ORAL ARGUMENT – 03/28/01
00-0282
ALLSTATE INS. CO. V. BONNER

CROSNOE: I first want to briefly summarize what Allstate's position is on the art. 21.55 issues before the court. Allstate's position is first that the plain language of art. 21.55 requires that the insured present a valid insurance claim. That is a claim that must be paid by the insured as a prerequisite to liability under art. 21.55. It is further our position that Ms. Bonner's claim for uninsured motorist benefits was not valid. And that is because Allstate made a pre-suit payment of $1619.00 in PIP benefits to Ms. Bonner before she ever filed suit. Our policy had a nonduplication of benefits provision which stated that we were not required to pay any damages under the UN coverage that we had already paid under the PIP coverage. Ms. Bonner in fact stipulated that that provision implied to the entire PIP payment, and this court has recently upheld in the Kidd case, the validity of that provision.

PHILLIPS: Is that provision in every Texan's auto insurance policy?

CROSNOE: Yes. The standard personal automobile policy. In this case, the jury found that Ms. Bonner suffered $1,000 in damages as a result of the uninsured motorist negligence. So this was effectively showing that Allstate had overpaid the claim in the amount of $619. Nonetheless, we're not here asking for a refund. We are simply here saying that the CA misconstrued the statute to prevent Ms. Bonner to recover attorney's fees incurred in pursuing a meritless claim.

Again, to our position that art. 21.55 requires a valid insurance claim. This interpretation is supported by the plain language of the statute. Sec. 1 (3) of the statute defines a claim as a first party claim that must be paid by the insured. Furthermore, §6 of the statute...

HANKINSON: I'm a little bit confused by your heavy reliance on §1 (3), the definitional section of the claim. You keep divorcing the language directly to the insured or beneficiary from the "that must be paid by the insurer". And I know you are interpreting that to mean "that the must be paid" language means it has to be a claim that must be paid. In other words, a claim on which money is owed that is valid. But it's the definitional section of the statute and if I apply that particular definition to each place in the statute where the word claim is used it doesn't work. I'm looking at the various places where there are rejection of claims for example. If the insuring subpart (3), the repeated references to if the insurer rejects the claim. How can it reject a claim that must be paid if in fact that's the way the definition works?

CROSNOE: There is that use in section 3. But given the claim definition - we don't believe that use overrides the definition given in section 1.

HANKINSON: My point is is that it seems to me you've lifted some of the words from the definition to give it a meaning that is different than what the complete definition means. The

definition talks about basically defining a first party claim, a claim that must be paid directly. You keep divorcing the directly, and you turn to that must be paid into valid. But when I try to apply that definition, not only to section 3, but other places in the statute where there is reference to claims that an insured decides not to pay, then I have an inconsistency. Can you square that for me or am I misunderstanding your argument?

CROSNOE: I'm not trying to divorce the language from the directly payable to the insured. Again, on that, I think if the legislature had intended something different they would have said something like that would be payable to the insured directly, or something like that.

HANKINSON: But my point is is that if I read the definition together and I say then a claim means a first party claim as opposed to the fact that a claim means a valid claim, then the definition works everyplace I see the word claim used in art. 21.55. However, if I read it the way you want me to read it and just use the language must be paid, then the definition doesn't work in numerous places in the statute.

CROSNOE: If you go to §(6) of the statute, and given your example there, you're example wouldn't work there because if you said...

HANKINSON: Do you agree with me that if I apply that definition in other places in the statute the way you would read §(3) that it doesn't work?

CROSNOE: It doesn't work in that particular section of section 3, section than the part about acknowledgment of claims.

HANKINSON: And in fact a definitional provision of the statute is intended then to apply to every place that term is used in the statute?

CROSNOE: Yes.

HANKINSON: And it doesn't work by the way you would interpret that subpart?

CROSNOE: It doesn't work in that particular section, subsection (3).

HANKINSON: Okay. I just wanted to make sure I understood that.

CROSNOE: If you've go to (6) though, (6) authorizes recovery of the statutory penalty of 18% and attorney's fees on a claim only when the insurer is liable therefor. And you can't be liable therefor if it's not a valid claim.

HANKINSON: Going back again to your definition of claim, and we can talk about the liable therefor, because I know that's another one of your plain language arguments. But again, in all cases where a claim is made - I mean it's talking about if you apply the definition to mean a first party

claim, then where a first party claim is made and nothing more is required. But if you start adding on the valid claim part, then it seems again to distort the meaning. So I'm having a hard time with your first plain language argument. I wanted to give you a chance to try to explain it to me.

CROSNOE: It may be that the legislature was using plain in the generic sense at some point in the statute. But I don't think so in section 6. Because if you read that §(6) to permit an 18% penalty on the amount of the claim, and read that to mean not the amount that's owed under the policy, but read it to mean the amount that's demanded by the insured to be paid, well in that situation it's - let's say the insured comes in and says I want $1 million on my UN claim. And it's ultimately determined that $5,000 is owed for instance. Well under that reading of the statute you would owe 18% on the $1 million...

HANKINSON: But I don't have to interpret the definitional term that way in order to give that particular read to §(6).

CROSNOE: And why is that?

HANKINSON: You're hanging your hat on some other language in §6, I thought.

CROSNOE: I'm just saying if you read (6) to reference claim to mean something other than the claim that must be paid, and to mean the claim that's demanded, then it doesn't make any sense because you end up paying a statutory penalty on the amount that's demanded rather than the amount that's owed.

HANKINSON: So there's not any other language in §6 that you hang your hat on besides the claim?

CROSNOE: We are hanging our hat on additional language. The liable therefor language. We are hanging our hats as well on the in addition to the amount of the claim language where the legislature has said that if you prove a violation of the statute, the insured recovers in addition to the amount of the claim the statutory penalty and the attorney's fees. And that's somewhat similar to the legislature's language in §38.001, the Civ. Pract. & Rem. Code. There the legislature said if you prevail on a cause of action, you get attorney's fees in addition to the amount of the valid claim. And we think that should all be interpreted consistently.

HANKINSON: But the word valid is included in §38.001.

CROSNOE: And again, our position is given the definition that it must be a claim. When you look at every section in the statute it says a claim that must be paid by the insurer. The liable therefor language, the in addition to.

HANKINSON: The court's holding in Kidd is that you don't stack PIP and uninsured/underinsured motorist coverage. That in fact there's an offset that's available. Is that

correct? Is that your understanding of Kidd?

CROSNOE: The court specifically used the term nonduplication of benefits rather than offset. Because I believe there is a distinction.

HANKINSON: But that's the language that's in the policy.

CROSNOE: The policy doesn't say offset or nonduplication of benefits. What it says is is in order to avoid basically double recoveries - I'm struggling for the language - but it doesn't say duplication of benefits. But that's the rule.

HANKINSON: But it doesn't mean that someone does not have a valid claim under either of the coverages or that in fact the claim is covered. It just means you can't recover the benefits twice. Isn't that what the opinion says? In that particular case, like in this case, she did try her uninsured motorist claim to a jury and got jury findings on it. It's just that she wasn't entitled to recover because she had already recovered the amount of benefits.

CROSNOE: She was not entitled to recover benefits under the policy.

HANKINSON: But it was a covered claim.

CROSNOE: I don't agree that it was a covered claim. We had no obligation to pay the claim because we had already paid it.

HANKINSON: Well but how could you ever get to the point where you would answer a nonduplication of benefits question if there wasn't ever any right to benefits under two different provisions of the policy?

CROSNOE: The right to the PIP benefits are not at issue here, because we paid them, and we paid them before the suit.

HANKINSON: I'm just trying to interpret Kidd, Kidd in terms of its overlay with looking at this particular statute. My question to you is, do you interpret Kidd to mean that if a person has already covered PIP benefits, that it's not just a question of not receiving benefits twice, but it actually means that the uninsured motorist claim is then not covered by the terms of the policy?

CROSNOE: The claim falls within the coverage, but then there's a limitations coverage that applies.

HANKINSON: So it's a covered claim under the policy, but then whether or not and how much the benefits have to be payed under that coverage depend on how much has been paid under another provision of the policy?

CROSNOE: Right. But it is a limitation on coverage that it in effect means that you didn't owe the benefits. You didn't breach your contract by not paying them. And I think that's the key point.

There is the Rodriguez case out of San Antonio that states very clearly that you have to have a valid claim in order to get liability under art. 21.55. We do think it's important that this court has similarly interpreted other fees shifting statutes. In the Beaston case it interpreted §38.001, art. 21.21 of the Insurance Code and the Deceptive Trade Pract. Act to require a showing that the insured prevailed on a cause of action for which fees were recoverable, and recovered damages.

In terms of awarding costs, take a look for instance at the Grayson case, which is out of the San Antonio CA. That's a case where the court said that a plaintiff who filed an underinsured motorist claim and submitted it, the case was presented to the jury, the jury found that she suffered damages as a result of the underinsured motorist negligence, and those damages were $6,500. But she had stipulated before trial that the insurer was entitled to a $20,000 settlement credit, because she had settled with the underinsured motorist for that amount before trial. Well the court said even though if this were a negligence case, you would have prevailed in the sense that you got a finding of negligence and damages. This is a contractual case, and because it was a contract you were also required to show in addition to negligence by the uninsured motorist, in addition to damages, you were obligated to show you otherwise were entitled to recover under the policy. And you didn't do that because you didn't show that the motorist was in fact underinsured. And, therefore, you weren't able to recover under the policy.

This court may have recognized a similar distinction between the contractual nature of a viewing(?) claim, and in the Henson case where it said even though you obtain a finding that the uninsured motorist was negligent and that that damaged you, that does not necessarily show that you can get prejudgment interest, because it's a contract case rather than a tort case.

O'NEILL: Under §6, the legislature seems to have put in there if suit is filed your attorney's fees shall be taxed as costs.

CROSNOE: I still think you have to have a valid claim in order to even get to a recovery of attorney's fees. But if you go to the prevailing party jurisprudence, I think we prevail on that based upon the Blizzard case and the Grayson case that are cited in our brief.

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RESPONDENT

MAXWELL: My comments will be directed to 21.55 of the Insurance code. Picking up on Justice Hankinson's inquiry, the statute obviously uses claim in different meanings in the statute. The definition it seems to me is really to distinguish between first party and third party claims. 21.55, for example, could not be used by a third party claimant against a liability insurer for the tort

feasor. But that when you get to the requirements of the statute, the statute unlike 3.62, which was its predecessor statute that dealt only with a live health and accident policies, the only duty under that statute was to pay within 30 days of the demand, and if you didn't pay within 30 days of the demand you were liable for the 12% penalty.

21.55 was a major departure from the prompt payment of claims statute. And it imposed specific deadlines by which insurers are to do certain things. One of which is acknowledgment of the claim. As one of the amicus pointed out, I believe it was one pointed out by the Baker & Botts law firm, recognized that many of the duties that are provided in 21.55 apply to invalid claims because you don't know whether a claim is valid or invalid when it's submitted.

PHILLIPS: Can we go to insurer liable therefor?

MAXWELL: I take that language to mean in the context in which it's written that you're liable for the claim under the terms of the policy. That is, that it goes back to the nature of the contractual arrangement. The insurer that is liable for the claim is the one under which the policy is obliged to make payment. They may have certain offset rights, but all this does is describe the proper party against which the suit is brought. And you get that from is in all cases where a claim is made. Well a claim was a made in this case. The insurer liable for that claim of course is Allstate under the specific provisions of the uninsured motorist sections of the policy of insurance. And then, and I think this is important, they are not in compliance with the requirements of this statute. That is, a statutory obligation to acknowledge a claim within 15 days of receipt.

ABBOTT: But you left out the middle part which says, and the insurer is liable therefor.

MAXWELL: The insurer in this case is liable for this claim...

ABBOTT: Under the policy is the insurer liable?

MAXWELL Absolutely.

ABBOTT: What does the policy provide?

MAXWELL: You read the uninsured motorist coverage, they are liable to pay for any sums that are compensable as damages that are caused by an uninsured or underinsured motorist. In this case there was $1000 found by the jury that was under the uninsured....

ABBOTT: What about the nonduplication of benefits provision?

MAXWELL: Absolutely. It's an affirmative defense. It's an exclusion or limitation.

ABBOTT: And under the nonduplication of benefits provision the insurer is not liable to pay any money for this claim.

MAXWELL: But they are - you're asking for my construction of this term. And the only way it makes any sense if the statutory penalty provision is to be applied to ensure compliance with the statute, if it's limited only to claims for which there is no offset and therefore recovery on part of the plaintiff, then you _____ out the penalty provision, and the enforcement mechanism by which this statute is enforced.

ABBOTT: Let's go back and cover some ground. First of all, do you agree that the insurer is not liable for this claim?

MAXWELL: I do not agree that the insurer is not liable for the claim.

ABBOTT: So you do not agree that the nonduplication of benefits provision does not exonerate the insurer from liability...

MAXWELL: No, I do agree with that. I think there's some distinction between those two.

ABBOTT: So you do agree that the insurer is not liable for this claim?

MAXWELL: If you want to read the statute that...

ABBOTT: Is the insurer liable to pay under the insurance policy?

MAXWELL: Not if they take advantage of the offset provision. But what I am saying to you that you cannot read this statute which provides one enforcement mechanism and one alone, which is...

ABBOTT: Then under your interpretation, you could have any situation in the world where an insurer is not liable. They don't have coverage at all that applies to a situation. And an insurer thinks well golly gee, I might be able to pick up a few bucks in attorney's fees just by filing a claim and maybe the insurer won't respond within 15 days. Whammo, even though there's no coverage, by golly I have a claim. And I can collect $50,000 in attorney's fees. This is a great bracket that could be created here.

MAXWELL: Absolutely not. In this case, and in cases into which this statute applies, there must be a policy of insurance, and the insurance company must be liable for payments under the policy. There's no question that they are liable for payments under the policy, but for the application of a affirmative defense or a limitation of liability based on nonduplication.

HANKINSON: If she had not gotten favorable jury findings on the uninsured motorist negligence so that there would not have been coverage, would you say that there was - could she recover attorney's fees under §6?

MAXWELL: The affirmative findings - there must be a finding of liability under the

policy...

HANKINSON: And that's my question. If there was a finding that because the driver was not negligent, then she would not have been entitled to - the claim is not covered?

MAXWELL: Absolutely.

HANKINSON: Would she be able to recover attorney's fees under §6? Your opponent says and I think it's a serious question, that what this would allow people to do is bring frivolous claims against insurance companies as he said for $1 million. No way in the world is it covered. We're not talking about nonduplication of benefits provisions at all. Just a bogus $1 million claim if the insurance company happens to miss the 15 day notice deadline. And therefore when they sue under art. 21.55 they get to recover 18% off $1 million, the million dollars and the attorney's fees. How far does it go in terms of when you say liable therefor? Does it require there to be coverage under the policy in order for §6 to be triggered, and then we can get into the semantics of nonduplication of benefits?

MAXWELL: I believe that in this case that the insurer is liable under the uninsured motorist coverage on the jury findings in this case. And so to hold that Ms. Bonner is entitled to her fees doesn't require the court to reach whether or not in a totally bogus $1 million claim that is not covered by the policy, that fees and penalties could be assessed because that stretches the statutory language.

The way I understand the jurisprudence of prevailing party under cause is the vindication of a legal right. And I think that is determined by the jury findings and not by a final judgment. I would have to say that there are cases cited in our response. I did not write the response so I do not know where those cases are.

O'NEILL: My understanding is that your argument is that this is not a fee shifting statute.

MAXWELL: That's correct. Well it does - it obviously shifts fees.

O'NEILL: But under those cases that are dealing with fee shifting statutes my understanding is you're claiming this is not a penalty.

MAXWELL: It is a penalty statute in the sense that it provides for an 18% penalty. It has a fee shifting component because it's trying to reduce or eliminate the transaction costs that stand between the injured plaintiff and enforcement of the statute.

Obviously the assessment of fees in a case against a party is going to have a deterrent effect. In a case where 18% of the claim may be $100, the fee may be $3,500, which is a bigger penalty. Which has a more deterrent effect, the $3,500 or the $100? Obviously the $3,500 does. So I think you have to look at it in toto.

The statute was expanded to impose specific duties on insurers in order to get them to do that which they were not doing. And one of the amicus even attached a commissioner's bulleting, which said their computer program that they are using are not designed to comply with the statute and he exhorts them to comply which is as late as 1996. So the statute is designed to encourage litigation to affect a statutory purpose, ie., comply with the statute. And you do that by assessing penalty, because it's hard to determine exactly what damages would flow from the failure to acknowledge a claim. Trying to pinpoint what kind of damages resulted from the conduct would be quite difficult, and also to provide for fees to encourage the litigation to go forward.

And so why they put it as cost, I really do not know. Now the distinction I think is 38.001 says valid claim. And obviously in that statute the only thing we're talking about is payment. Here, there are a lot of other statutory duties and obviously apply to claims that are being made by insureds, and if you hold that only a claim that is not subject to an offset qualifies for the recovery of fees, then essentially _____ out the private action as a way of enforcing the statute, and that's the only mechanism the statute provides. The insurance commissioner has adopted the 21.55 deadlines and put them over in the unfair claims settlement practices regulation under 21.21-2, and in that way he is able to enforce it. But the mechanism the legislature chose was for private remedies designed to achieve this public purpose.

ABBOTT: Let's go back to that remedy for a second. Under §6, aren't there two aspects to the remedy. One, is the recovery of attorney's fees. And the other is the recovery of 18% per annum of the amount of the claim. And here you're seeking attorney's fees only. Why are you not seeking the 18% of the claim?

MAXWELL: I was not in the trial below, so I don't know. That decision was made by trial counsel below. It may have been because it anticipated a legal issue about how you're supposed to assess that, calculate that.

ABBOTT: What's your argument on the way the statute should be applied as to whether in dealing with the facts of this particular case the plaintiff in this lawsuit should be entitled to recover 18% of the claim?

MAXWELL: I believe that in this case the jury findings of $1,000 of actual damages that but for the offset provision that's covered by the policy established the figure against which the 18% could be applied.

ABBOTT: Did you say the 18% should be applied to the $1,000?

MAXWELL: Yes.

ABBOTT: And so do not apply the offset?

MAXWELL: No. I thought you were asking me how in a situation in which there was no

offset, you would apply. I would say 18% ought to apply to the $1,000. This is no different than the court's opinion in Stewart Title v. Sterling. In that case no offsets before trebling.

ABBOTT: You think that 18% should be applied to the $1,000 and you do not include the offset?

MAXWELL: Absolutely. Because it achieves the deterrent effect of the statute. If you recall in the Sterling v. Stewart Title case, the issue was do we apply offsets to the actual damages before the damages are trebled pursuant to 21.21. The court holds that you only apply the offsets after the trebling, because to do otherwise would defeat the deterrent effect of the statute.

OWEN: What are we trying to deter?

MAXWELL: You are trying to encourage compliance with the statute.

OWEN: You said the deterrent effect. They didn't owe the $1,000, but what are we trying to deter?

MAXWELL: The stature requires them to respond to claims, notices of claims within 15 days. They did not do it. They admitted they did not do it. The statute requires that it be done. The insurer shall acknowledge the claim within 15 days. That statutory duty is not deterred. It's compliance is not encouraged by a construction of the statute that would limit the attorney's fees and penalty provisions to only those claims for which there is no offset.

ABBOTT: You're saying that in this case, even though the claim wasn't made, that you believe that if the law were properly applied to the facts of this case, the 18% should be tacked on to the $1000?

MAXWELL: The 18% of 1,000 would be the penalty amount. Correct?

ABBOTT: Why would it be $1,000 instead of the claim that she made? She claimed more than $1,000.

MAXWELL: Because under the policy of insurance, the claim is for damages. It is essentially a third-party claim in the context of a suit against your insurance company. They are not obliged to pay anything but the actual damages...

ABBOTT: Section 6 could be read easily to say that it's the amount that the claimant says she is claiming. And what was claimed by Ms. Bonner here was more than $1,000. So why shouldn't the 18% be applied to what she was claiming which was roughly $1,800?

MAXWELL: Because the policy only provides for the recovery of actual damages. We have a way of finding out what those actual damages are and the jury in this case found them to be $1,000.

ABBOTT: Help me understand why you would apply the policy language in that situation, but not apply the policy language with regard to the nonduplication of benefits.

MAXWELL: I am applying the policy language with regard to the nonduplication of benefits. It is only by - this is no different than the McKinley v. Drozd situation where you have an offset available because of another provision. In that case another cause of action. In this case another provision of the policy that allows an offset. The insurance company did not acknowledge the claim. I think all would agree that as to acknowledgment of claims, the word claim has to mean valid or invalid because you can't know whether they are valid or not at the time of acknowledgment. And all you're asking the insurance company to do is acknowledge the claim.

BAKER: Did I understand you to say earlier that this is a contract case because it's based on the policy between Ms. Bonner and Allstate?

MAXWELL: It's a cause of action based upon 21.55.

BAKER: But what gives Ms. Bonner the right t sue Allstate in the first place?

MAXWELL: She has two bases for her action. She...

BAKER: Without the policy of insurance and her being the insured, she has no claim against Allstate for anything. Is that right?

MAXWELL: Absolutely.

BAKER: So is it a fair statement we have to judge the rights of the parties and who's liable for what based on the policy in its entirety. Do you agree with that?

MAXWELL: Absolutely.

BAKER: But that it is a contract case even though she's suing for a penalty provided by a statutory scheme?

MAXWELL: Who could disagree with that. I certainly can't disagree with that.

BAKER: If that's the case, don't we use the entire policy to determine the second part of §6 for which the insurer is liable therefor?

MAXWELL: You do at the risk of undercutting the purposes of the statute.

BAKER: That may be so, but we have to apply what the legislature says is the right to successively maintain a claim under §6 you have to show to get the penalty and to get the fees and to get the cost that your carrier is liable therefor. And if you have to look to the policy it seem to me

is you look to the entire policy.

MAXWELL: I wanted to say that this is the same colloquy I was having with Justice Abbott is that they are liable for. This was not a claim for $1 million on a policy that was never issued. They are liable for uninsured motorist coverage. The only thing that saves them is a nonduplication or offset provision in the policy.

BAKER: Do you base the liability on the judgment the TC may render, or do we judge the company's liability on the contract between the parties?

MAXWELL: You judge it based upon the verdict rendered by the jury in light of the contractual language. In this case, the uninsured motorist part of it was stipulated. The negligence interestingly was not, but was found by the jury. And damages covered by the policy under the uninsured motorist coverage was found.

BAKER: Because of the nature of the contract, the damages paid are not to a third-party. They are paid to the insured's policy holder.

MAXWELL: That's correct.

BAKER: But if you take the whole policy and apply all of the provisions Allstate pays nothing to Ms. Bonner. Is that correct?

MAXWELL: Absolutely correct under the contract because of the offset provision that _____ recovery. The point is, that you can't - when you talk about reading all of the contract, you've got to read all of the statute. I would direct the court's attention to §3(g). This is the only place in which the statute talks about an invalid claim. If it is determined as a result of arbitration or litigation that a claim received by an insured is invalid and therefore should not be paid by the insurer, the requirements of (f) of this section shall not apply in such case. Subsection (f) only requires the payment. In other words the only place where this statute talks about an invalid claim, the only duty it is excuses the insurer from complying with is the duty to pay. It does not excuse the other provisions of the chapter.

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HANKINSON: What reasons did the insurer give for rejecting the claim?

CRAMPTON: They didn't give any. It was simply a matter of not being able to agree on a settlement amount. The claim was not rejected. They didn't give any. They simply failed to respond to the claim. The notice was sent to them, some period of time went by, approximately 30 some odd days. And then we contacted the insurer to say: what gives? are you going to respond or not? At that point they began the process of responding. That's the way the case came about.

HANKINSON: But the first step is notice of the claim. The second step is acceptance or

rejection. So after you were in contact with them when they did not acknowledge the claim, did they formally reject the claim at some point in time under the statute, and if so, did they give the reasons for the rejection and what were those?

MAXWELL: They did not. They did not formally reject the claim. And therefore, they gave no reasons because they didn't reject it. And in fact they accepted the claim after some period of time.

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REBUTTAL

CROSNOE: I want to return to a couple of Justice Hankinson's questions. The last one regarding whether we rejected the claim. Interestingly, I thought we didn't have a record of this, but if you look at the request for admissions that they sent us, which are in the record at pages 12 and 16 of the clerk's record, they sent us a request for admission that says: admit that the settlement offer you made for UN benefits, not the PIP benefits that we had already paid, that that settlement offer of $1,802 did not include. And then it listed certain elements of damages. So in fact, we actually did make a settlement offer in this case of an additional $1,800 that was obviously not accepted.

I want to go back to your question about whether this is a covered loss under the policy and make this particular analogy. Let's take for instance the general liability policy. As an insuring agreement that broadly covers bodily injury arising from an occurrence, let's say the claim is within the policy period and all that, so the claim would fall within the broad insuring agreement. But then let's say it's for pollution - for damages that were caused by pollution. So it's excluded from coverage by the policy's pollution exclusion. Well that is in no sense a claim that's covered under the policy.

HANKINSON: But an exclusion means it's expressly not covered by the policy. As I read Kidd, Kidd says, yes you can have a covered claim for uninsured motorist benefits under the policy, but before you can actually get the benefits under the policy you have to account for benefits paid under the PIP provisions. Since PIP provisions work up front when there's an accident or injury so that people can get their money quickly, people tend to get the PIP benefits before the uninsured motorist claim would be resolved. And the question was how do you reconcile those two coverages in the policy vis-a-vis payment of benefits? It's just a little bit different than an exclusion, which means there's no coverage.

CROSNOE: I think it is analogous. It doesn't say there's no coverage. There's no obligation to pay those benefits.

HANKINSON: Would you respond to Mr. Maxwell's comments about how if we were to adopt your interpretation of the statute, that we would undercut the legislature's intent to encourage insurers to respond promptly and in specific ways to claims that are made, because we will now allow for a covered claim that ultimately was not paid under the policy to escape those provisions.

CROSNOE: That particular conduct can be remedied under other statutory provisions in the insurance code. Just not this one. For instance, art. 21.22-2 gives the Dept. of Insurance administrative enforcement power over insurers who fail with reasonable promptness acknowledge communications from the insured. There could also potentially be a cause of action under art. 21.21(10). And this court has even left open the door that in particular situations if the conduct was egregious enough you could even have liability for bad faith even in the absence of liability under the contract. The court hasn't elaborated on that.

So this is conduct that is regulated by other provisions of the insurance code just not this one.

HANKINSON: But we have to interpret this statute and we're required to make certain that we adhere to legislative intent. And if the intent of this particular statute is to give a private cause of action as an enforcement mechanism for certain claims handling conduct by insurers, will we be defeating legislative intent as Mr. Maxwell says if we adopt your interpretation of the statute, and if not, why not?

CROSNOE: The legislature has stated its intent expressly. It stated that the purpose is to encourage prompt payment of claims as distinguished from prompt acknowledgment of claims or prompt payment or acknowledgment of demands that are made by the insured that don't necessarily need to be paid. And so, the intent is to encourage prompt payment and it's certainly not to make you promptly respond to claims that did not need to be paid. But that would be enforceable under other provisions.

HANKINSON: Is it your position that under this statute and under various other statutes in light of Kidd, which means that the nonduplication of benefits provision means that a lot of uninsured motorist benefits are not going to be paid, instead you will get PIP coverage instead, that that particular case is going to affect the various remedies that are in the insurance code in other context with respect to prompt handling of claims, because ultimately insurers may not have to pay them because of the nonduplication of benefits provision?

CROSNOE: Can you give me an example of which particular...

HANKINSON: You went through all these different remedies that you say exist. And yet your fundamental position is there's no liability under the policy and, therefore, their conduct is excused with respect to handling a claim. And my question is, if we adopt that particular interpretation in how Kidd affects the handling of claims, are we going to affect the remedial scheme that's in place by the legislature in other context because insurers will be able to say hey nonduplication of benefits don't have to pay, therefore, it's not a good claim, and therefore we don't have to worry about our conduct?

CROSNOE: Under the provision I first mentioned art. 21.21-2, where the TDI has administrative power. It just says that insurers engage in unfair claim settlement practices if they do

not acknowledge with reasonable promptness written communications from the insured. And it doesn't say written communications that are valid or not valid. So I don't believe that would be the case.

And then again on the bad faith example I gave in Republic Ins. v. Stoker case, this court said we're not going to say when, but in egregious _____ situations you can have bad faith even in the absence of coverage under the conduct.

BAKER: Under your statement then would under the unfair settlement practices of part 2, the failure to acknowledge the claim within the 15 day statutory period would be an unfair settlement practice. Is that right?

CROSNOE: It uses different language. It says with reasonable promptness.

BAKER: Well the reasonable promptness has been decided by the legislature because they said you have to respond to the notice of the claim within 15 days. Whether you agree whether it's reasonable or not, that's what they said. So would you agree then that she could sue separate and apart for that just one failure of Allstate under that section?

CROSNOE: I think it's probably a fair reading in the statute that, or at least a good argument could be made, you would carryover the 15 days into that art. 21.21-2. You don't have a private right of action under that - under this court's holdings. But it is something where the TDI can come in and...

BAKER: So in other words the one person who suffers for the failure to give a timely notice doesn't have an action under the part of the statute that says that's bad practice?

CROSNOE: Let's look in this case. There was no independent proof that there was any harm suffered at all. And when you look at the harm that's suffered...

BAKER: But the legislature thinks if you don't give prompt notice there may be a penalty involved. I know your position is that it's only triggered if you can find that the carrier is liable therefor. But that's the way they set up the scheme. So does your view then write out the opportunity for recovery of the person actually involved?

CROSNOE: No, because again, I do believe there are other provisions in the insurance code. Art. 21.21(4)(10) requires you to accept or reject claims within reasonable amount of time. That could be potentially applicable. And then the bad faith example I gave as well. But just it's not regulated under this particular provision of art. 21.55