA PROBATE CODE ARE SELF-OPERATING, SELF-EXECUTING, JURISDICTIONAL STATUTES OF NONCLAIM THAT AUTOMATICALLY BAR UNTIMELY CLAIMS, OR WHETHER THEY ARE ORDINARY STATUTES OF LIMITATIONS, WHICH CAN BE WAIVED, IF NOT AFFIRMATIVELY PLED AND PROVED.

JUST BEFORE WE GET TO THAT NARROW QUESTION, SINCE WHEN WE HAVE A QUESTION CERTIFIED FROM THE ELEVENTH CIRCUIT, THEY, WE ARE CLOSED FROM LOOKING AT THE BROADER PICTURE.

YES, YOUR HONOR.

HERE, WHAT IS YOUR POSITION ON THE -- BECAUSE THERE ISN'T ANY CASE FROM THIS COURT AS TO WHY THE COUNTER-PETITION, FILED BY PROCKUP IN FEBRUARY 1993 WOULD NOT SATISFY THE TWO-YEAR OF THE -- FOR 710. WHY ISN'T THAT -- I MEAN, THAT CERTAINLY PUT -- THERE IS NO QUESTION IN THIS CASE THAT THE ESTATE HAD NOTICE OF HIS CLAIM, AND IN FACT, ACTUALLY AFFIRMATIVELY SAID THEIR INTENTION WAS TO HONOR THE CLAIM, SO WHY, SINCE WE ARE, YOU KNOW, LOOKING AT FAIRNESS, AS WELL AS MAKING SURE THAT THE STATUTORY INTENT IS COMPLIED WITH, WHY SHOULDN'T WE LOOK AT THE BROADER QUESTION AND DECIDE, FOR FLORIDA LAW, WHETHER A PETITION, SUCH AS WAS FILED HERE, WOULD BE SATISFY 710?

WELL, YOUR HONOR, THE COURT'S DECISION OBVIOUSLY WILL HAVE APPLICATION IN A BROADER ARRAY OF CASES THAN JUST ONE BEFORE YOU TODAY. AND THE QUESTION HAS BEEN ANSWERED BY FLORIDA COURTS IN THE PAST. ALL FLORIDA COURTS THAT I HAVE READ THAT HAVE ADDRESSED THIS ISSUE HAVE SAID THE ISSUE IS NOT WHETHER THE PERSONAL REPRESENTATIVE KNOWS. THE ISSUE IS WHETHER THE CREDITORS CAN ASCERTAIN THAT A CLAIM HAS BEEN MADE AND THE EXTENT OF THE CLAIM AND THE NATURE OF THE CLAIM. WHAT THE DISTRICT COURT OF THE NORTHERN DISTRICT AND THE ELEVENTH CIRCUIT COURT OF APPEALS DETERMINED IS THAT, IN THIS COUNTER-PETITION, BURIED INTO THE COUNTER-PETITION, WAS NOTHING MORE THAN A STATEMENT AS TO WHY MAY SHOULD BE FAVORED OVER THE OTHER TWO PEOPLE SEEKING APPOINTMENT AS PERSONAL REPRESENTATIVES. IT DID NOT ADVISE CREDITORS FULLY OF THE NATURE OF THE CLAIM, THE A CLAIM, WHETHER IT EXCEEDED POLICY LIMITS. IT SIMPLY DID NOT COMPLY WITH THE FLORIDA PROBATE RULES TO PUT CREDITORS ON NOTICE ABOUT WHAT THE LIMITS WOULD BE AND WHAT IT IS ABOUT.

YOU WOULD NOT KNOW, AT THE TIME YOU HAVE THE PERSONAL INJURY ACTION, WRONGFUL-DEATH ACTION, YOU SAY IT IS FOR AN UNLIQUIDATED AMOUNT. YOU DON'T KNOW, UNTIL THERE IS A JUDGMENT, WHAT THE AMOUNT OF THE CLAIM IS, AND I AM SURE FOR THE PURPOSE OF, IF IT WAS ON THE CLAIM FORM APPROVED, THAT IF YOU SAY UNLIQUIDATED AMOUNT THAT, IS SUFFICIENT TO PUT THE CREDITOR ON NOTICE, IS IT NOT?

WELL, YOUR HONOR, I DON'T THINK THAT THE WAY THIS ONE WAS PRESENTED WAS SUFFICIENT. HAD IT BEEN IN A STATEMENT OF CLAIM, PURSUANT TO THE RULE, I WOULD AGREE WITH YOU, BUT IT WASN'T SET FORTH AS A STATEMENT OF CLAIM. IT WAS SET FORTH --

WHAT IS THE AUTHORITY? WHAT CASE LAW HAVE YOU BEEN ABLE TO LOCATE THAT SUPPORTS

THAT STATEMENT, THAT IT MUST BE ON THE FORM THAT SAYS STATEMENTS OF CLAIM, AS OPPOSED TO OUTLINING, FOR EXAMPLE, WHAT WAS IN THE PETITION? IT HAD VERIFIED CLAIM. IT HAD ALL OF THE ADDRESSES OF THE CLAIMANTS. IT HAD CAUSE OF ACTION. DUE TO THE DEATH. DIDN'T KNOW NEXT OF KIN. DIED AS A RESULT OF THE ACCIDENT. WHAT IS DIFFERENT FROM WHAT IS IN THAT FILE, OTHER THAN AT THE TOP IT DOESN'T SAY STATEMENT OF CLAIM?

YOUR HONOR, THE FLORIDA COURTS THAT HAVE ADDRESSED THIS, IN A FAIRLY LENGTHY LINE OF CASES, I BELIEVE, AND, AGAIN, I APOLOGIZE THAT I AM NOT BEING MORE CLEAR, BUT I WASN'T PREPARED TO NECESSARILY ADDRESS THIS FULLY, BUT SPORUM VERSUS BEAR, IS ONE SITUATION, WHERE A CIVIL LAWSUIT WOULD NOT SETTLE THIS.

AGREE THAT THERE IS LAW IN THAT. HOW ABOUT IN THE ESTATE?

YES. IN THIS PARTICULAR CASE, THE ADMINISTRATOR AD LITEM WAS APPOINTED ONLY TO HANDLE THIS PARTICULAR ISSUE. NOW, THERE WAS NO STATEMENT, THEN, FILED, AFTER THIS WAS SET UP AND THE PERSONAL REPRESENTATIVES CAME AND OPENED UP THE ESTATE, IF YOU WILL. THERE WAS NO -- NOTHING ELSE FILED FOR CREDITORS HERE, AND OUR REASON FOR SAYING WHERE THIS IS PUT, IN THE PETITION FOR COUNTERADMINISTRATION, DOESN'T PUT SOMEONE ON NOTICE OF WHAT THEY WILL ARE DEALING WITH, IN TERMS OF A PETITION.

YOUR REASON FOR THAT AGAIN?

IF I CAN STATE THE BASIC PUBLIC POLICY REASON FOR THIS, CREDITORS OF THIS STATE NEED TO KNOW IF THEY ARE GOING TO BE AFFECTED. THIS DOESN'T TELL THEM THAT. THEY DON'T KNOW WHETHER THERE IS A MILLION DOLLARS' WORTH OF INSURANCE COVERAGE, 10 MILLION DOLLARS' WORTH OF INSURANCE COVERAGE OR 100 MILLION.

IT HAS TO BE ON THE STATEMENT OF CLAIM.

WE BELIEVE IT HAS TO BE ON THE STATEMENT OF CLAIM PLUS ADDITIONAL INFORMATION. YES, YOUR HONOR. WE CONTEND THAT THIS WOULD NOT BE SUFFICIENT, EVEN ON A STATEMENT OF CLAIM.

THIS WOULD NOT BE FILEED AFTER THE NOTICE OF ADMINISTRATION THAT THAT WAS REQUIRED IN 702.

IT WAS.

AND THE STATUTE MAKES REFERENCE SPECIFICALLY TO THAT.

IT WAS, YOUR HONOR, AND THERE ARE THREE EXCEPTIONS THAT WERE CREATED TRADITIONALLY BY THE COURT, IN THE BARNETT BANK VERSUS REID CASES AND FRAUD, ESTOPPEL AND INSUFFICIENCY I OF NOTICE TO 702, NONE OF THOSE APPLY. THAT HAS BEEN STIPULATED TO.

WHAT WOULD HAPPEN IN THIS CASE, IF THE SECOND ESTATE, IF I CAN REFER TO IT, LOOSELY, JUST FOR PURPOSES -- HAD NEVER BEEN OPENED. THAT IS WE ONLY HAD THE AD LITEM PROCEEDINGS, THAT IS ASKING THAT MR. , WAS IT MR. MAY BE APPOINTED FOR PURPOSES OF THE LITIGATION. TO HAVE AN ESTATE THERE. TO PARTICIPATE. AND THERE NEVER WAS A -- WHAT WOULD BE THE STATUS OF THIS CASE, IF THAT NEVER HAPPENED?

WELL, IF --

ALL OTHER THINGS BEING THE SAME.

IF ONLY THE ADMINISTRATOR AD LITEM HAD BEEN APPOINTED, YOUR HONOR, I HAVE TO

CANDIDLY CONFESS TO YOU THAT THAT IS NOT SOMETHING I HAVE CONSIDERED, BECAUSE IT IS FACTS DIFFERENT THAN THIS, OF COURSE, BUT I BELIEVE THAT, HAD ONLY THE ADMINISTRATOR AD LITEM BEEN APPOINTED IN THIS CASE, WE WOULD HAVE PROCEEDED IN A SLIGHTLY DIFFERENT FASHION. THE ADMINISTRATOR AD LITEM WOULD HAVE HAD OBLIGATION TO SAY RAISE CERTAIN DEFENSES. HE KNEW ABOUT THE CASE, CLEARLY, BUT -- LET ME SAY IT THIS WAY, IF ONLY AN ADMINISTRATOR AD LITEM HAD BEEN APPOINTED, WE WOULD HAVE NO ESTATE. THE ESTATE WOULD NOT HAVE BEEN OPENED, BECAUSE REALLY WHAT HAPPENED WAS THEY ASKED THE STATE TO APPOINT THE ADMINISTRATOR AD LITEM TO STAND IN AS A STRAW FOR THE ESTATE, BUT THE ADMINISTRATOR AD LITEM DID NOTHING IN THESE PROCEEDINGS. UNDER THAT ARGUMENT, I DON'T THINK THAT I WOULD HAVE ANY POSITION DIFFERENT THAN WHAT I HAVE HERE TODAY. THAT IS THAT THE ESTATE WOULD NOT BE LIABLE FOR ANYTHING OVER THE POLICY LIMITS HERE.

WOULD YOU EXPLAIN FOR US, AS BEST YOU CAN, THE DIFFERENCE BETWEEN NONCLAIM AND A STATUTE OF REPOSE, IF THERE IS ONE, AND WHAT THE AUTHORITY THAT YOU RELY ON TO MAKE THAT STATEMENT.

I DON'T KNOW THAT THERE IS A DIFFERENCE BETWEEN A STATUTE OF REPOSE AND A STATUTE OF NONCLAIM. I KNOW THAT THERE IS A DIFFERENT DIFFERENCE BETWEEN A STATUTE OF NONCLAIM AND A STATUTE OF LIMITATIONS.

THAT IS NOT THE QUESTION.

YES, SIR. AND THE LABEL,, I BELIEVE, MAY BE CONFUSING. IN THE SENSE OF THE QUESTION THAT DOES THE STATUTE OPERATE AUTOMATICALLY. IS IT SELF-EXECUTING? WITHOUT ANY LABELS, DOES IT OPERATE WITHOUT ANY INTERVENTION BY THE COURT, WITHOUT ANY TYPE OF DEFENSE NEEDING TO BE RAISED, OR IS IT A STATUTE WHICH, IF NOT RAISED, IS WAIVED, AND THE LANGUAGE OF THE STATUTE PROVIDES THAT. STATUTES OF REPOSE ARE NONCLAIM, IF YOU WILL, BOTH HAVE BEEN CONSTRUED TO BE STATUTES WHICH OCCUR BECAUSE OF AN EVENT. THEY ARE TRIGGERED BY EVENT. IN THIS PARTICULAR SITUATION, NOTICE OF ADMINISTRATION OF THE ESTATE WOULD TRIGGER 702. 710 WOULD BE TRIGGERED BY DEATH OF THE DECEDENT. A STATUTE OF LIMITATIONS, ON THE OTHER HAND, IS TRIGGERED BY THE CAUSE OF ACTION ACCRUING. FOR EXAMPLE THE DEATH, IN THIS CASE, IF YOU WILL.

MY QUESTION IS NOT THE LIMITATIONS. I THINK WE ALL UNDERSTAND THERE ARE DIFFERENCES, BUT IN THE REPOSE SITUATION, FOR EXAMPLE, IN A MANUFACTURING SITUATION, CERTAINLY FLORIDA LAW SAYS THAT, IF A MANUFACTURER DOES NOT RAISE THE REPOSE DEFENSE, IT IS NOT RAISED. AND IS THERE A DIFENS BETWEEN THE TWO, BECAUSE IF THEY ARE THE SAME, THEN WHERE DO WE GO WITH REPOSE STATUTES AND CAN YOU WAIVE THOSE, AS WELL, AND WHAT IS THE DIFFERENCE? THAT IS REALLY WHERE I AM GOING WITH THE QUESTION.

I AM SORRY, YOUR HONOR. I DID NOT UNDERSTAND IT FULLY BUT I DO NOW. THERE IS A DIFFERENCE, AND THAT IS FOUND IN THE LANGUAGE OF 02 ITSELF. THAT -- OF 702, ITSELF. IT SPECIFICALLY STATES THAT AN UNTIMELY PETITION IS BARRED, EVEN THOUGH GROUNDS OF TIMELINESS OR OTHERWISE ARE EXTENDED AND WHICH THE CASE CAN BE FILED. THIS IS A NONCLAIM STATUTE, NOT REPOSE, WHICH, IF YOU DON'T BRING THAT CLAIM, YOU ARE BARRED.

HOW ABOUT 710? WHAT LANGUAGE IN 710 WOULD YOU RELY ON?

710 ESTABLISH ES A ABSOLUTE JURISDICTIONAL BAR AFTER TWO YEARS. WHAT 710 SAYS, AND THE PARAMOUNT LANGUAGE IS FOUND IN THE CLAUSE NOTWITHSTANDING ANY OTHER LANGUAGE IN THE CODE, TWO YEARS AFTER THE DEATH OF THE PERSON, NEITHER OF THE BENEFICIARIES OR THE PR SHALL BE LIABLE FOR ANY CLAIM OR CAUSE OF THE DECEDENT, CLEARLY WHETHER OR NOT THE ESTATE HAS BEEN FILED OR OPENED. THAT IS, WE BELIEVE, VERY CLEAR LANGUAGE. THE "SHALL" IS NOT DISCRETIONARY. IT IS MANDATORY. FURTHER, IF

YOU LOOK AT 702.

NO. 710. HOW IS THAT DIFFERENT FROM THE REPOSE LANGUAGE FOR MANUFACTURER'S LIABILITY?

WE BELIEVE THAT THE STATUTES HAVE TO BE READ IN PARLIM EMT ARIA. I WAS GOING BACK TO POINT OUT THAT 702 IS A CLAIM ALREADY BARRED. NO OBJECTION IS NECESSARY. THEN IN SUBSECTION 5, IT SAYS NOTHING IN THIS SECTION SHALL EXTEND THE LIMITATIONS PERIOD SET FORTH IN 733.710. IN OUR OPINION THAT, IS A CLEAR PRONOUNCEMENT BY THE LEGISLATURE, THAT THE TWO-YEAR HINTATION IN 710, ALSO, IS A -- LIMITATION IN 710, ALSO, A SELF OPERATING, SELF EFFECT WAITING STATUTE THAT COMPLETELY BARS CLAIMS AFTER TWO YEARS. IN 702, WITH ITS HIGHLY RERESTRICTIVE LANGUAGE, REFERS TO 7 10E, THEN -- TO 710, THEN IT CAN BE NOTHING ELSE.

WHAT DOES THE PROBATE CODE SAY ABOUT ADMINISTRATORS AD LITEM?

THE CODE SAYS THAT ADMINISTRATORS AD LITEM WILL, IN ESSENCE, STAND IN FOR THE STATUTE IN A CIVIL LAWSUIT.

WHAT IS O. -- THAT IS IT?

THAT IS PRETTY MUCH IT.

WHAT DO WE DO HERE, WHERE WE HAVE TWO ESTATES OPENED AND CREATED? DO WE JUST IGNORE THE FIRST ONE?

NO, SIR, AND IF I CAN START WITH A LITTLE BIT OF EXPLANATION, FIRST, ON THAT, AND THIS GOES BACK TO THE EARLIER QUESTION, I BELIEVE, AS WELL. WHEN THE ADMINISTRATOR AD LITEM IS APPOINTED, HE IS APPOINTED FOR A CIVIL LAWSUIT, WHICH WE BELIEVE IS THE BARRY RATIONALE AND THIS IS MORE AKIN TO A LAWSUIT BEING FILED THAN AN ESTATE BEING OPENED, PROBATED, ORAL BEING FILED OR INTESTATE PROCEEDINGS BEING GUN AND CREDITORS BEING TOLD THERE IS A NOTICE OF ADMINISTRATION. COME IN AND TAKE A LOOK AT THE ESTATE THERE. IS A DIFFERENT DIFFERENCE, IN OUR OPINION. FURTHER, ONE OF OUR ARGUMENTS, IF YOU WILL, IN THE DISTRICT COURT AND IN THE ELEVENTH CIRCUIT COURT OF APPEALS, IN THIS PARTICULAR CASE WHEN THE TWO PERSONAL REPRESENTATIVES WERE APPOINTED, THE ESTATE WAS CLOSED. THERE WAS NO OBJECTION, WHATSOEVER, BY PROCKUP, WHO WAS THE INTERESTED PARTY TO THE CLOSE YOUR OF THE ESTATE. THE PERSONAL REPRESENTATIVES, WHO WERE APPOINTED TO ADMINISTER ALL ASSETS OF THE ESTATE, WERE DISCHARGED.

WHAT DATE WAS THAT THAT THEY WERE DISCHARGED?

YOUR HONOR, I DON'T HAVE THE DATE, BUT IT WAS AFTER THE DATE OF THE CIVIL ACTION IN THE JUDGMENT.

BUT THEY HAD ALREADY, IN '94, FILED A STATEMENT OF THEIR INTENTION TO HONOR THE CLAIM.

YES, YOUR HONOR, THEY HAD, BUT WHEN YOU READ THE PROBATE CODE, IT INDICATES, UNDER 702, THAT THE CLAIM IS STILL BARRED, IF NOT TIMELY FILED, EVEN THOUGH THE PERSONAL REPRESENTATIVE HAS RECOGNIZED THE CLAIM OR DEMAND BY PAYING A PART OF IT OR INTEREST OR OTHERWISE. EVEN IF IT IS RECOGNIZED, IT IS CLEARLY BARRED BY THESE NON-CLAIM STATUTES. WE BELIEVE THAT THE LEGISLATURE HAS INTENDED, BY THESE NON-CLAIM STATUTES, TO ERECT A JUDICIAL BAR. IT IS IN DIRECT OPPOSITION WITH THE --

NOTHING IN THE STATUTE SPECIFIES TO HOW THAT CLAIM WILL BE UNDER PUBLIC RECORD. WHAT FORMAT THAT CLAIM IS TO BE FILED. CORRECT?

I AM SORRY, YOUR HONOR. I DIDN'T UNDERSTAND THE QUESTION.

THERE IS NOTHING IN THE STATUTE, DESPITE THE CLEAR INTENT THAT THIS BE DONE WITHIN SPECIFIED PERIODS OF TIME, AS TO THE FORM AT TO BE USED -- AS TO THE FFORMAT TO BE USED IN FILING THE CLAIM.

THAT IS --

UNDER THIS COURT.

THE PROBATE RULES, YES, YOUR HONOR. I BELIEVE IT IS 9.50 -- I CAN'T REMEMBER, YOUR HONOR, BUT IT SETS FORTH THE MANNER OF FILING FORMS AND STATES HOW A CLAIM IS SUPPOSED TO BE AND HOW IT IS SET FORTH, AND IT WAS NOT SET FORTH IN THAT MANNER, YOUR HONOR. NONE OF THAT WAS FOLLOWED. IN FACT, JUDGE, LET ME ADD --

IT IS HARD TO DECIDE WHAT THE INTENT OF THE RULE WAS AND WHETHER THERE WAS COMPLIANCE WITH THE RULE. WOULD THAT BE --

WE DON'T BELIEVE SO, YOUR HONOR. WE THINK --

THE ELEVENTH CIRCUIT? IT IS THE ELEVENTH CIRCUIT RIGHT NOW THAT IS MAKING THAT DECISION.

THAT'S CORRECT.

THAT WOULD BE A GOOD POLICY FOR THIS COURT, NOT TO BE THE ONE TO MAKE THAT DECISION, WOULD IT?

WELL, YOUR HONOR, WE BELIEVE, IN THIS SITUATION, THAT IT SHOULD NOT BE REVISITED, AND THE REASON, I BELIEVE THAT, THE DISTRICT COURT AND THE ELEVENTH CIRCUIT BOTH AGREED THAT IT WAS NOT SUFFICIENT IS THE PLAINTIFF, THEMSELVES, ARGUED THAT IT WAS NOT SUFFICIENT. THEY ARGUE THAT IT IS, BUT THEY FILED A STATEMENT OF CLAIM. THEY FILED AN ACTUAL FORMAL STATEMENT OF CLAIM, LATE. THAT IS THE REASON THAT WE ARE HERE ON THE ISSUE. THEY REALIZED THAT THEIR COUNTER-PETITION DIDN'T SATISFY THE STATUTE. THEY REALIZED THEIR COUNTER-PETITION DIDN'T SATISFY THE LAW, SO THEY FILED A LATE STATEMENT OF CLAIM ONLY FOR THE ESTATE OF INEZ PROCKUP. THEY NEVER FILED A STATEMENT OF CLAIM FOR DONALD PROCKUP. WE THINK IT IS CLEAR THAT THAT IS TANTAMOUNT TO AN ADMISSION THAT IT DID NOT SATISFY THE CODE OR THE RULE. THE PLAINTIFF, ALSO, RAISES AN EQUITY ARGUMENT THAT IT COURT SHOULD NOT CONSTRUE 702 AND 710 AS STATUTES OF NONCLAIM BECAUSE OF EQUITY, THAT IT WOULD ALLOW FROUD TO BE REAPED, IF YOU WILL, BY UNSCRUPULOUS PERSONAL REPRESENTATIVES, BUT WE BELIEVE THE EQUITY, IF IT IS LOOKED AT BY THIS COURT, SHOULD BE LOOKED AT IN BOTH DIRECTIONS, WHICH IS BY THE SAME TOKEN, STATES NEED TO HAVE A POINT OF JUST AND SPEEDY RESOLUTION, AND IF THESE STATUTES ARE NOT IMPLIED AS THEY WERE INTENDED TO BE APPLIED, THEY WILL ALWAYS HAVE THE ABILITY TO COME IN LATE, AFTER THE TWO-YEAR PERIOD, AND RAISE CLAIMS OF FRAUD AND MISREPRESENTATION AND THOSE TYPES OF THINGS. WE WILL HAVE SITUATIONS WHERE PERSONAL REPRESENTATIVES OR ADMINISTRATORS ADD RIGHT EM-- AD LITEM, WHO WERE SUPPOSED TO BE REPRESENTING THE BEST INTERESTS OF THE STATES, NEGATIVE FAIL TO RAISE THE INTENTIONS THAT WERE SUPPOSED TO BE RAISED BUT DON'T. WE BELIEVE THAT THESE STATUTES ARE JURISDICTIONAL STATUTES OF NONCLAIM THAT AUTOMATICALLY BAR LATE-FILE CLAIMS AND SHOULD BE ENFORCED. WE BELIEVE, AS FAR AS 702 GOES, VERY QUICKLY, YOUR HONORS, THAT THERE IS NO CONFLICT IN 702. WE UNDERSTAND THAT, IN BARNETT BANK VERSUS READ, THIS COURT DETERMINED THAT 702 WAS A STATUTE OF LIMITATIONS AND RAISED CERTAIN CONCERNS ABOUT IT. THOSE CONCERNS WERE ADDRESSED BY THE LEGISLATURE, AND WE

BELIEVE, CLEARLY, IN AN EFFORT TO RETURN 702 TO ITS JURISDICTIONAL NONCLAIM STATUS, THAT STATUTE WAS, THEN, LOOKED AT BY THE FIRST DCA, AND IN RE ESTATE OF PARSON, AND THEY NOTED THAT THE STATUTORY CHANGES THAT HAD BEEN WROUT MADE 702 A -- THAT HAD BEEN WROUGHT, LAID IT A STATUTE OF NONCLAIM. IS THAT INCONSISTENT INTERNALLY?

I HAVE TO AGREE THAT IT IS SOMEWHAT INCONSISTENT, YOUR HONOR. I WILL NOT REPRESENT OTHERWISE, WITH THE EXCEPTION THAT THE LEGISLATURE CLEARLY INTENDED FOR THESE PARTICULAR STATUTES, 702, AS WELL, TO BE A STATUTE OF NONCLAIM, AND I THINK THAT IS WHY THEY PUT IN THE EXCEPTIONS THAT THIS COURT RAISED. THE COURT SAID, BECAUSE THE STATUTE DOESN'T ALLOW FOR THOSE EXCEPTIONS, WE ARE GOING TO FIND IT TO BE A STATUTE OF LIMITATIONS, SO THE LEGISLATURE TRIES TO GO BACK AND FIX IT, BY SAYING WE WILL PUT THIS IN, AND WE WILL ADD THE OTHER LANGUAGE AS WELL, IN WHICH WE INDICATE THAT THIS STATUTE IS GOING TO BE SUBORDINATE TO 710, WHICH IS A ABSOLUTE TO YOUR CUTOFF. WITH REGARD TO 702 AS WELL, EVEN THE BAPTIST HOSPITAL VERSUS CARTER CASE, WHICH THE PLAINTIFF RELIES ON HERE, DETERMINED THAT 702 IS A JURISDICTIONAL STATUTE OF NONCLAIM. SPORE VERSUS BERRYMAN, IN A PASSING COMMENT, SAID IT IS NONIT IS KNOWN AS THE STATUTE OF LIMITATIONS, BUT -- IT IS KNOWN AS THE STATUTE OF LIMITATIONS. WE BELIEVE THAT COMERICA CORRECTLY ANALYZED IN 710, AND THAT COMERICA, IN A SAYING THAT 710 CREATES AN ABSOLUTE IMMUNITY FOR CLAIMS FILED FOR THE FIRST TIME HERE, MORE THAN TWO YEARS AFTER THE DEATH OF THE PERSON WHOSE ESTATE IS UNDERGOING PRONE EIGHT. THERE IS -- UNDERGOING PROBATE THERE. IS QUESTION THAT MR. MAY RAISED THAT WERE NOT RAISED AS AFFIRMATIVE DEFENSES. BUT AS JUSTICE PARIENTE POINTED OUT, THE ELEVENTH CIRCUIT SAID WE DO NOT WANT TO RESTRICT THE ABILITY TO HEAR THIS. SO AS REGARD TO THE COMERICA CASE, IT DOES NOT DEPEND ON THE TIMELY CLAIM AND THE CLAIMANT COULD AVOID IT UNDER 702, FRAUD, ESTOPPEL OR INSUFFICIENCY OF NOTICE, THE AUTHORIZATION OF ENLARGEMENTS AS TO THE REPOSE PERIOD, NEGATING ANY USE OF THE PROVISION TO EXTEND THE PERIOD, MADE IT CLEAR THAT THE TWO-YEAR PERIOD ERECTS AN ABSOLUTE BAR TO JURISDICTIONAL CLAIMS THAT THE PROBATE JUDGE ALLOWS TO IGNORE. WHAT IT SAYS IS IT IS RAISED AS A JURISDICTIONAL CLAIM. IT IS SELF OPERATING AND SELF-FULFILLING AND THE COURT LACKS THE POWTORY HEAR THE CLAIM. THERE HAS BEEN A CONTENTION BY MR. MAY THAT THE CUNNINGHAM CASE PROVIDES A BASIS WHERE YOU CAN STIPULATE, IF YOU WILL, TO JURISDICTION. THAT IS, WITH ALL DUE RESPECT, APPLES AND SQUASH. THE CUNNINGHAM CASE DEALT WITH JURISDICTION WHICH HAS NOT YET ARISEN ON A BAD FAITH JUDGMENT. IN THIS CASE THEY ARE SEEKING TO USE THE SAME ANALOGY TO REVIVE THE SUBJECT MATTER JURISDICTION THAT HAS COLE'SED. THANK U.

THANK YOU-HE COLE'SED. THANK YOU -- THANK YOU. THAT HAS COLE'SED.

REBUTTAL?

THERE WAS NO STIPULATION TO JURISDICTION. I THINK IT PRETTY WELL SETTLED THAT THE PARTIES CANNOT STIPULATE TO JURISDICTION. THE POINT THAT WE WERE MAKING FROM CUNNINGHAM IS THAT A COURT OF JURISDICTION THAT HAS JURISDICTION OVER THE PARTIES AND THE SUBJECT MATTER HAS THE POWER TO ADJUDICATE THE CAUSE OF ACTION, AND IN THIS CASE THE CIRCUIT COURT, NOT THE PROBATE COURT, HAD JURISDICTION OVER THE PARTIES, AND THE SUBJECT MATTER OF MR. PROCKUP'S WRONGFUL-DEATH SUIT, AND WENT AHEAD, ON A STIPULATION OF THE PARTIES, AND ADJUDICATED A FINAL JUDGMENT FOR $1 MILLION. THERE WAS NO AFFIRMATIVE DEFENSE RAISED OF THE STATUTE OF NONCLAIM OR STATUTE OF REPOSE OR STATUTE OF LIMITATIONS, AND LET ME NOTE, PARENTHETICALLY THAT, ILLINOIS NATIONAL, WHO IS THE RESPONDENT IN THIS CASE, HAS, REALLY, NO CAUSE TO COMPLAIN ABOUT THAT, BECAUSE THAT COMPANY DENIED COVERAGE AND REFUSED TO PARTICIPATE IN THE DEFENSE AND LEFT THE DEFENSE TO ANOTHER CARRIER. SO WE ARE LEFT WITH THIS JUDGMENT, SO EVEN IF WE CALL IT A STATUTE OF NONCLAIM, IT WAS NEVER RAISED, AND THAT JUDGMENT IS STILL ON THE BOOKS. NO ONE HAS EVER ATTEMPTED TO SET IT ASIDE UNDER ANY RULE OF

PROCEDURE, SO WE CONTEND THAT THAT JUDGMENT, IF ALL ELSE FAILS, CERTAINLY SUPPLIES A SUFFICIENT BASIS TO BRING A BAD FAITH ACTION. I WANT TO COMMENT, REAL QUICKLY, ABOUT THE SUBSTANCE OF THE CLAIM OR THE PAPERS THAT MR. MAY FILED, BECAUSE I WANT TO BE REAL SPECIFIC. HE DID OPEN THIS ESTATE, IF YOU WILL, BY A PETITION FOR APPOINTMENT OF ADMINISTRATOR AD LITEM, AND WITH THE COURT'S INDULGENCE, I WANT TO QUICKLY READ WHAT HE LATER SAID IN HIS COUNTER-PETITION, TO BE APPOINTED AS PR. HE SAID RESPONDENT IS A CREDITOR OF THE ESTATE OFES CAR THOMAS BRADLEY, BY VIRTUE YOUR OF A WRONGFUL-DEATH CLAIM AGAINST OSCAR THOMAS BRADLEY, WHICH AND ARE -- WHICH AROSE OUT OF AN ACCIDENT IN WHICH INEZ PROCKUP SUSTAINED FATAL INJURES, SO I DON'T KNOW WHAT ADDITIONAL INFORMATION HE COULD HAVE PROVIDED, AND IN FACT, IN HIS ADMITTEDLY UNTIMELY STATEMENT OF CLAIM, THE ONLY INFORMATION THAT HE DID FILE AND GIVE IN THERE IS THE ADDRESS AND THE FACT THAT THE CLAIM IS UNLIQUIDATED AND UNCLEAR, WHICH IS KNOWN TO EVERYBODY AHEAD OF TIME, SO IN SHORT, WE THINK THAT MR. MAY AND MR. PROCKUP HAVE DONE ALL THEY COULD TO PRESERVE THEIR CLAIM, AND THAT IT IS SUFFICIENT TO FORM THE BASIS OF THE BAD FAITH CASE. THANK YOU.

THANK YOU, COUNSEL WE WILL BE IN RESAYS FOR 15 MINUTES. -- WE WILL BE IN RECESS FOR 15 MINUTES. BAILIFF: PLEASE RISE.