

ORAL ARGUMENT - 03/04/99
98-0800
MID-CENTURY INS V. KIDD
98-1024
NATIONWIDE MUTUAL INS. V. GERLICH

PAXSON: The issue today is whether an insurance carrier is entitled to offset PIP payments against the UM benefits under your standard Texas personal auto policy. The source of the PIP credit is contract. The Texas Dept. of Insurance promulgated a standard contract of insurance for use in all 254 counties. The facts of our case are simple. The amount of actual damages was liquidated by jury verdict at \$13,000 in the Kidd case. The amount of actual damages was within the UM policy limits.

The TC and the 8th CA disallowed an offset for the PIP payments of \$10,000, which meant that the carrier was forced to pay double on the very same element of damage. In other words, \$10,000 in medical bills was paid under PIP. Those very same bills from the very same doctors were then introduced and according to the 8th CA would be required to be paid again under the UM portion of the policy.

ABBOTT: But this very same party paid double premiums: 1 for the PIP, and 1 for the UM?

PAXSON: Yes. The way it works is you have to have separate premiums when you go in to buy a policy of insurance.

ABBOTT: Well if you're charged 2 premiums why shouldn't they be able to recover under the separate policy provisions?

PAXSON: You have to buy insurance an a la carte basis. When you go in you make a decision on whether you want to buy the coverage or not to buy the coverage. But when you pay the premiums either in bulk or separately, you only get what you bargain for.

ABBOTT: Is it made clear to the purchasers of insurance that they may be buying something that they really don't need, or they may be paying for something that they may not be provided coverage for later because of circumstances like this, or are the consumers left in the dark?

PAXSON: Well you can give somebody a policy of insurance but you can't make them read it. I don't know if ...

BAKER: Can you explain it to them?

PAXSON: Absolutely. And I'm sure that that's why policies are usually purchased on a face-to-face or now telephone type basis. But again, this is not where each individual company goes out and crafts their own contract language. This is a standard policy of insurance. You get everything you bargain for into that contract of insurance. The PIP is there up front and fast on a no-fault basis to pay you if you've had an accident and you've lost wages or you've incurred medical bills. Later if you decide that you've got additional damages and you want to go off and sue your insurance company or claim against the company for an underinsured or uninsured motorist, you also get the benefit of that. And that's over and above the amount that you paid in PIP.

GONZALEZ: Isn't it true that the contract requires an offset, permits an offset?

PAXSON: Right and that contract language starts off: In order to avoid payment of benefits in excess of actual damages.

GONZALEZ: So the reasonable expectations of the insureds are, that they understand that it's subject to an offset?

PAXSON: Right. No one should go into a policy of insurance expecting double recovery.

GONZALEZ: The respondent's argue that we've decided this issue in *Dabney*. Why doesn't *Dabney* control in this case?

PAXSON: Different contract, different language, different result. *Dabney* needs to be read in conjunction with *Westchester Fire*. In *Westchester Fire* you had a policy of insurance, and the language back then required that any payment under PIP would actually reduce the policy limits. Completely different set of facts, that produces completely different results when you start doing the math after a loss. That's not the policy before the court today at all.

HANKINSON: Would we have to overrule *Dabney* or *Westchester Fire* in order to reach the result that you would have us reach?

PAXSON: No. Hypothetically if somebody bought a policy of insurance that had that type of language in it and had a Texas court interpret it under Texas law, that's still the rule. The problem here is that we've got a different policy of insurance with different contract language and we're not trying and have never attempted to offset the PIP payments against the policy limits only against the actual damages so no one gets double recovery.

ENOCH: Why would anybody have purchased uninsured motorist coverage?

PAXSON: Because there's an awful lot of uninsured motorist on the street.

ENOCH: Is uninsured motorist coverage designed to replace that other person's

insurance?

PAXSON: The idea behind it, it is for your protection against financial loss as a result of uninsured motorists' negligence.

ENOCH: So if the other person has insurance coverage could they take an offset for the fact that I have PIP?

PAXSON: No, they couldn't.

ENOCH: So I buy uninsured motorist under the risk that the other party won't have insurance?

PAXSON: Yes.

ENOCH: So why should I get less coverage under my uninsured motorist that I'm trying to replace just because the other side doesn't have insurance?

PAXSON: It's meant to replace it to the extent of compensatory damages. The idea is that you are going to get your actual damages. You're going to get the full benefit of your policy if the other person is uninsured. But it's always been construed as being compensatory.

ENOCH: Uninsured motorist coverage is not designed to replace a third-party's insurance coverage up to a certain limit it's just a different kind of insurance coverage?

PAXSON: Right. The carrier is a defendant by virtue of contract not by tort. Mid-Century Ins. Company is not the tortfeasor in this case. And so when you start looking at different rules of law like the collateral source rule, we're not the tortfeasor. We are a defendant by way of contract.

UM coverage has always been a compensatory vehicle. For example: the CA's have consistently held that you don't get to recover punitive damages against your UM coverage. It's a compensatory claim.

O'NEILL: But aren't there cases that specifically say the purpose of the UM statute is to put the claimant in the same position they would be in as if they had been hit by an insured? And if those cases do in fact say that, how do we get around that language?

PAXSON: If you just want to take one pithy statement out of a case, you can find language by which you can build _____ by which you can require double recovery. But when you go back and you look at the statute it was put out there in order to protect people from financial harm resulting from uninsured motorist. It is a compensatory plan.

ABBOTT: Well let's look at the statute. In particular, let's look at 5.06-15. It says: The underinsured motorist coverage shall provide for payment to the insured of all sums, which he shall be legally entitled to recover as damages. It doesn't say: All actual damages. But it says: All sums which he is legally entitled to recover. Here we have a judgment for the \$13,000. Because it is a judgment, that means that the insured is legally entitled to recover those sums. Why does 5.06-15 not tie your hands?

PAXSON: This is an uninsured motorist case as opposed to an underinsured motorist. The underinsured motorist provision - this is the offset for the other driver's liability coverage. In other words, you go out and you settle and get a verdict against the tortfeasor, this provision simply states that you go ahead and offset that amount against what you might could recover against your underinsured motorist coverage. But it's not meant to go ahead and to have the interplay between the policy provisions which is what we're talking about in terms that you paid PIP under the same policy. There's nothing collateral about the source of payment here. Under the same policy we're supposed to pay it again under UM. That's what the respondent argues. That's what the 8th CA held. And you've got to go ahead and read this policy fairly. There's no way you can read this policy, and no one has ever argued this policy is ambiguous not to date, the only fair reading is that they are going to pay you the PIP fast and up front for your lost wages and medical. But when you go ahead and you make a claim under the same policy for UM, at that point in time you're going to be capped your actual damages. No one is going to come out ahead on this deal. And we have had cases out of this court before, *The Briggs v. American Motorist* case, where there is two completely different UM policies applying to the same loss. The employee's personal policy and the employer's policy. And they've been harmonized, the two policies together, not to allow recovery of more than actual damages. We're not trying to short anybody. We are willing to pay this man his actual damages as liquidated and found by the jury. But \$13,000 in medical bills shouldn't require a payment of \$23,000 under the policy of insurance. So the rule against double recovery is the rule that attains here.

There is 3 arguments that the respondent set forth against enforcement of the policy as written. One, that *Dabney* doesn't allow it. And again, *Dabney* is a different contract which meets with a different result. Two, that the insurance code doesn't provide for it. One thing I do want to point out, one of the things that they like to key off of is the idea that there was a statutory provision in the liability section of the insurance code that's completely inapplicable here, that limits a PIP credit to guests and passengers.

For example: You're riding in a car and the driver of your car is negligent. Well because you are occupying a covered auto, you're entitled as a covered person to PIP benefits. Later when you make a claim against the driver of that auto, that same carrier now defending on the liability portion would have a PIP credit. That provision demonstrates the strong public policy in favor of avoiding double recovery.

ABBOTT: But couldn't the legislature have added on this particular category of claimant

as opposed to limiting it to just passengers and guests?

PAXSON: It would have been unnecessary. The statutory provision was actually required because in that situation where you are going to go ahead and sue the driver of that car, the collateral source rule is applicable there. You're not a subscriber. You're not the insured under that policy of insurance. You are a third-party claimant against their insured in that context. To abrogate the collateral source rule you needed a statutory provision and that's where you see 5.06-3(h) come in. In our situation, it's by virtue of contract.

GONZALEZ: I want to go back to the statute cited by Justice Abbott. I'm troubled by the term "all sums." It seems to me that a party cannot contract in violation of the statute, do you agree with that? Even though the parties may contract to have an offset, that is not a valid provision if it's in violation of this statute which requires recovery of all sums. What is the public policy argument for not allowing someone to recover "all sums" pursuant to this statute?

PAXSON: A couple. First off, that statute is specifically dealing with underinsured motorist coverage, which is a completely different fact pattern than an uninsured motorist. The intent of this provision is to go ahead and make sure that you get an offset for the liability coverage of the tortfeasor. Whatever you are able to recover from the tortfeasor is offset because of your underinsured motorist coverage. This provision when you look at it in the context of what they are trying to do is actually an offset provision meant to avoid double recovery. That's the intent of this section.

Secondly, in terms of public policy, there are separate premiums. One of the things that we know from the *Ramulus(?)* decision, from the Texas Dept. of Ins. Commissioner, is that right now we are paying less for UM and UIM because the PIP credited offset is part of the rate making process. The respondents are trying to get something that they didn't pay for. They are - trying to change the contract. The contract was meant and rated on a specific actuarial basis.

So the policy behind it is, trying to get something that you didn't pay for or contract for.

BAKER: Could you explain to me why then is there a separate premium charge for that particular coverage? Is it required or is it voluntary coverage?

PAXTON: PIP adheres to all contracts unless you reject it in writing. UM adheres to all contracts unless you reject it in writing. And a lot of people make a financial decision to reject it in writing. When you buy insurance today it's on an a la carte basis. You can decide whether or not you want collision coverage. The thing you've got to have is the liability coverage. You've got to have 20/40 liability coverage in order to ride legally on the highways. Everything else is your option and your consumer decision.

BAKER: So the basic structure of the policy is it's all there and you back off by declining?

PAXTON: Yes.

BAKER: And so that's why they break out the premium so you're not paying separate if you get the whole thing.

PAXTON: You can't lump sum price it because there's a lot of decisions and you go through and pick and choose on an a la carte basis what you want in your insurance policy.

BAKER: So does that answer Judge Abbott's question of, Well aren't we paying for two separate things and shouldn't we get coverage rather than credit to the offsets?

PAXTON: This court has previously rejected the notion that payment of separate premiums results in automatic intrapolicy stacking. That has not been the rule in Texas.

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KRENICK: I am Mel Krenick from San Antonio. I represent Nationwide Insurance Co. in that portion of this case. At the outset, I have to address one point in the San Antonio court's opinion. In the *Gerlich* case, appellee devotes 4 sentences of their brief to this. In regards to disagreement among the members of the appellate court as to whether the parties had stipulated on the amount of damages in the case. The record will show that there was no disagreement between the parties. We filed a written stipulation. We all agreed showing the total damages of Ms. Gerlich to have been \$3,500. The judgment in the TC says specifically: Actual damages, \$3,500. Nationwide had paid \$2,200 in PIP benefits. There was no fact dispute in the TC or in the CA. And the fact question was not briefed. There was not a single question asked us in argument before the 3 judge panel that heard the case. When the opinion came down from the en banc panel, for the first time the court raised the fact issue, or the possibility of a fact issue that maybe this \$3,500 was not the total damages of Ms. Gerlich.

OWEN: One thing I don't understand, you all agreed had a settlement agreement and that you agreed to pay \$3,500. Why aren't you bound by that settlement agreement?

KRENICK: Only subject to the 5th offset in the contract. We rely on the contract that said: We had previously paid \$2,200 of PIP benefits.

OWEN: Did your settlement agreement say: Subject to PIP or does it reference the PIP?

KRENICK: It just says: Total settlement, \$3,500. And we say, Here's your \$3,500 less the

PIP offset which we are entitled to under the contract.

OWEN: But you settled after you already made the PIP payments?

KRENICK: Yes.

OWEN: I don't understand why you are not bound to pay an additional \$3,500 under your settlement agreement?

KRENICK: It was all part of the agreed facts that we went up on to the TC. The company said; We will settle, we will pay you your total damages of \$3,500, but we get the PIP offset, so you only get \$1,200. And plaintiff said: We disagree with you. We think you owe us \$3,500, but lets take it into court and have an agreed set of facts and take it on up to see if you're entitled to the offset. The court has to realize this is a very small amount of money.

OWEN: You agreed to disagree is part of...

KRENICK: Yes, very clearly that. And the *Kessler* case cited in our brief as far as the CA opinion says, that in a case involving agreed facts, the only issue on appeal is whether the TC properly applied the law to the agreed facts. And the *Gerlich* case is not fact specific. And I think it was properly consolidated with the *Kidd* case for the court's consideration of the legal issues.

The question of law before the court is, Should the PIP offset against total actual damages recoverable under the UM provisions of the standard Texas auto policy be held to be void and unenforceable so as to allow insureds to obtain a double recovery of their damages?

OWEN: The PIP statute itself, art. 5.06-3(c) specifically says that, You're required to pay these benefits without regard to any collateral source. How do you deal with that language?

KRENICK: The PIP benefits are paid without regard to any collateral source and they were in this case. Ms. Gerlich and Mr. Kidd both received full PIP benefits. No question. When they made their UM claims, they received their full actual damages under their UM claim.

OWEN: What if they had made a claim under the UM policy first, would they be entitled to come back and get the PIP benefits in addition to the UM coverage?

KRENICK: I can't think of a way that that could happen. I guess it could. They are always entitled to their PIP benefits. That's the immediate quick money - get them through the rough time money as has been described in some of the cases. If they make a UM claim first, it seems to me the company would say, Are you going to make a PIP claim?

OWEN: We're not telling you. We're claiming under our UM provision. We will worry

about PIP later. Are they entitled to do that?

KRENICK: I think the company would be able to say at that point, Well if you make a PIP claim later you've already been paid for those damages, so it will be deducted.

OWEN: Then what do you do about the collateral source language under the PIP statute?

KRENICK: The rule to my knowledge is that the collateral source rule does not apply if the source from which the benefits are sought is not collateral to the primary source of benefits. It's all the same policy. The source is not collateral when you're obtaining PIP benefits and UM benefits.

O'NEILL: There are cases that say, The legislature's intent behind this statute is to put the claimant in the same position they would be in as if they had been hit by an insured. Do you share counsel's assessment that that language is pithy?

KRENICK: I do. The *Brown* opinion upholding the PIP offset addresses that. It says, and I don't think it's a valid argument to say, well if they had been insured then we would get a double recovery. The *Brown* opinion says, We're talking apples and oranges here. We're talking a third-party claim if they were insured. We're talking first-party claim, contractual claim, under the UM coverage. And the *Brown* case says over and over, It's different facts. It's not the same. You cannot compare these.

O'NEILL: So you think those cases were just wrong in stating that that was the legislature's intent?

KRENICK: No. I think it's a good way to look at UM coverage from one standpoint and say, Hey it's just like this was liability coverage. But it's not the same when you get down to the nitty gritty of what kind of a claim is it. When we first got these cases to defend back in the 70's, we didn't know what kind of cases they were. These look like liability claims, the UM claims. You tried them like a liability claim. I went in and defended numerous uninsured motorist as my clients, and the insurance company was kept as a silent defendant. We did that on a motion. This court and the subsequent lower courts told us, You're wrong. These are first-party claims. They are governed by the rules of contract. They have a 4-year statute of limitations. They may recover attorney's fees under this. This is a different breed of cat. So it may look like liability, but it's not. And don't compare it. Don't handle them that way.

ENOCH: In *Schaefer v. Uniguard*, the argument was made that the PIP endorsement was really a separate agreement of insurance that was not affected by other provisions in the policy to which it was attached. Primarily that had to do with a driver exclusion that was under the policy and the court concluded that the exclusions under the policy didn't apply to the insurance provided by the PIP coverage. Now I understand your argument saying that we have to remember this is a

defendant by contract not a defendant by tort. And so the contract governs what responsibilities between the parties are based on a condition which is that this driver who caused the accident was uninsured. But it seems to me you're arguing that there's a provision of the policy that affects the coverage by PIP.

KRENICK: It's my understanding that *Uniguard* said, The insurance company cannot limit the extent of PIP coverage by this exclusion by saying this is an excluded driver, therefore, the passengers don't have any PIP. It's excluded under the policy. And this court said, You can't do that. That's limiting the extent of PIP coverage. The PIP offset doesn't limit or even affect the extent of PIP coverage. Both Ms. Gerlich and Mr. Kidd received full PIP benefits. And it's our contention they've received full UM benefits. The only thing they complain about is that they didn't get some of them twice.

OWEN: Why do you think when the legislature passed the uninsured motorist coverage statute went to such great pains in §4b to talk about double recovery when you're talking about property damage, and talked about when you've got two provisions in the policy and how all that works and finally says, In no event shall you be entitled to recover twice. Why do you think they just did that with respect to property damage and didn't do that for personal injury?

KRENICK: The property damage offset, and that's what it is, it's an offset. Under collision damage UM you can't make a double recovery. That was passed in 1979. The PIP offset had been in the policy for several years at that time. And I think this is an excellent argument that the legislative intent is shown against double recovery. The legislature said, We don't want them to have a double recovery under property damage and we're going to amend the statute. They already don't have a double recovery because of the PIP offset. And to me, it shows legislative intent that the legislature is saying, There cannot be double recovery under any portions of the standard Texas automobile policy.

OWEN: Where is the PIP offset under these circumstances in the statute?

KRENICK: It's not in the statute. It's in the contract. And as Commissioner Bomer said in his 1997 opinion, that's attached to all the briefs, It's been in there for 20 years. The insurance companies have been relying on it. They rate their policies. It's been there all this time. And that's what I say as to the property damage offset. It was there. The companies had been relying on it, rating their policies, selling them and using the PIP offset. And then the 1979 amendment on property damage just shows the legislature's further intent. There's no case in Texas history that I know of, no evidence in the legislative intent or in insurance principles that allow this double recovery and say, You should you make a profit from your insurance policy.

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RESPONDENT

BLATT: There are two points I'd like to make to the court today. The first is that the UM and PIP statutes actually prohibit the offset of PIP benefits against Kidd's UM claim. And as such, Mid-Century's proposed interpretation of its policy must be found void as a matter of law. The second is that Mid-Century's attempt to raise the specter of double recovery or recovery in excess of actual damages is misplaced in that this court's precedents, the statutory scheme and public policy support rather than forbid the complete recovery that was awarded Kidd at trial and that was affirmed by the 8th CA.

HANKINSON: Do you disagree with Mr. Paxson's explanation of what the rate structure is for the PIP and UM coverage, that in fact the offset is taken into account with the rate structure that applies to the standard Texas automobile policy?

BLATT: Certainly with regard to the calculation of premiums, the commissioner's opinion indicates that, yes, that is taken into account.

HANKINSON: In fact the insured then is not paying for coverage it didn't get if the offset is allowed?

BLATT: I think one of the justices alluded to the fact that there is still two separate premiums that are paid for this coverage. The way the premiums may be calculated is not necessarily revealed to the consumer.

HANKINSON: But do you disagree that in fact what is happening is as the rate structure is set, the offset is taken into account, so in fact the premium is less on UM coverage than it otherwise would be if the offset were not allowed? Do you disagree with his representation that that's in fact the way the rate structure works?

BLATT: That was not an issue - we did not receive any evidence on that. It wasn't an issue that came up in our case.

HANKINSON: So you don't know one way or the other?

BLATT: I don't know.

HANKINSON: And you don't know in contrast to that, that in fact insureds are paying for full UM coverage without offset and then not getting that if an offset is allowed? You don't know that contrary either?

BLATT: If you look at the policy that you receive every 6 months, there isn't any indication that there is an offset.

HANKINSON: So you really can't say one way or the other whether you agree or disagree

with Mr. Paxson?

BLATT: No, because I don't have any evidence on that.

OWEN: What about his argument about the construction of the UM statute that the legislature already thought there were PIP credits and when they tried to align the property damage side of it they weren't trying to say that there were double recovery possibilities?

BLATT: Do you mean the property damage in the UM portion of the statute?

OWEN: Right. What about his argument that they were trying to align it with existing law regarding personal injury?

BLATT: I think it's precisely the opposite actually. Because the property damage portion of the UM statute was added in 1977. If the legislature had wanted to deal with the issue of offsets in the bodily injury portion of the statute, it certainly could have done so at the same time that it added the property damage language into the UM statute.

GONZALEZ: But is it possible the legislature decided to leave that agreement to the parties to contract, to deal with by contract?

BLATT: Yes, the parties can be left to contract with one another as they see fit. But if the contract violates the statute still is not valid. Clearly the legislature had the idea of offsets in its mind when it put this extra provision in for property damage. And the fact that it didn't add that to the bodily injury, I think is indicative of precisely the opposite...

JUSTICE: Is there any public policy reason for prohibiting offsets for property damage but not for bodily injury?

BLATT: The underlying policy on UM is that the person who is injured is supposed to be put in the same position that they would have been in had they hit an insured, had they had the dubious fortune to be hit by an insured motorist. I think if you look at this court's cases, you see that even in those cases where stacking is not allowed, the actual intent is that the insured motorist gets 1 full UM recovery. If that has to be accomplished in some cases by stacking then it is, and if not, then the motorist is still covered for all bodily injury. And that is the public policy behind the UM statute.

JUSTICE: Just because the state has a public policy that says, A tortfeasor shouldn't get the benefit of the person they injured having the foresight to buy insurance, that is, not the benefit of a collateral source, the tortfeasor should pay the full amount of the damages. We don't look to see what other money is available. Does that translate into a public policy that considers a double recovery to be proper? You're saying the public policy is for Mr. Kidd to get a full recovery and in

the tortfeasor context the public policy would mean a double recovery. Is that necessarily equal?

BLATT: In the third-party situation, we don't even call that double recovery. We don't say that because Mr. Kidd would be entitled to his PIP in a third-party situation and could still recover his full \$13,000 from the uninsured motorist, that we don't call that double recovery. We say that's how the statute works. Well, the same thing applies here especially when you consider that the PIP statute has an absolute prohibition on subrogation and also says that the benefits should be available without regard to any collateral source.

HANKINSON: But isn't the purpose of that to facilitate quick payment of these kinds of claims so the insured doesn't have to wait?

BLATT: That is one purpose of PIP insurance. But on the other hand, if Mid-Century's interpretation is adopted here, in essence what we're doing is we're just with one hand giving them quick benefits and with one hand and then taking them away. It's an illusion that there is a benefit there.

HANKINSON: Isn't it critical though to the analysis in this case, that both of these claims are first party insurance claims?

BLATT: Not if you consider that they are separate premiums paid for the coverage.

HANKINSON: But doesn't that then depend on looking at the rate structure as to whether or not the premium does appropriately take into account the offset provision of the contract?

BLATT: It does have implications for the rate structure. However, the difference is a few dollars in either direction.

HANKINSON: But a few dollars multiplied times all the automobile insurance policies issued in the State of Texas and all the premiums paid is a lot of dollars?

BLATT: That's certainly true. But as an insured I'd rather pay a few extra dollars and be ensured that I get all of the coverage which I believed I was contracting for. And certainly, in this case, there was evidence that Kidd was not advised of this offset provision at all.

HANKINSON: When you buy insurance do you expect to buy insurance that will pay you more than what your loss is? Is that one of your expectations as a consumer?

BLATT: As a consumer, my expectation is that I get the benefit of the coverage that I pay for.

HANKINSON: That goes back to rate structure doesn't it?

BLATT: But again, the point here is is what we are calling double recovery in this other circumstance, the circumstance which UM is precisely designed to address, that is that you are put back in the position that you would have been in, that you are entitled to legally recover all sums that you have available to you. If that's the case, that's not double recovery and that is my expectation under the policy. I see that there is no difference between the fact that Kidd is making a claim. Even though it's pursuant to his own policy, it's still pursuant to a separate coverage for which he paid premiums, and as opposed to...

HANKINSON: Do you agree though that your argument breaks down if in fact the rate structure takes into account the offset?

BLATT: No, because I think there are other public policy provisions that feed into the purpose of the two statutes and the interaction of the two statutes is such that the offset should be prohibited.

BAKER: One question you alluded to is Mr. Kidd not being advised about the credit. Is it a correct statement that this is purely and simply a contract issue and not one for fraud where he was "misled" to his detriment, and therefore, that's a ground for recovery but we're just looking at a contract cause of action pure and simple?

BLATT: No. This case needs to be resolved at the statutory level. And it is our contention that the statutes indicate that the policy provision should be voided.

I would like to also talk about the *Dabney* decision. The *Dabney* decision is on point with this case. The *Dabney* court specifically noted that the PIP coverage at issue in that case arose from the standard automobile insurance policy. Commissioner's opinion which has been offered by the other side in this case indicates that that policy provision has been in effect since 1977 - *Dabney* was decided in 1982, and therefore, the *Dabney* court did have the same provision in front of it.

GONZALEZ: What weight or deference do we give to an order or an opinion of the Commissioner here?

BLATT: In this case, the commissioner's opinion is not required to have any deference per se by this court. The only area in which deference has to be given by the court is if it's actually part of the rule making authority of the commissioner.

It's also clear that the *Dabney* case had precisely the same issue in front of it that's in front of the court today, which is whether or not a PIP credit can be given as an offset against UM benefits claimed. For those reasons, the *Dabney* opinion is essentially on point with this case.

I would like to return to the UM statute. The fact that the legislature's choice of language with regard to 5.06(4)(b), which is the property damage provision of the UM statute, again comports with this court's holdings that the insured is still entitled to the 1 full UM coverage recovery pursuant to 1 limit in each one of those cases. In this court's 1978 *Uniguard* decision, and in the 1982 *Dabney* decision, this court held that, The exclusions that are contained in §e of the PIP statute were the only exclusions that were permitted under the PIP statute. And indeed, 4 years later in *Dabney* this court also held, That there was no offset of PIP benefits against UM coverage.

The point here is, that if the legislature had intended that there would be an offset allowed, certainly *Dabney* and *Uniguard* would have been red flags to the legislature to then go back and reformulate the statute so that such an offset provision could be included in the PIP statute. That was not done and those cases still stand. And that is I think further support for the conclusion that the legislative scheme under PIP does not allow an offset to be taken.

HANKINSON: Did the insured in *Dabney* recover more than the amount of the full damages, or was the net effect and the result of the case that in fact it was compensation for the extent of the damages and not beyond?

BLATT: We don't know that from that the language of the *Dabney* case. But what we do know about *Dabney* is that it was a case like this one. It was not an excess damages case. This was a case where the damages of the plaintiffs were within the limits of the policy itself.

HANKINSON: But you don't know one way or the other whether or not the insured in that case recovered more than the actual loss?

BLATT: No.

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ZINN: In answer to your question Justice Hankinson, they did make a double recovery in *Dabney*. We have the judgment in *Dabney*. We have the actual jury awards in *Dabney*. There was a double recovery in *Dabney*. It is exactly the same situation as this, the exact same contract provision.

HANKINSON: So we would have to overrule *Dabney* in order to go with the insurance companies in this case?

ZINN: You have to overrule *Dabney*. You have to also overrule *Uniguard*.

GONZALEZ: So they recovered in excess of their damages?

ZINN: They did.

GONZALEZ: Wasn't there an issue of comparative negligence in that case?

ZINN: Yes. There were credits taken for comparative. There were credits taken because all of the plaintiffs in that case were found negligent to some degree. So credit was taken off for that matter. However, the judgment was in the amount for the uninsured motorist coverage. And they had already received PIP. And that judgment of the uninsured motorist coverage was under the uninsured limits. All the judgments, even the woman who was killed was under \$10,000 in that case. And in fact, we have the actual judgments in that case.

HANKINSON: Have you read the Dallas CA's decision on this same issue that goes against you?

ZINN: The *Kim* case?

HANKINSON: Yes.

ZINN: Yes.

HANKINSON: Do you disagree then with the Dallas court's analysis of *Dabney*?

ZINN: Yes.

HANKINSON: The Dallas court concludes that they were only compensated up to the full extent of their damages as a result of the comparative fault.

ZINN: They didn't read the file. This is the judgment in *Dabney*. It came from y'all's records. You can check it. The judgment for the woman who was killed was \$6,611.40. That was for the uninsured motorist coverage. The judgment for the second plaintiff was \$3,286.69. For the third plaintiff, it was \$251.87. That was his uninsured coverage. He had been paid over \$500.00 in PIP. If they took a PIP credit in that case, he would have got zip. He would have actually owed them money back.

In answer to your question Justice Owen about the addition of the uninsured motorist coverage in 1977 and 1979, I have reviewed the legislative history from both of those acts and those amendments. I've read every tape there is on that. I've looked at the bill file on that. Never did any (SIDE A ends)

When they added that bodily injury language in §3 of the UM statute, they added the same language about property damage in §4. That language on bodily injury in 3(a) did not exist before 1977 nor did that property damage language. Clearly they thought the property damage was going back to the PIP statute they passed in 1973. And I've reviewed that legislative history. And it's clear that they wanted folks to get their PIP regardless of the existence of other

benefits. That's the whole point of that §3(c). It never occurred to them that if they didn't give the insurance companies the right to subrogate against the third party driver who hadn't paid premiums and who was at fault, that somehow they would be able to subrogate against their own insured who had paid premiums and wasn't at fault. It never occurred to them that somebody would allow that to happen.

HANKINSON: Since you've checked all the background and everything, have you checked the rate structure and can you respond to Mr. Paxson's argument?

ZINN: I can. And I can tell you that from our experience, that there's a reason why you only had 1 case in-between. You had *Dabney* in 1982; *Lucas* out of Texarkana which was 1-2 years later, it was already in the mill; and then in-between 1982 in *Dabney* and 1998 in the *Kim* case, you only had one case and that *James*. Now all of a sudden you've got about 6-7 cases all of a sudden. Why? Because this is the first time they've been insisting on their PIP credit. They followed *Dabney* for years. Ms. Gerlich had her accident in 1995, and frankly we brought this case because that's the first time we had an insurance company insist on that PIP credit.

HANKINSON: Well Mr. Paxson says that the rate structure takes into account the offset. So in fact, the insureds are paying under a rate structure that includes consideration for the offset; therefore, the premiums are less. Is that right or not?

ZINN: I don't think it is. But let's assume it is.

HANKINSON: Do you know one way or the other?

ZINN: No, and he doesn't either. Because there's no evidence in this record. You can check the record of both cases and you won't find any evidence on rate structure. You're going to have to go outside this record, make some phone calls and find out, because it's not in this record.

HECHT: Well we have a decision of the commissioner that's in the record that says, That as a general matter this is taken into account.

ZINN: You do.

HECHT: Who would know better than the commissioner?

ZINN: But he wasn't commissioner early on. And I would suggest - all I can tell you is our experience and just look at the case law and how it's developed and why this issue has all of a sudden everywhere cropped up. And the reason is because they weren't paying the PIP credit, they weren't insisting on it. And the reason was, because of y'all's decision in *Dabney*.

OWEN: How long has the language been in the policy?

ZINN: According to the commissioner it's been in since 1977. The accident in *Dabney* occurred Sept. 1, 1978. Y'all decided that case in 1982. This is the exact same provision. It's the exact same situation. Folks are making a double recovery off of their UM and their PIP. It is factually indistinguishable.

ENOCH: Is there some sort of general waiver of the contract provisions if people just don't enforce the contract provision from time to time over the years?

ZINN: Yes. Have you ever known an insurance company just not do it? They are going to insist on everything. They are going to play it by the book.

O'NEILL: Well again, we have no evidence in this record either that they are not offsetting with the PIP. I would anticipate that they are going to stand up here and tell us that for years they have been offsetting.

ZINN: And that is true. It is not in the record either way. There's no evidence there's a rate structure. You can look at the record and see that there is only one case basically in-between *Dabney* and *Kim* in a period of 18 years, and that was *James*. And now you've got how many cases?

ENOCH: So your argument really is that this offset is in the contract, but it's either against public policy so it ought to be out of the contract?

ZINN: Well it's public policy. It's written in the statute. When the legislature passed both the UM and PIP statutes they made a pact with the people of Texas. They said, You've got to buy this coverage. This is mandatory. Unless you go to the trouble of rejecting this coverage in writing it's going to be in your policy and you've got to pay for it. And in return they made a deal: Okay, we are going to force you to buy this coverage but doggone it, we are going to make sure you get it. This is statutory coverage. This isn't contractual coverage. These coverages are determined by a statute. And for years this court rigorously defended that public policy. And the legislature made this deal with the people.

ENOCH: I understand that you get this \$2,500 or whatever the limit is and that you can't lose that. That's yours. Now you can go out here and buy some other policy, and that policy can have a provision of offsets and credits. Is there a public policy that says, that the insurance company can't with respect to its own insurer not contract for offsets and credits or $\frac{1}{2}$ of their damages, or $\frac{3}{4}$ of their damages?

ZINN: They can on the PIP credit. The reason they call it a PIP credit is because they are getting a credit in the exact amount of the PIP that's been paid. It's like an advance in a lawsuit. This is exactly what's going on here. These aren't PIP benefits that are being paid. These are PIP advances that are being paid.

ABBOTT: Do you think in the future if things don't work out for you here and the case goes the other way, that parties will first file a UM claim and then go back and seek the double recovery by then filing the PIP claim?

ZINN: They might. And I'm sure the insurance companies will take it out somewhere at the end of the game.

ABBOTT: Is that legally workable for a party and is it going to be likely that that will occur?

ZINN: I don't know if it's likely. But in the end it just becomes a semantic shell game. That's what's going to happen. People are going to pay a PIP premium. Ms. Gerlich paid a PIP premium in this case. If she had never paid a PIP premium, she's going to recover the same amount in UM benefits - total recovery than she would have of if she had paid the premium.

GONZALEZ: But her premiums on the UM are lower.

ZINN: I don't know if they are or not. That record has not been developed. We have the commissioner's opinion and that's really all we've got on that.

OWEN: But UM premiums also go to property damage. It just so happens she didn't have property damage in this case.

ZINN: Actually I think she did. They paid that.

OWEN: My point is, you're paying your premium not just for personal injury coverage under UM coverage. It's also the property damage coverage.

ZINN: But there is separate premiums for that. In fact, if you look at the transcript on page 21 there's a deck sheet. You will see the list of the premiums for all the difference coverages. You get a different premium for the property damage UM than you do from the bodily.

OWEN: Can you elect to get UM just for personal injury as opposed to the whole thing? I thought when you got UM you got the whole bottle of wax. You don't divide it between personal injury and property damage?

ZINN: You can. You can just get property damage or just reject that. UM bodily injury and UM property damage are separate. You can reject either.

HECHT: A question earlier asked, was there any public policy reason why double recovery of property damages should be prohibited by the legislature but not double recovery of personal injury damages?

ZINN: And the answer is, yes. Because when they added that provision in 1977 they had the PIP statute out there which dealt with bodily injury recoveries. And they didn't want you to lose your PIP benefits. If they had put that in there they would have been entitled to this credit. But they didn't want you because they wanted that PIP to be paid. That is mandatory no fault benefits paid without regard to the existence of other benefits.

HECHT: Why shouldn't you get the same property damage benefits?

ZINN: Well it's not the same policy. There's no statute that says collision coverage as a matter of law. There's no statute that says every policy has to have collision coverage. That's a voluntary coverage that you can get or not get, and there's no public policy of Texas that every automobile liability policy in Texas have property damage. There is a public policy of Texas that every automobile liability policy in Texas have PIP, and UM, and you be able to recover for both.

ABBOTT: Your case is the one that has the settlement agreement?

ZINN: Yes.

ABBOTT: Do you concede that notwithstanding that settlement agreement that the other side has the right to go ahead and appeal and contest this particular issue?

ZINN: Yes. The stipulations speak for themselves. That's what we stipulated to. We disputed the offset and that was the whole point of bringing a lawsuit. And we both agreed to bring that. I do not want to foreclose their ability to appeal that on that ground because I don't think we had a written settlement agreement. It was an oral agreement. We didn't agree to actual damages. We agreed to settle the thing for \$3,500, and if we didn't do enough _____ stipulations we just didn't do it. They speak for themselves. But I do not want to foreclose their ability to raise the issue. Because I don't think that would be fair and that wasn't in the spirit of our agreement.

Every time y'all have dealt with the UM issue, you've always left at the end of that case, the plaintiff, the consumer in the same position they would have been if the third-party driver had had liability insurance.

O'NEILL: You don't think that language is pithy?

ZINN: I don't it is pithy at all. I think it's comforting. So in order to speak to the legislative intent and the public policy behind these statutes, they wanted folks to get 1 UM and 1 PIP recovery, not 2 UM coverages or 17 PIP recoveries. You pay your UM and you pay your PIP and get 1 UM and 1 PIP recovery, whatever the rates are. The legislature didn't set the rates. But they did know that they wanted folks to have the coverage. And if you allow a PIP credit in this case, then in those cases where something that Ms. Gerlich had absolutely no control over, she was hit by an uninsured driver instead of an insured one, she's going to suffer a financial loss if you allow

this PIP credit. They didn't say actual damages. They said financial losses.

O'NEILL: Is there anything in the statute, the bill analysis, the legislative history that states that as the purpose of enacting the UM statute to put the claimant in as good a position, anything actually written in the legislative history?

ZINN: The original UM statute was passed in 1967 and they didn't do tapes then. But clearly if you just look at the statutory language, clearly they wanted it to replace that third-party liability insurance. That's what it's called - uninsured motorist coverage. It's for the uninsured drivers as opposed to the insured one. When you try a UM case, when you submit the elements to a jury, you submit negligence, you submit proximate cause and you submit damages of the third-party driver. You submit that case the exact same way you would in a third-party negligence case. The elements are exactly the same. So UM is not some different kind of coverage. At least when we try those things, they are the exact same thing. We have to prove the exact same thing and the policy says we have to prove the exact same thing. It is a substitute for that third-party liability insurance. And that's what they intended. And if you allow the PIP credit it won't happen.

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REBUTTAL

ENOCH: One of the questions posed was perhaps the insured should submit the uninsured motorist claim first, and put the insurance company in the position of having to pay that and then making the PIP claim later. What keeps the insured from doing it that way?

PAXSON: We are talking about different elements and damage basically. The PIP only covers a small subset of the damages available on the UM case.

ENOCH: It seems to me that's a strong point they make: I'm injured, I submit an uninsured motorist claim to the insurance company. What are you evaluating then? You're evaluating what the damages are. Can the insurance company say, Well I'm going to withhold the amount of a PIP coverage? You couldn't could you? There's no offset yet. You haven't paid it have you?

PAXSON: The El Paso CA in construing 2 PIP policies...

ENOCH: All I've done is claimed uninsured motorist. We've gone through the trial. There's a liability of \$10,000.

PAXSON: Even though the statute talks about not without regard to collateral source, again when it's the same carrier for the same elements of damages, nothing collateral about the source.

ENOCH: Well you haven't paid me the PIP, so you can't take the offset can you?

PAXSON: No.

ENOCH: You pay the uninsured motorist. Now I make a claim for PIP. Can you refuse to pay the PIP?

PAXSON: In that scenario, there's nothing collateral about the source. You wouldn't have any unpaid medical bills to be paid under PIP. There would be nothing to be submitted to the company that hasn't already been compensated under the UM provision of the policy.

ENOCH: So you're saying if you've been paid for your damages by the third-party policy, the third-party out there has paid it then you don't have to pay PIP?

PAXSON: Not the third-party but the carrier, the UM carrier has already paid it and if you come back and now I want to make it a PIP carrier to, I would argue, that no, you've already been paid and it's not a collateral source that would implicate the statutory provision. And again, by way of analogy, the El Paso CA in the *USAA* decision talked about when you had 2 PIP policies. And that could happen. You can't go ahead and take both PIP policies that pay the exact same bills. Again, the policy in this state in construing insurance policies is no one has the right to come out ahead. If you get 2 fire policies on your house, and your house burns down, you don't get twice what the cost of your house was.

As far as the rate making, again, you who knows better than the commissioner.

OWEN: Are you contending that the insurance industry can change a statute by restructuring its rates?

PAXSON: Absolutely not.

OWEN: So what difference does it make how they've structured their premiums? Aren't we supposed to look at the statute without regard to what the insurance industry thinks the statute says?

PAXSON: Just that the notion was that somebody was paying for something they weren't getting. And the response is, is they are getting exactly what they paid for because they paid less for...

OWEN: What does that got to do with the statute?

PAXSON: Nothing. When you look at the statute, I can agree that there is nothing specifically in black letters in the Vernons that says, I get a PIP credit when somebody comes in and

wants to collect UM benefits.

HANKINSON: Then if its' not in the statute how can it be in the policy?

PAXSON: The Texas Dept. of Insurance has great discretion in writing a UM policy. As long as it's not inconsistent with or repugnant to the statute, it can be in there.

HANKINSON: Would you respond to your opponent's argument that it is repugnant to the statute?

PAXSON: There's nothing in the UM statute that says you can't take a credit for PIP. There is just no such language. Again, they have great discretion in writing the policy and there's a lot of things in the statute that says these are essential ingredients. You can't write a UM policy without these ingredients. But it's not meant to be an exhaustive list of ingredients. The policy is not written by the legislature. It's written by the TDI.

OWEN: If this were an underinsured situation, under §5, You pay all, and you only get a credit from the underinsured policy. Are you saying it's different depending on whether you are underinsured as opposed to uninsured?

PAXSON: No. I am saying that you have to read the statute as a whole. That specific provision doesn't exist in a vacuum. That provision is an offset provision that says...

OWEN: So if you paid all, and it says what offset you get, doesn't give you an offset for PIP.

PAXSON: In an underinsured motorist context they are saying you absolutely positively get the offset for the other guy's recovery.

OWEN: And it says, Beyond that, you get all.

PAXSON: But again, taken as a whole, when you start looking at the entire statute, there is nothing in there that would be violated or repugnant to that statute when you say you are going to take a PIP credit.

HANKINSON: Mr. Zinn says though that the purpose in the statute of having the UM coverage and what the legislature was trying to do was to create the equivalent of the third-party liability insurance, and therefore, to allow the offset you have to treat it the same way. And to allow the offset then is repugnant to the statute because it would be treating UM coverage differently.

PAXSON: The actual bill that passed the legislature says that it's to protect the Texans from financial loss. It's the intent and purpose of this act to provide a means of protecting the

conscientious and thoughtful motorist against such loss refers to financial loss which goes back to the actual damages. We talk about pithy language, the Houston 14th CA said, UM coverage is mandated by law with the stated purpose of relieving innocent motorist of actual losses. This case is about double recovery, not the collateral source rule.

O'NEILL: Mr. Zinn stated that since *Dabney* there have been no offsets of PIP. Did I anticipate correctly that you would say that you have routinely been offsetting PIP?

PAXSON: I can't speak for his unique and personal experiences. But I can tell you that this case is percolated for it because carriers are obviously taking the credit. This is not a case about waiver and estoppel, which has never been pled.

O'NEILL: I got some impression that there was some routine in the industry based on *Dabney*. Are you disputing that that is done?

PAXSON: In my personal experience there was a great amount of confusion after *Stratener* and *Hestelow* as to what if anything a UM carrier could or should do. And back then, first party bad faith was a raging animal. And so there was a lot of confusion back in industry then as to whether or not any of the exclusions could be...

O'NEILL: Are you saying you don't know whether those offsets have been taken or not?

PAXSON: I know that carriers have taken the offset. I don't know at what period in time and what carriers have made what decisions.

O'NEILL: And you don't know whether it is routine or not?

PAXSON: Right. Usually \$2,500 is not worth a fistfight. The double recovery in *Dabney*, there were 3 plaintiffs. Goosby had no double recovery. *Dabney* had no double recovery. Haynes had double recovery of exactly \$231.87. The briefs do not address double recovery, the court does not address double recovery and I suspect that \$231 is not enough in controversy to come forward to the SC and argue about it.

ABBOTT: How much are we dealing with here?

PAXSON: \$10,000. We paid \$10,000 in medical bills under the PIP, the same medical bills are then introduced in the UM case and they find total accrued medical of \$13,000.