>>> THE SECOND CASE ON THE DOCKET IS DONALD KIPNIS V. BAYERISCHE, ET AL.
TAKE YOUR TIME, WHENEVER YOU'RE READY.
YOU MAY PROCEED WHEN YOU'RE READY, SIR.
>> GOOD MORNING, AND MAY IT PLEASE THE COURT, MY NAME IS MICHAEL DICKLER, AND ALONG WITH MY CO-COUNSEL, DENNIS CANAAN, I AM HERE REPRESENTING TWO TRUSTEES IN BANKRUPTCY WHO WERE APPOINTED BECAUSE THE TAXPAYERS SUFFERED FROM THE ADMITTED FRAUDULENT ACTS OF DEFENDANTS IN PUSHING A FRAUDULENT CONSPIRACY TO DEFRAUD THE UNITED STATES.
WE'RE HERE TODAY ON AN ISSUE CERTIFIED BY THE 11TH CIRCUIT.
IT'S AN ISSUE OF ACCRUAL.
AND FOR THE LAST 25 YEARS, THIS COURT HAS BEEN CONSISTENT IN HAVING A BRIGHT LINE RULE THAT WHEN, WHETHER THE EXISTENCE OF A CLAIM WILL OCCUR, WHETHER THERE IS A CLAIM DEPENDS ON A PROCEEDING, AN UNDERLYING PROCEEDING HERE, A TAX COURT PROCEEDING, THE CLAIM DOES NOT ACCRUE UNTIL THAT IS ESTABLISHED AND FINAL LIABILITY.
>> IT DOESN'T SEEM LIKE OUR JURISPRUDENCE IS ALL THAT, I MEAN, ALL THAT CONSISTENT IN THIS REGARD.
IT SEEMS THAT THERE IS A TENSION BETWEEN EARLIER CASES THAT TALK ABOUT THE FIRST INJURY RULE, WHICH I THINK THE FEDERAL DISTRICT COURT JUDGE RELIED ON, AND THEN THOSE CASES THAT RECOGNIZE WE REALLY-- IT'S ALMOST LIKE WE WANT TO MAKE SURE THE DAMAGES ARE MITIGATED.
SO UNTIL SOMETHING IS FINAL, THE DAMAGES AREN'T SET.
SO HOW DOES, IN THIS CASE, THE FEDERAL-- THE CIRCUIT COURT GAVE EITHER THE NOTICE OF

DEFICIENCY OR THE FINAL JUDGMENT
OF THE TAX COURT AS THE TWO
EVENTS, BUT YOUR OPPONENTS SAY,
NO, THAT IT REALLY WAS MUCH
EARLIER.
YOU KNEW ABOUT THIS OR SHOULD
HAVE KNOWN ABOUT THIS FRAUD
YEARS BEFORE.
AND THEY'RE PUSHING IT BACK TO,
YOU KNOW, SEVERAL YEARS EARLIER.
SO HOW DO WE RESOLVE THAT
TENSION?
BECAUSE THAT'S WHAT THE CIRCUIT
COURT IS ASKING US, IS WHAT IS
THE RULE OF LAW.
IS IT THE FIRST INJURY RULE OR
THE, THAT THERE IS REDRESSABLE
HARM NOT UNTIL THE TAX
DEFICIENCY ISSUE IS RESOLVED?
>> THIS COURT IN THE PRIOR
OPINIONS IN SILVESTRONI AND THE
2009 OPINION IN LARSON, I THINK,
DID PUT THOSE STRANDS OF THE LAW
TOGETHER TO FIND THAT IN THE
CASE WHERE IT IS POSSIBLE THAT A
LITIGANT HAVE NO INJURY AFTER
THE RESULT OF A, OF ANOTHER
PROCEEDING, THEN THERE'S NO
ACCRUAL FOR TWO REASONS.
FIRST, THE COURT DIDN'T WANT TO
ENCOURAGE LITIGANTS TO HAVE TO
HAVE TWO DIFFERENT OR
OPPOSITIONAL ARGUMENTS BEFORE
DIFFERENT COURTS AND, SECOND,
BECAUSE IT DIDN'T WANT TO
ENCOURAGE ANYONE TO HAVE TO COME
TO COURT WHEN IT WAS POSSIBLE
THAT THE NEED FOR COURT WOULD BE
OBVIATED.
SO HERE--
>> THAT'S REALLY, I MEAN AGAIN,
AND I'VE LOOKED AT LARSON.
ISN'T THAT, THAT SOUNDS LIKE
THAT'S A POLICY ISSUE THAT
REALLY IS, IN SOME WAYS, BETTER
LEFT TO THE LEGISLATURE.
THE ISSUE IS ACCRUAL OF THE
CAUSE OF ACTION.
WHEN DOES THE REDRESSABLE HARM
OCCUR?

NOW, IF YOU'RE CONTENDING THAT THE REDRESSABLE HARM WAS NOT UNTIL YOUR CLIENTS HAD TO PAY THE TAX DEFICIENCY AS OPPOSED TO EARLIER COSTS, THEN THAT MAKES THIS FAIRLY, YOU KNOW, THEN THE ISSUE OF THE FINAL JUDGMENT IS CONSISTENT.
BUT THERE SEEMS TO BE, AGAIN, LOOKING AT THE FEDERAL DISTRICT COURT JUDGE'S ORDER, THESE OTHER DAMAGES THAT YOU'RE SEEKING THAT OCCURRED MUCH EARLIER.
SO, AGAIN, I ASK YOU HOW DOES THE FIRST INJURY RULE-- IS THAT OUT THE DOOR BASED ON OUR SUBSEQUENT CASE LAW?
HOW WOULD YOU ARTICULATE THE RULE?
AND LARSON REALLY, YOU KNOW, THERE WAS A SENSE THERE LARSON SAYS THERE'S ALMOST, LIKE, TWO CAUSES OF ACTION, YOU KNOW?
ONE FOR THE EARLIER JUDGMENT AND THEN ONE FOR THE SANCTIONS.
>> RIGHT.
>> SOME DISAGREED, BUT THAT'S WHAT LARSON SAYS.
>> RIGHT.
AND UNDER THAT RULE ARTICULATED, AND LARSON'S PERFECTLY CLEAR THAT THE INJURIES THAT OCCURRED AS A FINAL JUDGMENT COULD NOT HAVE ACCRUED UNTIL THAT DECISION WAS FINAL.
BUT PERTAINING TO YOUR HONOR'S QUESTION--
>> THAT'S JUST THE DAMAGES. THAT'S NOT THE-- THE DAMAGES ARE GREATER BECAUSE THERE'S A DEFICIENCY.
IT WOULD BE LIKE IN A PERSONAL INJURY CASE YOU'VE GOT, YOU KNOW, FOUR YEARS.
YOU MIGHT HAVE IN THE FUTURE SOME REALLY SIGNIFICANT DAMAGES FROM BACK SURGERY, BUT YOU CAN'T WAIT TIL THE BACK SURGERY IS COMPLETED TO BRING YOUR CAUSE OF ACTION.

>> RIGHT.
BUT HERE UNTIL THE TAX COURT RULED AGAINST THE TAXPAYERS, THEY HAD SUFFERED NO INJURY.
I MEAN, I KNOW WE PUSHED THAT POINT IN THE BRIEF, BUT THE KEY TO THAT IS WHAT THEY WERE PROMISED IN THE DEAL IS A LOAN WHICH HVB COULD TERMINATE AT ANY TIME AND DID, IN FACT, TERMINATE A YEAR INTO THE LOAN WHICH WAS THEIR CONTRACTUAL RIGHTS THAT THEY HAD.
AND WE DO NOT CONTEND ANY NEGATIVE CONSEQUENCE.
THEY'RE PUSHING IN THEIR BRIEFS THAT WE WERE HARMED, THAT THE TAXPAYERS WERE HARMED FROM THE TERMINATION OF THE LOAN.
>> WELL, YOUR COMPLAINT SEEMS TO SUGGEST THAT THAT WAS A WRONGFUL ACT, DOESN'T IT?
>> IT'S A WRONGFUL ACT, BUT THERE'S NO INJURY FROM IT UNTIL THE TAX COURT OPINION IS FINAL.
THERE'S NO, THERE'S NO SEPARATE OR INDEPENDENT INJURY THAT'S AS A RESULT OF THE TERMINATION OF THE LOAN.
AS THE TAX COURT HELD, THERE WAS NO, THERE WAS NO BONDING CAPACITY ISSUE, THERE'S NO PROJECT THAT THE CLIENTS LOST OUT ON ON ACCOUNT OF THE TERMINATION OF THE LOAN.
WE HAVEN'T ALLEGED THAT THERE WAS ANY INJURY AS A RESULT, AND THERE'S A GOOD REASON HERE THAT WE COULD NEVER HAVE ALLEGED DAMAGES RIGHT AFTER THE LOAN WAS TERMINATED.
THAT'S THE 9/11 ATTACK, AND THERE'S NO CONSTRUCTION THAT GOES ON.
SO THERE'S NO CLAIM THAT THE CLIENTS COULD EVER HAVE PUT FORTH ABOUT THE TERMINATION OF THE LOAN.
BUT SEPARATE FROM THAT, WE'RE THE MASTERS OF OUR COMPLAINT.

WE HAVEN'T ALLEGED ANY INJURY AS
A RESULT OF THAT TERMINATION,
AND IF WE HAD, THE 11TH CIRCUIT
OPINION IN CURTIS DEMONSTRATES
THAT THERE'S NO CLAIM THAT WE
COULD HAVE BROUGHT, BECAUSE THEY
PUT IN THE AGREEMENT THAT THEY
HAD THE RIGHT TO TERMINATE IT.
AND THEY DIDN'T JUST HAVE RIGHT
TO TERMINATE IT, THEY ALSO HAD A
RIGHT TO REDETERMINE THE APR,
THE PERCENTAGE INTEREST RATE,
EVERY YEAR.
SO WE KNEW AT THE OUTSET, THE
TAXPAYERS UNDERSTOOD AT THE
OUTSET THAT THE DEAL COULD
CHANGE AFTER A YEAR, COULD
TERMINATE AFTER A YEAR AND COULD
HAVE A DIFFERENT EFFECT.
THAT'S NOT THE INJURY.
THEY WEREN'T HURT IN THE
PARLANCE OF THIS COURT IN
LARSON, PETE MARWICK AND
BLUMBERG UNTIL THE TAX RULE, AND
THEY WERE FINALLY--
>> TO SAY IT ANOTHER WAY, HAD
YOU WON THE TAX COURT
LITIGATION, THERE WOULD BE NO
INJURY.
>> THAT'S RIGHT.
THAT'S EXACTLY RIGHT.
WE WOULD NOT BE HERE, WE WOULD
NOT HAVE FILED THE LAWSUIT
AGAINST HVB BECAUSE THEY WOULD
HAVE GOTTEN EXACTLY WHAT THEY
BARGAINED FOR; A LOAN THAT COULD
CHANGE AFTER A YEAR AND TAX
CREDIT.
THAT WAS MORE LIKELY THAN NOT TO
PREVAIL.
NO ONE EVER PROMISED THEM THAT
THEY WOULDN'T HAVE TO FACE AN
IRS NOTICE OF DEFICIENCY.
AND IN PETE MARWICK, THIS COURT
SETS A CLEAR RULE OF LAW THAT
THE NOTICE OF DEFICIENCY IS NOT
ITSELF THE ACCRUAL OF THE CLAIM.
>> IN PETE MARWICK, IN ALL
FAIRNESS TO THE WAY THE COURT
REASONED THERE, I THINK IT'S

IMPORTANT TO UNDERSTAND THAT
THAT WHAT THEY SAID WHEN THEY
ARTICULATED THE HOLDING IS THIS:
"WE HOLD THAT UNDER THE
CIRCUMSTANCES OF THIS CASE WHERE
THE ACCOUNTANT DID NOT
ACKNOWLEDGE ERROR, LIMITATIONS
PERIOD FOR ACCOUNTING
MALPRACTICE COMMENCE WHEN THE
TAX COURT ENTERED ITS JUDGMENT."
SO THEY SEEM TO BE FOCUSING ON
THE POSSIBILITY THAT IF THE
ACCOUNTANT HAD ACKNOWLEDGED
ERROR, THEN YOU'D BE IN A
DIFFERENT SITUATION.
AND, OF COURSE, THAT BRINGS ME
TO THE RATHER DRAMATIC
ACKNOWLEDGMENT OF ERROR BY YOUR
CLIENT IN THIS CASE IN THE
DEFERRED PROSECUTION AGREEMENT
WHERE YOU ACTUALLY, YOUR CLIENT
ADMITTED TO COMMITTING FRAUD IN
ENTERING IN THIS TRANSACTION AND
NECESSARILY OBTAINING THE FEES
FRAUDULENTLY IN THIS
TRANSACTION.
SO WHY ISN'T THAT SPECIFICALLY
DIFFERENT FROM WHAT THE COURT
WAS ADDRESSING IN PETE MARWICK?
>> FIRST, TO BE CLEAR, I
REPRESENT THE TAXPAYERS HERE.
HVB DID ADMIT TO FRAUD.
THEY ADMITTED TO A FRAUD ON THE
U.S. GOVERNMENT.
AS WE ALLEGE IN THE COMPLAINT IN
PARAGRAPH 16, AND OTHERWISE THEY
NEVER CAME TO US-- TO THE
TAXPAYERS-- TO ACKNOWLEDGE THAT
THERE WAS ANYTHING FRAUDULENT
ABOUT IT.
BUT THIS COURT HAS NOT, HOWEVER,
HELD THAT KNOWLEDGE OF
MALPRACTICE OF A WRONG OF
NEGLIGENCE TRIGGERED THE STATUTE
OF LIMITATIONS IN THESE
CONTEXTS.
IN FREMONT THERE WAS UNDERLYING
KNOWLEDGE OF THE FRAUD.
IT DID NOT TRIGGER, IT DID
NOT-- I'M SORRY, FREMONT WAS A

MALPRACTICE CASE.
THIS COURT HELD THAT THERE WAS
NO TRIGGER OF THE ACCRUAL UNTIL
THE UNDERLYING ISSUE.
THAT'S BECAUSE THIS ISN'T A
DISCOVERY ISSUE.
THE CLIENTS COULD KNOW THAT
THERE WAS FRAUD AND EVEN FRAUD
AGAINST THEM.
BUT UNTIL THEY ACTUALLY SUFFERED
AN INJURY, THEIR CLAIM WASN'T
RIPE.
THEY COULDN'T BRING IT IN ANY
COURT, AND THAT'S WHAT THE
CO-CONSPIRATORS OF HVB, KPMG,
ARGUED AND PREVAILED ON IN THE
FEDERAL DISTRICT COURT IN
LOFTON.
THEIR ARGUMENT IS UNTIL THERE'S
A FINAL RESOLUTION OF THE TAX
COURT CASE, THERE'S NO STANDING
TO BE SUED.
AND OUR CLIENT SHOULDN'T BE HELD
TO THE STANDARD OF KNOWING THAT
MIGHT OR MIGHT NOT APPLY HERE.
THE WHOLE PURPOSE OF THE BRIGHT
LINE THAT THIS COURT ARTICULATED
IN SILVESTRONI AND AGAIN
DISCUSSED IN FREMONT AND LARSON
IS THAT WE SHOULDN'T HAVE TO
INQUIRE INTO THE FACTUAL ISSUE
OF WHEN THERE WAS SUFFICIENT
FACT SO THAT A PARTY UNDERSTOOD
OR WAS LIKELY TO KNOW THAT IT
WOULD FACE A LIABILITY--
>> BUT DON'T YOU SEE LARSON AS
ALMOST HAVING A SPLITTING OF THE
CAUSE OF ACTION WHICH WAS, YOU
KNOW, WHAT THE CONCERN JUSTICE
LEWIS' WAS IN THAT CASE, WHICH
WAS THAT YOU COULD HAVE TWO
REDRESSABLE HARMS?
BUT HERE, AND IT SEEMS LIKE THE
CIRCUIT COURT OF APPEALS, 11TH
CIRCUIT, LIMITED-- WHICH IS
GOOD FOR YOUR CLIENT-- BETWEEN
NOTICE OF DEFICIENCY OR THE
FINAL JUDGMENT.
WELL, IF YOU HAVE TO PICK
BETWEEN THOSE TWO, IT'S PRETTY

CLEAR IT'S GOT, IN MY VIEW, IT'S GOT TO BE THE FINAL JUDGMENT BECAUSE IT'S TO EVERYONE'S ADVANTAGE TO HAVE-- MAYBE THERE WOULD BE NO, AS YOU SAYING, YOU'RE SAYING THERE'S NO DAMAGES.
WHY WOULD SOMEONE WANT TO GET SUED AND PAY FOR-- THEY WOULD SAY IT'S SPECULATIVE.
NOW, SO THE KEY THOUGH IS YOU'RE SAYING THAT THERE'S NO-- THAT YOUR REDRESSABLE HARM DID NOT OCCUR BEFORE THERE WAS, YOU HAD TO PAY A TAX DEFICIENCY.
>> THAT'S EXACTLY RIGHT.
>> BUT WHAT THE FEDERAL DISTRICT COURT THEN WENT, GOT IT WRONG BECAUSE WHY?
>> THE FEDERAL DISTRICT COURT ANALYZED THE ISSUE AS ONE OF DISCOVERY OF THE FRAUD IN THE FIRST INSTANCE AND ALSO ADDRESSED IT AS WHEN YOU PAY YOUR FEES, YOU ARE, THEREFORE, INJURED BECAUSE OF THE PAYMENT OF FEES.
BUT WHAT THE FEDERAL DISTRICT COURT DID NOT ACCOUNT FOR IS THAT HAD CLIENTS PREVAILED IN THE TAX COURT, THEY WOULD HAVE GOTTEN EXACTLY WHAT THEY BARGAINED FOR.
THEY WOULD HAVE PAID THEIR FEES.
THEY KNEW WHAT THOSE FEES WERE.
>> SO DOES THE RUNNING OF THE STATUTE OF LIMITATIONS HAVE TO DO WITH ACTUALLY ANALYZING WHAT THE DAMAGES ARE?
BECAUSE THIS, AGAIN AS YOU CAN IMAGINE, IS VERY DIFFERENT IN A COMMERCIAL SITUATION THAN IT WOULD BE IN A PERSONAL INJURY SITUATION WHERE THE DAMAGES ARE FLUID, WHERE YOU MAY NOT KNOW 'TIL THE END OF YOUR LIFE WHAT THE DAMAGES ARE, BUT THERE'S FUTURE DAMAGES.
SO HOW DOES IN A CASE LIKE THIS, WE'VE GOT TO BE VERY CLEAR THAT,

NO, NO DAMAGES ARE BEING SOUGHT
EXCEPT FOR THE ONLY COMPENSABLE
DAMAGES ARE THE, IS THE TAX
DEFICIENCY.
IF YOU MAKE IT THAT SIMPLE, THEN
YOU ARE, I THINK, IN-- AND I
THINK YOU'RE HELPED BY THE
FEDERAL APPELLATE COURT BY
GIVING YOU THOSE TWO, US THESE
TWO CHOICES.
NOT THAT WE HAVE TO LIMIT
OURSELVES TO THAT.
DO YOU SEE WHAT I'M--
>> RIGHT.
I SEE WHAT YOU'RE SAYING, YOUR
HONOR.
>> THERE ISN'T A BRIGHT LINE
RULE BECAUSE IT MIGHT DEPEND IN
EVERY CASE WHAT THE DAMAGES ARE.
>> DIFFERENT CAUSES OF ACCRUAL
OCCUR AT DIFFERENT TIMES UNDER
FLORIDA LAW, AND THAT'S A POINT
THAT THE DEFENDANTS MAKE IN
THEIR BRIEF, AND I THINK IT'S
RIGHT.
OUR POINT IS NONE OF THE DAMAGES
THAT WE SEEK, BE THEY FEES,
CLEAN-UP COSTS, THE INTEREST,
NONE OF THOSE ACCRUE AS CLAIMS
UNTIL THE FINAL TAX COURT
RESOLUTION.
BECAUSE UNTIL THAT HAPPENS, THE
PLAINTIFFS HAVEN'T BEEN INJURED.
THEY'VE GOTTEN EXACTLY WHAT THE
BARGAIN WAS.
THEY GOT THE CARDS TRANSACTION
WHICH THEY WERE ABLE TO EXECUTE,
THEY DEFENDED THEIR TREATMENT
WITH THE IRS, THEY BROUGHT THEIR
CLAIM IN THE TAX COURT.
AND UNTIL THEY'RE INJURED, THIS
IS NO PROBLEM.
AND THIS ISN'T THE CASE,
RESPECTFULLY--
>> WELL, YOU KNOW, BUT I'M JUST
HAVING A LITTLE TROUBLE
UNDERSTANDING HOW THE BANK HAS A
DEFENSIBLE CASE IN A CLAIM FOR
THE RECOVERY OF THOSE FEES THAT
WERE PAID IF-- I'M SORRY, I GOT

THE SIDES MIXED UP EARLIER.
BUT IN THE RECOVERY OF THOSE FEES, WHEN THE BANK HAS ADMITTED THAT THEY OBTAINED THE FEES BY FRAUD.
THAT'S WHAT I STRUGGLE WITH.
I MEAN, IT SEEMS LIKE TO ME WITH THIS DEFERRED PROSECUTION AGREEMENT IF THE BANK IS SUED FOR THE RECOVERY OF THOSE FEES, THEY, THE BANK, IS GOING TO LOSE.
I MEAN, THEY ARE BECAUSE THEY HAVE ADMITTED THAT THEY ENGAGED IN FRAUD TO OBTAIN THE FEES.
WHAT AM I MISSING?
>> WE KNOW THAT THEY WOULD MAKE THE SAME ARGUMENT THAT THEIR CO-CONSPIRATORS DID IN THE LOFTON CASE WHICH IS ON POINT HERE WHERE KPMG ADMITTED THAT THE TRANSACTION WAS NOT CORRECT PRIOR TO THE CASE.
IN THAT CASE, WHICH WAS PENDING BEFORE THE ISSUANCE OF THE NOTICE OF DEFICIENCY, THE OTHER OF THE SAME GROUP OF CO-CONSPIRATORS WHO PUSHED THESE FRAUDULENT TAX SHELTERS IN THE EARLY 2000s AND OTHERS WHOM HVB CONSPIRED WITH SAID THIS CLAIM IS NOT RIPE.
YOUR CLAIM AGAINST US, WHICH IS A CLAIM THAT INCLUDED FEES IN THAT CASE, THEY SAID IT WASN'T RIPE.
AND THE JUDGE AGREED THAT IT WAS NOT RIPE BECAUSE THERE HAD BEEN NO NOTICE OF EFFICIENCY, AND THERE HAD BEEN NO FINAL JUDGMENT THERE.
NOW, I KNOW HVB HAS MADE THE ARGUMENT THAT THAT CASE STANDS FOR NOTICE OF DEFICIENCY.
BUT YOU LOOK AT IT, THE JUDGE IS ANALYZING ACCRUAL UNDER TWO DIFFERENT STATES' LAWS.
AND TO TALK ABOUT FLORIDA, HE CITES BLUMBERG AND SAYS THERE'S NO ACCRUAL OF THESE CLAIMS UNTIL

THE FINAL DECISION IS MADE.
AND SO WHILE LIABILITY-- YOUR HONOR, RESPECTFULLY-- MIGHT BE SET AND MAY BE ESTABLISHED BY THE 2006 DEFERRED PROSECUTION AGREEMENT, INJURY ISN'T.
DAMAGES ARE NOT SET.
THEY WOULD HAVE SAID IT WAS TOO SOON, AND THERE'S A REAL HARM TO THE TAXPAYERS MAKING THEM BRING THAT CASE BEFORE THE RESOLUTION OF THEIR IRS ACTION BECAUSE IT HINDERS THEIR ABILITY TO DO SO.
>> I JUST WANT TO WARN YOU, YOU'RE DEEP INTO YOUR REBUTTAL.
>> I AM.
>> YOU'RE CHEWING UP YOUR REBUTTAL TIME.
>> THANK YOU FOR THE WARNING.
IF THERE ARE NO FURTHER QUESTIONS AT THIS TIME, I WILL RESERVE THE BALANCE OF MY TIME.
>> GOOD MORNING, YOUR HONORS.
MAY IT PLEASE THE COURT,
MICHAEL HANIN.
THE CLAIMS IN THIS CASE ARISE OUT OF A CONVOLUTED LOAN TRANSACTION CALLS CARTS FOR WHICH MY CLIENT, UNICREDIT, ACTED AS LENDER--
>> YOU SAY CONVOLUTED.
IT'S ADMITTED TO BE FRAUDULENT--
>> MY CLIENT ADMITTED IT WAS FRAUDULENT, IT ALSO HAD A NUMBER OF MECHANICAL ASPECTS THAT MAKE IT CONVOLUTED.
>> THAT'S ALL FINE, BUT THE QUESTION HERE IS WHAT ARE YOU SAYING THAT THE DATE THAT THE STATUTE OF LIMITATIONS SHOULD START TO RUN IN THIS CASE?
>> WELL, IN THIS CASE WHAT WE'RE SAYING IS THE INITIAL INJURY ACCRUED IN 2001 WHEN THIS PLAINTIFF REALIZED THAT THE UNCONSCIONABLE HALF MILLION DOLLARS IN FEES THAT IT PAID FOR WHAT IT SAID WAS A LONG-TERM LOAN, WHEN IT SAID IT WANTED A

LONG-TERM LOAN ENDED UP BEING
MONEY NOT WELL SPENT AT ALL
BECAUSE MY CLIENT TERMINATED
THAT LOAN AFTER ONE YEAR, THAT
WAS INJURY.
THAT WAS ABSOLUTE AND PLAIN
INJURY.
AND UNDER 60 YEARS OF FLORIDA--
>> DIDN'T YOUR CLIENTS HAVE THE
RIGHT TO DO THAT?
I THOUGHT THE AGREEMENT WAS THAT
THEY HAD THE RIGHT TO TERMINATE
IT, AND SO WHY WOULD THERE BE AN
INJURY IF THAT WAS A PART OF THE
AGREEMENT?
>> WELL, MY CLIENT HAS ARGUED IN
PAST CASES-- BY THE WAY, ALL OF
THE CASES THAT AROSE OUT OF
CARDS WHERE MY CLIENT WAS SUED
WERE BROUGHT IN 2006, 7 AND 8
NOT SURPRISINGLY AFTER MY CLIENT
ADMITTED WHAT THEY DID TO THE
DPA.
BUT THERE IS A CONTRACTUAL
PROVISION THAT ALLOWED UNICREDIT
TO TERMINATE THE LOAN EARLY.
BUT YOU NEED TO LOOK AT THE
COMPLAINT HERE ITSELF WHICH
DOESN'T SUGGEST UNICREDIT HAD
THE RIGHT TO TERMINATE THE LOAN.
IT SAYS AGAIN AND AGAIN AND
AGAIN THESE PLAINTIFFS EXPECTED
A LONG-TERM LOAN, NEEDED A
LONG-TERM LOAN WHICH THEY SAID
WAS VITAL TO THEIR BUSINESS AND
THE BONDING CAPACITY--
>> WELL, THAT'S THE AGREEMENT.
I MEAN, YOU CAN EASILY, I WOULD
THINK, LOOK AT THE AGREEMENT TO
DETERMINE WHETHER OR NOT YOUR
CLIENTS ACTUALLY HAD THE RIGHT
TO DO WHAT THEY DID.
>> THAT'S RIGHT, YOUR HONOR.
AND IF WE WERE TALKING ABOUT
THIS CASE ON THE MERITS AND THE
CLAIM WAS YOU FAILED TO,
UNICREDIT TERMINATED THE LOAN
EARLY, THAT CLAIM WOULD
PROBABLY-- SHOULD BE DISMISSED
ON THE MERITS.

BECAUSE UNICREDIT HAD THAT
RIGHT.
>> WELL, THEN EXPLAIN TO ME WHAT
WOULD HAVE BEEN THE CAUSE OF
ACTION AND THE DAMAGES IF THEY
HAD, IF YOUR OPPONENTS HAD FILED
SOME KIND OF ACTION IN 2001?
>> WELL, YOUR HONOR IS
PRESUPPOSING THAT THESE CLIENTS
HAD A CAUSE OF ACTION, HAVE A
MERITORIOUS CAUSE OF ACTION.
>> NOW, YOU ARE THE ONE THAT
SAID THAT'S WHEN THE CAUSE OF
ACTION ACCRUED, AND JUSTICE
QUINCE IS ASKING YOU WHAT WOULD
HAVE BEEN THE CAUSE OF ACTION IN
AND YOU'RE GOING, WELL, THERE
WOULD HAVE BEEN A BOGUS CAUSE OF
ACTION.
SO, I MEAN, WE WANT TO
ENCOURAGE-- I MEAN, HERE'S THE
PROBLEM.
YOU'VE GOT A SITUATION WHERE WE
WANT TO ENCOURAGE THOSE THAT ARE
INJURED TO MITIGATE THEIR
DAMAGES.
AND IT IS-- TO DISCOURAGE
SOMEBODY FROM-- ARE YOU SAYING
THEY SHOULDN'T HAVE FOUGHT, THEY
HAD NO BASIS FOR FIGHTING THE
NOTICE OF DEFICIENCY AND YOU
WOULD HAVE BEEN HAPPIER IF THEY
JUST CLAIMED, YOU KNOW, SAID
THEY AGREED TO PAY DEFICIENCY
AND THEN SUED YOU EARLIER OR
SPECULATED THAT THEY WERE GOING
TO BE SUED FOR DEFICIENCY?
>> YOUR HONOR, THEY HAD A VERY
THIN BASIS FOR DEFICIENCY.
THE IRS HAD TOLD THEM A NUMBER
OF TIMES IT WAS NOT A LEGITIMATE
TRANSACTION.
>> WHAT IS-- YOUR CLIENT
BENEFITS IF THERE ARE NO
DAMAGES.
I MEAN, IT'S SORT OF LIKE-- IT
SEEMS TO ME, AND I APPRECIATE
YOU'RE NOT YOUR CLIENT, YOU'RE
ADVOCATING FOR YOUR CLIENT THAT
IT IS THE RULE OF LAW WHICH IS

THAT THE REDRESSABLE HARM OCCURS
FOR A CAUSE OF ACTION FOR FRAUD
WHICH IS WHAT THIS CAUSE OF
ACTION WAS.
NOT BREACH OF CONTRACT, FOR
FRAUD, WHEN THERE'S REDRESSABLE
HARM.
SO YOU'RE SAYING IT OCCURRED IN
2001.
WELL, NO, BECAUSE THERE WAS NO
KNOWLEDGE OF FRAUD AT THAT TIME.
NOW-- THEN YOU SAY, WELL, NO,
IT ACCRUED WHEN OH PEOPLE SUED
IN 2006 AFTER THEY ENTERED INTO
THE STIPULATION THAT THEY WERE
FRAUDULENT.
BUT WHAT ARE THE DAMAGES THEN?
>> YOUR HONOR, WHAT WE'RE SAYING
IS WE THINK THE CAUSE OF ACTION
ACCRUED IN 2001 AND SHOULD HAVE
BEEN DISCOVERED NO LATER THAN
2006 OR 2007 WHEN VARIOUS PUBLIC
ADMISSIONS CAME OUT ABOUT THIS
REPORT.
BUT I THINK WHAT'S CRITICAL HERE
AND, JUDGE QUINCE, WHAT I THINK
YOUR QUESTION'S REALLY GETTING
AT IS WHAT DOES THE COMPLAINT IN
THIS ACTION SAY?
THERE'S A COMPLAINT THAT GOVERNS
THIS ACTION.
>> I WANT TO KNOW WHAT THE
COMPLAINT WOULD HAVE SAID AND
WHAT DAMAGES COULD HAVE BEEN
ALLEGED IN EITHER THE 2001 OR
2006 IF THOSE ARE THE DATES YOU
ALLEGE THE ACTION ACCRUED.
>> IT COULD HAVE SAID, YOUR
HONOR, WE PAID OVER HALF A
MILLION DOLLARS FOR A LOAN, FOR
A LOAN THAT WE WANTED TO BE A
LONG-TERM LOAN, THAT WE NEEDED
TO BE A LONG-TERM LOAN.
THESE APPELLANTS TOLD THE TAX
COURT WHEN THEY PETITIONED THE
TAX COURT TO OVERTURN THEIR
NOTICE OF DEFICIENCY THAT THE
REASON THEY HAD A LEGITIMATE
REASON FOR ENTERING--
>> AND THEN YOU WOULD, YOUR

ANSWER WOULD HAVE BEEN THAT
UNDER THE TERMS OF THE CONTRACT,
WE DID WHAT WE WERE ALLOWED TO
DO UNDER THE TERMS OF THE
CONTRACT?
>> THAT WOULD HAVE BEEN OUR
ANSWER, BUT IT WOULDN'T HAVE--
IT WOULD HAVE BEEN ONE OF OUR
ANSWERS, AND THE COURT MAY OR
MAY NOT HAVE CREDITED IT.
BUT YOU HAVE TO LOOK AT WHAT
THESE PLAINTIFFS HAD TO ACTUALLY
ALLEGE IN THEIR COMPLAINT.
THEY ALLEGE AGAIN AND AGAIN THEY
WANTED A 30-YEAR LOAN.
THEY NEEDED IT TO BE LONG TERM.
THAT'S WHAT THEY TOLD--
>> WHAT YOU WOULD HAVE DONE AS A
VERY GOOD LAWYER IS DEFENDED
THAT CASE ON THE BASIS THAT,
YES, THE BANK MAY HAVE COMMITTED
FRAUD, BUT YOU AS A TAXPAYER
MAY HAVE A NONTAX
BUSINESS PURPOSE, TAKE IT
UP WITH THE IRS, AND YOU MAY GO
DEFEND THAT.
THIS IS PREMATURE.
THAT'S THE REASON YOU HAVE TO
WAIT UNTIL THIS FINAL JUDGMENT
IS ENTERED, RIGHT?
>> YOUR HONORS, I THINK THIS
ENTIRE-- WE'RE MISSING A LOT OF
UNDERLYING, KEY FACTS HERE.
THIS ENTIRE APPEAL IS PREMISED
ON A FICTION, ALL RIGHT?
AND I JUST WANT TO BE CLEAR,
THESE APPELLANTS MULTIPLE TIMES
IN THEIR COMPLAINT ALLEGED THEY
WANTED A 30-YEAR LOAN AND THAT
THEY WERE INJURED WHEN THEY PAID
UNCONSCIONABLE FEES FOR THAT
LOAN WHICH THEY WANTED FOR 30
YEARS THAT WAS TERMINATED AFTER
ONE YEAR.
>> ARE THEY SUING FOR FEES?
>> I'M SORRY?
>> THEY SUING FOR FEES?
>> THEY ARE SUING FOR FEES.
AND, IN FACT, THAT'S THE ONLY
POTENTIALLY, CONCEIVABLY

RECOVERABLE SET OF DAMAGES THEY
ASK FOR IN THE COMPLAINT.
IT'S IMPORTANT TO REMEMBER--
>> SO YOU'RE TAKING ISSUE WHEN
YOUR OPPOSING COUNSEL SAYS NO
INJURY HAD OCCURRED--
>> ABSOLUTELY, WE'RE TAKING
ISSUE WITH THAT.
TO BE VERY CLEAR, BACK TAXES AND
INTEREST-- WHAT THEY LEARNED
FROM THE TAX COURT DECISION,
THAT THEY WERE NOT GOING TO GET
THEIR TAX DEDUCTION.
THAT'S NOT RECOVERABLE.
THAT'S SETTLED NINTH CIRCUIT,
11TH CIRCUIT, FLORIDA LAW.
YOU CANNOT RECOVER TAXES THAT
YOU LAWFULLY OWED TO THE IRS AS
DAMAGES.
SO--
>> BUT IF THEY, IF THEY DID WIN
THERE, WOULDN'T THAT MEAN THAT
NOTWITHSTANDING THE ADMISSIONS
THAT YOUR CLIENT HAD MADE,
WOULDN'T THAT MEAN THAT THERE IS
NO RECOVERY OF THE FEES THAT
WERE PAID FOR THE TRANSACTION?
>> ABSOLUTELY--
>> BECAUSE NOTWITHSTANDING THAT
IT WAS FRAUDULENT FROM A TAX
PERSPECTIVE, IT WORKED.
>> FROM A TAX PERSPECTIVE IT
WORKED, BUT IN TERMS OF WHAT
THESE PLAINTIFFS HAVE SWORN IN A
VERIFIED COMPLAINT IN THIS
CASE-- AND WE CAN'T MAKE LIGHT
OF IT-- AND WHAT THESE
PLAINTIFFS SWORE TO THE TAX
COURT IN SWORN TESTIMONY TO THE
TAX COURT, THEY SCREAMED UP AND
DOWN WE WANTED A LONG-TERM LOAN.
WE--
>> YOU KEEP GOING BACK TO THAT.
LET ME ASK YOU THIS QUESTION.
HOW MANY CAUSES OF ACTION DO YOU
SAY AROSE OUT OF THIS
RELATIONSHIP?
>> WELL, WE DON'T THINK ANY
VIABLE CAUSES OF ACTION ROSE OUT
OF THE RELATIONSHIP, BUT--

>> WELL, OUT OF THE TRANSACTION.
>> PRESUMABLY THE SEVEN CAUSES OF ACTION ALLEGED IN THE COMPLAINT.
ALL OF WHICH ARE IN THE NATURE OF FRAUD.
>> OKAY.
WELL, BUT YOU'VE GOT DIFFERENT CAUSES OF ACTION.
BUT IF THE CONTRACTORS HERE HAD FIRED THE LEGAL ACTION IN '01, '07 AND ANNOUNCED WE'RE READY FOR TRIAL OR YOU HAD ANNOUNCED I'M READY FOR TRIAL, THEN WHAT WOULD HAPPEN?
HOW WOULD THIS, HOW WOULD PROCEED?
WOULD SOMEBODY BE ABLE TO SAY, NO, THIS OUGHT TO BE ABATED SO THAT WE CAN SEE WHAT'S GOING TO HAPPEN IN THIS TAX ACTION, OR WE PROCEED FORWARD AND IF THEY LOSE IN THE TAX ACTION, THEN THEY HAVE ANOTHER CAUSE OF ACTION?
I'M TRYING TO UNDERSTAND--
>> WELL, YOUR HONOR, CERTAINLY.
AS THIS COURT NOTED IN BLOOMBERG, THERE IS AN OPTION FOR ABATEMENT WHERE DAMAGES ARE NOT BE YET FINALLY DECIDED.
>> WELL, WHY SHOULD WE?
THAT'S THE POINT I'M MAKING.
WHY SHOULD WE CLUTTER THE FLORIDA COURT SYSTEM WITH LAWSUITS AND JUST ABATE THEM?
>> BUT THERE WOULD BE NO ABATEMENT.
THE--
>> WELL, IT EITHER PROCEEDS OR DOESN'T.
IT'S GOT TO HAVE SOME BASIS FOR NOT PROCEEDING.
>> IT DOESN'T, BECAUSE THE TAX COURT, THE APPELLANTS' INJURY WAS NOT DEPENDENT ON THE DECISION BY THE U.S. TAX COURT.
>> AGAIN, YOU'RE SAYING THEN THAT IT WOULD PROCEED, AND THEY WOULD NOT BE ABLE TO RECOVER ANYTHING NO MATTER WHAT HAPPENED

IN THE TAX COURT.
THERE'S ONLY TWO OPTIONS.
IT EITHER PROCEEDS OR IT
DOESN'T, RIGHT?
DO YOU AGREE WITH THAT?
>> YES.
>> THE UNDERLYING CLAIM CAN
EITHER PROCEED OR NOT PROCEED,
IS THAT A FAIR?
>> THAT'S FAIR.
>> ALL RIGHT.
SO THEN THE QUESTION IS, IS THAT
IF IT DOES NOT PROCEED, WHY
SHOULD WE JUST LET THESE THINGS
BE FILED AND LANGUISH AND HAVE
HUNDREDS OF CASES IN THE COURT
SYSTEM THAT ARE JUST GOING TO BE
ABATED BECAUSE THEY'RE NOT READY
FOR TRIAL?
>> THAT'S A REALISTIC
POSSIBILITY UNDER THESE FACTS.
>> ALL RIGHT.
SO THEN YOU'D SAY THEY WOULD
HAVE TO GO AHEAD AND-- IF THE
TRIAL COURT WOULD SAY WE'RE
GOING TO PROCEED TO TRIAL ON
THIS, THEN THEY COULD NEVER
RECOVER ANY DAMAGES THAT THEY
MAY SUSTAIN BECAUSE OF THE TAX
COURT JUDGMENT.
>> NO, I DON'T THINK THAT'S
RIGHT BECAUSE THERE'S NO
CIRCUMSTANCE IN WHICH THESE
APPELLANTS COULD EVER RECOVER
THEIR BACK TAXES AND INTEREST.
WHAT THE TAX COURT DECIDED--
>> NO DAMAGES AT ALL, OKAY.
>> THE ONLY DAMAGES AT ISSUE IN
THIS CASE ARE THE FEES THEY PAID
FOR CARDS, AND THOSE BECAME
DAMAGES IN 2001, AND THE
APPROPRIATE TIME-- AND THE
DISTRICT JUDGE LOOKED AT THIS--
SAID PERHAPS THOSE CLAIMS WERE
DISCOVERED IN 2006 OR 2007.
THAT'S POTENTIALLY WHY THE 11TH
CIRCUIT FOCUSED ON THE NOTICE OF
DEFICIENCY DATE AS ONE OF THE
POSSIBLE DATES, BECAUSE THE
JUDGE SAID, WELL, LOOK, BY THE

TIME YOU GET THAT NOTICE OF DEFICIENCY, YOU CLEARLY KNOW YOU MAY HAVE BEEN HARMED WHEN YOU PAID HALF A MILLION DOLLARS IN FEES FOR A LOAN-- LET'S BE CLEAR WHAT THIS TRANSACTION WAS. IT WAS HALF A MILLION DOLLARS IN FEES FOR A LOAN OF LESS THAN HALF A MILLION DOLLARS THAT WAS TERMINATED AFTER ONE YEAR. THAT'S PRECISELY WHY ALLEGING THE COMPLAINT-- THIS IS PARAGRAPH EIGHT OF THE COMPLAINT.
PLAINTIFFS ENTERED INTO CARDS IN RELIANCE OF REPRESENTATION MADE BY UNICREDIT ABOUT THE LAWFULNESS AND LEGITIMACY OF THE TRANSACTION AND ITS POTENTIAL FOR PROFIT ABOVE AND BEYOND TAX SAVINGS.
THAT'S WHAT THE COMPLAINT ALLEGES.
IF THAT IS TRUE, THEN THESE PLAINTIFFS WERE INJURED WENT UNICREDIT TERMINATED THEIR LOPE AFTER ONE YEAR.
THESE PLAINTIFFS ARE SAYING THAT CARDS WASN'T WHAT THEY ALLEGED IN THE COMPLAINT, IT WASN'T WHAT THEY SWORE TO THE TAX COURT IT WAS, WHICH WAS A WAY FOR THEM TO MAKE MONEY ON A LOAN WHICH THEY HAD TO TELL THE TAX COURT BECAUSE HAD THESE APPELLANTS TOLD THE TAX COURT THIS IS JUST A TAX SHELTER BARGAIN, ALL I CARE ABOUT IS BUYING A TAX DEDUCTION, ARTIFICIAL TAX DEDUCTION FOR A FEE, THE TAX COURT WOULD HAVE LAUGHED THEM OUT OF COURT.
IF THAT WAS WHAT THEY PLED IN THIS CASE-- AND THAT'S PRECISELY WHAT THESE APPELLANTS DO.
TO PRETEND THAT THEIR INJURY WAS UNCERTAIN UNTIL THE TAX COURT REJECTED THEIR BOGUS TAX DEDUCTION.

THEY'RE DISAVOWING THEIR
COMPLAINT, AND THEY'RE
DISAVOWING THEIR SWORN
STATEMENTS TO THE TAX COURT.
THEY'RE NOW ARGUING THAT SO LONG
AS THE IRS APPROVED THEIR $3
MILLION TAX LOSS, THEY DIDN'T
CARE ABOUT OBTAINING THE
LONG-TERM CARDS LOAN, THEY
DIDN'T CARE ABOUT BONDING
CAPACITY FOR THEIR BUSINESS.
AND THIS IS ACTUALLY PERHAPS THE
MOST EGREGIOUS, THEY DIDN'T EVEN
CARE IN 2006 WHEN THEY LEARNED
THAT THEIR TRANSACTION WAS PART
OF A FRAUD AGAINST THE UNITED
STATES.
THAT DIDN'T MATTER TO THEM AT
ALL.
ALL THEY CARED ABOUT IS THEIR
TAX LOSS.
THE PROBLEM IS THAT REINVENTED
THEORY OF THE CASE WHICH IS NOT
IN THE COMPLAINT AND NOT WHAT
THEY TOLD THE TAX COURT.
IT'S NOT A VIABLE THEORY.
IT'S NOT VIABLE NOT ONLY BECAUSE
IT'S NOT CONTRARY TO THE
COMPLAINT, BUT BECAUSE IT WOULD
ACTUALLY RUN AFOUL OF EXACTLY
WHAT HAPPENED IN BLOOMBERG WHICH
IS PLAINTIFFS USING THE COURTS
AS KIND OF AN ALL YOU CAN SUE
BUFFET.
>> SO IT SEEMS TO ME THAT YOUR
ARGUMENT THEN IS THAT IN BOTH
2001 OR 2006 THE DAMAGES WOULD
HAVE BEEN THE SAME FEES THAT ARE
BEING ALLEGED NOW.
>> THAT'S CORRECT.
>> OKAY.
>> THAT'S CORRECT.
THE BACK TAXES AND INTEREST ARE
NOT, THEY'RE NOT A RECOMPENSABLE
AMOUNT OF DAMAGES.
IT'S THE TAXES AND FEES-- I'M
SORRY, IT'S THE FEES.
THOSE FEES WERE INJURY IN 2001
AND NO LATER THAN 2006.
WHAT I WAS SAYING ABOUT

BLOOMBERG, YOUR HONORS, IS THESE PLAINTIFFS TOLD THE TAX COURT, THEY SWORE UP AND DOWN THEY WANTED A LONG-TERM LOAN.
THAT'S WHY THEY ENTERED INTO CARDS.
THEY TOLD THE TAX COURT IN THEIR PETITION THE 30-YEAR FEATURE OF CARDS WAS PARTICULARLY ATTRACTIVE TO THEM.
NOW THEY WANT TO TELL THIS COURT WE DIDN'T CARE ABOUT ANY OF THAT AT ALL.
WE WERE JUST BUYING A TAX DEDUCTION.
THEY CAN'T DO THAT.
THEY'RE ESTOPPED FROM DOING THAT.
THAT'S AN ILLEGAL TRANSACTION.
I'M SORRY, YOUR HONOR.
>> I JUST WANT TO CLARIFY, YOUR POSITION IS HAD THEY WON THE TAX COURT LITIGATION, YOUR CLIENT STILL WOULD HAVE OWED THE FEES.
>> OUR POSITION IS OUR CLIENT STILL WOULD HAVE BEEN, STILL COULD HAVE BEEN SUED FOR THE FEES, SURE.
MY CLIENT HAS OTHER DEFENSES TO THE CLAIMS FOR THOSE FEES.
FOR EXAMPLE, THE FACT THAT THESE APPELLANTS COULD NOT POSSIBLY HAVE REASONABLY RELIED ON ANYTHING MY CLIENT SAID GIVEN THE NATURE OF THIS TRANSACTION.
BUT THAT'S ON THE MERITS, AND THAT'S NOT RELEVANT HERE.
BUT YOUR HONOR'S ABSOLUTELY CORRECT.
>> AND THEY COULD HAVE INITIATED THAT LAWSUIT EITHER IN 2001 OR 2006, AND THAT WOULD HAVE PROCEEDED ON ON ITS MERITS, AND THE TAX COURT LITIGATION WOULD HAVE HAD NO EFFECT ON THAT.
>> ABSOLUTELY.
THE IT'S IMPORTANT TO UNDERSTAND HERE MOST-- MY CLIENT, AS YOU CAN IMAGINE, WAS SUED BY MANY OF THE PARTICIPANTS IN CARDS.

ALL OF THOSE LAWSUITS WERE
BROUGHT IN 2006, 7, AND 8, AND
VIRTUALLY ONE OF TO THOSE
PLAINTIFFS WERE ALSO AT THE SAME
TIME TELLING THE IRS, LOOK,
CARDS WAS PERFECTLY OKAY--
>> AND, NOW, ARE THOSE OTHER
LAWSUITS, I MEAN, ARE THERE
COURT DECISIONS?
BECAUSE YOU'RE TALKING ABOUT
OTHER LAWSUITS.
DO WE HAVE THE--
>> WE HAVE.
WE'VE ATTACHED SEVERAL OF THEM
DISMISSING THE CLAIMS ON STATUTE
OF LIMITATIONS ROUNDS,
REASONABLE RELIES GROUNDS AND
OTHER BASES.
>> SO EVEN IF THEY SUED AT THE
TIME OF THE STIPULATED JUDGMENT,
THE STATUTE WOULD HAVE RUN,
YOU'RE SAYING?
>> THERE ARE SOME COURTS THAT
HAVE HELD THE CLAIM ACCRUED IN
2001.
>> COURTS IN--
>> THE 11TH CIRCUIT ACTUALLY
HELD THAT.
>> WELL, WHY DID THE 11TH
CIRCUIT CERTIFY IT IF IT'S SO
CLEAR?
>> I THINK ON THE MERITS IT IS
CLEAR--
>> SO THE 1 19TH CIRCUIT GOT
TOTALLY CONFUSED WHEN THEY
RELATED THE DEFICIENCY WAS SORT
OF THE KEY EVENT?
>> I--
>> I MEAN, I'M JUST TRYING TO
UNDERSTAND.
>> I UNDERSTAND, YOUR HONOR.
NO, NO.
>> WHY ARE WE HERE TALKING ABOUT
A CASE--
>> WE'VE ASKED OURSELVES THE
SAME QUESTION, BUT I UNDERSTAND
YOUR HONOR'S QUESTION.
THE 11TH CIRCUIT, I THINK, WAS
TRYING TO MAKE SENSE OF THE LINE
OF CASES IN FLORIDA LAW ON THE

TENSION YOUR HONOR IDENTIFIED
BETWEEN THE FIRST INJURY RULE
WHICH WE BELIEVE HAS BEEN FOR 60
YEARS AND CONTINUES TO BE THE
LAW MANY FLORIDA AND SOME OF THE
PETE MARWICK LINE OF CASES--
>> YOU'RE ACTUALLY MAKING--
WELL, CERTAINLY I WANT TO ASK
YOUR OPPONENT ABOUT IT.
YOU'RE SAYING THAT THE
REDRESSABLE HARM IS NOTHING TO
DO WITH THE TAX DEFICIENCY.
THEY CANNOT RECOVER THAT, AND SO
THAT'S A FALSE ISSUE THAT WE'RE
BEING MISLED INTO BY REALLY THE
11TH CIRCUIT OPINION.
>> THAT-- YES.
THE 11TH T CIRCUIT OPINION,
AGAIN JUST SPECULATING, IT MADE
VERY CLEAR THAT THIS COURT IS
FREE AND SHOULD RESPOND TO THE
CERTIFIED QUESTION IN ANY MANNER
IT SEES FIT AND SHOULD BE--
>> WELL, THAT'S WHAT THEY ALWAYS
SAY.
>> FAIR ENOUGH.
BUT THIS COURT CAN DO WHAT IT
WANTS IN ESSENTIALLY RESPONDING.
AND NO PARTY HAS EVER ARGUED
THAT THE NOTICE OF DEFICIENCY
DATE IS RELEVANT.
IN FACT, THIS COURT IN PETE
MARWICK IN THE MALPRACTICE
CONTEXT SAID THE DATE IS NOT THE
RELEVANT DATE.
THE 11TH CIRCUIT DOESN'T WASTE
ALL OF OUR TIME HERE TODAY TO
ANSWER A QUESTION ANSWERED 60
YEARS AGO.
THE RELEVANCY OF IT IS WHEN THE
JUDGE APPLIED THE DISCOVERY RULE
VERY LIBERALLY AND SAID WHEN IS
THE LAST POSSIBLE TIME THESE
PLAINTIFFS COULD HAVE REALIZED
THAT PAYING FEES FOR THIS
FRAUDULENT TRANSACTION WAS AN
INJURY, BY THE TIME THEY GOT THE
NOTICE OF DEFICIENCY AND FILED
THEIR TAX PETITION,THEY DIDN'T
KNOW BE, THEY SHOULD HAVE KNOWN.

SO THAT'S WHERE, I THINK, THE
NOTICE OF DEFICIENCY--
>> THEY WERE TAKING A DIFFERENT
POSITION IN THE TAX COURT.
THEY WERE SAYING THERE WAS
ECONOMIC BENEFIT.
>> THAT'S EXACTLY RIGHT.
>> BUT THAT'S TO THEIR-- I
MEAN, AGAIN, AND THEY'RE SAYING
IF THEY HAD SUCCEED INSIDE, THAT
THEY WOULDN'T HAVE A BASIS TO
SUE YOU.
>> FIRST OF ALL, THAT'S WRONG,
AND IT'S DIFFERENT-- WELL.
>> IT SEEMS TO ME THEY'RE
ARGUING THAT EVEN THOUGH YOUR
CLIENT ADMITTED THAT IT WAS
FRAUDULENT AND THEY WENT TO THE
STIPULATION, THE OTHER SIDE IS
ARGUING THAT, NO, THERE IS
SOMETHING TO BE GAINED FROM WHAT
THEY DID THAT SUITS MY PURPOSE.
THAT'S WHAT WAS ARGUED TO THE
TAX COURT.
AND THAT HAD NOTHING TO DO WITH
THE FEES.
THAT'S WHAT THEIR ARGUMENT IS.
>> I UNDERSTAND.
THERE MAY BE A SEPARATE INJURY
WITH REGARD TO BACK TAXES THAT
THE TAX COURT WAS DECIDED.
IT'S NOT A CONDITIONS BL INJURY
UNDER THE LAW, BUT IT'S
IMPORTANT TO REMEMBER NOTHING
UNICREDIT DID HAD ANY BEARING ON
THE TAX COURT DECISION.
THERE'S SOME SUGGESTION IN THE
PAPERS THAT THE SAME TYPE OF
EVIDENCE IN THE TAX COURT CASE
WOULD BE USED IN THIS-- THAT'S
ENTIRELY UNTRUE.
>> WELL, HOW DID-- I THINK
SOMEBODY FILED A MOTION FOR
SUMMARY JUDGMENT IN TAX COURT,
AND IT WASN'T GRANTED.
IS THAT CORRECT.
>> THAT'S CORRECT.
>> THAT MEANS THAT THERE'S SOME
ARGUABLE--
>> THAT'S EXACTLY RIGHT.

>> SO THERE MUST HAVE BEEN SOME TENDENCY OF MERIT IN THERE OR ELSE--
>> WELL, THE IDEA, JUSTICE PERRY S NOTWITHSTANDING HVB'S A AT MISSION OF FRAUD, SOME TAXPAYERS, INCLUDING THESE TAXPAYERS, THOUGHT THE CARDS TRANSACTION STILL SHOULD HAVE BEEN RECOGNIZED BY THE IRS.
AND WHAT THE TAX COURT SAID IS THEY REJECTED THE TAX TREATMENT OF CARDS BUT NOT FOR REASONS HAVING ANYTHING TO DO WITH HVB'S ADMITTED FRAUD.
THEY JUST SAID IT WAS A BAD TAX TRANSACTION.
SO UNLIKE EVERY ONE OF THE CASES IN THE PETE MARWICK LINE WHERE THERE WAS A DIRECT RELATIONSHIP BETWEEN THE UNDERLYING TAX PROCEEDING AND THEN THE CASE THAT FOLD, WHAT THE TAX-- THE TAX COURT'S DECISION SAID NOTHING ABOUT HVB'S CONDUCT.
IT DIDN'T RELY ON HVB'S CONDUCT.
IT WAS INDEPENDENT OF THAT.
IF THESE PLAINTIFFS WANTED TO SUE HVB FOR FRAUD AND RICO AND CONSPIRACY, THEY HAD TO DO SO WITHIN FOUR OR FIVE YEARS OF WHEN THEY DISCOVERED THEIR CLAIMS IN 2006 AND 2007.
AND IF THEY SIMULTANEOUSLY WANTED TO CHALLENGE THE TAX TREATMENT OF CARDS, THEY COULD HAVE DONE SO.
AND IF THEY WANTED TO SUE HVB FOR MALL MALPRACTICE, THEY COULDN'T HAVE DONE THAT.
AND THEY COULD HAVE STAYED--
ONE THING THEY COULD HAVE STAYED THEIR FRAUD CASE AGAINST HVB AND PURSUED THE TAX COURT LITIGATION.
BUT THERE'S NO-- I'LL SAY IT THIS WAY.
THE TAX COURT CHALLENGE TO CARDS AND THEIR CLAIM FOR FRAUD AGAINST HVB ARE ENTIRELY

RECONCILABLE.
THERE WAS NO NEED TO ASSERT
INCONSISTENT POSITIONS.
WHEN THESE APPELLANTS CHALLENGED
THE TAX COURT, WELL, CHALLENGED
THE NOTICE OF DEFICIENCY OF THE
TAX COURT, THE TAX COURT KNEW
ABOUT HVB'S ADMISSIONS.
THEY KNEW THEY HAD COMMITTED
FRAUD--
>> COUNSEL, YOUR--
>> I'M SORRY.
>> YOUR TIME IS UP.
I WAS WAITING FOR YOU TO CATCH
YOUR BREATH.
>> OH.
[LAUGHTER]
IF I COULD JUST FINISH MY
THOUGHT.
>> YOU MAY.
>> AT THE TIME THE CARDS WAS
BEING CHALLENGED, THE TAX COURT
KNEW THAT THESE APPELLANTS'
LAWYERS HAD BEEN INDICTED AND
WERE GOING TO JAIL.
AND NONETHELESS, THEY CHALLENGED
THE TAX COURT DECISION.
THE TWO CASES HAVE NOTHING TO DO
WITH ONE ANOTHER, UP LIKE
EVERYONE IN THE PETE MARWICK
LINE OF CASES.
>> THANK YOU.
>> THANK YOU, YOUR HONORS.
>> REBUTTAL?
>> MAY IT PLEASE THE COURT, MY
CLIENTS DID KNOW ABOUT HVB'S
ADMITTED FRAUD AT THE TIME THEY
DECIDED TO DEFEND THEIR TAX
TREATMENT, AND THE REASON THAT
THEY CHALLENGED IT IS THAT AS
THE TAX COURT RECOGNIZED, THEY
HAD A DIFFERENT ARGUMENT THAN
EVERYONE ELSE WHO HAD CHALLENGED
THE CARD'S TREATMENT.
THEY ARGUED THAT THEY USED IT TO
INCREASE THEIR BONDING CAPACITY.
NOW, THE TAX COURT ULTIMATELY
FOUND THAT WANTING, BUT AFTER
JUSTICE PERRY NOTED A MOTION FOR
SUMMARY JUDGMENT, THERE WAS A

FULL BLOWN TRIAL.
THE TAXPAYERS' ACCOUNTANT
TESTIFIED ON THEIR BEHALF AT
THAT TILE, AND WE WOULD NOT BE
HERE AND WOULD NOT HAVE SUFFERED
ANY DAMAGES, WE WOULD HAVE NO
CASE AGAINST HVB HAD WE WON THAT
CASE, HAD MR. CANAAN WON--
>> WELL, YOUR OPPONENT'S
ARGUMENT THAT THE FEES WERE
DAMAGES THAT WERE, THAT YOU
COULD HAVE SUED FOR IN EITHER
2001 OR 2006?
>> RESPECTFULLY, DESPITE HIS
STATEMENTS HERE, THEY WOULD HAVE
TAKEN THE SAME LINE THAT THE
DEFENDANTS, THEIR
CO-CONSPIRATORS DID IN LOFTON IN
THE FEDERAL DISTRICT COURT CASE
AND ARGUED THAT THOSE WERE NOT
RIPE.
THEY WOULD HAVE SAID YOU GOT
EXACTLY WHAT YOU PAID FOR, WHICH
WAS A ONE-YEAR LOAN THAT WE
COULD TERMINATE AFTER A YEAR OR
CHANGE THE APR ON.
THAT'S WHAT YOU CONTRACTED ON,
AND YOU STILL COULD GET THE TAX
BENEFITS THAT WERE THE OTHER
BASIS OF THIS--
>> THAT SEEMS TO BE EITHER A
FACTUAL ISSUE OR A LEGAL ISSUE
OF THE CASE THAT IS SEPARATE AND
APART FOR WHAT WE ARE BEING
PRESENTED HERE AS A MATTER OF
LAW.
>> RIGHT.
>> I'M FINDING IT ALONG THE
LINES OF JUSTICE PARIENTE'S LINE
OF QUESTIONING MORE INCREASINGLY
DIFFICULT FOR ME AS A JUSTICE ON
THIS COURT TO BE ABLE TO ANSWER
THIS QUESTION WITHOUT HAVING THE
WHOLE CASE.
HOW CAN WE ANSWER THIS QUESTION?
>> HOW CAN YOU ANSWER THE
QUESTION?
>> IN LIGHT OF THE TWO OF YOU
WITH SUCH STARK DISAGREEMENTS ON
WHAT THE EFFECT OF THESE FEES

ARE AND WHETHER THEY CAN BE SUED
UPON INTERMIXED WITH TAX
TREATMENT OF THIS, HOW CAN WE
POSSIBLY ANSWER THIS QUESTION?
BE.
>> SO YOUR QUESTION, YOUR HONOR,
IS WHETHER IT'S A MIXED QUESTION
OF FACT AND LAW AND SHOULD NOT
BE ADDRESSED ON A MOTION TO
DISMISS STAGE.
>> ON A CERTIFIED QUESTION TO US
FROM THE 11TH CIRCUIT.
>> WHAT YOU COULD ANSWER ON THE
CERTIFIED QUESTION IS THAT THERE
ARE NO INJURIES UNTIL THE FINAL
RESOLUTION OF THE TAX COURT CASE
BECAUSE HAD PLAINTIFF-- THERE
IS NO FACT--
>> THAT'S THE DISPUTED ISSUE
BETWEEN THE TWO OF YOU.
>> I DON'T KNOW HOW THEY DISPUTE
THAT-- I HEAR HIM HERE
SAYING--
>> MY PROBLEM IS I DON'T EITHER.
>>-- YOU COULD HAVE SUED, BUT
THERE IS NO BASIS IN THE
COMPLAINT OR THE LAW IN GENERAL.
I THINK JUSTICE QUINCE'S
QUESTION HERE IS ON POINT.
HAD WE SUED PRIOR TO THE TAX
COURT, THERE WOULD HAVE BEEN NO
CLAIM.
YOU SAW--
>> WAIT A SECOND.
IS IT, CAN YOU RECOVER AS A
MATTER OF LAW IF YOU HAD THE TAX
DEFICIENCY YOU HAD TO PAY?
DO YOU AGREE AT LEAST ON THAT
ISSUE THAT YOU ACTUALLY CANNOT?
>> SO WE HAVEN'T BRIEFED THAT
ISSUE.
THERE IS LAW THAT SUGGESTS THE
TAX DEFICIENCY ITSELF--
>> BUT THAT'S--
>> BUT WE'VE--
>> BUT IF I WERE BEGINNING TO
THINK HOW I WOULD WRITE IN THIS,
I WOULD START WITH, WELL, YOUR
REDRESSABLE HARM IS THE TAX
DEFICIENCY.

>> WELL--
>> BUT YOUR OPPONENT SAYS, NO, YOUR REDRESSABLE HARM HAS ALWAYS BEEN YOU WANTED TO RECOVER THE FEES.
IF THAT'S THE CASE, THEN IT'S AN ACTION FOR FRAUD THAT HAD TO ACCRUE WHEN THE, AT LEAST--
THEN I CAN UNDERSTAND WHY THE FEDERAL DISTRICT COURT JUDGE DID WHAT SHE DID.
>> SO, AND I SEE THAT MY TIME IS UP, CAN I--
>> WELL, NO, BECAUSE WE'RE IN, AND THIS HAPPENS, UNFORTUNATELY, LOVE THE 11TH CIRCUIT, BUT WHEN WE GET THESE CERTIFIED QUESTIONS AND WE DON'T HAVE THE CASE, IT'S VERY FRUSTRATING BECAUSE IT LOOKS LIKE THIS IS MUCH MORE COMPLICATED THAN A QUESTION OF FLORIDA LAW.
>> WELL--
>> I MEAN, AND THERE ARE FACTS IN IT THAT WE DON'T HAVE.
SO YOU CAN TRY TO-- CAN YOU RECOVER THE TAX DEFICIENCY, AND DOES THAT MATTER FOR THE ANSWER TO TO THE CERTIFIED QUESTION?
>> IT DOESN'T MATTER.
BECAUSE IN ADDITION TO THE TAX DEFICIENCY, THERE ARE CLEAN-UP COSTS THAT THE CLIENT INCURRED, AND THERE'S NO DISPUTE THAT THE FEES IT PAID TO LITIGATE THAT IT BADE TO MR. CANAAN AND THE EXPERT FEES AND WHATEVER ELSE, THOSE ARE INJURIES THAT IT SUSTAINED THROUGH ITS UNIQUE ARGUMENT OF THE TAX COURT WHICH SURVIVED SUMMARY JUDGMENT--
>> ARE YOU SEEKING TO GET THE FEES THAT YOU WERE ORIGINALLY PAID?
>> WE ARE SEEKING--
>> AND COULDN'T YOU HAVE SUED ON THOSE, WHICH ARE SUBSTANTIAL FEES, AT THE LATEST BY THE TIME THAT THEY STIPULATED THAT THEY ACTED FRAUDULENTLY?

>> NO, WE COULD NOT HAVE.
BUT THAT CLAIM--
>> BUT HE'S SAYING EVERYONE ELSE
DID.
WHY, WHAT WOULD HAVE PREVENTED
YOU--
>> WELL, FIRST OF ALL, A LOT OF
THOSE OTHER ENTITIES GAVE UP IN
THE TAX COURT AND THEN SUED.
BUT IN ADDITION, THE 11TH
CIRCUIT OPINION THAT HE REFERRED
TO WHICH IS CURTIS IS DECIDED
UNDER GEORGIA LAW WHICH HAS A
FAR DIFFERENT ACCRUAL.
SO THEY'RE NOT CERTIFYING TO YOU
A QUESTION THAT THEY'VE
OTHERWISE ANSWERED.
IT'S A TOTALLY DIFFERENT SET OF
ACCRUAL RULES IN THAT CASE.
AND IN THAT CASE THEY PREVAILED
BY SAYING YOU HAVE NO CLAIM--
>> WHY DON'T WE JUST TELL THEM
TO FIGURE THIS OUT?
>> I'M SORRY, WHAT?
>> I MEAN, I DON'T SEE HOW WE
HELP FLORIDA LAW.
I MEAN, I'M JUST-- BY TRYING TO
ANSWER THIS QUESTION.
HOW DO WE-- BECAUSE IT'S NOT
LIKE ANYTHING THAT WE'VE HAD IN
ANY OTHER CASE.
AND IT'S VERY CONVOLUTED
FACTUALLY AND LEGALLY, SOME
INVOLVING ISSUES OF FEDERAL LAW.
>> BUT IT'S NOT, IT'S NOT
CONVOLUTED UNDER THIS COURT'S
RULING IN LARSON.
AT THE VERY LEAST--
>> ISN'T THE REAL ISSUE WHETHER
OR NOT THE FEES THAT THEY'RE
ARGUING ABOUT AND YOU'RE
CLAIMING ARE RECOVERABLE BY YOUR
CLIENT, WHETHER THEY'RE
RECOVERABLE BY YOUR CLIENT AS A
MATTER OF DETERMINATION OF THIS
TAX SHELTER STATUS?
>> NO.
IF WE CAN'T RECOVER THOSE FEES,
THEN THERE'S NO ARGUMENT FOR OUR
CLAIM BEING--

>> I KNOW.
HE'S SAYING OTHERWISE.
SO THAT'S THE DISPUTED ISSUE.
>> BUT HE'S HOISTED ON HIS OWN ARGUMENT HERE, YOUR HONOR.
BECAUSE IF HE'S RIGHT AND WE CAN'T RECOVER FEES AS A MATTER OF LAW IN THIS PROCEEDING, THEN THE ONLY CLAIM THAT HE CONTENDS IS TIME BAR IS ONE FOR FEES THAT ACCRUED IN 2001.
THAT'S NOT A RELIEF THAT WE CAN SEEK HERE.
SO EVEN IF YOU GIVE HIM THE FULL WEIGHT OF HIS ARGUMENT THAT A CLAIM FOR THE FEES THAT WE PAID IN 2001 IS TIME BARRED-- WHICH I THINK IS NOT A VALID ARGUMENT BECAUSE WE COULDN'T, WE COULDN'T HAVE A CLAIM.
THE STATUTE OF LIMITATIONS DOESN'T ACCRUE, DOESN'T START UNTIL YOU HAVE A CLAIM YOU CAN ASSERT IN COURT, AND WE DIDN'T HAVE A CLAIM ON THAT BECAUSE THEY HAVE THE CONTRACT DEFENSE.
BUT EVEN IF HE'S RIGHT ABOUT THAT AND THAT FEE ACCRUED IN 2001, IF HE'S RIGHT WITH HIS CLAIM THAT WE CAN'T GET THAT RELIEF HERE, THEN THE ONLY REMEDY WHICH MIGHT BE TIME BARRED IS NOT AVAILABLE HERE, AND WE'RE NOT BARRED BY THE STATUTE OF LIMITATIONS WITH THIS CLAIM.
>> OKAY.
THANK YOU FOR YOUR ARGUMENTS.
>> THANK YOU, YOUR HONORS.
APPRECIATE THE TIME.
>> COURT'S IN RECESS FOR TEN MINUTES.