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Shirley Sawczak vs Alan L. Goldenberg

THE NEXT CASE ON THE COURT'S CALENDAR IS GOLDENBERG VERSUS SAWCZAK. MR. BRADY?

MR. CHIEF JUSTICE, JUSTICES. GOOD MORNING. MY NAME IS FRANK BRADY. I'M HERE TODAY WITH MY PARTNER, JEAN BRADY N. BEHALF TO DR. GOLDENBERG ON A CERTIFIED QUESTION FROM THE 11th CIRCUIT COURT OF APPEAL ON THE ISSUE OF WHETHER SEVEN ANNUITY CONTRACTS, THE CASH SURRENDER VALUE IS EXEMPT UNDER FLORIDA STATUTES SECTION 222.14. I POINT OUT AND START OUT BY SAYING THAT THE SEVEN CONTRACTS ARE STANDARD COMMERCIAL ANNUITY CONTRACTS. THEY ARE DEFERRED --

THE DISTRICT COURT FOUND THAT THESE WERE ACTUALLY OPTIONS TO PURCHASE ANNUITIES. AND WHAT WAS THE BASIS IN THESE CONTRACTS? WHAT WAS THE ARGUMENT ABOUT? IS WHAT I'D LIKE TO UNDERSTAND, THAT GAVE RISE TO THAT CONCLUSION BY THE DISTRICT COURT FROM YOUR PERSPECTIVE.

THERE WASN'T ANY ARGUMENT TO THAT POINT. BUT WHAT THE DISTRICT COURT RELIED ON WAS THE LEVINE VERSUS WESTING CASE IN WHICH THERE WAS AN ANALYSIS OF WHAT THE -- WHETHER AN ANNUITY CONTRACT HAS AN UNFETTERED ACCESS TO THE CASH VALUES. THE COURT WAS ANALYZING AND USED THE LAST SENTENCE OF THREE SENTENCES IN THAT CASE IN WHICH THE LEVINE COURT HELD THAT BECAUSE THE ANNUITY CONTRACTS IN THAT CASE HAD A SURRENDER CHARGE THERE WAS NOT AN UNFETTERED ACCESS TO THOSE CASH SURRENDER VALUES. BUT THEN CONCLUDED THAT IF THERE WERE UNFETTERED ACCESS, THEN THEY WOULD NOT NECESSARILY BE ANNUITY CONTRACTS. IN OUR CASE, ALL SEVEN OF THESE CONTRACTS DO HAVE A SURRENDER CHARGE. THEY FLUCTUATE AND DECLINE FROM 7% DOWN TO 0 OVER THE FIRST SEVEN YEARS OF EACH OF THE POLICIES. SO THERE IS, JUST LIKE IN THE LEVINE CASE, A FETTERED RIGHT --

WOULD YOU -- IS THIS MATTER ISSUE ONE OF STATUTORY CONSTRUCTION THAT'S BEFORE US AS TO WHETHER THE STATUTE WHERE IT SAYS PROCEEDS OF AN ANNUITY CONTRACT, WHAT THAT LANGUAGE MEANS AND WHEN YOU GET TO THE PROCEEDS OF AN ANNUITY CONTRACT, AS OPPOSED TO THE CASH VALUE OF A LIFE INSURANCE POLICY? IS THAT WHAT THIS ISSUE BOILS DOWN TO?

YES, I BELIEVE IT IS A CONSTRUCTION ISSUE. HOWEVER, I THINK THAT THE COURT ON THREE OTHER OCCASIONS ADDRESSED THE QUESTION OF THE ANNUITY CONTRACTS UNDER THIS SPECIFIC STATUTE, AND DETERMINED THAT BECAUSE OF THE WORDS USED IN THE STATUTE, THE WORDS "UPON WHATEVER FORM" WERE DISPOSITIVE. IN THE 1934 CASE OF THE GREENWOOD VERSUS RALSTON N 196 IN THE ZUCKERMAN CASE AND ALSO IN '93 IN THE McCOLLUM CASE WHICH WAS A CERTIFIED QUESTION FROM THE 11th CIRCUIT. LET ME JUST GO THROUGH THE McCOLLUM CASE TO BEGIN WITH. IN THAT CASE THE COURT HELD IT WAS THE ANNUITY CONTRACTS THAT WERE EXEMPT. AND THAT IF THE LEGISLATURE INTENDED TO LIMIT THE EXEMPTION TO ANY PARTICULAR TYPE OF ANNUITY CONTRACT, IT WOULD HAVE DONE SO WHEN IT AMENDED THE STATUTE IN 1978 TO ADD A CASH -- EXCUSE ME, TO ADD PROCEEDS OF ANNUITIES TO THE CASH SURRENDER VALUE LANGUAGE IN THE STATUTE.

BUT IF WE'RE LOOKING JUST AT THE LANGUAGE OF THE STATUTE, IT IS DIFFICULT TO UNDERSTAND WHY THE LEGISLATURE WOULD USE AN ENTIRELY DIFFERENT TERM WHEN THEY'RE REFERRING TO ANNUITY CONTRACTS THAN LIFE INSURANCE POLICIES. IT'S A PURPOSEFUL

CHOICE, PROCEEDS. YOU WOULD HAVE US JUST SAY THAT CHOICE OF WORDS MADE NO DIFFERENCE.

YES, I WOULD. AND THE REASON I WOULD DO THAT IS BECAUSE WHEN YOU LOOK AT WHERE THE AMENDMENT PLACED THE NEW WORDS, IT PLACED THEM BEFORE THE WORDS "UPON WHATEVER FORM," AND I THINK THE WORDS "UPON WHATEVER FORM" MODIFIED BOTH CASH SURRENDER VALUES UPON WHATEVER FORM AND PROCEEDS UPON WHATEVER FORM.

WHY CAN IT JUST NOT BE UPON WHATEVER FORM OF ANNUITY CONTRACT STILL LIMIT IT ONLY TO THE PAYMENT, STREAM OF PAYMENTS, OF THE ANNUITY CONTRACT RATHER THAN AGAIN YOU WOULD HAVE US EQUATE PROCEEDS WITH CASH SURRENDER VALUE, CORRECT?

THAT'S CORRECT. AND THE OTHER REASON --

HOW? WHY? IT'S A WORD CHOICE. IT SORT OF VIOLATES EVERY PRINCIPLE OF STATUTORY CONSTRUCTION, DUNZN'T IT? TO TAKE THAT WORD AND JUST SAY, IT MEANS NOTHING OTHER THAN CASH SURRENDER VALUE?

NO, I DON'T THINK IT MEANS NOTHING OTHER THAN CASH SURRENDER VALUE.

OR INCLUDES.

IT INCLUDES. AND I THINK THE REASON WE CAN COME TO THAT CONCLUSION IS BECAUSE THE LEGISLATURE, THE YEAR BEFORE IT AMENDED THE EXEMPTION STATUTE, AMENDED THE INSURANCE CODE AND THE DEFINITION OF LIFE INSURANCE TO INCLUDE ANNUITY CONTRACTS WITHIN THE DEFINITION OF LIFE INSURANCE. AND WHEN WE READ THE TITLE OF THIS PARTICULAR STATUTE, THE TITLE REFERS TO CASH SURRENDER VALUES OF LIFE INSURANCE CONTRACTS -- LIFE INSURANCE AND ANNUITY CONTRACTS. IT DOES NOT PUT THE WORD PROCEEDS IN THE TITLE OF THE STATUTE.

REFRESH US AGAIN WITH THE -- YOU'VE STARTED OUT IN A WAY THAT I THINK YOU WERE HEADED TO. REFRESH US AGAIN WITH THE FACTS THAT WE HAVE HERE. IF I UNDERSTAND IT CORRECTLY, THESE WERE SINGLE PAYMENT ANNUITY POLICIES.

RIGHT --.

IN OTHER WORDS, THERE WAS A LUMP SUM PAYMENT MADE.

RIGHT.

IS THAT CORRECT?

THAT'S CORRECT. WHAT HAPPENED WAS DR. GOLDENBERG IN HIS MEDICAL PRACTICE HAD A DEFINED BENEFIT RETIREMENT PLAN THAT WAS TERMINATED AND WHEN THAT WAS TERMINATED, THE FUNDS WERE ROLLED OVER INTO INDIVIDUAL RETIREMENT ACCOUNTS, AND INDIVIDUAL RETIREMENT ANNUITIES. AND SO THERE WERE SEVEN SEPARATE ANNUITIES THAT WERE PURCHASED WITH THE FUNDS FROM THE RETIREMENT ACCOUNT.

THESE WERE INTACT AT THE TIME IN QUESTION, THE BANKRUPTCY, IS THAT CORRECT? AT THE TIME THE EXEMPTION WAS CLAIMED.

THAT'S CORRECT. THESE WERE ALL PURCHASED IN 1989 WHICH WAS FOUR YEARS I BELIEVE, OR THREE YEARS BEFORE THE NEGLIGENCE THAT WAS -- THAT LED TO THE JUDGMENT AGAINST DR. GOLDENBERG.

WERE THE CLAUSES IN TERMS OF THE FEES FOR THIS FIRST SEVEN YEARS THE SAME IN EACH OF THE POLICIES?

IT'S PRETTY CLOSE TO THE SAME. ONE OF THEM I THINK HAS A 6% DECLINING SURRENDER CHARGE AND THE REST OF THEM HAVE A 7% DECLINING DOWN TO ZERO SURRENDER CHARGE. SO -- OH.

IS THIS SIGNIFICANT FOR THIS CASE AND FOR OUR ANSWER TO THE CERTIFIED QUESTION THAT THESE ANNUITY CONTRACTS WERE PURCHASED WITH EXEMPT PENSION FUNDS? BECAUSE THAT DOESN'T -- YOUR CASE SEEMS STRONGER THAN, SAY, SOMEBODY ELSE WHO WOULD HAVE JUST TAKEN THEIR O WHOLE FORTUNE AND DECIDED I JUST WANT TO SHIELD MYSELF FROM CREDITORS SO I'M GOING TO TAKE THAT AND I'M GOING TO PURCHASE ANNUITY CONTRACTS. SO THAT'S A STRONGER CASE BUT THAT'S IN TERMS OF WHAT WE'RE LOOKING AT HERE, HOW DO WE - - THAT'S NOT A DISTINCTION WE CAN MAKE.

THE WAY THAT WE GET TO THAT ISSUE IS AGAIN WHAT THE DISTRICT COURT IN THE -- RELIED NONTHE LEVINE CASE. THAT ONE WAS EXACTLY WHAT YOU'RE DESCRIBING WHERE THOSE BANKRUPTCY DEBTORS LIQUIDATED A STOCK PORTFOLIO THAT WAS NOT EXEMPT AND INVESTED THEY IN ANNUITIES IN ORDER TO SHIELD IT FROM THE CREDITORS. OUR LEGISLATURE HAS ADDRESSED THAT FOLLOWING I BELIEVE IT WAS AT THE LEVINE CASE WHERE THERE'S NOW A STATUTE PARTICULARLY ON THAT POINT. WHEN A PERSON CONVERTS A NONEXEMPT ASSET INTO AN EXEMPT ASSET, THAT A TRANSACTION THAT A CREDITOR CAN UNDO AND REACH THE -- NOT WITHSTANDING THE FACT IT WAS INVESTED IN EXEMPT PROPERTY. AND THAT GETS DONE NOT REALLY BY THIS CASE. WHERE THAT HAPPENS IS IN THE BANKRUPTCY COURT, OR IF IT'S NOT IN BANKRUPTCY, IN THE LITIGATION ON EXECUTION ON THE JUDGMENT. THE CREDITOR CAN REACH THE EXEMPT PROPERTY AND UNDO IT IF THERE IS SOME KIND OF FRAUDULENT CONVEYANCE OR FRAUDULENT ASSET CONVERSION FROM NONEXEMPT INTO EXEMPT PROPERTY, WHICH IS THE KNOWN ISSUE OF A CREDITOR OUT THERE WITH INTENT TO GET THE MONEY --. THAT'S WITHIN A CERTAIN PERIOD OF TIME.

RIGHT.

BUT NOT AGAIN, IF SOMEBODY IN THIS STATE WANTS TO EXEMPT THEIR ASSETS UNDER THE LEGISLATURE, YOU'RE SAYING SEEMS TO BE ALLOWING THAT TO HAPPEN BY PURCHASING, TO BE ABLE TO PURCHASE THESE ANNUITY CONTRACTS.

YES. THE LEGISLATURE HAS THE WHOLE CHAPTER, THE WHOLE CHAPTER 22 DEALS WITH EXEMPT ASSETS, AMONG OTHER THINGS LIKE THE ANNUITIES. THERE'S INDIVIDUAL RETIREMENT ACCOUNTS. THERE ARE THE HOMESTEAD, WHICH IS IN THAT SAME SERIES OF STATUTES. AND THERE'S COMMON-LAW CREATION OF EXEMS BY TENANCY BY THE ENTIRETY.

BUT YOUR ANSWER IS TO JUDGE PARIENTE'S QUESTION IS IT DOESN'T MAKE A DIFFERENCE THAT SOURCE OF THE FUNDS IS FROM AN EARLIER RETIREMENT?

YES, IT DOES.

IT DOES? IN OTHER WORDS, IT TURNS ON THE FACT THAT THE SOURCE OF THESE FUNDS ORIGINALLY WERE EXEMPT RETIREMENT FUNDS?

IT DOESN'T TURN ON THAT, BUT THAT'S A FACTOR. IN THIS LEVINE CASE SINCE THERE WAS NONEXEMPT TO EXEMPT THERE WAS AN ABILITY FOR THE CREDITOR TO REACH THE PROPERTY. IN OUR CASE AND OTHER SIMILARLY SITUATED CASE IF YOU HAVE PROPERTY IN AN EXEMPT FORM, AND FOR WHATEVER BUSINESS REASONS DURING THE COURSE OF THE ORDINARY INVESTMENT OF YOUR EXEMPT PROPERTY, IT GETS -- THERE'S A MATURITY OR WHATEVER THERE IS AND A PURCHASE OF NEW PROPERTY, WHEN IT WENT FROM THE ONE EXEMPT FORM TO THE OTHER

EXEMPT FORM JUST BECAUSE OF THE TERMINATION OF THE PENSION PLAN --

I'M NOT SURE WHETHER -- YOU'RE NOT SAYING THAT IF THESE FUNDS CAME FROM SOME OTHER SOURCE WHEN THESE ANNUITY CONTRACTS WERE PURCHASED THAT THEY WOULDN'T BE EXEMPT, THEN.

THAT WOULD HAVE GIVEN RISE, IF THEY CAME FROM A SOURCE DIFFERENT FROM --

THE SOURCE THEY DID.

YES, THAT COULD HAVE GIVEN RISE TO THE CREDITOR TO FILE AN ACTION IN THE BANKRUPTCY COURT TO CHALLENGE IT. EITHER UNDER THE SEK SUN 727 WHICH IS A CHALLENGE TO TRANSFERS FROM ONE FORM OF OWNERSHIP TO ANOTHER. HERE, SINCE THEY WERE ALWAYS EXEMPT, AND IN FACT, THE BANKRUPTCY COURT DID HAVE THAT IN ITS INITIAL ORDER THAT THE SOURCE OF THESE FUNDS WAS ALWAYS FROM EXEMPT PROPERTY, AND THAT THE CREDITOR DID NOT IN ANY WAY CHALLENGE THESE ASSETS AS ANY WAY OF FRAUDULENT CONVEYANCE, CONCEALMENT OF ANY PROPERTY FROM A CREDITOR, OR ANY OTHER ACT THAT WOULD GIVE RISE TO REACHING THE EXEMPT PROPERTY. I THINK THAT THE LEGISLATURE DOES HAVE IN MIND THE ABILITY OF FLORIDA RESIDENTS TO OWN THEIR IN AN EXEMPT FORM AS LONG AS THE OWNERSHIP AND THE INVESTMENT TAKES PLACE WITHOUT ANY CREDITORS STARING THEM IN THE FACE AND TRYING TO KEEP THE PROPERTY OUT OF THE HANDS OF THE CREDITOR. AND HERE THAT'S EXACTLY WHAT HAPPENED. DR. GOLDENBERG INVESTED HIS FUNDS FROM 1972 FORWARD ACCORDING TO THE BANKRUPTCY COURT ORDER. HAD BEEN INVESTING THESE FUNDS IN EXEMPT ASSETS. AND AS I SAID, THIS CREDITOR DID NOT COME ALONG UNTIL WELL AFTER THESE ANNUITIES WERE IN PLACE. AND THE ANNUITIES BY THE WAY DO CALL FOR EACH ONE OF THEM WHEN THEY WERE PURCHASED WITH THE SINGLE PREMIUM, DID PROVIDE FOR PERIODIC PAYMENTS FOR THE LIFE OF THE ANNUITY, DR. GOLDENBERG. EACH OF THE CONTRACTS HAVE AN ELECTION TO CHANGE THE MANNER OF PAYMENT EITHER FROM PERIODIC FOR THE LIFE OF THE AN KNEW TANT TO A FIXED PERIOD OR TO SURRENDER HIS POLICY AND GET THE CASH VALUE. THE FACT THAT THERE ARE THESE ELECTIONS AND ALTERNATIVES AVAILABLE TO THE ANNUITANT DOESN'T CAUSE THEM TO BE OPTIONS TO PURCHASE ANNUITIES IN THE FUTURE AS THE DISTRICT COURT HAD CONCLUDED. THERE WAS ONLY ONE OF THE SEVEN POLICIES THAT ENABLED THE ANNUITY COMPANY, THE ISSUER, TO TO PURCHASE AN ANNUITY TO SATISFY ITS ONLY GATION TO PAY AN ANNUITY TO THE ANNUITANT I THINK THE COURT MISAPPLIED OR MISUNDERSTOOD AND CHARACTERIZED ALL THE CONTRACTS AS OPTIONS TO PURCHASE BECAUSE OF THAT FACTOR. I THINK THE CASE THE COURT RELIED ON IN FACT WHEN IT HAD THE ISSUE OF THE SURRENDER CHARGES AS PROVIDING NOT AN UNFETTERED RIGHT KIND OF MISUNDERSTOOD OR MISS READ THAT PARTICULAR CASE. I'D ALSO LIKE TO POINT OUT THAT WHEN -- IF WE ARE GOING STRICTLY BY WAY OF STATUTORY CONSTRUCTION AND READING OF THE WORK, I DON'T THINK THAT WE NEED TO GO TO OTHER STATUTES. BUT IF WE DO, THE FLORIDA STATUTES DO DEFINE THE WORD "PROCEEDS" FOR INSTANCE IN THE UNIFORM COMMERCIAL CODE AT 679.306. THE UNIFORM COMMERCIAL CODE DEFINES PROCEEDS AS AMONG OTHER THINGS MONEY ON DEPOSIT, CHECKS, AND MONEY ITSELF. IT ALSO DEFINES IT AS WHATEVER IS RECEIVED ON EXCHANGE FOR COLLATERAL. SO WE DO HAVE OTHER AREAS OF THE LEGISLATION THAT DOES DEFINE THE WORDS, EVEN THOUGH THIS PARTICULAR STATUTE DOESN'T DEFINE THE WORD "PROCEEDS."

IF A DOCTOR OR A LAWYER FOR THAT REASON PURCHASED THESE POLICIES AND PUT MOST OF HIS ASSETS IN THESE, HE WOULD BE JUDGMENT-FREE. IS THAT THE PRACTICAL RESULT OF THIS? HE COULD PRACTICE BARE. HE WOULDN'T NEED MALPRACTICE INSURANCE.

HE POSSIBLY WOULD NOT NEED MALPRACTICE INSURANCE. BUT AS THE COURT MAY RECALL THERE WAS A PERIOD OF TIME WHERE THERE WAS A MEDICAL MALPRACTICE INSURANCE CRISIS THAT NO INSURANCE CARRIER WAS EVEN WRITING MALPRACTICE INSURANCE. AND NOW WITH

THE MALPRACTICE INSURANCE THAT IS IN FACT WRITTEN, THERE'S ONLY AN AVAILABILITY OF \$250,000 WORTH OF INSURANCE ON ANY PARTICULAR INCIDENT AND IN A CASE LIKE THIS ONE WHERE THE JUDGMENT WAS APPROXIMATELY \$4 MILLION, THE 250,000 OF INSURANCE WASN'T GOING TO DO VERY MUCH GOOD TO THE PHYSICIAN.

DID I UNDERSTAND YOU TO SAY THE LEGISLATURE HAS ADDRESSED NOW? OR IS THIS STILL A SITUATION?

HAS ADDRESSED --

COULD THIS STILL BE DONE IN THE PRESENT?

TO OWN ALL OF YOUR ASSETS?

YEAH, IN THESE POLICIES.

YES.

-- AND BE PRACTICALLY JUDGMENT FREE.

YES, YES. BUT THE POINT IS, THOUGH, THAT THE LEGISLATURE ALSO ENABLES THE CREDITOR TO DO SOMETHING ABOUT IT IF IT'S DONE FOR THE PURPOSE OF TRYING TO GET THE FUNDS OUT OF THE -- OR DEFRAUD THE CREDITOR IN SOME MANNER.

YOU'RE IN YOUR REBUTTAL TIME.

YES, THANK YOU.

MR. NORRIS?

MAY IT PLEASE THE COURT, TIMOTHY NORRIS. I'M ON BEHALF OF SHIRLEY SAWCZAK. WITH ME AT COUNSEL TABLE IS HERMAN RUSSOMANNO MY CO-COUNSEL AND ALSO THE TRIAL COUNSEL IN THIS CASE.

MR. NORRIS, WOULD YOU AGREE THAT THESE SEVEN CONTRACTS ARE GARDEN VARIETY ANNUITY CONTRACTS? IS THAT CORRECT?

YOUR HONOR, I THINK THEY PROBABLY ARE. I DON'T SEE ANYTHING IN THEM THAT'S TERRIBLY DIFFERENT FROM OTHER ANNUITY CONTRACTS THAT I'VE SEEN FROM TIME TO TIME. BUT AGAIN, I'M NOT IN THE INSURANCE BUSINESS.

AND IN THESE -- THE WAY THAT THESE ANNUITY CONTRACTS WORK IS THAT YOU PAY A LUMP SUM PREMIUM, AND THEN THERE IS A VALUE THAT GROWS IN THE ANNUITY, AND IF YOU GO PRIOR TO THE MATURITY DATE AND DRAW THAT MONEY OUT FOR WHATEVER REASON, YOU PAY -- YOU GET MORE THAN YOUR PREMIUM IF IT'S SOME TIME DOWN THE ROAD BUT YOU PAY A SURRENDER VALUE, THERE'S A SURRENDER FEE.

YOUR HONOR, THERE'S A SURRENDER FEE IN THE FIRST FEW YEARS. I BELIEVE IT'S NORMALLY THE FIRST FOUR, FIVE, SIX YEARS. BEYOND THAT, THERE IS NO SURRENDER CHARGE. AND IN FACT, THE SURRENDER CHARGE IS A DECLINING AMOUNT.

SO WHY WOULDN'T THE TERM "PROCEEDS" REFER TO ANY TIME YOU GO AND GET THE MONEY OUT OF THESE ANNUITY CONTRACTS?

YOUR HONOR, I THINK THAT THIS IS PURELY A CASE OF STATUTORY CONSTRUCTION WHERE THE LEGISLATURE IS OPERATING IN A FIELD, GENERALLY INSURANCE, WHERE TERMS HAVE MEANING,

AND THE TWO TERMS WE'RE TALKING ABOUT HERE ARE "PROCEEDS" AND "SURRENDER VALUE" OR CASH SURRENDER VALUE. WE SEE IN SECTION 222.14 ITSELF THE TWO TERMS USED. CASH SURRENDER VALUE OF A LIFE INSURANCE POLICY OR PROCEEDS OF ANNUITY CONTRACTS. -- POLICY, PROCEEDS OF ANNUITY CONTRACTS. WE LOOK BACK INTO INSURANCE CODE AND IN THE BRIEF WE'VE CITED A NUMBER OF SECTIONS IN THE INSURANCE CODE WHERE THE LEGISLATURE USES THE TERM "SURRENDER VALUE" WITH RESPECT TO ANNUITY CONTRACTS. SO CLEARLY, THE LEGISLATURE RECOGNIZES THAT THERE CAN BE A SURRENDER VALUE WITH RESPECT TO AN ANNUITY CONTRACT.

BUT IN ORDER TO GO WITH YOUR VIEW OF THE STATUTE, WE WOULD HAVE TO COME TO THE CONCLUSION THAT THE WORD "PROCEEDS" ONLY REFERS TO PAYOUTS AT THE DAY OF MATURITY OF THE ANNUITY CONTRACT. ISN'T THAT CORRECT?

YES, SIR, I THINK THAT'S EXACTLY WHAT IS MEANT IN THE LEGISLATIVE CONSTRUCT IN THE INSURANCE CODE AND IN SECTIONS 222.13, LIFE INSURANCE, WHERE THE TERM "PROCEEDS" IS USED AND 222.14 WHERE BOTH LIFE INSURANCE AS FAR AS CASH SURRENDER VALUE IS CONCERNED AND PROCEEDS OF ANNUITY CONTRACTS IS USED.

BUT ISN'T THAT A MUCH MORE RESTRICTIVE VIEW OF ANNUITY CONTRACTS THAN THIS COURT GAVE THE CONTRACTS IN THE McCOLLUM CASE? THE MOCK COLUMN CASE WAS DEALING WITH A STRUCTURED SETTLEMENT WHICH WASN'T EVEN LABELED AN ANNUITY CONTRACT BUT IT WAS DEALING WITH PERIODIC PAYMENTS OUT OF AN INSURANCE POLICY, OR AN INSTRUMENT THAT WAS DESIGNED TO DO THAT. AND THIS COURT FOUND THAT THAT WAS COVERED BY THE STATUTE.

ABSOLUTELY. AND, YOUR HONOR, THAT'S AN IMPORTANT POINT. IN McCOLLUM, YOU HAD WHAT IS REFERRED TO AS AN IMMEDIATE ANNUITY. WHAT WE HAVE HERE IS A DEFERRED ANNUITY. THERE IS NO PERIODIC PAYMENT STREAM AT THIS POINT IN TIME. AND THERE WOULD NOT BE UNTIL I THINK THE FIRST INSTANCE IS IN THE YEAR 2009. IN McCOLLUM, THE JUDGMENT DEBTOR DEBTOR OR THE BANKRUPT WAS ALREADY RECEIVING THOSE PERIODIC PAYMENTS, THE PROCEED. AND WAS THE ANNUITANT OR THE BENEFICIARY IN TERMS OF SECTION 222.14 WAS THE BENEFICIARY OF THE ANNUITY CONTRACT. NOT THE OWNER.

BUT DOESN'T THAT SYLOGISM RUN YOU DIRECTLY INTO THE USE OF THE PHRASE WHICH YOUR OPPONENT RELIES UPON, "WHATEVER FORM"

NO, SIR, I DON'T THINK SO. AND THE REASON I DON'T IS THIS: THE TERM UPON WHATEVER FORM WAS IN THE ORIGINAL VERSION OF SECTION 222.14 PRIOR TO THE 1978 AMENDMENT WHICH ADDED "PROCEEDS OF ANNUITY CONTRACTS." IT WAS IN THE STATUTE IN THE 1925 ENACTMENT. WAS IN THE STATUTE WHEN THIS COURT DECIDED THAT SURRENDER VALUE INCLUDED WHATEVER TYPE OF CONSIDERATION WAS GIVEN BY THE INSURANCE COMPANY WHEN THE LIFE INSURANCE POLICY WAS SURRENDERED. THE POINT WAS IT WAS A SURRENDER OF THE POLICY AND VALUE GIVEN. TO TAKE WHAT DR. GOLDENBERG SUGGESTS WOULD MEAN THAT THERE IS SOME CHANGE, COMPLETE CHANGE, THAT INSTEAD OF SURRENDERING THE POLICY, ANYTHING THAT CAME OUT OF THE LIFE INSURANCE POLICY WOULD SOMEHOW BE EXEMPT. THIS COURT HELD OTHERWISE IN THE CASE WE CITE THE WESTERN CASUALTY AND SURETY VERSUS ROTTER CASE WHERE IN THAT CASE THE FUNDS PAID OUT WERE A DISABILITY BENEFIT. AND THIS WAS PRIOR TO EXEMPTION BEING PROVIDED BY STATUTE FOR DISABILITY BENEFITS. THE RECIPIENT ARGUED IT'S SURRENDER VALUE. THIS COURT SAID: WAIT A MINUTE. THOSE ARE TWO DIFFERENT THINGS. DISABILITY BENEFITS ARE ONE TYPE OF PRODUCT OFFERED IN THE INSURANCE WORLD. AND SURRENDER VALUE IS SOMETHING COMPLETELY DIFFERENT.

DID THAT CASE INVOLVE THE SURRENDER OF THE POLICY OR WAS THAT JUST THE PAYMENT OF DISABILITY BENEFITS.

THAT WAS THE PAYMENT OF DISABILITY BENEFITS.

SO THERE WAS NOT A SURRENDER THEN.

AND THIS COURT POINTED OUT THAT THEY'RE TWO DIFFERENT THINGS AND THEY DON'T OPERATE TOGETHER. THEY'RE SEPARATE. AND THE STATUTE AT THAT POINT IN TIME HAD IN IT THE PHRASE "UPON WHATEVER FORM."

BUT IT WAS NOT A SURRENDER OF THE POLICY. THE POLICY STILL STAYED IN FORCE.

CORRECT.

WOULD YOU ALSO ADDRESS, I'M HAVING A DIFFICULTY TRYING TO UNDERSTAND WHY THE LEGISLATURE WOULD WANT TO HAVE A SITUATION THAT WE WOULD LEAVE CERTAIN ASSETS THAT WOULD BE SUBJECT TO EXECUTION UP TO MATURITY, BUT THEN ALL OF A SUDDEN THERE'S SOME MAGIC DATE OF MATURITY THAT CONVERTS THESE THINGS INTO SOMETHING ELSE. IS THERE ANY POLICY, ANYTHING WE CAN LOOK TO ANYWHERE? BECAUSE WE KNOW LEGISLATIVE HISTORY IS TO THE CONTRARY. AND THAT IT SEEMS THAT LEGISLATIVE HISTORY SAYS THAT WE SHOULD HAVE ANNUITY SHOULD BE TREATED EXACTLY LIKE THE LIFE INSURANCE. IS THERE SOMEPLACE ELSE THAT WE CAN LOOK TO FOLLOW THIS POLICY THAT YOU'RE TALKING ABOUT THAT YOU HAVE A PERIOD OF TIME WHERE THESE THINGS ARE AT RISK? AND THEN THERE'S AUTOMATICALLY THEN SOMETHING CHANGES?

YOUR HONOR, I THINK THERE ARE A COUPLE OF THINGS. FIRST, LEGISLATIVE INTENT IS GLEANED FROM THE WORDS OF THE STATUTE. AND THE WORDS OF THE STATUTE USE TWO DIFFERENT TERMS. BUT GOING PRECISELY TO YOUR POINT, THERE IS NO REQUIREMENT THAT AN ANNUITY CONTRACT HAVE A SURRENDER VALUE. WE HAVE SET FORTH IN THE BRIEF THE STATUTE THAT GOVERNS WHAT THE LEGISLATURE REQUIRES IN AN ANNUITY CONTRACT. AND SURRENDER VALUE IS NOT ONE OF THEM. WE CITE A CASE, IT'S A CALIFORNIA CASE, SO AS TO THE LAW, IT'S TOTALLY IRRELEVANT. BUT AS TO THE FACTS, THAT THERE IS A PRODUCT OUT THERE IN WHICH ONE CAN PURCHASE AS DEFERRED ANNUITY WHICH HAS NO SURRENDER VALUE. IF THAT IS WHAT DR. GOLDENBERG HAD PURCHASED, WE WOULD NOT BE HERE. WE WOULD HAVE ABSOLUTELY NO ABILITY TO MAKE A CLAIM, BECAUSE THERE WOULD BE NOTHING THAT COULD BE SURRENDERED. AND WHEN THE MAGIC DATE OF THE YEAR 2009 OR WHATEVER ROLLS AROUND AND THE FUNDS WERE PAYING OUT, THOSE PROCEEDS WOULD BE EXEMPT. SO THERE IS AVAILABLE TO ANYONE AN ANNUITY CONTRACT WITH NO SURRENDER VALUE. AND I SUGGEST, YOUR HONOR, THAT IF YOU TRY TO GLEAN A POLICY REASON ONE CAN SAY THAT THE LEGISLATURE, ACTING IN A PATERNALISTIC WAY WHICH EXEMPTION LAWS I BELIEVE ARE, COULD SAY, "YES, WHAT WE WANT YOU TO DO IF YOU'RE PUTTING ASIDE MONEY FOR RETIREMENT IS TO NOT TOUCH IT UNTIL RETIREMENT." NOT HAVE IT AVAILABLE TO PULL OUT ON ANY WHIM BUT TO HAVE IT THERE AVAILABLE SO WHEN THE YEAR 2009 ROLLS AROUND, THAT MONEY WILL START PAYING. AND WHEN THAT MONEY STARTS PAYING, IT'S GOING TO BE EXEMPT FROM CREDITORS. BUT IF YOU'RE GOING TO HAVE THE ABILITY TO PULL THAT MONEY OUT JUST LIKE IT'S A SAVINGS ACCOUNT AT ANY POINT IN TIME, THEN IT'S NOT EXEMPT. I THINK THAT'S A DISTINCTION THAT CAN BE READILY APPLIED --

SO YOU WOULD TREAT LIFE INSURANCE AND KNEW 'TIS DIFFERENTLY IS THE BASIC PREMISES YOU GO ON THEN. BECAUSE THE LIFE INSURANCE YOU CAN PULL OUT SURRENDER VALUE AT WHATEVER TIME SO YOU TREAT THESE DIFFERENTLY.

BECAUSE THE LEGISLATURE TREATED THEM DIFFERENTLY IN SECTION 22213, AND THIS HAS BEEN THE CASE WELL OVER 100 YEARS IN FLORIDA, PROCEEDS OF THE LIFE INSURANCE POLICY ARE EXEMPT FROM THE CLAIMS OF THE CREDITORS OF THE INSURED. AND AFTER 1925, CASH SURRENDER VALUE OF THAT LIFE INSURANCE POLICY LIKEWISE EXEMPT.

NOW, IN McCOLLUM, BECAUSE THE DEBTOR DID NOT OWN THE STRUCTURED SETTLEMENT, THAT WAS OWNED BY THE INSURANCE COMPANY AS PART OF THE PAY-OUT, THERE WAS NO CASH SURRENDER VALUE THAT COULD HAVE BEEN ATTACHED BY THE CREDITOR, CORRECT?

THAT'S CORRECT. THAT'S CORRECT.

SO REALLY McCOLLUM, ALTHOUGH THERE IS -- WE DEFINED WHAT AN ANNUITY CONTRACT WAS, REALLY WEREN'T DEALING WITH A DISTINCTION BETWEEN PROCEEDS AND CASH SURRENDER VALUE, CORRECT?

CORRECT. WHAT THE COURT WAS FACED WITH IN McCOLLUM WAS NOT THE ISSUE OF WHETHER THE MONEY WAS PROCEEDS. CLEARLY WAS. BUT WAS IT PROCEEDS OF AN ANNUITY CONTRACT? OR WAS IT PROCEEDS OF A PROMISSORY NOTE? AND THE COURT HELD THAT THE WAY IT WAS SET UP, IT WAS AN ANNUITY CONTRACT, AND THEREFORE, WITHIN THE PLAIN MEANING OF THE STATUTE PROCEEDS OF ANNUITY CONTRACTS WERE EXEMPT.

SO IN THIS CASE, IF WE ACCEPT YOUR VIEW THAT CASH SURRENDER VALUE IS NOT EXEMPT, BASICALLY THAT'S THE END OF THE ANNUITY FOR DR. GOLDENBERG, CORRECT?

FOR DR. GOLDENBERG, YES.

AND IT SEEMS, AGAIN, IF WE'RE TO BE LOOKING AND LIBERALLY CONSTRUING THESE EXEMPTION STATUTES, SOMEWHAT ACTUALLY IRRATIONAL AND MAYBE THAT'S -- MAYBE IT IS -- THAT YOU COULD TAKE A PERSON WHO HAD AN EXEMPT PENSION FUND, AND IF HE HAD ROLLED IT OVER INTO ANOTHER IRA, THAT WOULD HAVE BEEN EXEMPT. IF HE HAD PURCHASED AN ANNUITY CONTRACT THAT DIDN'T HAVE THE CASH SURRENDER VALUE UNDER YOUR INTERPRETATION, IF SUCH PRODUCT EXISTS, THAT WOULD BE EXEMPT. IF HE HAD PURCHASED A LIFE INSURANCE POLICY, THAT WOULD ALL BE EXEMPT. BUT IF HE HAD PUT HIS MONEY IN A SAVINGS ACCOUNT, NONE OF THAT WOULD HAVE BEEN EXEMPT. AND NOW WE WOULD SAY THAT IF HE PUT HIS MONEY INTO AN ANNUITY CONTRACT THAT HAD A CASH SURRENDER VALUE, IF HE WAS NOT JUDGMENT PROOF UNTIL HE REACHED RETIREMENT AGE. IS THAT SORT OF THE WAY THIS WOULD GO?

YES, YOUR HONOR. THE LAW DRAWS MANY LINES. AND SOME OF THEM AREN'T ALWAYS CLEAR. SOME OF THEM PERHAPS CANNOT ALWAYS BE FULLY DEFENDED. BUT I WOULD MAKE TWO POINTS. ONE IS A PERSON CAN TAKE AN EXEMPT ASSET THAT HE OWNS AND CHANGE IT TO SOMETHING THAT'S CLEARLY NONEXEMPT. HE CAN TAKE HIS HOMESTEAD AND DECIDE, I DON'T WANT MY HOMESTEAD ANY MORE. I'M GOING TO RENT AN APARTMENT AND I'M GOING TO USE THE MONEY AND GO TRAVEL AROUND THE WORLD. OKAY? HE'S CONVERTED HIS EXEMPT HOMESTEAD INTO NONEXEMPT FUNDS TO USE FOR TRAVEL. BECAUSE THAT'S IMPORTANT TO HIM. THE SECOND THING IS FLORIDA RECOGNIZES, FOR EXAMPLE, THAT PROPERTY HELD IN THE FORM OF TENANCY BY THE ENTIRETIES, THAT THAT PROPERTY IS NOT AVAILABLE TO THE CLAIM OF A JUDGMENT CREDITOR OF ONE SPOUSE. BUT IF THE HUSBAND AND WIFE BOUGHT THE PROPERTY AND AT THE TIME THEY BOUGHT THE PROPERTY INSTEAD OF HAVING IT EXPRESSED AS TENANTS BY THE ENTIRETY, THEY SAID, WE WANT THIS AS JOINT TENANTS WITH RIGHT OF SURVIVORSHIP, THAT INTEREST OF ONE SPOUSE WOULD BE SUBJECT TO EXECUTION BY CREDITORS. WHAT'S THE DIFFERENCE? ESSENTIALLY, THAT'S ABOUT THE ONLY DIFFERENCE THERE IS BETWEEN THOSE TWO FORMS OF OWNERSHIP, WHEN IT'S HUSBAND AND WIFE THAT'S THE OWNER OF THE PARTICULAR PROPERTY. IT'S A LINE. HOW DEFENSIBLE IS THAT LINE FROM A PUBLIC POLICY PERSPECTIVE? I DON'T KNOW. BUT IT'S CERTAINLY A LINE AND IT IS A DISTINCTION AND IT IS THESE TYPES OF DISTINCTIONS THAT WE HAVE TO LIVE WITH AND COUNSEL OUR CLIENTS WITH EVERY DAY.

BUT ONCE WE GET INTO, IF WE DECIDE THE TERM "PROCEEDS" NEEDS STATUTORY CONSTRUCTION AND WE GO THROUGH ALL THE TRADITIONAL METHODS BUT WE ALSO GO TO LEGISLATIVE

HISTORY, AT THAT POINT, WE HAVE TO LOOK AND SAY, THE LEGISLATIVE HISTORY INTENDED THAT THESE TWO FORMS OF SAVINGS VEHICLES, LIFE INSURANCE AND ANNUITY CONTRACTS, WERE TO BE TREATED EXACTLY THE SAME, WOULD YOU AGREE WITH THAT AS FAR AS JUST READING THE LEGISLATIVE HISTORY? THAT IS, WHAT THE LEGISLATURE WHEN THEY WERE WRITING THIS WERE SAYING THEY WERE INTENDING TO DO.

YOUR HONOR, FIRST, I DON'T THINK IT'S APPROPRIATE TO GO INTO THE LEGISLATIVE HISTORY BECAUSE I THINK STATUTE IS CLEAR ON ITS FACE. BUT LOOKING AT THE LEGISLATIVE HISTORY, THAT COMMENT WAS MADE ABOUT ANNUITIES, NOT ANNUITY CONTRACTS. AND IT WAS MADE WITH RESPECT TO A BILL THAT DID NOT BECOME LAW. NOW, IF YOU SAY ANNUITIES HAVE THE SAME PROTECTION AS LIFE INSURANCE, AND BY ANNUITIES YOU MEAN AS THIS COURT DEFINED ANNUITIES IN McCOLLUM, AS "PERIODIC PAYMENTS FOR LIFE OR FOR A TERM, QUALITY THEN THE STATUTE WOULD GIVE EXACTLY THE SAME PROTECTION TO ANNUITIES, TO THOSE PERIODIC PAYMENTS BECAUSE THOSE PERIODIC PAYMENTS ARE PROCEEDS AND THEY'RE CLEARLY COVERED BY SECTION 222.14. WE DON'T KNOW WHAT THE LEGISLATURE MEANT WHEN IT SAID "GIVE ANNUITIES THE SAME PROTECTION." WHAT WE DO KNOW IS THAT IT SAID THAT WITH RESPECT TO A BILL THAT DIDN'T BECOME LAW. AND WHAT WE DO KNOW IS THAT IN THE STATUTE ITSELF, WHICH IS THE ULTIMATE EXPRESSION OF THE INTENT OF THE LEGISLATURE, THEY MADE A DISTINCTION, PROCEEDS OF ANNUITY CONTRACTS, CASH SURRENDER VALUES OF LIFE INSURANCE POLICIES.

IS THERE ANOTHER STATUTE YOU WOULD POINT TO TO DEFINE "PROCEEDS."

YOUR HONOR, I WOULD LOOK AT THE INSURANCE CODE. I THINK IT INAPPROPRIATE TO LOOK TO THE UNIFORM COMMERCIAL CODE, AR ARTICLE 9, SECTION 9306.

DOES THE INSURANCE CODE DEFINE PROCEEDS THAT WILL HELP US HERE? BECAUSE WE LOOK TO THE INSURANCE CODE AND IT SEEMS TO SUGGEST, DOES IT NOT, THAT ANNUITY IS A -- IT'S A FORM OF LIFE INSURANCE, IS IT NOT, OR DEFINED IN SIMILAR FASHION?

WELL, PERHAPS IT IS. THAT WAS IN 1977. 1978 IS WHEN WE HAD THIS AMENDMENT TO SECTION 222.14. SO THAT'S A LATER ENACTMENT. BUT WHEN YOU LOOK AT THE INSURANCE CODE ITSELF, ANY NUMBER OF PLACES ARE REFERENCES TO ANNUITY CONTRACTS. AND TO ACCEPT DR. GOLDENBERG'S ARGUMENT WOULD MEAN THAT THAT'S PURE SURPLUSAGES EVERYWHERE IT APPEARS IN THE INSURANCE CODE, WHICH IS CLEARLY NOT THE CASE.

I DIDN'T MEAN TO GET YOU OFF THE TRACK AS FAR AS THE STATUTE ON PROCEEDS. WHERE WOULD YOU DIRECT US?

I WOULD DIRECT THE COURT TO PARTICULARLY -- PARTICULARLY TO SECTIONS 627.464 THROUGH SECTIONS 627.470. IN PARTICULAR, I WOULD ASK THE COURT TO LOOK AT SECTION 627.470 IN PARTICULAR, BECAUSE IT SPEAKS DIRECTLY TO ANNUITY CONTRACT. DOES NOT TALK ABOUT LIFE INSURANCE. AND IT SPECIFICALLY REFERS TO CASH SURRENDER VALUES OF ANNUITY CONTRACTS. WHETHER THEY'RE FIXED DOLLAR, VARIABLE, AND IT HAS TO DO WITH RIGHTS OF REINSTATEMENT, UNLESS THE CASH SURRENDER VALUE HAS BEEN PAID. SO WHILE I'M NOT GIVING YOU A STATUTORY DEFINITION OF "PROCEEDS," I THINK THAT WHEN YOU READ THESE STATUTES THAT WE'VE CITED, YOU ARRIVE AT THE CONCLUSION THAT DISTRICT JUDGE FERGUSON DID, WHICH IS THE PERIODIC PAYMENTS FOR LIFE OR FOR A TERM THAT ARE PROCEEDS.

MR. NORRIS, YOUR TIME IS UP. THANK YOU VERY MUCH.

THANK YOU MUCH.

MR. BRADY?

THANK YOU, YOUR HONOR. I'D LIKE TO MAKE A COUPLE OF POINTS. FIRST OF ALL, IN A REMARK THAT JUSTICE LEWIS MADE, THERE IS NO DEFINITION OF PROCEEDS EITHER IN THE INSURANCE CODE -- EXPRESSLY IN THE INSURANCE CODE. BUT IN THE BOTH IN THE ZUCKERMAN CASE AND IN THE BANK OF GREENWOOD CASE, THE COURT STATED THAT WE DO NOT LOOK ONLY TO THE INSURANCE CODE AND LIMIT THE LANGUAGE TO WHAT THE INSURANCE CODE DESCRIBES AS CASH SURRENDER VALUES WHEN IT WAS TALKING ABOUT CACHE SURRENDER VALUE. IT SAID WE LOOK AT WHATEVER IS OUT THERE. IN FACT, THE COURT IN BOTH OF THOSE CASES SAID THAT THE CLARITY OF THESE WORDS LEADS US TO CONCLUDE THAT THE EXEMPTION IS NOT CONTINGENT ON THE FORM OF PAYMENT. AND THAT'S WHAT WE'RE GUIDED BY HERE. IT'S NOT CONTINGENT ON THE WAY THAT THESE PROCEEDS ARE PAID. I ALSO WOULD STATE THAT BECAUSE OF THE ISSUE THAT YOU RAISED ABOUT THE -- IF THERE'S A MAGIC DATE WHEN YOU BECOME RETIRED AND THESE ARE IN PAY-OUT PHASE, I THINK THAT THERE IS SOME SUBSTANCE TO CONTINUING THE EXEMPTION THROUGHOUT, WHETHER YOU'RE IN RETIREMENT OR NOT. BECAUSE IF WE LOOK TO MANY FORMS OF THE STATE'S RETIREMENT SYSTEM IT PROVIDES OPTIONAL RETIREMENT SYSTEMS TO PUNCH A AS ANNUITIES WHETHER YOU'RE IN THE COMMUNITY COLLEGE, THE STATE UNIVERSITY SYSTEM, IN THE SENIOR MANAGEMENT RETIREMENT SYSTEM. AND IN EACH OF THOSE IN THE OPTIONAL RETIREMENT SYSTEM, THERE IS -- ALTHOUGH THERE IS NO REQUIREMENT FOR CASH SURRENDER VALUE OF THE ANNUITIES, THE ONLY INVESTMENT YOU CAN HAVE IN THE OPTIONAL RETIREMENT IS ANNUITIES. AND THERE MUST BE A CASH SURRENDER VALUE, BECAUSE IF AN EMPLOYEE TERMINATES HIS EMPLOYMENT WITH THE STATE OR WITH ANY OTHER EMPLOYER, THERE IS A REQUIREMENT UNDER THE FEDERAL TAX LAW THAT THE EMPLOYEE TAKE HIS MONEY OUT OF THE RETIREMENT SYSTEM AND MOVE IT TO ANOTHER EITHER AN INDIVIDUAL RETIREMENT SYSTEM OR THAT HE HAS WITH HIS NEW EMPLOYER. AND IN PARTICULAR, IN THE STATE RETIREMENT SYSTEM, THERE IS REQUIREMENT UPON TERMINATION OF EMPLOYMENT THAT THE PERSON BE CASHED OUT. SO THERE IS A NEED TO CONTINUE THAT EXEMPTION EVEN BEFORE RETIREMENT, BECAUSE IT'S NOT ONLY DOCTORS AND PROFESSIONALS THAT MAY BE SUBJECT TO JUDGMENTS. IT'S ANY INDIVIDUAL, A STATE EMPLOYEE, A GARBAGE COLLECTOR, CAN GET INTO AN AUTOMOBILE ACCIDENT AND HAVE NOT SUFFICIENT INSURANCE TO COVER THE ULTIMATE JUDGMENT THAT HE MIGHT REACH.

MR. BRADY, I THINK YOUR TIME IS UP. THANK YOU, COUNSEL, VERY MUCH FOR YOUR HELP. COURT WILL BE IN RECESS FOR 15 MINUTES.

PLEASE RISE.