Corporate Express Office Products, Inc. v. Doug Phillips

CHIEF JUSTICE: GOOD MORNING, EVERYONE. IT APPEARS THE FIRST CASE IS UP AND READY TO GO. SO COUNSEL MAY PROCEED FOR CORPORATE EXPRESS OFFICE PRODUCTS INC..

THANK YOU. MAY IT PLEASE THE COURT. MY NAME IS ALAN WEITZMAN. I AM A MEMBER OF THE FIRM OF PROSKAUER AND ROSE, AND WE REPRESENT CORPORATE EXPRESS OFFICE PRODUCTS. SEATED WITH ME AT COUNSEL TABLE IS THE COUNSEL WHO ASSISTED IN THE REPLY BRIEF. WE ARE HERE TODAY TO ADDRESS THE ISSUE AS TO WHETHER CORPORATE EXPRESS IS ENTITLED TO ENFORCE, FIRST, THE BARE NONCOMPETE AGREEMENTS THAT WERE EXECUTED BY RESPONDENTS PHILLIPS AND FARRELL, WITH WHAT WAS MERGED INTO CORPORATE EXPRESS, AND THE AGREEMENT ENTERED INTO INTO BY SIERRA OFFICE PRODUCTS, WHOSE ASSETS WERE ACQUIRED BY CORPORATE EXPRESS OFFICE PRODUCTS AND THE WRITTEN ASSIGNMENT TO NONCOMPETE.

MAY I ASK YOU A QUESTION AS TO HOW THIS WILL FIT IN A SCENARIO, IF WE HAVE A VERY LOCAL OPERATION HERE IN LEON COUNTY. THAT IS, THEN, TAKEN OVER THROUGH A PURCHASE MERGER. NO DISSOLUTION OF A CORPORATE ENTITY. BUT WE JUST KEEP THAT PURCHASING GOING ON, UNTIL WE REACH SOMEPLACE, SOME GERMAN COMPANY. ULTIMATELY, THEN, PURCHASES EVERYTHING, AND WE HAVE GOT A PERSON HERE IN LEON COUNTY THAT HAD AGREED NOT TO COMPETE WITH THE SMALL EMPLOYER BUT VIRTUALLY WITHIN A SHORT PERIOD OF TIME WOULD NOT BE ABLE TO COMPETE ANYWHERE IN THE WORLD. BECAUSE THESE THINGS WILL HAVE BROAD APPLICATION. HOW DO WE PARS OUT THOSE KINDS OF FACTORS? DO WE REWRITE THE CONTRACT AND SAY, IF FOR EXAMPLE, IF IT WOULD ONLY, WITH REGARD WE WON'T COMPETE WITH THE EMPLOYER, BUT THAT EMPLOYER ULTIMATELY BECOME AS WORLDWIDE OPERATION, DO WE THEN HAVE TO CHANGE THE CONTRACT AS WE INTERPRETED IT? CERTAINLY YOU WOULD NOT URGE THAT PERSON COULD NOT WORK ANYWHERE IN THE WORLD.

NO.

SO YOU WOULD HAVE TO CHANGE THE CONTRACT THEN.

NOT OUR CONTRACT, BECAUSE OUR CONTRACT PROHIBITED COMPETITION WITHIN SIX LIMITED FLORIDA COUNTIES, AND WE ARE ASKING THAT THIS COURT REVERSE THE FIFTH DCA, TO ENFORCE THE NONCOMPETE WITHIN THOSE FIVE COUNTIES.

SOME OF THE OVER ARCHING PRINCIPLES WOULD APPLY, IF WE JUST HAD A NONCOMPETE WITH AN EMPLOYER, WITHOUT ALL OF THE SPECIFICITY OF THE ONE COUNTY BUT IN FACT IT HAPPENED TO BE A ONE-COUNTY OR SMALL AREA, WOULD IT NOT?

JUSTICE LEWIS, UNDER REQUIREMENTS OF THE STATUTE, SAY THAT THE COVENANT HAS TO BE WRITTEN WITHIN A REASONABLE TIME LIMIT AND REASONABLE GEOGRAPHIC SCOPE. I THINK THAT, IF THE COVENANT WERE ENFORCEABLE AD MONICIO, BECAUSE IT WAS REASONABLE IN SCOPE AND EFFECT, BUT IT WAS ULTIMATELY, ULTIMATELY, ULTIMATELY TAKEN OVER BY A CORPORATION, WOULD NOT BE A PROBLEM.

SO YOU DON'T SEE THIS AS IMPACTING SOME OF THE FUNDAMENTAL PRINCIPLES THAT WE ALREADY HAVE IN PLACE THEN. THIS CAN BE ACCOMPLISHED WITHOUT VIOLATING THE FUNDAMENTAL PRINCIPLES.

I THINK IT CAN BE ACCOMPLISHED, IF THE AGREEMENT IS DRAFTED IN THE WAY THE LEGISLATURE HAS HELD THE PRINCIPLE.

DOES IT MAKE ANY DIFFERENCE, FOR THE PURPOSE OF YOUR ARGUMENT, WHETHER THERE IS A 100 PERCENT PURCHASE BY THE SUCCESSIVE CORPORATION OR A LESSER PURCHASE?

JUSTICE SHAW, OUR CLIENT PURCHASED 100 PERCENT, AND WE SAY THAT A 100 PERCENT PURCHASE DOESN'T CHANGE ANYTHING, IN TERMS OF THE ENFORCEMENT RIGHT OF THE CORPORATE ENTITY THAT HAS BEEN PURCHASED. AND YOUR QUESTION IS WHETHER SOMEBODY BOUGHT 50 PERCENT --

IT DOESN'T MAKE ANY DIFFERENCE.

NO, BECAUSE THE CORPORATE ENTITY'S RIGHTS DON'T CHANGE, REGARDLESS OF WHO HOLDS THE SHARES. THAT IS BASIC CORPORATE LAW.

DOES IT MAKE ANY DIFFERENCE WHETHER OR NOT, IT SEEMS TO ME IN THIS CASE BISHOP ACTUALLY CONTINUED TO OPERATE AS BISHOP, BUT IF BISHOP HAD NOT CONTINUED TO OPERATE AS BISHOP, BUT OPERATED AS CES, WOULD THAT HAVE MADE ANY DIFFERENCE? THIS SITUATION?

-- ANY DIFFERENCE IN THIS SITUATION?

THAT WOULDN'T MAKE ANY DIFFERENCE, JUSTICE QUINCE. WE BELIEVE THAT, AS LONG AS BISHOP DOESN'T DISSOLVE AND THAT ITS CORPORATE IDENTITY CONTINUED IN THE EMBODIMENT OF ITS MERGED ENTITIES, CORPORATE EXPRESS, THAT THOSE RIGHTS ARE ENFORCEABLE, WHETHER IT CONTINUED TO DO BUSINESS UNDER THE NAME OF CORPORATE EXPRESS OR UNDER THE NAME OF BISHOP. AS THIS COURT HAS HELD IN 1920, THE NAME CHANGE DOESN'T MAKE ANY DIFFERENCE.

IF YOU, IN A STOCK PURCHASE SITUATION, IF THE CONTRACT ALSO PROVIDED FOR OBLIGATIONS, VIS-A-VIS BISHOP TOWARDS ITS EMPLOYEES, SUCH AS OTHER BENEFITS, AND THE EMPLOYEE SOUGHT TO HE FORCE THAT CONTRACT, UNDER YOUR -- SOUGHT TO ENFORCE THAT CONTRACT, UNDER YOUR SAME RATIONALE THAT, CONTRACT SHOULD BE MUTUALLY ENFORCEABLE, THAT IS THAT CEC OR CES, WHATEVER IT WAS, WOULD BE OBLIGATED FOR BOTH THE ASSETS AS WELL AS LIABILITY, OR THE OBLIGATIONS OF THE CONTRACT. DO YOU AGREE WITH THAT?

WHEN THERE IS A MERGER, ALL RIGHTS AND LIABILITIES FLOW TO THE MERGED ENTITY. THAT IS OUR POSITION, BASED ON CORPORATE POLICY.

THAT IS THE MERGER. IT IS THE SAME WITH THE STOCK PURCHASE. IN OTHER WORDS THE STOCK PURCHASE MEANT THAT ALL THE STOCK WAS PURCHASED BUT THE CORPORATE ENTITY CONTINUED AS IT WAS BEFORE.

THAT'S CORRECT. JUSTICE PARIENTE, THE STOCK PURCHASE SITUATION IS REALLY THE SIMPLEST, BECAUSE BISHOP INC. CONTINUED TO EXIST, WHETHER YOU OWNED THE STOCK OR I OWNED THE STOCK.

AND THEN SUBSEQUENTLY, THAT WAS THE CASE WHERE THERE WAS THE MERGER, CORRECT?

ULTIMATELY, BISHOP MERGED INTO ITS 100 PERCENT OWNER CORPORATE EXPRESS OF THE SOUTH AND THEN THERE WERE OTHER MERGER NAME CHANGES, AND THAT IS HOW WE GET TO CORPORATE OFFICE PRODUCTS, TODAY'S PETITIONER.

AND APPARENTLY CORPORATE EXPRESS RECOGNIZED, AS THE PURCHASER, THAT WHEN IT WAS JUST PURCHASING THE ASSETS, THAT A CONSENT TO ASSIGNMENT WAS NEEDED, IS THAT --

THAT'S CORRECT.

THERE FOR IN THAT SITUATION, IT WOULDN'T BE AS CLEAR THAT THE LIABILITIES OF THE TENETS OF THE CONTRACT AS WELL AS THE BENEFITS, WOULD FLOW TO THE PURCHASING ENTITY.

YOU ARE ABSOLUTELY RIGHT, JUSTICE PARIENTE. WHEN THERE IS AN ASSET PURCHASE, ONE HAS TO ACQUIRE THE ASSETS, AND IN THIS CASE, BECAUSE THERE WAS A NONCOMPETE, CORPORATE EXPRESS SOUGHT THE EXPRESS WRITTEN CONSENT OF MR. GOFF AND IT WAS GIVEN.

THAT IS CORPORATE LAW, BECAUSE WHAT WE ARE LOOKING AT HERE AND MY CONCERN WITH THE FIFTH DISTRICT OPINION IS THAT, TO APPLY, I GUESS THIS IS SORT OF A FRIENDLY QUESTION, THIS MOTIVE CULTURE TEST, WOULD REALLY BE VERY, VERY DIFFICULT ON A, YOU KNOW, CASE-BY-CASE BASIS, TO DECIDE HOW THE CULTURE CHANGED.

EXACTLY. WE SEE THE TEST THAT WAS ENUNCIATEED BY THE FIFTH DCA, TO BE A NEW TEST NOT SUPPORTED BY ANY PRECEDENT IN FLORIDA, OTHER THAN MAYBE THE CASE WHERE THERE IS SOME DICTA IN SCHWEIGER, BUT THAT INVOLVED THE DISSOLUTION OF A PREVIOUS ACCOUNTING PARTNER. THERE IS NO DISSOLUTION HERE. AND WITH THIS NEW TEST, WE DON'T KNOW HOW MUCH CHANGE IN CORPORATE MODE OF OPERATIONS IS NECESSARY, TO CROSS THE LINE TO BE ENFORCEABLE.

AS I READ THE STATUTE THAT GOVERNS NONCOMPETE AGREEMENTS, EVEN IF AN ONGOING CORPORATION BECAME A DIFFERENT TYPE OF BUSINESS, THAT WOULD BE GROUNDS FOR THE EMPLOYEE NOT TO BE BOUND BY THAT NONCOMPETE AGREEMENT, THERE WOULDN'T AND LIKE BUSINESS.

THAT IS THE SLIPPERY SLOPE THAT THE FIFTH DCA STARTED. FOR EXAMPLE IF MR. BISHOP'S SON INHERITED ALL THE STOCK, MR. BISHOP'S SON MIGHT NOT BE ABLE TO ENFORCE THE NONCOMPETE, IF HE CHANGED THE CORPORATION FROM BEING A FAMILY-ORIENTED BUSINESS TO A MORE MODERN ONE WITH VOICEMAIL AND OUT PRESSING WAREHOUSE, SO THAT IS THE STANDING AND THAT IS WHAT WE THINK SHOULD BE REVERSED.

BUT IF THE CORPORATION CHANGES ITS TYPE OF AGREEMENT, THEN UNDER THE STATUTE, GOVERNING A NONCOMPETE AGREEMENT, THAT WOULD BE THE CONSENT TO ENFORCEMENT. IS THAT CORRECT?

IT REQUIRES IT TO BE ALIKE BUSINESS, THAT'S CORRECT. AND IF THE BUSINESS IS SOMEBODY IN A DIFFERENT BUSINESS THAT DOESN'T EXIST --

DOES THE PART OF MODE OF OPERATION OR THEIR ARGUMENT, AS I UNDERSTAND THEY ARE ALSO MAKING AN ARGUMENT THAT, BECAUSE THERE WAS A CHANGE IN THE REIMBURSEMENT FOR TRAVEL EXPENSES, THAT SOMEHOW THAT IS INVOLVED IN THIS MODE OF OPERATION, AND THAT THAT INDICATES THAT THERE IS A CHANGE, AND THEREFORE THE PLAINTIFFS HERE SHOULD NOT HAVE BEEN BOUND BY THIS AGREEMENT.

JUSTICE QUINCE, THE ARGUMENT AS WE UNDERSTAND IT IS BASED ON THE PROMISES THAT, IF THERE IS A MATERIAL BREACH IN AN EMPLOYMENT CONTRACT, THAT IS AN EQUITABLE DEFENSE AGAINST THE ENFORCEMENT OF A NONCOMPETE INJUNCTION. THAT IS NOT THE CASE HERE.

HOW DOES THAT WHEREAS CLAUSE ACTUALLY READ?

THE WHEREAS CLAUSE --

THE WHEREAS CLAUSE CONCERNING PAYMENT OF THE TRAVEL EXPENSES.

THE WHEREAS CLAUSE THAT YOU ARE ASKING ABOUT, WHICH IS NOT A SUBSTANTIVE PROVISION OF THIS AGREEMENT, READS THAT WHEREAS THE EMPLOYEE IS NOW OR IS TO BE EMPLOYED AS A SALESMAN, SALES WOMAN OR INTERIOR DESIGNER FOR THE EMPLOYEE ON A SALARY OR COMMISSION BASIS AND IS NOW OR WILL BE PART OF THE EMPLOYEE'S DUTIES, AT THE EXPENSE OF THE EMPLOYER, TRAVELING BETWEEN ONE OR MORE COUNTIES, ET CETERA.

WHAT PROCEEDS THAT WHEREAS CLAUSE?

WITNESSED.

WITNESSED.

THERE IS THE WORD WITNESSED, AND THEN THERE ARE THREE OTHER WHEREAS CLAUSES AND TWO OTHER WHEREAS CLAUSES AFTER IT. THIS AGREEMENT, JUSTICE QUINCE, DOES NOT CONTAIN MAGIC WORDS IN PARAGRAPH ONE THAT SAYS THE FOREGOING RECITALS ARE INCORPORATED HERE IN BY REFERENCE, AS IF THEY ARE FULLY SET FORTH. THAT IS A FATAL FLAW.

AND NO ARGUMENT CAN BE MADE THAT THESE ARE REASONS FOR HAVING ENTERED INTO THIS NONCOMPETE AGREEMENT, BECAUSE YOU HAVE THESE OTHER PROVISIONS THAT THE EMPLOYER IS REQUIRED TO ABIDE BY.

JUSTICE QUINCE, THAT WOULD GIVE SUBSTANTIVE CONTEXT TO THE WHEREAS CLAUSE. FLORIDA LAW IS CLEAR. WHEREAS CLAUSES ARE PREPARATORY. THEY ARE NOT ENFORCEABLE TERMS, AND THEY SHOULD NOT BE REFERRED TO, UNLESS THERE IS A AMBIGUOUS CLAUSE IN THE SUBSTANTIVE PROVISIONS, THEMSELVES, AND THAT IS NOT PRESENT HERE.

HOW DO THE EFFECTS OF THE 1990 AMENDMENT TO, I REALIZE THAT THESE AGREEMENTS PROCEEDED THAT AMENDMENT TO THE STATUTE, THAT SPECIFICALLY REQUIRED ASSIGNMENT, BUT SINCE WE WILL BE WRITING A DECISION THAT WILL BE GUIDING OTHER ENTITIES IN THE FUTURE, WHAT, IF THAT PARTICULAR STATUTE HAD BEEN IN EFFECT THAT REQUIRED ASSIGNMENTS, HOW WOULD THAT AFFECT THE ISSUES IN THIS CASE?

JUSTICE PARIENTE, YOU ARE REFERRING TO THE 1996 STATUTE.

1996MENT OKAY.

-- 1996. OKAY.

WHICH DOES REQUIRE SPECIFIC AUTHORIZATION IN THE NONCOMPETE, TO ALLOW IT TO BE BINDING ON A SUCCESSOR AND ASSIGNS. MY ANSWER TO YOUR QUESTION IS THAT, OF COURSE, OUR POSITION IS THAT THESE PASSED BY OPERATION OF LAW THAT, IT IS NOT ASSIGNMENT. IT IS NOT A SUCCESSOR SITUATION.

THAT WOULD BE UNDER THE MERGER SITUATION.

CORRECT.

AND THAT IS BECAUSE OF THE OTHER FLORIDA STATUTE THAT GOVERNS HOW, WHAT HAPPENS IN THE, WHEN A MERGER OCCURS.

THAT IS THE FLORIDA MERGER STATUTE, WHICH APPLIES TO ALL PROPERTY RIGHTS FLOWING AND TO US ALL MEANS, ALL INCLUDING NONCOMPETE.

AND THE STOCK PURCHASE WOULDN'T BE AFFECTED, BECAUSE, AGAIN, YOUR ARGUMENT WOULD

BE THAT IS JUST 100 PERCENT OF THE PURCHASE OF THE STOCK.

THAT'S RIGHT.

TO COME BACK TO JUSTICE LEWIS'S CONCERN, IF I AM UNDERSTANDING THIS, YOU WOULD AGREE THAT, JUST BECAUSE CE OFFICE PRODUCTS BECOMES THE EMPLOYER, DOES NOT MEAN THAT THE SCOPE OF THE NONCORPSTITION AGREEMENT -- OF THE NONCOMPETITION AGREEMENT SOMEHOW EXPANDS BECAUSE THE CORPORATION IS EXPANDED.

NO, WE ARE NOT ARGUING THAT OUR RIGHTS ARE ANY DIFFERENT THAN THE RIGHTS OF BISHOP OR SIERRA WOULD HAVE HAD TO ENFORCE THOSE CONTRACTS. JUST IN THE SIX NAMED COUNTIES.

WHAT HAPPENS IS AN IMPRACTICAL MATTER, THAT IS A CORPORATION THAT STARTED OUT SMALL EXPANDS. ARE THE WRITTEN AGREEMENTS SUCH THAT THEY WOULD HAVE TO BE CHANGED AS THE CORPORATION GOT LARGER, ASSUMING THERE WAS NOT EVEN A CHANGE IN THE OWNERSHIP?

IF I WERE ADVISING A CLIENT TODAY, JUSTICE PARIENTE, AND THEY ASKED ME WHAT YOU JUST ASKED AS TO HOW THEY WERE GOING TO MAKE THESE AGREEMENTS ENFORCEABLE IN ALL LOCATIONS WHERE THEY WILL BE DOING BUSINESS AFTER THE AGREEMENT, I WILL TELL THEM I WILL WRITE IT THAT WE, AND AS LONG AS IT IS A PROTECTABLE BUSINESS INTEREST, WHICH THE LEGISLATURE REQUIRES, I THINK THAT WOULD BE ENFORCEABLE.

HOW DOES THAT SQUARE WITH THE STATUTORY AND I THINK CASE LAW ADMONITION THAT NONCOMPETE AGREEMENTS HAVE TO BE FINITE AND LIMITED IN SCOPE AND BOTH IN DISTANCE AND TIME. THAT IS SAY IF YOU HAVE SEARS TERMITE AND YOU HAVE THAT KIND OF PROVISION THAT YOU JUST SUGGESTED AND THEN THEY ARE NOW IN ALL OF THE UNITED STATES, WOULD AN AGREEMENT THAT WOULD PROHIBIT AN EMPLOYEE FROM COMPETING WITH THE FORMER EMPLOYER THROUGHOUT THE UNITED STATES, BE ENFORCEABLE UNDER THE FLORIDA STATUTE?

JUSTICE CANTERO, YOU ARE ASKING A QUESTION THAT IS NOT GERMANE TO THIS PARTICULAR DISPUTE, BECAUSE OF THE LIMITED WAY, BUT I AM HAPPY TO ADDRESS IT. THE LEGISLATURE DOES REQUIRE THAT THE GEOGRAPHIC SCOPE BE FINITE, BUT IT ALSO REQUIRES THAT IT CAN BE REASONABLE, AND IF THERE IS A LEGITIMATE BUSINESS INTEREST TO PROTECT A REASONABLE INTEREST, WHETHER IT IS IN TALLAHASSEE OR NEW YORK CITY OR LOS ANGELES, BECAUSE IN TODAY'S INTERNET, FAXING, EMAIL SOCIETY THAT WE LIVE IN, SOMEBODY SITTING IN TALLAHASSEE COULD BE JUST AS EASILY COMPETING WITH SOMEBODY IN LOS ANGELES. I THINK I COULD DEFEND THAT, IF A CLIENT ASKED ME TO DRAFT IT THAT WAY. THAT IS NOT THE QUESTION HERE. THE PROBLEMS WITH THE TEST THAT THE FIFTH DCA HAS ASKED YOU TO AFFIRM, IT FOCUSES NOT ON WHAT WE CONSIDER PRINCIPLES OF BASIC CORPORATE HANDLED LAW OR THE WORDING OF THE STATUTE. WHAT IT WANTS YOU TO DO IS TO ENGRAFT A NEW TEST ON TO THE STATUTE, AND THE WAY WE READ THE PRE-1990 STATUTE, THERE WERE ONLY TWO REQUIREMENTS, GEOGRAPHIC SCOPE AND TIME, AND TO ADD A NEW REQUIREMENT ONTO THAT STATUTE WOULD BE TO DO SOMETHING THAT THE LEGISLATURE SHOULD DO AND NOT THE JUDICIAL BRANCH. AND THERE IS PRECEDENT THAT SAYS THAT, WHEN THE LEGISLATURE PASSES A NEW REQUIREMENT, WHICH THEY DID IN 1996, FOR SUCCESSORS AND ASSIGNS, THAT THIS COURT SHOULD PRESUME THAT THE LEGISLATURE INTENDED TO DO SOMETHING DIFFERENT THAT WASN'T IN THE PREVIOUS LAW. AND THAT IS NOT WHAT THE FIFTH DCA SAID. I SEE THAT MY TIME IS ALMOST UP. I HAVE RESERVED THREE MINUTES. THANK YOU.

CHIEF JUSTICE: THANK YOU. COUNSEL.

MAY IT PLEASE THE COURT. MY NAME IS KEITH WHITE APPEARING HERE FOR THE RESPONDENTS, WITH THE LAW FIRM OF BROAD AND CASTLE. I WOULD LIKE TO THANK THE CLOSING -- OF BROAD

AND CASSEL. I WOULD LIKE TO THANK COUNSEL FOR ADVOCACY AND ALLOWING US TO APPEAR BEFORE THE COURT.

CAN YOU GIVE US BACKGROUND, AS FAR AS YOUR SPECIFIC ISSUES IN THIS CASE, AS FAR AS THE EVOLUTION OF THE COMMON LAW OR STATUTORY APPROVAL OF NONCOMPETE AGREEMENTS, TO NOW THE STATUTORY BACKGROUND WITH REFERENCE TO FAVORING OR NOT FAVORING OR LIMITING OR NOT LIMITING NONCOMPETE AGREEMENTS HERE, IN FLORIDA. IN OTHER WORDS COULD YOU GIVE US A LITTLE THUMBNAIL SKETCH OF THE EVOLUTION OF THE LAW IN THE LAST 20 YEARS ON THAT ISSUE?

CERTAINLY, YOUR HONOR, I CAN, AND ACTUALLY, IF IT PLEASES THE COURT, I CAN GO BACK A LITTLE BIT FARTHER THAN THAT. HISTORICALLY, NONCOMPETES OR ANY CONTRACTS IN RESTRAINT OF TRADE WERE VOID UNDER THE COMMON LAW. THE PETITIONER ASSERTS THAT THE FIFTH DCA OPINION GOES AGAINST WELL-ESTABLISHED LAW IN FLORIDA. IN FACT, THE FIFTH DCA OPINION IS IN ACCORDANCE WITH WELL-ESTABLISHED LAW, AND IN PREPARING FOR ORAL ARGUMENT TO REFUTE THAT CHARACTERIZATION, THERE IS CASES GOING BACK FROM THE COMMON LAW IN ENGLAND IN 1616, CASES THAT ESTABLISHED, IN THE CASE OF THE TAILORS OFINS WITCH, A CONDITION THAT -- OF IPSWICH, THAT RESTRAINS AN OCCUPATION, IS VOID, THAT RECITES FROM 1414, IN WHICH CASE A DYER, SOMEONE WHO ACTUALLY DOOID CLOTHING, WAS ACTUAL -- WHO ACTUALLY DYED CLOTHING, WAS RESTRAINED FROM DOING HIS POSITION THERE, AND IT SAID IT IS ENFORCED BY THE COMMON LAW AND BY ALMIGHTY, HE WOULD GO TO JAIL UNTIL HE MADE A FINE TO THE KING.

WHAT HAS THE LEGISLATURE DONE IN FLORIDA, NOW, HERE, TO EFFECT THAT COMMON LAW?

WHAT THE LEGISLATURE HAS DONE, YOUR HONOR, IS TWO THINGS. NUMBER ONE, THEY PASSED A STATUTE THAT SAYS THE COMMON LAW OF ENGLAND, AS OF JULY 4, 1776, IS THE COMMON LAW OF FLORIDA, EXCEPT TO THE EXTENT CONTRARY TO STATUTE. AS FORMER JUSTICE THEN JUDGE GRIMES POINTED OUT IN MANPOWER INC., IT WAS NOT UNTIL 1953 THAT THE LEGISLATURE PASSED A STATUTE THAT ALLOWS FOR NONCOMPETES TO EXIST, UNDER CERTAIN LIMITED CIRCUMSTANCES, AND THAT SAME STATUTE AND THE STATUTE THAT WE ARE HERE TODAY, IT HAS BEEN RENUMBERED, SAYS ALL OTHER RESTRAINTS OR TRADE ARE -- RESTRAINTS OF TRADE ARE VOID, AND THE LEGISLATURE SETTING FORTH THOSE REQUIREMENTS, WAS VERY SPECIFIC, AS IN DEROGATION OF THE COMMON LAW AND AS THIS COURT HAS SAID, STATUTES IN DEROGATION OF COMMON LAW MUST BE STRICTLY CONSTRUED TO NOT CHANGE THE COMMON LAW ANY MORE THAN IS CLEARLY AND UNEQUIVOCALLY REQUIRED UNDER THE STATUTE. THE STATUTE SAYS THAT AN EMPLOYEE MAY AGREE WITH HIS OR HER EMPLOYER AND NOT COMPETE AGAINST THAT, SUCH EMPLOYER, PROVIDED THAT SUCH EMPLOYER REMAIN IN BUSINESS. VERY LIMITED. IT DOES NOT SAY THAT THE EMPLOYEE MAY AGREE WITH HIS EMPLOYER OR SOME THIRD PARTY, HIS EMPLOYER OR HIS EMPLOYER'S SUCCESSOR. IN FACT, IN MANPOWER, JUDGE GRIMES WAS DEALING WITH AN ISSUE WHERE THE PARENT CORPORATION AND THE SUBSIDIARY ENTERED INTO AN AGREEMENT WITH THE EMPLOYEE. THE EMPLOYEE WAS EMPLOYED BY THE SUBSIDIARY. IN THAT CASE, THE PARENT, MANPOWER INC., THEN TRIED TO ENFORCE THE NONCOMPETE, AND THE COURT, THE TRIAL COURT REFUSED ENFORCEMENT, AND IT WAS AFFIRMED BY THE SECOND DISTRICT. JUDGE GRIMES SAID THAT THE STATUTE COULD NOT BE CONSTRUED BEYOND THE LANGUAGE OF ITS TERMS BY THE LANGUAGE USED IN THE STATUTE, AND THAT STATUTE REQUIRED ONLY ALLOWED THE EMPLOYER TO ENFORCE IT. THE SUBSIDIARY WAS THE EMPLOYER. IN THIS CASE, BISHOP, IT IS UNDISPUTED, THE EMPLOYER IS DEFINED IN THE AGREEMENT. BISHOP IS THE EMPLOYER. BISHOP IS NOT HERE. BISHOP IS NOT THE PETITIONER. THEY ARE NOT SEEKING ENFORCEMENT. INSTEAD THE PETITIONER IS SEEKING ENFORCEMENT, BY VIRTUE OF THIS OPERATION OF LAW.

COUNSEL, LET'S TAKE THE HYPOTHETICAL THAT INSTEAD OF BEING HERE ON A NONCOMPETE AGREEMENT, WE ARE HERE ON AN EMPLOYMENT AGREEMENT, AND THE EMPLOYER IS SAYING

THAT, BECAUSE CORPORATE EXPRESS IS NOT BISHOP, THE AGREEMENT THAT YOUR CLIENT HAD." WITH BISHOP TO PAY YOUR CLIENT 150,000 DOLLARS A YEAR AND GIVE HIM AN OFFICE AND TRAVEL EXPENSES AND A CAR, IS NOT ENFORCEABLE, BECAUSE CORPORATE EXPRESS IS NOT BISHOP. UNDER THOSE CIRCUMSTANCES, WOULD WE BE ABLE TO ENFORCE THE EMPLOYMENT AGREEMENT AGAINST CORPORATE EXPRESS?

IN THE CIRCUMSTANCE OF THE TRANSACTIONS AT ISSUE HERE?

HYPOTHETICAL THE I -- THE HYPOTHETICAL I JUST PROPOSED. WOULD YOU THINK THAT THAT CONTRACT, THE EMEMPLOYMENT CONTRACT WITH BISHOP WOULD BE ENFORCEABLE WITH CORPORATE EX-SFLES.

YES, YOUR HONOR, PROVIDED THAT THE PARTICULAR PARTY, THAT IS THE EMPLOYEE, HAD CONSENTED. THERE IS THE GENERAL RULE THAT CONTRACTS FOR EMPLOYMENT -- ACTUALLY IT IS BROADER THAN THAT, CONTRACTS OF A PERSONAL NATURE, NOT JUST CONTRACT FOR SERVICES ONLY, BUT ANY CONTRACT OF A PERSONALNATOR INVOLVING NONDOM PETE, EMPLOYMENT AGREEMENT -- NONCOMPETE, EMPLOYMENT AGREEMENT, CAN BE ASSIGNED WITH CONSENT.

NOT AN ASSIGNMENT BUT THE SAME TYPE OF SITUATION HERE, WHERE THEY PURCHASED THE STOCK OF BISHOP AND YOU HAD AMEND EMPLOYMENT AGREEMENT WITH BISHOP TO PAY $150,000 A YEAR. THERE IS NO CONSENT, ANY ASSIGNMENT, NOTHING. THE ONLY THING THAT HAPPENS IS YOUR EMPLOYEE IS NOW WORKING FOR CORPORATE EXPRESS, AND CORPORATE EXPRESS SAYS HEY, YOUR EXPLOIT -- YOUR EMPLOYMENT CONTRACT WAS WITH US, THERE FOR WE ARE NOT GOING TO ADDRESS THAT. WE ARE NOT GOING TO LIVE BY THAT AGREEMENT. WOULD YOUR CLIENT BE LEGALLY ENTITLED TO ENFORCE THAT CONTRACT AGAINST CORPORATE EX-SFLES.

YES, YOUR HONOR. IF MY CLIENT, IF THE CLIENT WOULD HAVE ESSENTIALLY SEND THE ENFORCEMENT OF THE NONCOMPETE, EXCUSE ME, THE TRANSFER OF THE THE EMPLOYMENT AGREEMENT, THEN BY VIRTUE OF THE STOCK SALE, AS MR. WEITZMAN POINTED OUT THAT, EMPLOYER WOULD HAVE REMAINED THE SAME AND SO THEREFORE THERE WOULD STILL BE A BINDING OBLIGATION AFTER A STOCK PURCHASE.

IN THIS CASE AFTER A STOCK PURCHASE, DID YOUR CLIENT SAY HEY, I AGREED TO WORK FOR BISHOP. I DIDN'T AGREE TO WORK FOR CORPORATE EXPRESS, SO I DON'T AGREE TO ANY TRANSFER OF MY EMPLOYMENT?

WELL, YOUR HONOR, A COUPLE OF POINTS THERE. NO, THEY DID NOT GO AND REPUDIATE THE NONCOMPETE, BUT TWO DIFFERENT SITUATIONS. YOUR SCENARIO, YOUR HONOR, INVOLVES AN EMPLOYMENT CONTRACT WHERE THERE ARE BENEFITS FLOWING TO THE EMPLOYEE AND THEN THE EMPLOYEE ACCEPTS THOSE BENEFITS. IN THIS CIRCUMSTANCE, THE NONCOMPETE AS MR. WEITZMAN CHARACTERIZED IT, IS A BARE NONCOMPETE. IT DOES NOT SET FORTH TERMS OF EMPLOYMENT, ACCORDING TO MR. WEITZMAN, SAYING THIS IS WHAT YOU ARE GOING TO BE PAID THIS. IS A FINITE TERM OF EMPLOYMENT, FIVE YEARS, ET CETERA. IT IS A NONCOMPETE, SO IF MY CLIENT CONTINUED TO WORK WITH THIS NEW OWNER OF THE CORPORATION DOES NOT, ESPECIALLY UNDER SWIGERT, IN AND OF ITSELF, MEAN THAT THEY RATIFIED THE AGREEMENT. IN FACT, SWIGERT SAID THEY DID NOT MEAN THAT AS A MATTER OF LAW, AND IT IS NOT THE DUTY OF THE EMPLOYEE TO GO AND REPUDIATE THE AGREEMENT.

IF WE ACCEPT A POLICY LIKE THAT, THOUGH, DOESN'T THIS HAVE MUCH MUCH LARGER IMPLICATIONS, AS FAR AS THE STABILITY OF BUSINESS TRANSACTIONS OUT THERE. IN OTHER WORDS A PROSPECTIVE PURCHASER AFTER BUSINESS OR WHATEVER -- PURCHASER OF A BUSINESS OR WHATEVER, WOULD REALLY THEN BE ON SHAKY GROUND, IF WE ACCEPT THIS POLICY THAT NONCOMPETE AGREEMENTS, FOR INSTANCE, ARE NOT GOING TO BE ENFORCEABLE UNDER THE NEW OWNERSHIP OF THE COMPANY? ISN'T THAT GOING TO HAVE, REALLY, A SEVERE

IMPACT IN THE GENERAL BUSINESS PRACTICES OUT THERE? A NEGATIVE IMPACT. THAT IS THAT IT IS GOING TO MEAN THAT YOU REALLY HAVE TO DO ALL KINDS OF SPECIFIC THINGS, BEFORE YOU CAN HAVE ANY STABILITY IN THIS TRANSACTION.

YOUR HONOR, I DO NOT BELIEVE THAT THE COURT ADOPTS EITHER OF THE RULES, AND I WILL EXPLAIN WHAT I MEAN IN A MINUTE, EITHER OF THE RULES WOULD HAVE THE EFFECT THAT YOU ARE SPEAKING OF. NUMBER ONE, THE RULE AS FAR AS ARTICULATED BY THE FIFTH DCA, I THINK RATHER THAN, ALTHOUGH THEY USE THE TERM "CULTURE AND MODE OF OPERATION CHANGE", IT IS REALLY A SUBSTANTIVE CHANGE. IS THERE A SUBSTANTIAL CHANGE TO THE EMPLOYER? EITHER THE IDENTITY OF THE EMPLOYER OR THE OWNERSHIP? WITH RESPECT TO THAT RULE, THE COURT COULD ADOPT THIS RULE TODAY UNDER THE FACTS BEFORE IT, AND THE FACTS BEFORE THIS COURT ARE A 100 PERCENT STOCK PURCHASE. THIS COURT DOES NOT HAVEG DELINEATE WHERE THE LINE IS, IN TERMS OF AN OWNERSHIP CHANGE. IT CAN SAY IN THIS CASE, WE HAVE TWO MEN, A FATHER AND A SON AND A FAMILY TRUST, AS OWNERS OF ACCOMPANY, BEING REPLACED BY A DELAWARE CORPORATION IN TOTO.

BUT THIS CANNOT BE THAT FACT SPECIFIC, BECAUSE AS MR. WEITZMAN SAYS, WOULD IT, IF MR. BISHOP SENIOR, DIED, AND MR. BISHOP JR. TOOK THE BUSINESS THROUGH THE WILL, WOULD -- AND MR. BISHOP JUNIOR TOOK THE BUSINESS THROUGH THE WILL, WOULD THAT MEAN THAT NONE OF THESE CONTRACTS WOULD ANY LONGER APPLY?

YES, YOUR HONOR, UNDER A RULE OF SUBSTANTIAL CHANGE IN OWNERSHIP. IF THE COURT IS TROUBLED WITH THAT RULE, THERE IS ALSO THE OTHER POSITION ARTICULATED BY RESPONDENTS, AND THAT WOULD ALLOW THIS COURT TO NOT DISAPPEAR PROVE SEARS BUT -- NOT DISAPPROVE SEARS BUT STILL APPROVE THE DECISION, IF NOT THE RATIONALE OF THE FIFTH DCA, THAN IS TO LOOK AT THE LEGAL IDENTITY OF THE EMPLOYER. THAT IS HAS THE EMPLOYER'S IDENTITY CHANGED, AND THAT WOULD NOT BE AN EXPANSION OF EXISTING LAW. UNDER EXISTING LAW, IF COMPANIES DECIDE THROUGH THEIR TRANSACTIONS THAT THEY WANT TO DO AN ASSET PURCHASE, ALREADY THE LAW RESTRICTS, IF YOU WILL, ASSET PURCHASINGS -- PURCHASES, BECAUSE IF YOU DO AN ASSET PURCHASE UNDER EXISTING LAW, UNDER SWIGERT, UNDER STRALOWE, UNDER JOHNSON, THEN YOU HAVE TO GET THE CONSENT OF THE EMPLOYEE. IF THE EMPLOYEES USED THEIR VETO POWER, AS MR. WEITZMAN CHARACTERIZED IT, THEN THE PURCHASE WOULD NOT GO FORWARD. AND THE BUSINESS PARTIES IN THE DRIVERS SEAT TO COMPEL SIGNING A NEW CONSENT OR NONCOMPETE OR ELSE IT IS THE HIGHWAY, OR IF THEY CAN'T GET THAT, THEN THAT WILL BE REFLECTED IN THE PURCHASE PRICE. THESE ARE BUSINESS ENTITIES. THEY CAN REFLECT THAT IN THE PURCHASE PRICE AS TO THE VALUE EW AFTER WHAT THEY ARE GETTING, AND IF THEY CAN'T GET AN AGREEMENT BY THE NEW EMPLOYEES TO BE BOUND BY A NONCOMPETE, THEN THAT WOULD BE REFLECTED BY THE PURCHASE PRICE, SO THAT IS ALREADY AN EXISTING LAW, YOUR HONOR, AND SO BY HAVING THIS LEGAL IDENTITY TEST, THAT WOULD JUST BE A LOGICAL EXTENSION OF THE SAME RULE, AND THAT IS AFTER A MERGER, WHICH IS DIFFERENT THAN A STOCKS SALE, SO YOU WOULD NOT HAVE TO DISAPPROVE SEARS TERMITE, BUT UNDER A MERGER, THE PREDECESSOR SEESS TO EXIST. -- CEASES TO EXIST. THAT IS AS A MATTER OF LAW, MATTER OF STATUTE, AS A MATTER OF THE DOCUMENTS IN THIS CASE. THE PLAN OF MERGER SAYS BISHOP IS THE DISAPPEARING CORPORATION. IT CEASES TO EXIST.

BUT NOW WE ARE, LET'S JUST FINISH WITH WHAT JUSTICE WELLS WAS ASKING YOU, BECAUSE I AM CONCERNED ABOUT THE FIRST ASPECT, WHICH IS THAT THE TEST IS SAYING THAT THE, THERE IS A POSITION CHANGE OF THE EMPLOYER, SO THAT THE NONCOMPETE AGREEMENT ISN'T ENFORCEABLE. WOULD YOU SAY THAT A CORPORATION THAT HAD, THAT CHANGED EVERY SINGLE CORPORATE OFFICER WAS, IS THAT A SUFFICIENT, UNDER THE FIFTH DISTRICT'S TEST, THAT A SUFFICIENT CHANGE OF THE EMPLOYER, SO THAT THE NONCOMPETE AGREEMENT IS NOT ENFORCEABLE?

-- ENFORCEABLE? IN OTHER WORDS YOU WENT TO WORK FOR ABC, AND NOW EVERY SINGLE

CORPORATE OFFICER THAT YOU P WENT TO WORK FOR HAS BEEN -- THAT YOU WENT TO WORK FOR HAS BEEN REPLACED. IS THAT A CHANGE IN THE EMPLOYER?

YOUR HONOR, I DO NOT BELIEVE THAT IS COMPELLED BY THE FIFTH DCA'S OPINION. I THINK THAT --

GO AHEAD.

I THINK THE FIFTH DCA WAS DEALING WITH THE FACT THAT THE OWNERSHIP CHANGED. THAT IS YOU HAD THESE TWO INDIVIDUALS AND A FAMILY TRUST, SELLING TO A CORPORATION THAT WAS, ACCORDING TO MR. WEITZMAN, OWNED BY YET ANOTHER CORPORATION. THAT IS DIFFERENT. REGARDLESS OF THE CHANGE IN THE MANAGEMENT OR THE OFFICERS OF THE COMPANY, BECAUSE UNDER EXISTING LAW, IF BISHOP WOULD HAVE CHANGED THE OFFICE MANAGER, ET CETERA, WHERE THE RESPONDENTS ARE NOT ARGUING THAT THAT WOULD HAVE BEEN A SUFFICIENT CHANGE IN EMPLOYER, BUT I THINK THE FIFTH DCA PUTS SUBSTANCE OVER FORM, BECAUSE TO SAY THAT IF CORPORATE EXPRESS OF THE SOUTH WOULD HAVE PURCHASED ALL THE ASSETS OF BISHOP, THEY WOULD HAVE REQUIRED THE CONSENT OF THE EMPLOYEE. AS THEY DID WITH MR. GOFF AND SIERRA, BUT TO SAY THAT IF CES BUYS ALL THE STOCK OF BISHOP, THEY DON'T.

IS THAT BECAUSE IN THE CORPORATE WORLD, CORPORATIONS ARE LEGAL FICTION. THEY ARE NOT PEOPLE. AND YOU KNOW THAT, IS WHY ALL THIS PARTNERSHIP LAW, CASES ARE NOT JUST ON POINT, BECAUSE WHEN A PARTNERSHIP, WHEN ONE PARTNER WITHDRAWS, THE PARTNERSHIP CEASES TO EXIST, AND THERE IS A NEW PARTNERSHIP FORMS FORMED. THAT IS -- PARTNERSHIP FORMED. THAT IS CLASSIC PARTNERSHIP LAW. SO NOW LET'S GET BACK INTO CLASSIC CORPORATION LAW, WHICH DOES TREAT, AS FAR AS I AM UNDERSTANDING IN THE REAL WORLD, ASSET PURCHASES, ON A COMPLETELY DIFFERENT SCALE OR TERM THAN STOCK PURCHASED, AND THEN MERGERS ARE COMPLETELY GOVERNED BY THE STATUTE THAT SAYS WHEN THERE IS A LARGER, THE BURGEONING CORPORATION ASSUMES ALL OF THE RIGHTS AND LIABILITIES OF THE CORPORATIONS, AND SO NOW BACK TO MERGERS, THE QUESTION IS YOU WOULD ASK US TO SAY THAT IN A MERGER THAT, IN FACT THAT THE CONTRACT DOES NOT SURVIVE THE MERGER, AND WOULDN'T THAT DO DAMAGE TO A LOT OF CASES OUT THERE THAT SAY IN FACT THOSE RIGHTS OF LIABILITIES DO SURVIVE THE MERGER OF TWO CORPORATIONS?

NEW YORK CITY YOUR HONOR. THE RULE THAT THE RESPONDENTS ADVOCATED DO NOT REQUIRE THIS COURT TO GO AGAINST ESTABLISHED MERGER LAW. ESTABLISHED MERGER LAW DOES NOT DEAL WITH NONCOMPETE AGREEMENTS, AND I THINK THAT IS AN IMPORTANT FACT HERE. WE ARE NOT DEALING WITH MERGERS ARE CREATURES OF STATUTE. THEY ARE NOT A PROHIBITION THAT AFFECT ACQUISITIONS, IS NOT VOID AGAINST THE COMMON LAW. RESTRAINTS OF TRADE ARE VOID AGAINST THE COMMON LAW, AND VOID AGAINST STATUTE. SO THE LEGISLATURE HAS ENACTED A SPECIFIC STATUTE THAT MUST GOVERN OVER THE GENERAL MERGER STATUTE, AND THAT SPECIFIC STATUTE DOES NOT ALLOW ENFORCEMENT BY A SUCCESSOR, AND WITH RESPECT TO THE MERGER, THE IDENTITY IS CHANGING. AND IT IS AN IMPORTANT POINT, YOUR HONOR, THAT THE PARTIES TO THE NONCOMPETE IS THE OLD EMPLOYER AND THE EMPLOYEE.

BUT UNDER YOUR SCENARIO, IT SEEMS TO ME THAT THE EMPLOYEE, THEN, GETS THE BEST OF BOTH WORLDS, EVEN THOUGH UNDER THE MERGER STATUTE, IT SAYS THAT THE SURVIVING CORPORATION HAS BOTH THE RIGHTS AND THE RESPONSIBILITIES OF THE COMPANIES THAT IT HAS TAKEN OVER. THE EMPLOYEE, THEN, CAN CONTINUE TO ENFORCE ITS EMPLOYMENT CONTRACT, BUT THE COMPANY CAN'T ENFORCE THE CONTRACT THAT THE EMPLOYEE ENTERED INTO, i.e. THE NONCOMPETE CONTRACT. THAT IS BASICALLY, IT SEEMS TO ME, WHAT YOUR ARGUMENT IS SAYING.

I DISAGREE WITH THAT, YOUR HONOR. IN THIS CASE THERE IS EXISTING LAW THAT TALKS ABOUT

RATIFICATION AND CONCEPT, BY ACTION, THAT WOULD ADDRESS YOUR HONOR'S CONCERN. THAT IS IF YOU HAVE AN EMPLOYMENT AGREEMENT AS YOUR COLLEAGUE JUSTICE CANTERO POINTED OUT, THAT HAS BENEFITS AND OBLIGATIONS ON BOTH PARTIES AND THEN ONE OF THE PARTIES, BY CONDUCT, RATIFY IT, THEN THAT ISSUE WOULD BE ADDRESSED BY THIS COURT'S DECISION IN HALE AND SOME OTHER CASES THAT FOLLOWED THAT, WHICH WOULD HAVE ALLOWED THAT SORT OF ENFORCEMENT, BUT HERE WE ARE NOT ALLOWING THE EMPLOYEE THE BETTER OF BOTH WORDS, YOUR HONOR. THE PETITIONER'S RULE WOULD ALLOW THE EMPLOYER THE BETTER OF BOTH WORLDS, BECAUSE THE LAW, THE EXISTING LAW, EXISTING STATUTE, EXISTING CASE LAW ON NONCOMPETES IS INCORPORATED INTO, AS A MATTER OF LAW, THE AGREEMENT, AND SO YOU HAVE AN EXPRESS PROHIBITION THROUGH THE STATUTE AND THROUGH THE CASES, THAT PROHIBITS ASSIGNMENT. IF THIS CONTRACT, I CAN'T BELIEVE THAT PETITIONERS WOULD ARGUE THIS CONTRACT IS SILENT EXPRESSLY, BUT IMPLICITLY AS A MATTER OF LAW THE PROVISIONS ARE INCORPORATED, BUT IF THE NONCOMPETE SAID THIS CAN'T BE ENFORCED BY A SUCCESSOR, WOULD PETITIONER SERIOUSLY ARGUE BEFORE THIS COURT THAT THE MERGER STATUTE COULD EVISCERATE THE AGREEMENT OF THE PARTIES BY ESSENTIALLY WRITING THAT OUTFIT THE CONTRACT, TO ALLOW THE CONTRACT TO BE TRANSFERRED TO A SUCCESSOR? THAT COULD NOT, SERIOUSLY, BE ARGUED TO THIS COURT. WE HAVE THE SAME SITUATION, BECAUSE THE ENABLING STATUTE, 542.33, INCORPORATED WITHIN THE CONTRACT, AND TO THE EXTENT THAT THE GENERAL MERGER STATUTE ALLOWS A TRANSFER OF A NONCOMPETE TO A SUCCESSOR, THAT STATUTE IS TO THAT EXTENT, OPERATING AS A RESTRAINT OF TRADE, AND IT IS THERE FOR VOID, UNDER 542.33. ALL OTHER RESTRAINTS OF TRADE ARE VOID, ACCORDING TO THAT STATUTE, EXCEPT THE NONCOMPETE UNDER THE SPECIFIC TERMS SET FORTH THERE IN.

SO EVERY OTHER CONTRACT, OTHER THAN A NONCOMPETE, IS NOT AFFECTED BY THE MERGER STATUTE, IS THAT YOUR POSITION?

NO, YOUR HONOR. MY POSITION IS THAT THE MERGER STATUTE IS AN AUTHORIZING STATUTE. IT IS NOT A SELF-EXECUTING STATUTE. IT ALLOWS PARTIES TO AGREE TO MERGE, BUT WHEN YOU ARE LOOKING AT THE RIGHTS THAT ARE TRANSFERRED, YOU HAVE TO LOOK AT THE EXTENT OF LAW AND STATUTES AND CASES AT THE TIME. A CONTRACT THAT IS WITH A MINOR WHO DOESN'T HAVE TO PASS THE CONTRACTS, DOES NOT SUDDENLY SFRINING TO VALIDITY -- SPRING TO VALIDITY BECAUSE THE PREDECESSOR SAYS HERE IS THIS CONTRACT.

IF THERE IS SOMETHING ABOUT THIS CONTRACT THAT IS NOT LEGAL OR UNENFORCEABLE, THAT WOULD BE DAVE RENT ISSUE. I SEE YOUR TIME IS UP.

CHIEF JUSTICE: WE HAVE USED YOUR TIME WITH OUR QUESTIONS. SO THANK VERY MUCH.

THANK YOU, YOUR HONOR. I AM SORRY.

CHIEF JUSTICE: HOW MUCH TIME DOES COUNSVERY WELL LEFT? OKAY.

THANK YOU. JUSTICE PARIENTE, I THINK YOU ARE EXACTLY RIGHT F WE WERE TALKING ABOUT ANY OTHER CONTRACT, WE WOULDN'T BE HERE TODAY. IF MR. BISHOP, HYPOTHETICALLY, HAD A CONTRACT WITH A WIDGET MANUFACTURER THAT HE WAS FRIENDLY WITH AND THEY WERE FRIENDS BECAUSE BISHOP'S FURNITURE SUPPORTED THE SAME CHARITIES AS THE BILGEITY -- AS THE WIDGET MANUFACTURER, THERE WOULD BE NO DISPUTE. CORPORATE EXPRESS WOULD HAVE THE RIGHT TO ENFORCE THAT CONTRACT, EVEN IF CORPORATE EXPRESS CAME IN AND CHANGED THE CULTURE AND DECIDEDED FOR COST CUTTING MEASURES, THEY WANTED TO STOP SUPPORTING THAT CHARITY. THIS IS A BARE NONCOMPETE, AS THE MIDDLE DISTRICT OF FLORIDA SAID IN THE IN REHEARING CENTERS CASE. IT IS DIFFERENT THAN A PERSONAL SERVICE CONTRACT. IT IS NOT A REQUIREMENT THAT SOMEBODY MUST WORK FOR SOMEBODY. IT IS A REQUIREMENT THAT YOU CANNOT WORK FOR SOMEONE ELSE, AND AS SUCH, THE WIDGET ISSUE NOW APPLIES.

LET ME GO BACK TO THAT I SHALL EW, BECAUSE WHEN YOU KEEP SAYING IT IS BARE NONCOMPETE, LET'S ASSUME THAT IT IS A PERSONAL SERVICES CONTRACT, SO THAT IT IS NOT ASSIGNABLE, ABSENT CONSENT OF THE PARTIES. NOW, LET'S GO BACK TO YOU ARE STILL SAYING THAT, NO MATTER HOW IT IS CATAGORIZED AS PERSONAL SERVICES CONTRACT, THE 100 PERCENT STOCK PURCHASE DID NOT AFFECT THE IDENTITY OF THE EMPLOYER AS IN THE NONCOMPETE AGREEMENT, CORRECT?

THAT'S CORRECT. BECAUSE AT THE MOMENT OF THE 100 PERCENT STOCK PURCHASE, THE CORPORATE ENTITY WHO STILL HAD THE RIGHTS TO THE PERSONAL SERVICE CONTRACT, IN YOUR HYPOTHETICAL, WOULD HAVE BEEN BISHOP.

OKAY. NOW, AGAIN, IN THE ASSET SITUATION WITH SIERRA, IT WAS, WE HAD THE CONSENT AT THE SAME TIME AS WE HAD THE ASSET SEARCHES, CORRECT?

CORRECT.

NOW LET'S GET BACK TO THE MERGER. MY CONCERN IS I WAS LOOKING AT THE LANGUAGE IN CELETEX THAT HAS TO DO WITH SUCCESSOR CORPORATIONS AND JUSTICE EHRLICH'S FAMOUS LINE WHEN TWO CORPORATIONS HAVE TRULY MERGED, A CORPORATE TORTFEASOR BY ANY OTHER NAME IS STILL A TORTFEASOR, AND I ASSUME THAT THIS CONCEPT APPLIES IN THE CONTRACTUAL WORLD THAT, IS THAT WHEN THE TWO CORPORATIONS MERGE, THEY ARE STILL THE RESPONSIBLE CONTRACTING EMPLOYER.

THE CELETEX CASE SAYS YOU TAKE THE GOOD WITH THE BAD.

IN TERMS OF ACTUAL CORPORATE EXISTENCE, WOULD YOU SAY THE MERGER THAT PASSED BY OPERATION OF LAW, BUT IN THE MERGER STATUTE, IT SAYS WHEN A MERGER BECOMES EFFECTIVE, EVERY OTHER CORPORATION, PARTY TO THE MERGER, MERGES INTO THE SURVIVING CORPORATION, AND THE SEPARATE EXISTENCE OF EVERY CORPORATION, ACCEPT THE SURVIVING -- EXCEPT THE SURVIVING CORPORATION CREASES, SO IF, WHEN THE -- CORPORATION CEASES, SO IF WHEN THE MERGER OCCURS THERE, IS NO MORE EXISTENCE OF THE EMPLOYER, THEN NOW WE GET BACK TO THIS QUESTION WHY IS AN ASSIGNMENT REQUIRED, WHEN YOU HAVE A MERGER?

BECAUSE THE MERGED ENTITY, UNDER THE THEORY OF CONTINUITY, CONTINUES TO LIVE IN THE NEW CORPORATION, AND THE WORDS IN THE STATUTE CEASES TO EXIST, ARE A FAR CRY FROM DISSOLUTION, WHICH IS CORPORATE DEATH. I THINK MY TIME IS UP. THANK YOU.

CHIEF JUSTICE: THANK YOU BOTH, VERY MUCH. THANK YOU, COUNSEL.