

>> NEXT CASE IS FRIDMAN VERSUS SAFECO.

WHENEVER YOU'RE READY.

>> MAY IT PLEASE THE COURT, COUNSEL, GOOD MORNING.

MY NAME IS MIKE RYWANT.

I'M HERE ON BEHALF OF THE PETITIONER, ADRIAN FRIDMAN.

TO MY LEFT IS JEFF BERG.

HE WAS TRIAL COUNSEL AND COUNSEL IN THE FIFTH DISTRICT WITH REGARD TO THE APPEAL THAT WAS PROSECUTED THERE.

ON BEHALF OF MR. FRIDMAN, WE'RE ASKING THIS COURT TO REVIEW AND REVERSE THE DECISION OF THE FIFTH DISTRICT THAT NULLIFIED THE JURY VERDICT THAT FIXED HIS DAMAGES, FOUND NO COMPARATIVE FAULT ON THE PART OF MR. FRIDMAN AND THAT HIS INJURIES WERE PERMANENT.

>> CAN I -- JUST A QUESTION THAT DOESN'T SEEM TO BE THE BASIS FOR THE FIFTH DISTRICT'S OPINION, BUT I WANT TO MAKE SURE ABOUT IT.

THEY'VE RAISED HERE A SECOND ISSUE ABOUT ERRORS THAT OCCURRED DURING THE TRIAL, CLOSING ARGUMENT, THE FUTURE DAMAGES. AND THAT SEEMED TO HAVE CONCERNED OTHER COURTS, WHETHER THAT'S REVIEWABLE.

I DON'T SEE YOU DISAGREEING WITH THE AMOUNT OF THE VERDICT FIXED AND IT BEING INCLUDED IN THE FINAL JUDGMENT, ALTHOUGH NOT THE JUDGMENT, THAT THOSE ARE REVIEWABLE ON APPEAL FOR ERROR THAT'S PROPERLY PRESERVED.

>> JUSTICE PARIENTE, I AGREE. AGREED, YOUR HONOR.

IN FACT, THIS DISTRICT DID REVIEW A VERDICT IN EXCESS OF THE JUDGMENT THAT WAS ULTIMATELY ENTERED.

SIMILARLY, IN A CASE CALLED THE DEGRANDCHAMP VERSUS GEICO, IF YOU REVIEW THE TWO OPINIONS THAT

EXIST, IT'S CLEAR THAT THE SECOND DISTRICT IN THAT CASE REVIEWED A VERDICT FOR FUTURE MEDICAL EXPENSES THAT WAS ABOVE THE \$10,000 POLICY LIMIT. SO WE BELIEVE IN REGARDS TO THIS PARTICULAR CASE SHOULD THIS COURT REVERSE THAT THOSE ISSUES WOULD BE SUBJECT TO REVIEW BY THE FIFTH DISTRICT.

>> AND THAT WAS NEVER AN ARGUMENT MADE -- OR WAS IT -- IN THE FIFTH DISTRICT BY SAFECO? THAT IS, THAT THE ISSUES THEY RAISED COULD NOT BE REVIEWED AND YOU DIDN'T RAISE THAT.

>> THEY IN FACT RAISED THOSE ISSUES, YES, YOUR HONOR. AND WE DID NOT OPPOSE IT ON THE BASIS OF NONREVIEWABILITY, YES. I APOLOGIZE FOR INTERRUPTING. THE DETERMINATIONS THAT THE JURY MADE WERE A NECESSARY ELEMENT OF FRIDMAN'S STATUTORY EXTRA-CONTRACTUAL CLAIM. THE TRIAL THAT WAS CONDUCTED IS THE UNDERLYING CLAIM THAT THIS COURT REFERS TO IN THE STATE FARM DECISION.

BY WAY OF BACKGROUND, I THINK IT'S IMPORTANT FOR THIS COURT TO APPRECIATE THE POSTURE THE TRIAL JUDGE FOUND HIMSELF.

THIS CASE ARISES FROM AN ACCIDENT THAT HAPPENED IN JANUARY OF 2007.

THE CIVIL REMEDY NOTES WHICH THIS COURT HAS SAID IS THE LAST OPPORTUNITY TO CURE A STATUTORY VIOLATION INSOFAR AS CLAIMS HANDLING WAS SERVED OCTOBER OF 2008, A YEAR AND A HALF OR SO AFTER THE ACCIDENT.

NO RESPONSE -- AND AS THIS COURT KNOWS FROM THE IMHOF DECISION, 60 DAYS A RESPONSE SHOULD BE GIVEN.

THERE WAS NO RESPONSE BY THE INSURANCE COMPANY TO THE STATUTORY NOTICE, THEREBY GIVING

RISE TO A PRESUMPTION OF BAD FAITH CONDUCT.

A COMPLAINT WAS FILED IN APRIL OF 2009.

THE ANSWER WAS FILED IN MAY OF 2009.

IN THIS CASE FRIDMAN FILED A PROPOSAL FOR SETTLEMENT GIVING THE INSURANCE COMPANY YET ANOTHER OPPORTUNITY TO RESOLVE EVEN THOUGH IT WAS OUTSIDE THE 60-DAY STATUTORY CURE PERIOD. THAT PROPOSAL FOR SETTLEMENT WAS IN FEBRUARY OF 2010.

>> HOW MUCH WAS THAT FOR?

>> \$50,000, POLICY LIMITS.

>> THE COMPLAINT WAS FILED, WAS THAT THE UM COMPLAINT YOU'RE TALKING ABOUT?

>> YES, YOUR HONOR.

THAT IS THE CONTRACT -- ARISING OUT OF THE CONTRACT.

I'VE SEEN THIS CHARACTERIZED AS A BREACH OF CONTRACT ACTION.

>> YOU'RE NOT TALKING ABOUT A SEPARATE BAD FAITH ACCIDENT. YOU'RE TALKING ABOUT THE UM COMPLAINT.

>> CORRECT, YOUR HONOR.

JUSTICE POLSTON, IT IS NECESSARY TO LIQUIDATE AND DETERMINE THE VALIDITY OF A CLAIM AND LIQUIDATE THOSE DAMAGES THAT ARISE FROM THAT CLAIM BASED UPON THE CONTRACT.

IT'S NOT A BREACH OF CONTRACT.

>> I UNDERSTAND.

THE ISSUE IS AT WHAT POINT YOU GET TO DO THAT.

HELP ME WITH JURISDICTION ON THE TRIAL COURT'S FINAL JUDGMENT.

THE FINAL JUDGMENT BY THE TRIAL COURT SAID IT RESERVED JURISDICTION WITH A RIGHT TO AMEND BY THE PLAINTIFF.

JUST MY FUNDAMENTAL KNOWLEDGE OF FINAL JUDGMENTS, WHEN SOMETHING IS FINAL, READY FOR APPEAL, YOU DON'T HAVE ANY MORE RIGHTS TO AMEND WHEN THERE'S A FINAL

JUDGMENT.

SO IF THERE IS A RESERVATION OF A RIGHT TO AMEND, HOW DOES THAT NOT MAKE IT NONFINAL FOR PURPOSES OF APPEAL?

>> THE RESERVATION OF THE RIGHT TO AMEND IS CONSISTENT WITH WHAT THIS COURT HAS SAID IN ALLSTATE VERSUS RUIZ INSOFAR AS THE SITUATION WHEN A CLAIM ARISING FROM THE CONTRACT IS FILED IN CONJUNCTION WITH THE CLAIM FOR STATUTORY BAD FAITH.

THIS COURT HAS SAID THE STATUTORY BAD FAITH SHOULD BE ABATED.

IF THAT CLAIM CAN BE ABATED, I WOULD RESPECTFULLY SUGGEST THAT IT'S NO DIFFERENT THAN ALLOWING A POST-VERDICT AMENDMENT VIA RESERVING JURISDICTION IN THE FINAL JUDGMENT THAT LIQUIDATES THE CONTRACT CLAIM.

>> WELL, IF SOMETHING IS ABATED, CAN IT BE APPEALED?

>> I DON'T BELIEVE SO, SIR.

>> SO HOW CAN THIS BE APPEALED IF THERE'S A RIGHT TO AMEND?

>> IF THERE IS A RIGHT -- WELL, THIS CAN BE APPEALED AS PART OF THE APPEAL RELATIVE TO THE SECOND PROCEEDINGS THAT WOULD RISE FROM THE AMENDMENT INSOFAR AS THE STATUTORY BAD FAITH CASE. THAT WOULD FOLLOW THIS INITIAL DETERMINATION OF A VALID CLAIM AND THE DAMAGES ARISING FROM THAT CLAIM.

>> MY STRUGGLE IS IT'S TREATING AS IF YOU HAD TWO COUNTS IN A COMPLAINT AND YOU GET TO APPEAL A JUDGMENT OR A DETERMINATION BY A COURT ON ONE OF THEM, BUT NOT BOTH.

SO I'M STRUGGLING WITH THAT.

BUT --

>> WELL, IT'S NOT -- IT'S NOT SIMULTANEOUS.

IT'S SERIAL IN TERMS OF REVIEWING THE JUDGMENT THAT

WOULD ARISE IN THE BAD FAITH
CASE.

>> THAT'S MY PROBLEM.

>> DO ANY OF THE CASES DISCUSS
THIS UNDER THE CONCEPT OF
PROCEEDING SUPPLEMENTAL, THAT
THIS IS IN THE NATURE OF A
PROCEEDING SUPPLEMENTAL, WHICH
IS TO ENFORCE A JUDGMENT AGAINST
SOMEONE?

IN THIS CASE THEY HAPPEN TO BE A
PARTY TO THE UNDERLYING CASE,
BUT TO ENFORCE A JUDGMENT BEYOND
THE TIME OF A FINAL JUDGMENT?

>> I WOULD RESPECTFULLY SUGGEST
THAT THAT IS PART OF THE DISSENT
BY THE JUDGE INSOFAR AS THOSE
TYPES OF PROCEEDINGS.

TO ANSWER YOUR QUESTION
EXPLICITLY, JUSTICE LEWIS, I
DON'T THINK I'M AWARE OF ANY UM
CASE EITHER ON CONTRACT ACTION
OR THE STATUTORY BAD FAITH THAT
REFERENCES THAT SPECIFIC
SUPPLEMENTAL TYPE OF PROCEEDING.

>> WELL, I THINK THAT WHAT WE'RE
DEALING WITH -- AND I'VE BEEN
READING ALL THE FEDERAL DISTRICT
COURTS, TRYING TO FIGURE OUT
WHAT FLORIDA IS INTENDING TO DO
TO FIX DAMAGES.

IF THIS HAD HAD A TORTFEASOR IN
THIS CASE, YOU COULD HAVE HAD
YOUR DAMAGES DETERMINED.

THE DAMAGES HAVE TO BE
DETERMINED AND FIXED IF YOU WANT
TO CLAIM THE EXCESS JUDGMENT AS
AN ELEMENT OF YOUR BAD FAITH
CLAIM.

SO I KNOW JUDGE GROSS STRUGGLED
WITH THIS IN PATTON, BUT THE
APPEAL OF THE DAMAGES AND THE
AMOUNT OF THE DAMAGES OUGHT TO
BE DETERMINED FIRST, LIKE WE
WOULD BE DOING HERE, AND THEN
EITHER THE BAD FAITH CLAIM IS
ADDED BACK TO THE -- BEFORE THE
SAME JUDGE AND THE SAME PARTIES
OR IN A SEPARATE CASE.

AND I'M NOT -- I'M SORT OF

STRUGGLING WITH WHY IT'S SO --
WHY THIS HAS BECOME SO DIFFICULT
WHEN THE IDEA THAT THE DAMAGES
-- I MEAN, AGAIN, YOU COULD END
UP -- IF THEY'RE RIGHT, MAYBE
THE DAMAGES WON'T BE A MILLION
DOLLARS.

MAYBE THEY'LL BE \$375,000.
AND THAT'S IMPORTANT FOR THE BAD
FAITH JURY TO KNOW BEFORE THEY
DECIDE WHETHER THERE'S BAD
FAITH.

AND I GUESS THIS IS A FRIENDLY
QUESTION, BUT YOU SOUND LIKE
YOU'RE FAMILIAR WITH THIS.
IS THIS THE RIGHT PROCEDURE TO
FOLLOW, OR DO YOU THINK THERE'S
A BETTER PROCEDURE?

AND DOES EVERY PROCEDURE HAVE
SOME FLAWS BECAUSE WE DON'T HAVE
AN EXACT PARITY BETWEEN
FIRST-PARTY AND THIRD-PARTY BAD
FAITH?

>> WELL, LET ME TAKE THAT LAST
COMMENT, IF I MAY, FIRST.

>> AND I'VE ADDED A LOT OF
THINGS IN, LIKE YOU COULD HAVE
THE TORTFEASOR IN THERE AND
THEREFORE THERE WOULDN'T BE A
QUESTION, BUT YOU'D GET THE FULL
EXTENT OF YOUR DAMAGES
DETERMINED.

>> THIS COURT GAVE SOME
FORESHADOWING INSOFAR AS THERE
SHOULD BE NO DIFFERENCE BETWEEN
A FIRST-PARTY BAD FAITH CASE NOW
THAT WE HAVE THE STATUTE IN
PLACE AND WHAT GOES ON IN A
THIRD-PARTY BAD FAITH CASE,
BURGESS VERSUS INFINITY
INSURANCE.

>> THERE HAS TO BE SOME
DIFFERENCE BECAUSE OF THE NATURE
OF ACCESS TO THE FILE.
SO THERE'S GOT TO BE SOME
DIFFERENCE.

IN A TRADITIONAL BAD FAITH CASE,
YOU CAN GET THE FILE BEFORE YOU
FILE IN A THIRD-PARTY BAD FAITH.
YOU CAN GET IT UP TO THE ENTRY

OF THAT EXCESS JUDGMENT.

>> CORRECT.

>> IN THE FIRST-PARTY BAD FAITH, YOU'RE NOT GOING TO BE ABLE TO GET IT FOR THAT ENTIRE PERIOD, IS WHERE YOU RUN INTO PROBLEMS. BUT HERE YOU'VE GOT SORT OF A -- IT'S THE SAME TORTFEASOR AT THE BEGINNING OR THE SAME TORT CONCEPTS, BUT DELAYING IT. YOU'RE NOT ADVOCATING THAT IN A FIRST-PARTY BAD FAITH THAT YOU CAN JUST START OFF AND GET ALL THE RECORDS IN YOUR UM CASE THAT'S GOING TO APPLY TO THE BAD FAITH, RIGHT?

>> ABSOLUTELY NOT.

>> SO IT'S NOT THAT MUCH DIFFERENT.

>> AND THAT'S PART OF -- WELL, THERE'S A SLIGHT DIFFERENCE DEPENDING ON WHO'S BRINGING THE CASE, WHETHER IT'S A JUDGMENT CREDITOR VERSUS THE INSURED, WHO WAS DEFENDED BY COUNSEL AND CAN IN FACT WAIVE THAT PRIVILEGE. THE ISSUE -- AND THAT DISCOVERY ISSUE IS IMPORTANT BECAUSE THE WAY THIS CASE -- OR THE WAY THE CASE SHOULD SET UP IS A DETERMINATION OF DAMAGES, AND THE OTHER NONMONETARY ISSUES THAT WERE IN FACT DETERMINED WHEN THE TRIAL JUDGE LET THIS CASE GO TO THE JURY, THOSE BEING PERMANENCY AND A LACK OF COMPARATIVE FAULT.

I HAD THE PRIVILEGE OR SOME SAY THE MISFORTUNE OF TRYING THE KING VERSUS GEICO CASE IN FEDERAL COURT, WHERE JUDGE MOODY INITIALLY RULED THAT THE VERDICT WAS MEANINGLESS IN THE UNDERLYING CASE BECAUSE OF THE DUE PROCESS ARGUMENTS THAT WERE RAISED.

WE WERE ALLOWED TO ASK THE COURT TO RECONSIDER A PORTION OF THE JURY'S DETERMINATION BECAUSE IT WAS CLEAR THAT THE JURY'S

DETERMINATION IN THE STATE COURT KING ACTION FOR PERMANENCY, LACK OF COMPARATIVE FAULT, LACK OF COMPARATIVE NEGLIGENCE WERE IN FACT REVIEWED BY THE SECOND DISTRICT.

BUT NONETHELESS JUDGE MOODY KEPT OUT THE ULTIMATE NUMBER THAT WAS DETERMINED BY THAT JURY.

>> SO HOW DID YOU -- WHAT HAPPENED?

>> WELL, YOU CANNOT -- I HANDLED THE BURGESS CASE THAT WAS BEFORE THIS COURT.

I'VE TRIED THAT CASE.

I'VE TRIED A NUMBER OF THESE BAD FAITH CASES.

>> WHAT HAPPENED AS FAR AS DAMAGES?

>> WE HAD TO RETRY --

>> SO THE JURY WAS -- EVEN THE FIRST --

>> YES.

>> WERE THEY FIRST ASKED TO DETERMINE DAMAGES AND THEN BAD FAITH?

ALTOGETHER?

>> THAT'S THE CORRECT QUESTION. WERE THEY ASKED TO DETERMINE DAMAGES FIRST.

NO.

WE ASKED, BUT THAT WAS NOT THE SPECIAL INTERROGATORY THAT WENT TO THE JURY.

THEY WERE ASKED TO DETERMINE BAD FAITH IN A VACUUM BECAUSE THE VERDICT, THE MILLION DOLLAR PLUS VERDICT IN KING, WAS KEPT FROM THEM.

THAT IS THE PROBLEM --

>> I'M SORRY.

IS THAT -- SO DID YOU GET MORE OR LESS?

>> WELL, THEY ANSWERED NO ON BAD FAITH.

>> SO IT BECAME --

>> SO THE POINT OF THE DAMAGES WAS MOOT BECAUSE -- AND THAT'S WHAT THE 11TH CIRCUIT IN AN UNPUBLISHED OPINION DETERMINED,

THAT IRRESPECTIVE OF THE HARM THAT WE ALLEGE WAS CAUSED BY HAVING TO RETRY THE DAMAGES -- AND THAT WAS THE FOCUS OF THE CASE, BECAUSE THERE WAS NO FINDING OF BAD FAITH, THERE WAS HARMLESS ERROR.

>> THE JURY INSTRUCTIONS ASSUME THAT THE DAMAGES ARE GOING TO BE FIXED.

THAT'S WHAT IS WRONG WITH JUDGE MOODY'S VIEW OF THIS, AS OPPOSED TO JUDGE DALTON, THAT IT'S NOT TO BE TRIED TOGETHER.

>> THAT'S EXACTLY WHAT THIS COURT SAID IN LAFORET WHEN IT REFERENCED THE UNDERLYING CLAIM. THE UNDERLYING CASE IS THE CASE THAT WAS TRIED.

WE TOOK ISSUE WITH THE FACT THAT THIS WAS A CONFESSION. CONFESSION ARISES FROM THE WOLLARD VERSUS LLOYD'S OF LONDON CASE.

THAT'S A PROPERTY DAMAGE CASE WHERE LLOYD'S CONFESSED THE ACTUAL AMOUNT OWED.

IT WAS NOT AN UM SITUATION. AND AS JUDGE SAWAYA HAS COMMENTED ON IN HIS DISSENT, IT'S A LEGAL FICTION TO PROVIDE FOR A SITUATION WHERE AN INSURED FROM RECOVER A FEE WHEN AFTER BEING REQUIRED TO FILE SUIT THE INSURANCE COMPANY PAYS WHAT IS OWED.

THAT IS NOT WHAT HAPPENED HERE.

>> HAS THE CONCEPT OF ESTOPPEL BEEN DISCUSSED AND APPLIED IN THESE CASES?

BECAUSE YOU DO HAVE THE SAME PARTIES IN THE UNINSURED MOTORIST CONTEXT.

YOU'VE GOT THE IDENTICAL INCIDENT THAT'S BEING SUED ON. IT'S JUST A DIFFERENT CAUSE OF ACTION.

AND THAT'S THE CLASSIC ESTOPPEL TYPE OF SITUATION THAT THE PARTIES -- I MEAN, YOU CAN'T ASK

FOR MORE, NOR CAN THE OTHER SIDE SAY THOSE AREN'T YOUR DAMAGES. YOU'RE BOTH STOPPED BECAUSE THAT'S WHAT YOU'VE DONE.

>> JUSTICE LEWIS, THAT IS WHAT IS BEING RAISED IN THE VARIOUS FEDERAL CASES THAT ARE -- ONCE THE UNDERLYING CASE IS RESOLVED, THERE'S A DISPUTE ABOUT REMOVAL, BUT BY AND LARGE THEY'RE BEING HANDLED IN FEDERAL COURT INSOFAR AS THE EXTRA-CONTRACTUAL ASPECT THAT'S THE SUBSEQUENT CLAIM. AND THAT IS BEING RAISED. AND I THINK TO A CERTAIN EXTENT THAT'S WHAT JUDGE DALTON WAS TALKING ABOUT IN THE BATCHELOR DECISION.

BUT I WAS ADDRESSING WHAT HAPPENED OR WHAT SAFECO ATTEMPTED TO DO IN THE TRIAL COURT AFTER TWO PLUS YEARS OF LITIGATION.

AND THAT'S WHERE I COME BACK TO WHAT THE TRIAL JUDGE WAS TRYING TO DO, HAVING SEEN THIS CASE IN HIS COURTROOM FOR A COUPLE YEARS, BEEN SET FOR TRIAL ONCE AND CONTINUED, IT WAS RESET FOR TRIAL AND THEN THIS DOCUMENT CALLED A CONFESSION OF JUDGMENT IS FILED.

I RESPECTFULLY SUBMIT IT IS NOT A CONFESSION.

IT'S A MOTION FOR PARTIAL SUMMARY JUDGMENT ON A DEFENSE THAT WAS PLED IN SAFECO'S ANSWER TO LIMIT THE RECOVERY TO THE CONTRACT BENEFITS.

THAT IS THE ACTUALITY OF THIS WE OWE \$50,000.

BUT THE CONFESSION DOESN'T RESOLVE THE OTHER NONMONETARY ISSUES THAT ARE IMPORTANT TO BE DETERMINED.

ARE THOSE ISSUES GOING TO BE THEN LITIGATED IN THE BAD FAITH CASE, WHETHER MR. FRIDMAN HAD A PERMANENT INJURY OR WHETHER HE WAS COMPARATIVELY NEGLIGENT IN

THE CONTEXT OF THE ACCIDENT?
BECAUSE THE CONFESSION, ALL TWO
PARAGRAPHS OF IT, DO NOT ADDRESS
THOSE DECISIONS THAT ARE
DETERMINED IN THE TRIAL.

>> WELL, AGAIN, IN THE BAD FAITH
CASE SAFECO CAN ARGUE THAT UNTIL
THEY UNDERSTOOD THAT HE WAS
BEING -- GOING TO HAVE AN
OPERATION, THEY DIDN'T THINK
THEY OWED THE POLICY LIMITS AND
THOSE -- AND ONCE THEY DID, THEY
OFFERED THE POLICY LIMITS.

>> THAT WAS GEICO'S ARGUMENT IN
KING, YOUR HONOR.

THEY SAID -- THE CASE WE HAD THE
CIVIL REMEDY NOTICE SERVED
AGAINST US ON --

>> WE DIDN'T HAVE ENOUGH
INFORMATION.

>> -- WAS TOTALLY DIFFERENT
THAN THE CASE THAT MR. KING GOT
HIS MILLION PLUS VERDICT ON.
AND THAT IS AN ABSOLUTE DEFENSE.
THEY CAN RAISE THAT IN THE BAD
FAITH CASE, THAT THE CASE
CHANGED.

>> DO YOU THINK THIS IS -- IF
YOU WERE TO BE WRITING THE
PROCEDURE FOR HOW TO DO UM
FIRST-PARTY BAD FAITH CASES,
WOULD THIS BE THE WAY YOU WOULD
DO IT, WHICH IS NOT TO FILE THE
BAD FAITH CASE, BECAUSE THAT'S
EITHER GOING TO BE ABATED OR
DISMISSED.

FILE THE UM ACTION, GET FULL
AMOUNT OF DAMAGES, GET THAT
FIXED AND APPEALED AND THEN
EITHER FILE IN THE SAME LAWSUIT
OR SEPARATE LAWSUIT BAD FAITH?

>> I INTERPRET YOUR HONOR ASKING
ME HOW WOULD I WRITE IT AND I'M
GOING TO TELL YOU.

I THINK THIS IS THE RIGHT WAY.
AND I THINK THIS COURT SHOULD
MAKE CLEAR THAT THAT EXCESS
VERDICT, ONCE THE JUDGMENT IS
ENTERED FOR THE POLICY LIMITS,
THAT EXCESS VERDICT IS

REVIEWABLE AS WAS DONE IN PATTON, WHICH IS ALSO BEFORE THIS COURT.

>> THE JUDGE SAID HE THOUGHT THE PROCEDURE THAT THE AMOUNT IS ACTUALLY PLACED IN THE FINAL JUDGMENT, WHICH IT WAS IN THIS CASE.

>> AND THAT IS CUSTOMARILY WHAT HAS BEEN DONE.

>> WELL, LOGICALLY, THOUGH, IT'S DIFFICULT, ISN'T IT?

BECAUSE LOGICALLY IT SEEMS THE DAMAGES THAT YOU'RE SEEKING REALLY ARE BAD FAITH DAMAGES, NOT UM COVERAGE.

AND WHAT YOU HAVE SPENDING IS AN UM ACTION THAT YOU HAVE NOW BEEN PAID FOR.

THE UNINSURED MOTORIST COVERAGE BENEFITS HAVE BEEN PAID.

SO WHAT YOU'RE REALLY AFTER ARE THE BAD FAITH DAMAGES IN AN ACTION THAT HASN'T YET TO BE FILED.

SO THAT'S THE LOGICAL, LEGAL DIFFICULTY THAT WE'RE ALL FACED WITH HERE.

>> HERE'S THE CAVEAT TO THAT, JUSTICE POLSTON.

SOME OF THESE CASES THE VERDICT COMES BACK LESS THAN THE POLICY LIMITS AND YOU DON'T HAVE THAT ELEMENT.

AS THIS COURT SAID IN BLANCHARD, WE WANT A DETERMINATION OF THE EXTENT OF THE DAMAGES.

>> THAT WOULD BE -- BUT THEN YOU'RE STILL LITIGATING THE AMOUNT OF THE UM COVERAGE THAT YOU'RE GOING TO BE ENTITLED TO. YOU'RE STILL AN UM DISPUTE AT THAT POINT, NOT THE BAD FAITH DAMAGES.

BUT HERE THEY SAID, YES, HERE IS THE UM COVERAGE.

>> I WOULD RESPECTFULLY SUGGEST THAT YOU'RE ARGUING ABOUT DAMAGES.

A CONTINUUM OF DAMAGES, WHETHER

THEY BE LESS --

>> THAT'S YOUR ARGUMENT.
THAT'S WHAT YOU'RE SEEKING,
RIGHT?

>> DAMAGES ARISING FROM THIS
CONTRACT.

I'VE SEEN COMMENTATORS TALK
ABOUT THE UM CAUSE OF ACTION
BEING A HYBRID BECAUSE ITS
UNDERPINNINGS ARE A CONTRACT,
BUT IT'S GOT A TORT COMPONENT.
BUT YOU'RE LOOKING AT A
CONTINUUM OF DAMAGES.

SOMETIMES THE DAMAGES ARE LESS
THAN THE POLICY LIMITS.

SOMETIMES THEY'RE MORE.

IF YOU DON'T HAVE THEM MORE,
THEN YOU OBVIOUSLY CANNOT
SATISFY THE CRITERIA UNLESS
THERE IS SOME OTHER BAD FAITH
CLAIMS HANDLING THAT CAN BE
ASCIBED TO THE CONDUCT OF THE
CARRIER.

BUT IN THE SITUATION WHERE YOU
HAVE MORE, THEN YOU HAVE THE
ABILITY TO GO AND CHALLENGE IF
YOU'VE GOT A PROPERLY UNCURED
CIVIL REMEDY NOTICE.

THEN YOU HAVE AN OPPORTUNITY TO
EXAMINE THE CARRIER'S CONDUCT,
GET THE FILE THAT JUSTICE LEWIS
WAS TALKING ABOUT, SEE HOW THEY
EVALUATED OR MISEVALUATED THE
CASE AND THEY CAN DEFEND
PREDICATED UPON, WELL, BASED
UPON WHAT WE KNEW WHEN THE CRN
WAS ALIVE, WE DIDN'T HAVE ANY
BASIS TO PAY THESE DAMAGES.

>> YOUR TIME IS UP.

WE HELPED YOU WITH THAT, SO I'LL
GIVE YOU A COUPLE OF MINUTES,
TWO MINUTES TO REBUT LATER ON,
OKAY?

>> THANK YOU.

>> MAY IT PLEASE THE COURT, GOOD
MORNING.

MY NAME IS ANTHONY RUSSO.

WITH ME IS ROBERT VAUGHAN FOR
SAFECO INSURANCE COMPANY.

JUSTICE PARIENTE, THERE IS A LOT

TO BE WRITTEN.

THERE ARE A LOT OF PROBLEMS REGARDING THE PLEADINGS AND ADJUDICATION OF UNINSURED MOTORIST CLAIMS AND THE BAD FAITH CLAIMS THAT FALL UPON THEM.

THE FRIDMAN DECISION ANSWERS ONE OF THEM VERY WELL.

IT'S THE FIRST CHAPTER IN THAT BOOK THAT YOU'RE LOOKING TO BE WRITTEN.

>> LET ME ASK YOU A QUESTION IF WE'RE PARALLELING FIRST-PARTY, THIRD-PARTY.

IF IN A THIRD-PARTY CASE THERE IS \$50,000 IN COVERAGE AND THEY HAVEN'T PAID IT AND IT GOES -- IT'S GOING TO TRIAL, BUT BEFORE IT FINISHES GOING TO TRIAL THE PLAINTIFF GETS AN ASSIGNMENT AND FILES A BAD FAITH CLAIM.

IS THAT PREMATURE?

>> FILES A BAD FAITH CLAIM AGAINST THE LIABILITY CARRIER.

>> CORRECT.

OF COURSE, IT'S PREMATURE.

>> YES.

>> OKAY.

SO WHAT WE'RE TRYING TO DO IS, AS MUCH AS POSSIBLE, UNDERSTAND, IS THE LEGISLATURE HAS SAID THEY WANT IT TO BE THE SAME.

>> RIGHT.

>> AS MUCH AS POSSIBLE.

>> RIGHT.

>> UNDERSTANDING SOME OF THE DIFFERENCES.

IT IS THEREFORE -- THE QUESTION IS IF YOU PAY THE \$50,000, THE BAD FAITH CLAIM IS YOU ARE -- ONE OF THE ELEMENTS IS THE DAMAGES EXCESS VERDICT.

>> RIGHT.

YOU'RE SPEAKING OF BLANCHARD.

>> HOW DO YOU GET -- YOU'VE GOT TO HAVE THAT -- UNLESS -- BASED ON RUIZ, THAT LITIGATION OF THE DAMAGES WHERE THEY CANNOT GET THE FILE --

>> YES.
>> -- SEPARATE.
SO HOW IS THIS -- YOU KNOW, YOU
COULD HAVE SAID, OKAY, ONCE
THERE IS THE UM -- ONCE THE
PAYMENT OCCURRED --
>> YES.
>> -- WE'RE NOW GOING TO ALLOW
YOU TO AMEND AND ADD BAD FAITH,
BUT WE'RE GOING TO HAVE THE JURY
FIRST DETERMINE THE EXTENT OF
THE DAMAGES.
YOU COULD CALL IT THAT, BUT
THAT'S ESSENTIALLY WHAT THIS
WAS.
IT WAS THE PRECURSOR TO THE BAD
FAITH CASE.
AS LONG AS YOU GET THE REVIEW OF
THE DAMAGE AWARD BEFORE YOU GET
-- GO TO BAD FAITH, YOU, SAFECO,
ARE PROTECTED.
>> TWO PROBLEMS, JUDGE, JUSTICE.
THE FIRST PROBLEM IS THE CASE
SHOULD NOT HAVE PROCEEDED AT ALL
BECAUSE THE CASE WAS MOOT.
UNDER THE GODWIN CASE, THE CASE
WAS MOOT.
ALL OF THE RELIEF THAT WAS
REQUESTED BY THE PLEADINGS HAD
BEEN EXHAUSTED.
THIS WAS THE JUDGE'S PROBLEM AT
THE COURT OF APPEAL.
>> LET'S ASSUME THAT -- THEN
LET'S SAY AT THE POINT OF
CONFESSION OF JUDGMENT THAT THE
JUDGE INSTEAD OF SAYING BECAUSE
OF THE -- WHAT'S GONE ON IN THIS
CASE, I'M NOW GOING TO ALLOW YOU
TO AMEND, SINCE THEY'VE PAID IT
NOW, TO ADD A CLAIM FOR BAD
FAITH.
>> SO --
>> SO SAME PARTIES, RIGHT?
BECAUSE YOU ONLY NEED MR. -- OR
MRS. -- IS IT MR.?
>> MR. FRIDMAN.
>> MR., AND SAFECO.
NOW THEY SAY, WELL, NOW WE WANT
YOUR WHOLE CLAIMS FILE.
WHAT HAPPENS THEN UNDER RUIZ?

DO THEY GET IT?

>> WELL, WE HAVEN'T -- AT THAT POINT THERE'S BEEN NO APPEAL.

>> WELL, THERE'S NOTHING TO APPEAL.

>> THERE ARE SO MANY PROBLEMS.

>> THERE REALLY ARE NOT.

>> YES, THERE ARE.

>> I DON'T SEE ANYTHING WRONG WITH JUDGE SAWAYA'S OPINION. I SEE INSURANCE COMPANIES WANTING TO CONFUSE THIS ISSUE. TO ME, WHAT HAPPENED WAS THE TRIAL JUDGE DID AND WHAT JUDGE SAWAYA AND DALTON AND GROSS HAVE SAID IS THE BEST WAY TO CREATE A PARALLEL, EQUAL SYSTEM BETWEEN WHAT IS NOT EXACTLY EQUAL WHILE PROTECTING THE RIGHTS OF THE INSURANCE COMPANY.

>> JUSTICE PARIENTE, I THINK THAT THERE ARE UM CASES -- THIS IS WHAT JUDGE AVANDER AND JUDGE PALMER WERE LOOKING AT IN THE FIFTH.

THEY SAID YOU HAVE TRIED BAD FAITH DAMAGES, PLAINTIFF, AND THAT WAS AGREED, BUT YOU HAVE DONE SO WITHOUT A BAD FAITH COMPLAINT, WITHOUT A BAD FAITH ANSWER AND WITHOUT THE INSURANCE COMPANY HAVING AN OPPORTUNITY --

>> BUT THEY'RE NOT BAD FAITH DAMAGES.

THEY'RE PRECEDENT TO FILING A BAD FAITH CLAIM.

YOU CAN'T FAIL A THIRD-PARTY BAD FAITH CLAIM UNTIL YOU HAVE THE DETERMINATION OF THE EXTENT OF THE DAMAGES.

ENDS OF STORY.

NEVER HAS HAPPENED.

YOU CAN DO IT BY A STIPULATION.

>> YES.

>> YOU CAN DO IT BY --

>> AS IN BROOKINS.

>> I'M TALKING ABOUT A THIRD-PARTY.

THAT YOU'VE GOT TO HAVE -- YOU HAVE TO HAVE A DETERMINATION OF

THE EXTENT OF DAMAGES.
AND EVERY CASE OUT OF THIS COURT
HAS SAID THAT.

>> IN THE BAD FAITH CASE.

>> NO.

IN THE THIRD-PARTY CASE THEY
TAKE PLACE IN THE LAWSUIT
AGAINST THE TORTFEASOR.

>> IMHOF, BROOKINS, KLAK, ALL OF
THOSE CASES SAID THAT THE BAD
FAITH CASE CAN ARISE WITHOUT
LITIGATION OF THE DAMAGES IN AN
UM CASE.

>> WHETHER YOU'RE REQUIRED TO OR
ENTITLED TO.

THEY COULD HAVE SAID IF THERE
WAS AN AGREEMENT BETWEEN THE TWO
THAT WE'RE GOING TO DO IT THIS
WAY.

BUT THEY CHOSE NOT TO.

AND THE QUESTION IS ARE THEY
ENTITLED TO HAVE THE
DETERMINATION OF DAMAGES FIRST
BEFORE THEY FILE THE BAD FAITH
CASE.

>> SO AN UM CASE CAN NEVER --
WELL, THAT PRESENTS A NUMBER OF
PROBLEMS, YOUR HONOR, THAT THE
FRIDMAN -- THAT THE FRIDMAN
DECISION AVOIDS.

SO NOT ONLY DOES IT SOLVE A
PROBLEM BY MAINTAINING THE
MOOTNESS DOCTRINE AND THE
AUTHORITY --

>> WELL, WHAT PROBLEMS DOES IT
-- WHAT PROBLEMS EXIST IF WE
AGREE WITH JUDGE SAWAYA AND
ALLOW YOU TO RAISE THE POINT --
AND, AGAIN, YOU RAISE -- IT'S
NOT LIKE THEY WALKED AWAY AND
SAID THEY'RE NOT DEFENDING THIS,
RIGHT?

IT WAS VIGOROUSLY DEFENDED.
THE CASE.

>> THE CASE WAS VIGOROUSLY
LITIGATED, YES.

>> AND THEN -- THOSE ARE
ARGUMENTS -- THOSE APPEALABLE
ARGUMENTS THAT YOU RAISED AND
YOU'VE RAISED HERE SHOULD BE

ADJUDICATED.

>> YOU'RE SPEAKING OF THE TRIAL ISSUES, THE FUTURE DAMAGES AND REMARKS AT TRIAL, THINGS LIKE THAT.

>> CORRECT.

>> SHOULD HAVE NEVER REACHED THAT POINT BECAUSE THE CASE WAS MOOT AND PUSHING A MOOT CASE THROUGH TO A -- THROUGH A VERDICT AND TO A JUDGMENT IS A PROBLEM.

IT UNDERMINES THE LEGITIMACY.

>> HOW IS IT MOOT IF YOU NEED A DETERMINATION OF THE EXTENT OF THE DAMAGES?

>> YOU DON'T NEED IT.

>> THEN WHEN DO YOU GET YOUR DAMAGES DETERMINED?

>> IF YOUR UM CASE IS MOOT OR NEVER BROUGHT, YOU HAVE YOUR BAD FAITH DETERMINED IN YOUR BAD FAITH CASE.

WHAT IF YOU NEVER FILED AN UM CASE?

WHY DOES HE HAVE TO FILE AN UM CASE?

TO GET AN UM VERDICT SO HE CAN GO TO A BAD FAITH CASE.

THAT'S NOT THE LAW.

>> IT'S THE BEST WAY TO PRESERVE WHAT JUSTICE LEWIS WROTE IN RUIZ ABOUT THE DISCOVERY THAT HE WOULD BE ENTITLED TO RECEIVE IN A BAD FAITH CASE HE CAN'T GET. HE CAN'T LOOK AT YOUR CLAIMS HANDLING AND WHY YOU REFUSED TO PAY THE POLICY LIMITS.

>> ABSOLUTELY.

IT'S COMPLETELY CONSISTENT WITH RUIZ.

THIS FRIDMAN DECISION IS COMPLETELY CONSISTENT WITH THE COURT'S DECISION IN RUIZ BECAUSE IN THE BAD FAITH CASE THAT SHOULD COME SHOULD THIS CASE BE APPROVED WOULD BE THAT THERE WOULD BE A TRIAL AT ONE POINT WHERE THE DAMAGES COULD BE DETERMINED AND THEN BIFURCATED

SO THAT THE SECOND PART, THE --
>> SO NOW YOU'RE SAYING -- OKAY.
BIFURCATION.

THAT'S WHAT I'M ASKING YOU.
IF AT THE POINT WHEN THEY SAY WE
CONFESS JUDGMENT, INSTEAD OF
WAITING UNTIL AFTERWARDS THE
JUDGE SAID, OKAY, NOW YOU CAN
AMEND NOW TO ADD YOUR BAD FAITH
CLAIM, BUT I'M GOING TO
BIFURCATE IT AND NOW I'M GOING
TO TRY DAMAGES.

WHAT'S THE -- WHAT IS THE
FUNCTIONAL DIFFERENCE FOR SAFECO
IN DOING IT -- SO THERE'S THREE
PARTS.

ONE, LIABILITY IS DETERMINED.

>> BY THE TORTFEASOR?

OF THE UM.

>> LIABILITY.

AND I SUPPOSE YOU'RE SAYING NO
COMPARATIVE NEGLIGENCE.

OR IS THAT STILL --

>> THERE WAS AN ARGUMENT, BUT
THAT'S -- THAT DOESN'T MATTER AT
THIS POINT.

>> NOW WE NEED A DETERMINATION
OF DAMAGES.

WE EITHER DO IT IN THE UM CASE
OR WE DO IT IN THE FIRST PART OF
THE BAD FAITH CASE.

>> THAT'S THE WAY THE BOOK
SHOULD BE WRITTEN, YOUR HONOR.

>> TELL US WHY.

TELL US WHY.

YOU'RE COMING TO THAT
CONCLUSION.

>> YES.

>> WHY IS THAT THE ONLY WAY TO
DO THIS?

IT SOUNDS TO ME LIKE YOU'RE --
UNDER THE CIRCUMSTANCES YOU WANT
JUST ANOTHER BITE OF THE APPLE.

>> DO NOT WANT ANOTHER BITE AT
THE APPLE.

DID NOT WANT THE FIRST BITE AT
THE APPLE.

WE GAVE THE MONEY, SAID, YOU
WIN, TAKE A JUDGMENT AGAINST US,
LET'S GO TO THE BAD FAITH CASE.

YOUR CASE IS RIPE ONCE THE UM
CASE IS OVER.

WE GAVE UP.

WE SAID BRING YOUR BAD FAITH
CASE.

>> YOU LITIGATED -- AM I WRONG?
I UNDERSTOOD THAT YOU LITIGATED

--

>> UNTIL WE DISCOVERED THAT WE
SHOULD NOT AND THEN --

>> YOU NEGATED THE UNDERLYING
UNINSURED MOTORIST CLAIM.

>> FOR A WHILE.

NOT TO CONCLUSION.

>> YOU DID NOT DEFEND THE CASE?
YOU JUST LET THE PLAINTIFF WALK
OVER?

>> WELL, WE DID NOT LITIGATE
VOLUNTARILY.

>> WAS IT DEFENDED BY ATTORNEYS
FOR SAFECO?

>> ABSOLUTELY.

>> SO THEY HAD THE OPPORTUNITY.
THEY PARTICIPATED.

>> YES.

>> AND WHETHER THERE WAS AN
UNINSURED CLAIM, TORTFEASOR WHO
INJURED SOMEONE WHO'D HAD NO
INSURANCE OR UNDERINSURANCE.

>> YES.

>> AND THEN THE NORMAL CLAIMS,
JUST LIKE IT'S A TORT CASE.

>> EXACTLY.

>> AT THE END OF THE CASE THEY
CAME BACK.

WHY IS THIS NOT LIKE A SOVEREIGN
IMMUNITY CASE, WHERE THERE'S A
CAP AND YOU HAVE TO GO THROUGH
AND THEN IT'S A STEP?

YOU HAVE TO GET THE DAMAGES
DETERMINED AT SOME POINT.

AND SO, I MEAN, I GUESS YOU
COULD --

>> TWO PROBLEMS.

>> WHY IS IT THAT IT HAS TO BE
ONE WAY OR THE OTHER REALLY?

>> BECAUSE ONE WAY IS MUCH
BETTER AND THE OTHER WAY
PRESENTS A HOST OF PROBLEMS.

>> WHY?

THAT'S WHAT I'M TRYING TO UNDERSTAND.

>> THE FIRST PROBLEM IS THAT AFTER WE PAY, THE UM CASE IS MOOT.

SO THE AUTHORITY OF THE COURT IS QUESTIONED OR QUESTIONABLE.

>> GO TO YOUR NEXT ONE.

I DON'T BUY THAT.

>> OKAY.

SO THE NEXT ONE IS THAT WE ARE PROCEEDING TO TRY BAD FAITH DAMAGES WHERE THERE IS NO BAD FAITH PLEADINGS.

THIS WAS THE JUDGE'S CONCERNS.

>> YOU KNOW WHAT YOU'RE DOING? YOU'RE TRYING THE DAMAGES -- I UNDERSTOOD IN THIS CASE THE PERSONAL INJURY DAMAGES THAT THIS INSURED SUSTAINED.

>> NO.

THE ISSUES FRAMED BY THE PLEADINGS WERE WHETHER WE OWED \$50,000.

>> NO.

THAT'S NOT THE ISSUE IN THIS CASE.

THIS IS NOT A BATTLE OVER THE AMOUNT OF COVERAGE.

THAT WASN'T IN DISPUTE, WAS IT?

>> YES, IT WAS, ABSOLUTELY.

NOT THE AMOUNT OF COVERAGE, BUT THE AMOUNT THAT WAS OWED UNDER THE \$50,000.

>> YOU TRIED THIS CASE LIKE A PERSONAL INJURY CASE.

>> WE THOUGHT THAT WAS UNDER \$50,000 AT THE COMMENCEMENT OF THE TRIAL.

>> YOU MAY BE WRONG.

THE POINT IS YOU TRIED A PERSONAL INJURY CASE AS THE PREDICATE FOR WHATEVER WAS GOING TO HAPPEN, RIGHT?

>> YES.

>> THAT'S THE WAY IT HAPPENED.

SO THOSE DAMAGES WERE THE PERSONAL INJURY DAMAGES.

THERE WASN'T SOME MYSTICAL BAD FAITH DAMAGES THAT WERE

DIFFERENT THAN A PERSONAL INJURY
CASE, WERE THERE?

>> I THINK THAT THE PLAINTIFFS
WERE ABSOLUTELY TRYING FOR A BAD
FAITH VERDICT.

ABSOLUTELY.

>> WELL, HELP ME THEN.
TELL ME WHY.

>> WELL, THEY ADMITTED THAT AT
THE FIFTH DCA IF YOU LOOK AT
WHAT THE JUDGE ASKED IN ORAL
ARGUMENT.

WEREN'T YOU TRYING FOR BAD FAITH
ARGUMENTS?

MISS BYRD SAID YES.

>> HOW IS THAT DIFFERENT?
HE'S TRYING TO GET THE MAXIMUM
DAMAGES FOR AN INSURED, CORRECT?

>> THAT'S HIS CLIENT, YES.

>> I DON'T UNDERSTAND WHY THAT'S
DIFFERENT THAN ANY KIND OF CASE
WHERE YOU'RE REPRESENTING AN
INDIVIDUAL IN A PERSONAL INJURY
MATTER.

>> BUT THE ONLY AMOUNT IN
DISPUTE WAS \$50,000.

>> SO YOU'RE GOING BACK TO THE
COVERAGE AMOUNT THAT'S NOT AN
ISSUE IN THE CASE.

>> SEE, WHAT I'M TRYING TO --
AND, AGAIN, I APPRECIATE THAT --
COURTS ARE STRUGGLING AND WE
WANT TO GIVE THE GUIDANCE THAT
IS NECESSARY.

>> YES.

>> NOW, LET'S ASSUME -- AND THIS
IS WHAT I'M -- FIRST OF ALL,
ASSUME HE ALSO HAD SUED THE
TORTFEASOR.

>> YES.

>> AND WOULD YOU AGREE IN THAT
SITUATION YOU'RE TENDERING THE
\$50,000 THAT TWO AND A HALF
YEARS LATER THAN HE WANTED IT --
AND, AGAIN, MAYBE IT'S THAT YOU
WERE TOTALLY JUSTIFIED -- WOULD
GO TO VERDICT?

>> IT WOULD.

>> OKAY.

AND SAFECO COULD HAVE DEFENDED

IT AS VIGOROUSLY BECAUSE THEY'D KNOW THAT THEY MIGHT BE ON THE HOOK FOR ANYTHING OVER \$50,000. OKAY.

AT THE POINT WHEN YOU, QUOTE, CONFESS JUDGMENT OR OFFERED TO PAY THE POLICY LIMITS, YOU KNEW THAT THEY WERE -- THAT THEY HAD FILED THEIR 624.155 NOTICE.

>> RIGHT.

>> AND THEY WERE INTENDING TO GET EXCESS DAMAGES SO THEY COULD PURSUE A BAD FAITH CASE, CORRECT?

>> YES.

>> THERE WAS NO SURPRISE ABOUT THAT.

NOW, SAFECO COULD HAVE SUGGESTED TO THE PLAINTIFF OR TO THE TRIAL COURT, WELL, WE PAID THE \$50,000, BUT WE THINK THEY SHOULD NOW AMEND THEIR COMPLAINT TO ADD A COUNT FOR BAD FAITH.

>> THEY COULD HAVE SAID THAT.

>> OR YOU COULD HAVE SAID THAT.

>> YES.

>> NOW, AT THAT POINT YOU WOULD -- YOU WOULD AGREE THAT THE BAD FAITH CASE SHOULD NOT BE AS FAR AS WHETHER YOU ACTED IN BAD FAITH, THE FIRST QUESTION IS WHAT WAS THE EXTENT OF THE DAMAGES?

BECAUSE THAT'S GOT TO BE FIXED EVEN UNDER THE JURY INSTRUCTIONS BEFORE YOU FIND OUT BAD FAITH. SO YOU WOULD HAVE THEN A TRIFURCATED.

ONE IS WHEN YOU DECIDE TO OFFER THE POLICY LIMITS.

>> THAT'S NO TRIAL HERE.

>> HERE IT'S NOT.

BUT THAT'S FIXED, RIGHT?

THERE'S NEVER GOING TO BE A QUESTION IN THE BAD FAITH CASE --

>> RIGHT.

>> -- WHEN YOU OFFER THE POLICY LIMITS.

>> THEY'RE SUING THE TORTFEASOR

AND THE UM CARRIER.

>> NOW YOU SAID THEY AMENDED THE COMPLAINT TO ADD BAD FAITH, BUT NOW WE'RE GOING TO JUST TRY DAMAGES FIRST.

>> WE'RE STILL IN THIS -- IN YOUR SCENARIO --

>> THEY AMENDED THE COMPLAINT AND NOW THERE IS A BAD FAITH ACTION.

THE JURY, THOUGH, DOESN'T KNOW WHEN THEY'RE DETERMINING DAMAGES THAT YOU ACTED IN BAD FAITH BECAUSE, FRANKLY -- AND THIS IS WHY I'M HAVING A LITTLE TROUBLE UNDERSTANDING THE INSURANCE COMPANY'S ISSUE -- YOU KNOW, THAT MIGHT INFLATE THE DAMAGES IF THEY KNOW THAT -- ALL THE THINGS THAT YOU DID.

BUT THEY CAN'T REALLY KNOW THAT, ASSUMING THERE'S ANYTHING BAD IN THE FILES, WHICH SOMETIMES THERE ARE --

>> YES.

>> -- BEFORE YOU GET -- TO GET THE EXTENT OF THE DAMAGES. BECAUSE RUIZ SAYS IN THE DETERMINATION OF THE DAMAGES, YOU'RE NOT ENTITLED TO SEE THE CLAIMS FILE.

JUST LIKE IN A THIRD-PARTY, WHEN THE ACTION AGAINST A TORTFEASOR OCCURS, YOU DON'T GET THE CLAIMS FILE DURING THE INITIAL CASE, RIGHT?

SO I DON'T SEE THE FUNCTIONAL DIFFERENCE IF THEY HAD AMENDED THEIR COMPLAINT TO ADD THIS COUNT AND THEN BIFURCATED DAMAGES FROM THE LITIGATION OF THE BAD FAITH CASE.

>> JUSTICE, LET ME ANSWER IT THIS WAY.

THAT SOMETIMES WILL OR WILL NOT BE A PROBLEM DEPENDING ON WHETHER THE UM INSURER WANTS TO REMOVE AND LITIGATE THE BAD FAITH CASE IN A FEDERAL FOUR. BECAUSE THE PROCEDURE YOU'RE

NOTING WOULD DESTROY THE RIGHT TO REMOVE.

THAT'S NOT AN ISSUE HERE.

THAT'S ANOTHER CHAPTER IN THE BOOK YOU NEED TO WRITE.

>> I GUESS THIS MIGHT BE MUST BE FROM THE LAST 21 YEARS, WHY ALL THESE CASES ARE GETTING REMOVED TO FEDERAL COURT, WHERE THESE FEDERAL JUDGES ARE TRYING TO FIGURE OUT WHAT FLORIDA LAW IS ON THE SUBJECT OF BAD FAITH.

>> YES.

LIKE I SAY, JUDGE, IT IS A BOOK THAT NEEDS TO BE WRITTEN.

FRIDMAN DOESN'T ANSWER THIS QUESTION.

IT DOESN'T RAISE THIS QUESTION. I UNDERSTAND IT'S A QUESTION FOR THE COURT WHICH NEEDS TO TAKE THE BIGGER VIEW.

IN THIS PARTICULAR CASE THE FIFTH DCA'S DECISION WAS NARROW. IT WAS BASED ON MOOTNESS AND IT PRESERVED MR. FRIDMAN'S RIGHT TO BRING HIS BAD FAITH ACTION IN A SEPARATE ACTION.

>> CAN I JUST ASK, IF YOU WANTED TO REMOVE, WHAT WOULD HAVE PREVENTED YOU -- THERE'S ONLY FRIDMAN AND SAFECO.

IF SAFECO HAD WANTED TO REMOVE IT, IT COULD HAVE REMOVED IT --

>> WELL, THE CONTROVERSY WAS \$50,000 WHICH DIDN'T MEET THE THRESHOLD FOR REMOVAL.

>> THEY JUST SAID IN EXCESS OF -- WHAT DID THEY SAY?

>> THE AMOUNT IN CONTROVERSY WAS \$50,000, YOUR HONOR.

THAT'S THE UM LIMIT.

THAT'S WHAT WAS IN CONTROVERSY.

>> WHEN YOU SAID THEY TRIED TO RECOVER BAD FAITH DAMAGES --

>> NOT RECOVER, BUT ESTABLISH.

>> OR THEY TRIED TO ESTABLISH.

>> YES.

>> ARE YOU SAYING BY THAT THAT THEY MADE BAD FAITH ARGUMENTS?

>> WELL, YES, THEY DID,

ACTUALLY.

>> SEE, THAT SEEMS TO ME THAT YOU DO HAVE RELIEF ON APPEAL IF THEY MADE IMPROPER ARGUMENTS FOR ELEMENTS OF DAMAGES THAT WERE NOT RECOVERABLE IN THAT UNDERLYING CASE.

>> WELL, THAT IS OUR FOURTH ISSUE.

>> I UNDERSTAND.

AND YOU'VE HEARD THIS MORNING US ALONG THE LINES DISCUSSING THAT THE INSURANCE CARRIER SHOULD HAVE THE RIGHT TO APPEAL.

THEY DO HAVE THE RIGHT.

THE QUESTION WOULD BE WHAT CAN BE REVIEWED.

AND IT SEEMS TO ME THAT THE INSURANCE INDUSTRY IS PROTECTED AGAINST IMPROPER ARGUMENTS.

>> MAY I SUGGEST SOMETHING TO THE COURT?

BECAUSE I THINK YOU ARE LOOKING AT A LOT OF QUESTIONS THAT ARISE IN A BAD FAITH CASE WHEN THE UM INSURER SAYS I DON'T WANT -- JUDGE, I DON'T WANT YOU TO USE THE VERDICT FROM THE UM CASE.

>> RIGHT.

>> AND THE POLICYHOLDER SAYS, OF COURSE IT WAS A PERFECTLY GOOD VERDICT.

THEY HAD THE RIGHT OF APPEAL.

THAT'S NOT THIS CASE.

THIS IS AN UM CASE WHERE WE SHOULD NEVER HAVE GONE TO A VERDICT IN THE FIRST PLACE BECAUSE THE CASE WAS MOOT.

AND THAT RESTRICTION --

>> YOU'RE GOING BACK TO THAT SAME ARGUMENT.

YOU'RE NOT HELPING US.

>> I'M NOT HELPING YOU WITH THE QUESTION THAT'S PRESENTED IN CASES LIKE PATTON OR HARRIS VERSUS GEICO, WHICH WILL BE ARGUED MONDAY, WHICH IS VERY MUCH LIKE THIS CASE.

IT'S NOT ANY OF THOSE CASES.

THAT'S WHY -- THAT'S THE GENIUS

OF THE FRIDMAN DECISION, IS IT WALKS THE LINE BY SAYING WE'RE GOING TO STICK THE ISSUES TO THE PLEADINGS THAT ARE MADE -- AND THIS IS WHAT JUDGE AVANDER'S POINT WAS.

YOU ASKED FOR UM.

YOU GOT YOUR UM.

IT'S PAID.

IT'S OVER.

YOU CAN GO ACCORDING TO BROOKINS AND VEST.

GO PROVE YOUR BAD FAITH DAMAGES IN A BAD FAITH CASE.

AND THAT'S WHAT MY CLIENT WANTS.

WE WANT TO FIGHT --

>> YOU SAY BAD FAITH DAMAGES.

>> YES.

>> THEY'RE NOT ENTITLED TO ASK IN THIS FIRST PART FOR ANYTHING OTHER THAN THE PERSONAL INJURY DAMAGES.

HE DIDN'T ASK FOR OTHER BAD FAITH DAMAGES SUCH AS -- I'M NOT SURE WHAT THE OTHERS WOULD BE.

>> RIGHT.

>> IT IS A TRADITIONAL THIS IS HOW MUCH HE WAS INJURED.

>> HOW WE'VE ALWAYS DONE IT.

I KNOW.

BUT HE CAN ASK FOR THOSE DAMAGES ALONG WITH ALL THE OTHERS IN THE 621.145 ACTION WHERE WE HAVE THE ABILITY TO HAVE A BAD FAITH COMPLAINT AND LITIGATE THE ISSUES THAT ARE PUT BEFORE US.

>> AGAIN, I KEEP ON GOING BACK TO UNTIL THE PERSON -- THE DAMAGES ARE DETERMINED, ARE YOU SAYING THAT THEY WOULD HAVE A RIGHT TO GET YOUR ENTIRE FILE EVEN THOUGH THEY HAVEN'T HAD A DETERMINATION THAT HIS DAMAGES ARE OVER --

>> RUIZ CONTROLS THAT.

>> I THOUGHT RUIZ SAYS ONE WOULD BE ABATED UNTIL THE DETERMINATION WAS HOW MUCH DAMAGE THERE WAS.

>> AND FEDERAL AND STATE COURTS

HAVE THE ABILITY TO BIFURCATE
THE PROCEEDINGS.
AND THEY CAN DO THAT IN THE BAD
FAITH ACTION.

>> TIME'S UP.

THANK YOU.

COUNSEL, TWO MINUTES.

>> TWO MINUTES.

>> AND I FEEL LIKE I'M MISSING
SOMETHING ABOUT THIS ISSUE OF
ABOUT REMOVING IT TO FEDERAL
COURT, BECAUSE THAT MUST BE --
THERE'S GOT TO BE SOMETHING MORE
HERE, WHY THE INSURANCE COMPANY
WOULD NOT SEE THIS AS A CLEANER
WAY TO GET THE DAMAGES
DETERMINED BEFORE THE BAD FAITH.
SO COULD YOU TELL ME FROM A
POLICY ISSUE OR A PRACTICAL
ISSUE WHAT I AM MISSING?

>> SUMMARY JUDGMENT STANDARD IN
FEDERAL COURT.

CARRIERS -- THE SUMMARY JUDGMENT
STANDARD IN FEDERAL COURT.

CARRIERS REMOVE THESE BAD FAITH
CASES FOR THE PURPOSE OF GETTING
SUMMARY JUDGMENT.

THAT'S NOT THE ISSUE HERE.

>> COULD THEY NOT HAVE REMOVED
THIS?

WHAT IS HE SAYING ABOUT YOU
DIDN'T PLEAD ENOUGH DAMAGES?
DID YOUR COMPLAINT ONLY PLEAD
FOR THE \$50,000 IN DAMAGES?

>> NO, YOUR HONOR.

THE COMPLAINT SAID DAMAGES IN
EXCESS OF \$15,000 THE
JURISDICTIONAL LIMIT FOR CIRCUIT
COURT.

THAT GETS BACK TO MY ARGUMENT I
WAS DISCUSSING WITH JUSTICE
POLSTON ABOUT THE CONTINUUM OF
DAMAGES.

I'M NOT SURE WHAT THE REFERENCE
IS TO BAD FAITH DAMAGES.

MR. FRIDMAN WAS ASKING FOR HIS
DAMAGES TO BE DETERMINED,
WHETHER THEY BE LESS THAN 50.

>> WOULDN'T IT BE THE DAMAGES
UNDER 624.155(4)?

THAT'S WHERE IT TALKS ABOUT DAMAGES UNDER BAD FAITH.

>> THE DAMAGES ARE BASED UPON 627.727(10), THE TOTAL AMOUNT THAT'S EVALUATED IN THIS UNDERLYING CASE.

YOU CAN HAVE ADDITIONAL DAMAGES. AND I THINK THIS IS WHAT JUSTICE PARIENTE SAID.

>> RIGHT.

YOU CAN HAVE PUNITIVE DAMAGES IF THE CIRCUMSTANCES JUSTIFY.

>> YES.

BUT YOU CAN HAVE, AS WE'VE SEEN, WHEN AN INSURED HAS A LOSS OF CREDIT, BECAUSE HE HAS A JUDGMENT THAT'S UNSATISFIED. THOSE ARE ADDITIONAL DAMAGES THAT THAT INSURED MAY BE ABLE TO BRING IN THE BAD FAITH CASE.

>> BUT YOU ACTUALLY -- YOUR COMPLAINT DOES SAY IT'S UNDER SUBSECTION 10 WHICH DOES NOT LIMIT TO THE POLICY LIMITS.

>> THE COMPLAINT ACTUALLY REFERENCES FLORIDA STATUTE 627.727 IN ITS ENTIRETY.

>> WHICH INCLUDES DOES NOT LIMIT IT TO THE POLICY LIMITS.

>> CORRECT.

>> DID THEY EVER REALLY ARGUE THAT WE ONLY THOUGHT WE WERE HERE TO GET -- TO SEE WHETHER WE'D PAY THE \$50,000 OR NOT?

>> THAT'S -- YOU KNOW, THE \$50,000 IS NEVER DISCLOSED TO THE JURY IN THIS TRIAL.

THAT'S WHAT HAPPENS IN THE BAD FAITH CASE.

THAT'S THE DIFFERENCE IN A BAD FAITH CASE.

>> WHAT I'M SAYING IS THEIR NOTICE OF WHAT WAS GOING ON WHEN THEY WENT INTO THE TRIAL.

THERE'S NO QUESTION THAT THEY WERE THERE TO DEFEND AGAINST WHAT THE TOTAL AMOUNT OF DAMAGES WOULD BE AS FIXED.

>> CORRECT, YOUR HONOR.

THERE WAS NO ISSUE OF PREJUDICE

OR SURPRISE.

>> SO THE QUESTION HAS COME UP ABOUT REMOVAL.

I'VE BEEN AWAY FROM DOING THIS DAY IN AND DAY OUT IN THE TRENCHES, BUT IT SEEMS TO ME IF THE FACE OF THE COMPLAINT DOES NOT ESTABLISH FEDERAL JURISDICTION, YOU SEND OUT YOUR FEDERAL JURISDICTION INTERROGATORIES AND ASK THOSE DAMAGE QUESTIONS AND THEN BASED UPON THAT YOU CAN REMOVE IT.

>> OR YOU CAN --

>> AND YOUR CASE COULD HAVE BEEN REMOVED IF YOU HAD THOSE INTERROGATORIES.

>> OR YOU SAY ISN'T THIS YOUR DEMAND LETTER THAT YOU WANTED \$75,000 AND OFF YOU GO TO FEDERAL COURT.

>> RIGHT.

LET'S FACE IT.

IT'S A PRACTICAL PROBLEM. IT MAY BE THE SUMMARY JUDGMENT STANDARD, BUT THE DEFENDANTS BELIEVE THAT THEY GET GREATER PROTECTION OR DON'T HAVE VERDICTS AS HIGH IN THE FEDERAL SYSTEM AS THEY HAVE IN THE STATE SYSTEM.

THAT'S THE PRACTICAL KIND OF REASONING?

>> THAT'S ANOTHER POTENTIAL ASPECT, YOUR HONOR.

>> THIS HAS BEEN GOING ON FOR 100 YEARS, THIS KIND OF ARGUMENT BACK AND FORTH, THAT THE FEDERAL COURTS ARE MORE DEFENDANT-FRIENDLY.

WE SEE IT.

>> AND UM COVERAGE IS \$50,000 AT ISSUE, RIGHT?

>> THAT'S THE POLICY LIMITS ON THE UM COVERAGE IN THIS CASE.

>> COVERAGE IS NOT AN ISSUE HERE.

>> THE AMOUNT OF THE POLICY WAS \$50,000.

>> THEY DID NOT DENY IT WAS

THAT.

>> THE MOST THAT COULD EVER BE PAID ON THE UM COVERAGE WAS \$50,000.

>> PURSUANT TO THE CONTRACT, WOULD BE THE \$50,000.

>> SO IF \$75,000 WORTH OF DIVERSITY JURISDICTION, UNDER FEDERAL COURT STANDARDS, SO YOU CAN'T REMOVE A CASE TO FEDERAL COURT THAT'S GOING TO BE \$75,000 OR MORE ON AN UM POLICY.

>> IF THERE IS SUCH A LETTER THAT I TALKED ABOUT WITH JUSTICE LEWIS THAT SAID WE'RE GOING TO BE LOOKING FOR MORE THAN \$50,000, ABOVE \$75,000, I BELIEVE IT COULD HAVE BEEN REMOVED.

>> OKAY.

WELL, THANK YOU FOR YOUR ARGUMENTS.

WE'RE IN RECESS.

TAKE TEN MINUTES.

>> ALL RISE.