ORAL ARGUMENT - 3/20/96
95-1283
LIBERTY NAT'L FIRE V. AKIN

LAWYER: The underlying suit is a suit upon a homeowner's insurance policy for alleged settling damage to the foundation of a house. The TC entered 3 separate orders or rulings in this case. This was done by the respondent, former Judge Akin. He first sustained a motion by my client for a severance and entered an order that the bad faith part of this case would be tried separately from the underlying contract action, and that the bad faith case would be abated. Upon motion for reconsideration by the real party in interest in this case, he set aside that order. And then on motion for reconsideration by Liberty National he reaffirmed that the bad faith case and the contract case would be tried together. It is that last order of the court to which we seek a writ of mandamus to set aside and to require that the bad faith case be tried separately and after the contract case.

CORNYN: May I ask you about the extraordinary nature of this preceding as opposed to an ordinary appeal, why a mandamus is appropriate. It is your contention that there is no set of circumstances, that is no rulings that the TC might make during the course of the trial, no one instructions the court might give to the jury that would cure the prejudice that you say would arise as a result of trial of the joint claims?

LAWYER: That is our position your honor.

CORNYN: Explain that please?

LAWYER: First your honor it's based on 2 principles. The first one is that the bad faith case should come second because it is based upon a final resolution of liability on the contract as held by this court in the Stoker case of last summer. Since it must be based upon contractual liability we believe to allow the jury to speculate in a single trial that the insurance company must be liable on the contract is inherently fallacious.

CORNYN: Under the Horseshoe Operating case that you cite on the law of severance, why aren't these claims so interwoven as to involve the same facts and issues and thus not subject to severance? Aren't the facts going to be the same?

LAWYER: No your honor they are not. The facts are entirely different. And in fact if I understand the contentions of my adversary they are even saying that it is not the denial of the claim. In fact they themselves say that they are entirely separate. And her position is that it's not the denial of the claim even from which the bad faith claim arises. But instead it's from a prejudice investigation before the denial of the claim. And it's that evidence on this alleged prejudice investigation and there are a number of items here which I will go through before I conclude, evidentiary items which the plaintiff in this case wishes to offer, which have nothing to do whatsoever with whether the contract claim is valid or not.

PHILLIPS: You never made any offer of settlement in this case is that right?

LAWYER: No we did make an a settlement offer even before the lawsuit was filed. That was an $1,800 offer of settlement which is undisputed between the parties. It's disputed I believe they take issue and they say that an offer by an insurance company to pay a claim is something different than a compromise settlement offer under rule 408. They've got this argument, but there's no doubt that an offer was made.

CORNYN: Assuming you're right that there's no difference between an offer made presuit and

one made during the course of the lawsuit, should the right to mandamus under these circumstances depend on whether there was an offer at all?

LAWYER: I don't think so.

CORNYN: Let's say in a case where there is no offer, there can't be any prejudice from having made one, so why the mandamus?

LAWYER: I believe that we have come to the point in the jurisprudence of this state that when a motion for severance is filed in a case such as this, that the TC really has no discretion and it should grant the severance, and that there should be a separate trial. I do not believe that it should depend upon there being a settlement offer that's been made. But we do have a settlement offer in this case, and we have a number of other facts also your honor, which would not be admissible in the contract suit, but which one side or the other wishes to introduce in the bad faith case.

PHILLIPS: Is an abatement required to like Judge Akin initially ordered, an abatement of the discovery?

LAWYER: I don't know if an abatement of discovery is necessarily required. I think it's a good idea. I think the main thing is from our point of view your honor that the jury trial be held after a final determination of the contract case.

PHILLIPS: Two separate juries or could you have one?

LAWYER: Yes, I think it's 2 separate juries. I believe we are talking about a true severance. And we are talking about some time in between. And yes there may be discovery on the bad faith case in between the trial of the contract case. It's just that I do not wish to advocate that there must be an abatement in every case of that discovery.

OWEN: Would you have us going as far as Mid Century did and wait till the contract portion had been appealed and was final?

LAWYER: There's one CA case that seems to indicate that and so I would go along with that, yes. I believe it should be a final judgment.

ABBOTT: What prejudice would occur though if the 2nd trial were able to go forward while the other ones going through the appellate process?

LAWYER: If the first case was reversed, then the second case would just automatically be reversed? I suppose there wouldn't be any prejudice your honor. That's why I don't think that that is a big point. I merely point out that one of the Houston courts has followed that rule and held that after severing a case that it was error to then consolidate them because that denied the right of appeal.

PHILLIPS: We have a bifurcation at least through severance I guess in punitive damages. And now you advocate a mandatory severance here. What type of precedent are we setting for peace-meal cases in other areas? Who's going to be next?

LAWYER: It may be that the bifurcation as announced by the Moriel case would fall into this use because I believe the true bifurcation should be at this level between the contract case and the bad faith case. So I don't think that it's a bad precedent.

PHILLIPS: This would not result in trifurcation of this type of case you're saying?

LAWYER: Right. Because the Moriel bifurcation is a trial before as I understand it, before the same jury, immediately after determination of liability on exemplary damages.

PHILLIPS: But in what other types of cases will people say: the SC has now recognized that we're not going to need to let prejudicial evidence for one claim come in that might affect the other claim. What litigants are going to come next and say you've got to follow this trend?

LAWYER: I understand what you're saying. And I have not given that any thought of what other cases might fall within such a rule. I think that the bad faith situation is such an extraordinary circumstance where punitive damages are sought such a heavy burden that to _____ prejudice in the contract case. And that's really what we're talking about, that severance is required.

OWEN: Why wouldn't bifurcation work? Why do you want a separate jury?

LAWYER: Have the second jury decide the...

OWEN: Why do you want a second jury as opposed to the same jury decide the bad faith claim?

LAWYER: Merely because I think it is a true severance, and if the court disagrees and it should not be a true severance, that it ought to only be a separate trial, then I don't have a strong feeling on that your honor. I do not see that that is really important. It merely follows from a true severance. The same jury could decide the liability. It's just that I think it would be inconvenient for the jury if the court not only granted a severance, but stayed with the discovery, abated the discovery in a bad faith case. And we're talking about a time lag. We might not be able to get the original jurors back. I just think it's unworkable if it's done that way.

SPECTOR: Your position I believe is that the evidence of bad faith is so prejudicial and if there was just a trial of the contract claim it would be inadmissible?

LAWYER: That's correct.

SPECTOR: But often isn't it intertwined, the investigation that was performed, the testimony as to the facts of the claim?

LAWYER: It may be some times very intertwined. It's not what we have here however because they are not complaining in the bad faith case about the denial. They are complaining about what I guess would be a huge conspiracy between the insurance company and its adjusters to always deny claims of this type and they wish to go into that or they wish to prove that the engineer that we hired allegedly always finds no coverage and therefore we are going to have to put on evidence to block that. The bad faith case is just an entirely different item from whether the water from this little sewer leak caused this house's foundation to settle; and, if so, how much damage did that cause? A very simple contract case.

CORNYN: From your answer to Judge Spector's question it sounds like you're saying there may be some bad faith cases where it would not be prejudicial to try them together because the facts are so intertwined. You're saying as I understand it this is not one of those cases?

LAWYER: That's right your honor.

CORNYN: But are you asking for a general rule that in all bad faith cases there must be either bifurcation or severance, or are you just saying in some of them, this one in particular?

LAWYER: Well I guess I'm really saying both. I really think your honor that this court should adopt the rule that there is no discretion in the TC under this fact situation and that a severance should be ordered. But of course I'm only here to advocate the case of my client, and I believe that the facts in this case certainly very strongly cry out for such a severance.

GONZALEZ: This is a mandamus. In Lunsford I criticized my colleagues for changing 100 years of law in mandamus context because we changed the rules, and the TC was just following the law as it existed at that time. Why is this not any different? There is no rule at the moment that requires a severance or bifurcation. So how can we say that the TC abused its discretion if he was following existing law?

LAWYER: Well your honor I guess the answer to that is I believe there is such a rule and that there is such a law, it just hasn't come from this court. And that is there are so many cases by the 1st CA, and by the 14th CA, that indicate that under the facts of this case severance is required. And there are not a whole lot of cases that I am aware of on the other side. So the only problem is this court has not declared that principle. We thought that the TC in this case should have followed the CA rulings and that they failed to do that was an abuse of discretion.

CORNYN: Your argument assumes I think that under Stoker a successful defense of the contract claim will automatically entitle you to judgment on the bad faith claim; is that correct? did I understand you correctly?

LAWYER: Yes. We realize your honor that that's the general rule.

CORNYN: And I was going to ask you about the exception. Where the claim is not that the insurance company showed bad faith in denying a claim, but by virtue of the investigation perhaps causing some other harm other than the denial of the claim per se, would you still advocate the same rule?

LAWYER: As far as the severance?

CORNYN: As far as severance.

LAWYER: As far as the severance I would your honor.

CORNYN: Even though there will be no...you would not be entitled to summary judgment?

LAWYER: Right. I still believe that that evidence on the bad faith case which both sides are talking about in this case would so severely taint the contract trial that the defendant insurance company could not receive a fair trial on the contract case alone.

Since I have not had an opportunity to talk about that type of evidence I think I ought to at least tell you the type of things that we are talking about in this case. We have already mentioned the settlement offer. In addition to that there is a reserve.

HECHT: Which would have to come into evidence at the trial of this case?

LAWYER: Yes these are items that would come into evidence, that are tried together, and if they are not tried together, these are items that would come into evidence in the bad faith case. But which we believe are prejudicial and should not be considered in a contract case. Those items include: settlement

offers (and by the way we're not the only one who made a settlement offer, the other side had a settlement offer and they refer to it as an offer, but they don't discuss it in their brief, well they discuss it in their brief they just don't put it in this same category; and that is Mrs. Broadrick offered to have the 2 engineers get a 3rd engineer to break the tie, and we refused to accept that offer. And that somehow leads into their bad faith claim.

ENOCH: The settlement that your company offered was that to cover some parts of the damage of the plumbing leak, or something?

LAWYER: It was to cover some parts of the damage.

ENOCH: It was simply your saying under the contract we are obligated to this much, and that's what we are paying; right?

LAWYER: That's right.

ENOCH: And during the trial of whether or not this damage is covered or not, would it not come into the trial in this case, that the insurance company acknowledges that certain portions of the damage are covered?

LAWYER: Payment was tendered for the entire claim. It's true that it was calculated and based upon various items of plumbing, repair and floor repair, and that sort of thing. But the offer was tendered as a payment of the entire claim, and was rejected.

ENOCH: In the trial of this case the insurance company would acknowledge that certain parts of the claim were covered?

LAWYER: It's possible that that could somehow even be removed your honor from the evidence on the damages. Yes. The reserve, there's a $18,000 reserve, which is offered in rebuttal to the plaintiff's allegation that from the very instant this particular adjuster got this file he was intending to pay nothing and to deny the claim, and that he worked from thereon in that respect. We believe the fact that before he did anything and before he particularly hired the engineer to make an investigation upon which he then relied in denying the claim that he set a reserve of $18,000 is material in showing that he was not so conceived evilly from the very beginning.

BAKER: Is the company required to make that reserve by regulations from the insurance commission?

LAWYER: They're required to make a reserve, but certainly not for $18,000.

BAKER: So they have to do it?

LAWYER: They have to put up some amount, which they think is sufficient to take care of the claim, that's right. And he could have put up $1,800 since that's what he thought was his actual liability, as it turns out. But the reserve was made for $18,000. Net worth is another item which there is evidence of in this case, and which I think will be relied on heavily by the plaintiff in their claim for punitive damages. They want some percentage of the relator's net worth, and we believe that that is an item which should not be gone into in the contract case.

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RESPONDENT

LAWYER: It seems to me that based on the questions you all have raised, that I don't have the same insecurity I have sometimes when I go to a court of appeals that maybe the judges haven't read the briefs and don't understand the issues. So my argument can be fairly brief, because I think especially on Judge Enoch and Justice Cornyn y'all understand what the issue is here. First, and I want to make this real clear, even by reading to you if I need to, there has been no rule 408 settlement offer in this case. There is a difference between saying: Here's your entire claim; we will pay you less than what you are demanding in release and settlement of your entire claim; as under rule 408 offers. In saying: here's your claim, we are going to pay this part unequivocally, but the rest of this claim we are denying unequivocally, and if you cash the check for the part we give you, we are not going to release you, you're not going to release us, you can still go forward and sue on the other part. That's what happened in this case. That's just a claim.

CORNYN: How is that evidence any less prejudicial in the contract case?

LAWYER: Because I don't even need that evidence in my contract case. The only thing I need in my contract case, and like I said in my brief is, the denial letter is the trigger for the breach of contract. We make a claim, they say denied. That is the breach of contract, so that letter comes in as the very evidence of the breach of contract.

CORNYN: Maybe my question could be phrased better. Counsel says these lawsuits ought to be tried separately because if you are going to offer evidence of the offer pre-suit, that will prejudice his client in the eyes of the jury because it looks like they've already decided that well maybe they are responsible at least in part. So he says that should not be admissible in the breach of contract case although it will be admissible perhaps in the bad faith case.

LAWYER: I'm not sure why that wouldn't be admissible in the breach of contract case, or why it would be inherently prejudicial. He's saying you have a $50,000 claim; we are going to pay $1,800 of your total claim, and that's all. We are denying the other...

HECHT: How is that admissible in the contract case?

LAWYER: The part about the denial?

HECHT: No, the $1,800. How is that admissible under the contract case?

LAWYER: It isn't, and the court could strike that our or it could delineate it.

HECHT: But it is admissible in the bad faith case?

LAWYER: I don't need it, because that's not the basis for my bad faith case.

HECHT: Well isn't it going to come out that somebody offered somebody something?

LAWYER: It's not part of the prima facie part of the case. I wouldn't think it would necessarily need to come out. I guess the defendant could say: well we offered $1,800 on a $60,000 claim, and therefore, we weren't in bad faith. But that is not like in the Mallard case, the Caldwell case, the F.A. Richards case, all of those cases had a rule 408 settlement offer. We are going to pay you this much money for your entire claim - go away. And they said that is prejudicial because under the same theory rule 408 isn't even in the books, that everybodys not a lawyer, they don't understand that they compromise claims for various reasons other than that they are admitting liability.

HECHT: But how is it any different that it was for all of it or some of it? Isn't the prejudice the same?

LAWYER: I think it can be explained very easily by the court in limiting instructions.

HECHT: You can explain both of them, but it looks like if there's prejudice as to one, there's prejudice as to the other. I don't see any difference. You can explain: Ladies and gentlemen don't take this as an admission. But either way whether it's for all or part, isn't the prejudice the same?

LAWYER: I don't think so because their offer is not that they are disputing the entirety of the claim. It's as if she made 2 claims. And the first claim they paid, and the second claim that came a week later they didn't pay. And the whole case is based on the claim that they didn't pay. The part they did pay there's no dispute about that. They offered $1,800 to fix the pipe. And so that's not critical, I wouldn't even think it would be admissible because it's not relevant in any of the case.

CORNYN: If there was a single claim and they made an offer of settlement on that, would they be entitled to a severed trial because of the prejudice inherent there?

LAWYER: Now you're getting into the issue that Caldwell raised and I could talk for an hour on the problems I think there are in that case. It depends on when that settlement offer is made. And that gets us to one of the final issues I've got in the case, which is if you are going to want to encourage settlements by insurance companies or anybody, you want to write law that will encourage them to make settlements. And the way you do that is you say: If you make a rule 408 offer, it will not be admissible if the offer is rejected in the trial of the contract case. In other words we will have a severance of those 2 issues. But if you fail to make a rule 408 offer, everything you do is going to come in. I think that encourages insurance companies to make rule 408 offers and try to dispose of these cases quickly. I think the opposite rule, which is the one advocated by Liberty would discourage rule 408 settlement offers because if they know they are going to get a severance no matter what, if there's just a bad faith in a contract claim pled together and they know they are automatically going to get a severance, what's their incentive to make a settlement offer. And not only that but if you go the step further that they are advocating, which is the loss of the contract case is by automatic operation of law a death nail to the bad faith case no matter what it's based on, which is what they are advocating, then the insurance company's sitting there going wow, I won't make a settlement offer because if I win the contract case, I don't have to worry about any of the rest of it, regardless of what I do in the claim's settlement process, regardless of how I treat the insured. I don't have to worry about it. You will discourage rule 408 offers if you do that. And I think that's part of what happened when the 14th CA came back last year in Mid Century v. Lerner and they said: only if the bad faith case is based solely on the inadequacy of the settlement offer, then you have to have a severance.

Now the earlier Houston cases that addressed that issue, the Mallard case, the Hunter case, the Wilborn case, they all had rule 408 offer in there. But the court did not craft its language specifically to say if the bad case is based solely on the inadequacy of the rule 408 offer, then you have to have a severance. And I think the CA in Houston recognized that problem and they corrected it in Lerner by adding that language in: you have to have an automatic severance if and only if a bad faith action is based solely on the inadequacy of the rule 408 offer. And that's what they said.

But the real issue here is are we going to have an automatic rule that in every case, I mean if the pleading says: bad faith in contract, it's automatically going to be divided into half, every time, no matter what the facts are. If you are going to have that you are going to have what Justice Phillips talked about, which is bifurcation, trifurcation. Next it will be DTPA and insurance co cases can't be tried together. Next it will be that various laundry lists violations can't be tried together. You are going to have

these cases just chopped into a million pieces and every district judge in Dallas right now has 3500 cases on their docket. I mean you're going to triple that potentially if you have some iron clad rule.

PHILLIPS: How does the punitive damage bifurcation work? Is the jury told in advance: answer these questions, don't worry about the effect of your answers, but don't make any immediate plans for tomorrow?

LAWYER: In actual practice you mean how is Moriel working out?

PHILLIPS: I am just wondering about how if you are going to bifurcate the same jury there, this is true in capital cases, what kind of advance warning is a jury given about their responsibility?

LAWYER: I haven't tried one of those yet. I've got one in June so I will find out in San Antonio. What I think is happening is the same thing they do in a criminal trial: ladies and gentlemen of the jury we are going to try this case in 2 pieces; if you answer certain questions and I am not even going to tell you about it now a certain way, there will be a second phase of the preceding in which you will answer other questions. And then when they go out the first time they go out just to answer the first jury charge. If they come back with affirmative answers on punitive damages, then they say: ladies and gentlemen you were lucky enough to have answered these questions correctly you get to spend another day hearing the rest of the case. I think that's how it's working on in practice and that's the way we drafted our charge in the San Antonio case to do it that way. I think that that is a much less onerous burden to have separate trials bifurcation than it would be to say: Okay, now we are going to have to come back and try the whole second case again a second time with a new jury after additional discovery if necessary, things like that.

As far as that goes, again, the breach of contract case as in Vale this court decided, the breach of contract case can stand alone. The bad faith case can stand alone. They are not dependent except in those limited circumstances like in Mallard and F.A. Richard, where the bad faith case is based solely on the failure to pay the contract damages.

GONZALEZ: How can you possibly have a bad faith case if there's no recovery?

LAWYER: Because the bad faith case is an independent tort which arises out of the way the insurance company adjusts the claim and treats the insured.

GONZALEZ: If there was no liability?

LAWYER: Absolutely. An insurance company number 1 can violate the insurance code and the Claims Settlement Practices Act and the DTPA even if there is no coverage by the way it treats its insureds. I believe. And I believe this court has intimated that on several of its earlier opinions, including Vale.

HECHT: Do you concede that there would be some contract and bad faith claims that ought to be severed?

LAWYER: Yes I do as a matter of fact.

HECHT: Is that because the trying of the two of them together is prejudicial? One or the other; either one party or both parties?

LAWYER: There are some that have to be automatically severed. I am going to retract my earlier answer Justice Hecht. I don't think so. I think that with limiting instructions, with the inherent ability

of the TC to enforce those instructions, I think that you would have to have it on a case-by-case basis with every trial judge to decide whether or not it needed to be severed.

HECHT: Well I don't think I used the word automatic. So we will be perfectly clear, you think however there are some cases that ought to be severed when there's a contract and a bad faith claim in the same case, the trial judge ought to severe it?

LAWYER: And I'm not been evasive. I am just trying to think of a fact situation where that could arise.

ENOCH: Don't you think that a 408 offer of settlement would be one of those cases?

LAWYER: No, because I think like in Evans, I think the court can instruct around that. And I think the court should instruct around that. In getting to the point that then leads to is is mandamus an appropriate remedy here? No. Because they can go through both this trial as a single unit, and if they can demonstrate to the CA that there was some prejudice or that the jury ignored the court's limiting instruction, they have reversal on appeal. There's no reason to have a mandamus. This action I think is premature. I don't think we have the Walker v. Packer inadequate remedy by way of appeal in this case.

HECHT: So then your answer is there should never be a severance. It can always be handled by a _____ of instruction?

LAWYER: I hate to be absolute about it. Like I say I am trying to think of a fact situation where I would say if I was a trial judge for instance, that I would say yes you are going to have a severance. I can't think of one, so I guess I will have to answer I think the court has the inherent power to limit or instruct the jury according to the law, and alleviate the prejudice of that type of an offer. So I guess I will have to answer your question no I can't think of one.

Again I really do want to make it clear that we do not...even if Mallard and Wilborn were correctly decided, which I don't think they were and I think the Houston CA has now not backed off of that necessarily but has clarified what those cases meant in the Lerner case, I still want to make a very clear point that we do not have a rule 408 settlement offer in this case.

HECHT: Before you make that point, you also think Lerner was wrongly decided?

LAWYER: Yes. I think what happened was they spoke a little boldly in Wilborn and Mallard, and then they got to thinking about what that meant, and they came back in Lerner and said: well that's not exactly what we meant; what we meant is if the situation comes up. And I think the next stage from there is well okay even Lerner went a little too far and maybe we could limit around it, have instructions. And I have tried several cases and depending on what the instruction is about, sometimes they are good and sometimes they are not. Most of y'all have been trial judges and you know what that means. I mean once you ring the bell sometimes it's hard to unring it. But I don't think that the prejudice in a case like this where really the whole sort of umbrella of what happened in this case from the purchase of the policy, to the damage to the house, to the adjustment of the claims, to the denial, and in some cases like Mallard, a settlement offer made, I think you sort of have to have a flavor for the whole case in order to determine the issues in the case. And I think if you were to divide that up you are going to have 2 juries deciding what are essentially different cases even though they arise of the same operative facts. And the facts do interrelate to each other. And it's clear what the insurance companies are trying to do here, is they are trying to create a severance, they are trying to create a void between the cases - the dividing conquer theory. If you don't get any of this evidence in over here, it won't hurt me. So I will never have to worry about what I do over here. If you're never going to get any evidence over here - over here. So the logical

construction of the total severance of the cases would be that in the contract case no bad faith information comes in, and in the bad faith case no contract information comes in. Why is it relevant? If the bad faith case is based on something other than the breach of contract, why would it be relevant.

HECHT: But you agree it shouldn't come in, and if it comes in in a joint trial there ought to be an instruction: don't consider this to the other claim.

LAWYER: Yes.

HECHT: So they're not really trying to gain advantage, they are just trying to get what they are entitled to in the first place? They are entitled to at least to an instruction: don't listen to it with respect to this claim?

LAWYER: I think they should get an instruction if they can demonstrate that the information wouldn't prejudice them. And that's going to be the trial judge's call in a case-by-case basis is how egregious is this evidence, this bloody knife that's going to come into evidence, how egregious is that? Is there anything inherently about that that is so bad, and I think this goes back to your earlier question Justice Hecht: Is there ever a piece of evidence so bad that we have to have this evidence? And again like I said I can't think of one in an insurance case. I can think of it in murder cases and things like that, but I can't think of one in an insurance context where you would have that.

SPECTOR: In the ordinary contract case would you think some evidence of bad faith is admissible?

LAWYER: When you say evidence of bad faith I am not sure any of the evidence in a case can be pigeonholed like that.

SPECTOR: You're claiming a poor investigation. Now wouldn't that possibly be relevant to the contract claim?

LAWYER: No, I don't think so. His contract claim is was there a covered event? did the insurance company pay on a covered event? It's pretty simple. But again when you are talking about the entirety of the case and explaining to a jury who's never heard the case 50 times like I had preparing it, you want to give them the flavor of what's happening in the case the entire case, how the parties related to each other, how this got to be where it is. And there's a lot of art that goes into this. It's just not just science. If it were science we could decide contract cases without juries. We would just have a computer decide them. But it's more than that. You have to give the jury the flavor of what's happened in the case. Now I'm not talking about inflaming the jury, although that happens I'm sure. I'm talking about just so that they are just not sitting them going: wow, how do we get from here to over here; nobody explained this big gap in the middle of the evidence. And so it's hard to say well this evidence relates only to this claim, and this evidence only relates to this claim. In the practical day to day reality of trial on the firing line it's really hard to do that. It's really hard to say this is only relevant here and this is really only relevant there, which again gets back to the limiting instruction. The judge would have to make the call on whether this particular piece of evidence is relevant and should be not instructed and just come in for whatever it could be argued to be worth, or whether it is such a piece of evidence that it only applies to this case, number 1; and number 2, that it is so prejudicial that there should be a limiting instruction telling the jury to ignore it for purposes of this case over here.

If you drive a hard and fast wedge between these 2 cases what you're doing really is you're saying you don't trust juries to follow the judge's instructions. When it comes right down to it that's what you're saying. I'm going to flip Justice Hecht's question around: If there is some case where a limiting

instruction will not work, why is there any case where a limiting instruction will work?

GONZALEZ: You would give limiting instructions to net worth, limiting instructions as to reserves?

LAWYER: Sure. You give limiting instructions in trial all the time. Motions in limine are just...every case I've tried has a motion in limine. Every case I've tried has limiting instructions or definitions to a jury.

HECHT: But as a trial lawyer don't you feel a little nervous about limiting instructions? Now ladies and gentlemen don't pay any attention to this. Doesn't that kind of wake them up don't pay any attention to this?

LAWYER: Nothing like having the judge talk from the bench to wake the jury up for sure.

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REBUTTAL

ENOCH: If this were an arson case, it seems to me that there would be a lot of evidence about the investigation of the claim in coming to a determination of whether or not it was covered. It's not covered if the property owner set it on fire. It is covered if somebody else set it on fire. So it seems to me in that circumstance you would have a lot of back and forth testimony on whether or not the owner of the property set the fire. And then the jury decides this is a covered deal, the owner didn't set it on fire. It seems to me that your notion that there should be a severance in cases between contract and bad faith produces a real problem in the case where arson is one of them. I suppose any car wreck could be the same thing. Where you then end up going to in your argument a different jury to hear exactly the same evidence except 1 additional element, which is would no reasonable insurance company have relied on this information in denying the claim. So you basically have a new trial on all the same evidence plus 1 additional element. Isn't that giving the insurance company what a second shot at if they didn't convince the jury that they weren't covered by the policy at least they've got a second shot to kind of review what they did in the first trial and retry it to see if they can avoid the bad faith claim on exactly the same factual underpinnings?

LAWYER: You may have hit upon an area where it would not be appropriate. I think that that comes into the third requirement of this court's severance idea, and that is how intertwined the evidence is. And you were suggesting that in an arson case the evidence on who actually set the fire and how the investigation proceeded to determine who set the fire, might be so intertwined with the bad faith evidence that severance would be inappropriate. And I appreciate that, and that may be the case.

ENOCH: Could that apply here in say a car wreck: pay for the damage to the automobile, but I don't think there's been all this personal injury that's being alleged. And so I am not paying the personal injury. Would that same problem exist in that kind of circumstance?

LAWYER: I think you're moving away once you get from the arson case into something like that which sounds more like just the liability on the contract. Before long you're to our case where it's just a very simple question of whether the leak caused foundation movement, and if so, how much?

BAKER: Does your answer to Judge Enoch's question do away with your position that the severance ought to be automatic if you have a contract claim plus the bad faith claim?

LAWYER: Well it would in the arson case.

BAKER: Because as soon as say that you have to look to determine whether they intertwine or not, that's the whole focus of what the TC's discretion is. So if you're arguing for a cut deal that they always are severed you just destroyed the TC's discretion. And they don't have the opportunity to exercise it under all the law as a rule we have in existence now to make a determination whether it's intertwined or not

LAWYER: Well I still think that there can be evidence your honor on this issue of intertwined which is so clear that the TC has no discretion. And I think that's what we have here.

PHILLIPS: Even if the TC has no discretion as you argue, why couldn't that error be...in your case if it's as bad as you say it is, why couldn't it be corrected on appeal?

LAWYER: Obviously some day your honor on the appeal that issue could be corrected on appeal.

PHILLIPS: What within our recent writings on mandamus makes this fall into the kind of cases we should correct now?

LAWYER: I think so you honor.

PHILLIPS: Where would you draw from Walker or some other case to say this needs to be corrected now rather than waiting to see how the trial comes out?

LAWYER: Because the strong evidence that both sides in this case wish to offer on the bad faith case; for example: at statement of facts 19, vol. 2, Mr. Pickel says that he wishes to redepose the adjuster and introduce evidence that Mrs. Broadrick has been paid $40,000 on prior claims and that that has prejudiced the adjuster in this case to this preconceived idea of what _____ the claim. It says he wants to take the adjuster ask this question to him. He doesn't care whether the adjuster answers yes or no. It doesn't make any difference. He wants to get that into the jury box. I believe that that evidence along with the rest of the evidence is so compelling that we have met every criteria that this court has set for severance, that Judge Akin had no discretion in this case.