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**Swire Pacific Holdings, Inc. v. Zurich Insurance Co.**

CHIEF JUSTICE: THE NEXT CASE ON THE COURT'S DOCKET THIS MORNING IS SWIRE HOLDINGS -- IS SWIRE PACIFIC HOLDINGS HINGE ON A CERTIFIED QUESTION FROM THE FIRST DISTRICT COURT OF APPEALS. GOOD MORNING.

GOOD MORNING.

CHIEF JUSTICE: IF COUNSEL IS READY TO PROCEED, YOU MAY PROCEED.

MAY IT PLEASE THE COURT. ELLIOTT SHIRKER ON BEHALF THE GREENBERG TRAURIG FIRM. THIS COURT, IN A CONTEXT OF DISPUTE BETWEEN SWIRE PROPERTIES, THE DEVELOPER OF THE QUESTIONS THE CONDOMINIUM -- OF THE QWEST CONDOMINIUM PROJECT ON A KEY IN MIAMI. WE SOUGHT TO SUE IN A LABOR CLAUSE, FOR WORK WE PERFORMED TO PREVENT THE COLLAPSE AFTER CONDOMINIUM BUILDING WHICH UNDISPUTEABLY WOULD HAVE BEEN THE CAUSE AFTER COLLAPSE OF THE BUILDING. WE SPENT APPROXIMATELY \$4.5 MILLION, TO CORRECT THE STRUCTURAL DEFICIENCIES IN THE BUILDING, AFTER DISCOVERING THOSE DEFICIENCIES DURING A PEER REVIEW OF THE WORK AND THAT MIAMI WOULD NOT ALLOW OCCUPANCY. THE LABOR CLAUSE DOES NOT APPLY TO THE PREVENTION OF IMMINENT LOSS AND FURTHER, THAT THE POLICY'S DESIGN DEFECT EX-CHURX -- EXCLUSION BARS LOSS.

CHIEF JUSTICE: COULD YOU GO DIRECTLY TO THE LANGUAGE IN THE POLICY.

THE SUE AND LABOR CLAUSE IN THE POLICY PROVIDES THAT, IN THE CASE OF LOSS OR DAMAGE -  
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COULD WE STOP RIGHT THERE FOR A MOMENT?

YES.

WHY WOULD IT NOT BE REASONABLE TO INTERPRET THAT INTRODUCTORY LANGUAGE AS REQUIRING, IN CASE OF A COVERED LOSS OR DAMAGE, IN THAT TYPE OF INTERPRETATION? I KNOW THE WORD COVERAGE IS NOT THERE, BUT WHY WOULD THAT BE AN INAPPROPRIATE READING, WHEN WE TAKE THIS WHOLE POLICY TOGETHER?

JUDGE, WE TAKE THE POSITION THAT THE POLICY, THAT THE SUE AND LABOR CLAUSE IS, WHILE INDEPENDENT IN SOME RESPECT, ABSOLUTELY LINKED TO THE COVERAGE PROVISIONS OF THE POLICY, AND IT IS ONLY APPLICABLE WHEN WE ARE SUING IN LABORING TO PREVENT THE COVERED LOSS.

THIS APPEARS IN A CONDITION SECTION OF THE POLICY.

YES, SIR.

SHOULD THAT TEMPER OUR ROAD EDING -- OUR READING OF THIS POLICY IN ANY WAY?

JUDGE, I DON'T SEE WHY. SUE AND LABOR CLAUSES HAVE MEAN BEEN IN CONTRACTS SINCE THE 1600S. THEY HAVE ALWAYS MEANT THE SAME THING, AND THEY HAVE ALWAYS BEEN INTERPRETED BY THE COURTS THAT HAVE LOOKED AT THEM, MOST NOTABLY THE RELIANCE

DECISION FROM THE FIFTH CIRCUIT, WHICH IS THE TOUCHSTONE CASE, AS MEANING EXACTLY WHAT WE SAY THEY MEAN. THAT IS IT IS THE INSURED'S OBLIGATION TO SAFEGUARD THE PROPERTY, TO PRESERVE THE PROPERTY AGAINST COVERED LOSSES.

WE HAVE TWO CLAUSES THAT SAY. THAT THE DUE DILIGENCE CLAUSE REQUIRES THAT AS WELL THEN.

BUT THE DUE DILIGENCE CLAUSE, YOUR HONOR, IS NOT LIMITED TO COVERED LOSSES. THE DUE DILIGENCE CLAUSE SAYS WE HAVE TO PRESERVE THE PROPERTY AND OF COURSE IT IS THE INSURED'S OBLIGATION TO PRESERVE THE PROPERTY, AND THAT IS A VERY GOOD QUESTION, BECAUSE THE DIFFERENCE BETWEEN THE DUE DILIGENCE CLAUSE AND THE SUE AND LABOR CLAUSE IS BECAUSE THE SUE AND LABOR CLAUSE ALLOWS US TO CLAIM REIMBURSEMENT WHEN WE ARE SUING AND LABORING TO PREVENT A COVERED LOSS AND IS ZURICH SAYS WE ARE TRYING TO DO SOMETHING ELSE. WE ARE NOT. IT IS OUR POSITION THAT UNDISPUTED FACTS ARE WE WERE SUING AND LABORING TO PREVENT COVERED LOSS ON THE PROPERTY.

IF THAT IS THE INTERPRETATION OF THAT PARTICULAR CLAUSE, THEN WHEN WOULD THE EXCLUSION CLAUSE EVER APPLY? IT SEEMS TO ME THAT THE WAY YOU HAVE INTERPRETED THE SUE AND LABOR CLAUSE, THAT ANY TIME ANYTHING HAPPENS TO THIS PARTICULAR PROPERTY, THAT THERE WOULD NEVER BE AN EXCLUSION.

NOT AT ALL, YOUR HONOR.

WELL, GIVE ME AN EXAMPLE OF WHEN, THEN, THE EXCLUSION FOR THE DEFECTS WOULD ACTUALLY COME INTO EFFECT.

JUDGE, FIRST, JUSTICE QUINCE, FIRST CLAIM SIMPLY THAT, WHEN WE ARE TRYING TO PREVENT A COVERED LOSS. WHAT ZURICH IS SAYING IS, IF WE CAN MAKE AN ARGUMENT THAT WHAT YOU ARE DOING TO PREVENT THE COVERED LOSS MIGHT, ALSO, BE EXCLUDED FROM COVERAGE, UNDER THE POLICY, THE SUE AND LABOR CLAUSE DISAPPEARS, AND ALL YOU ARE LEFT WITH IS YOUR OBLIGATION UNDER THE DUE DILIGENCE CLAUSE, AND BASICALLY WE HAVE WRITTEN THE SUE AND LABOR CLAUSE OUT OF EXISTENCE. AND NO COURT HAS ACCEPTED THAT ARGUMENT. THIS IS NOT A PURE COVERAGE CASE.

BUT THE WAY YOU ARE SAYING IT SEEMS, TO ME, TO HAVE EXCLUDED THE EXCLUSION FROM THE POLICY.

NOT AT ALL. NOT AT ALL.

SO WHEN WOULD THAT DEFECT EXCLUSION BE APPLICABLE?

IF THE, IN THIS INSTANCE, IT IS THE DESIGN DEFECT EXCLUSION, AND THE CASES THEY RELY ON IS MAKING GOOD EXCLUSION. IT IS A DIFFERENCE BUT FOR THE PURPOSE OF YOUR QUESTION, ASSUME THEY ARE THE SAME. IF CORRECTING THE DESIGN DEFECT IN A GIVEN SITUATION, WHATEVER IT MIGHT BE, WAS NOT TO, PREVENT A COVERED LOSS, THE EXCLUSION AND PLICHLTS THERE ARE ANY NUMBER OF INSTANCES, IN OTHER WORDS IF THIS BUILDING HAD NOT BEEN IN DANGER OF COLLAPSE AND THERE HAD BEEN A DESIGN DEFECT IN THE ELEVATORS, AND THAT, CORRECTING THAT DESIGN DEFECT WOULD BE EXCLUDED, WE WOULD BE FINISHED. WE WOULDN'T HAVE COVERAGE. THE UNDISPUTED FACTS ON WHICH THIS CASE IS BEFORE THE COURT AND IN LIGHT OF THE UNDER CIRCUIT'S QUESTION IS WE WERE SUING TO PREVENT A COVERED LOSS.

ARE YOU SAYING THAT IT WAS UNCONTESTED THAT IF THIS WAS, IF THESE MONIES HADN'T BEEN EXPENDED AND THESE DEFICIENCIES CORRECTED, THAT THE BUILDING WOULD HAVE COLLAPSED?

IT IS UNCONTESTED FOR THE PURPOSE OF THE ELEVENTH CIRCUIT'S QUESTIONS TO THIS COURT, YOUR HONOR.

I THOUGHT IT WAS UNCONTESTED THAT THE REASON IT MOTIVATED THE CORRECTION WAS THAT THE CITY OF MIAMI WAS NOT GOING TO GIVE YOUR CLIENT A CERTAIN I CAN'T OF OCCUPANCY. -- A CERTIFICATE OF OCCUPANCY.

THAT WAS ONE OF THE FACTS, YES, BUT THE ELEVENTH CIRCUIT, IN FOOTNOTE ONE OF ITS DECISION ON PAGE 1233, ADDRESSED SOME OF IT -- SOME OF THE, LET'S PUT IT THIS WAY, LATENT FACTS IN DISPUTE BETWEEN THE APPEALS IN THE ELEVENTH CIRCUIT, AND SAID IN THE FOOTNOTE THAT THE FACTS DEVELOPED ARE THAT SWIRE HAD TO CORRECT THE DEFICIENCIES IN ORDER TO OCCUPY THE BUILDING AND THAT BY CORRECTING THOSE DEFICIENCIES, SWIRE MAY HAVE PREVENTED THE FUTURE COLLAPSE OF THE BUILDING TO PREVENT A COVERED LOSS AND THEN IT GOES ON TO SAY WHETHER IT WOULD HAVE OCCURRED AND WHETHER IT WOULD HAVE BEEN IN THE POLICY PERIOD, ARE FACTS THAT ARE ON APPEAL.

WHETHER IT WOULD HAVE COLLAPSED OR NOT, SO I TOOK THAT AS BEING THAT WAS SPECULATIVE.

THIS ONE BEFORE THE ELEVENTH CIRCUIT ON SUMMARY JUDGMENT ON THEIR MOTION FOR SUMMARY JUDGMENT WHICH WAS GRANTED, AND THE FACTS WERE TAKEN BITE COURT, AS I HAVE JUST READ THEM OUT. THERE WAS NO QUESTION BEFORE THE LEFT CIRCUIT THAT THE COLLAPSE OF THE BUILDING WOULD HAVE BEEN A COVERED LOSS, AND THERE WAS NO DISPUTE THAT WE WERE SUING AND LABORING TO PREVENT THAT LOSS.

THERE IS NO DISPUTE THAT THE IMMEDIATE PRECIPITATING CAUSE OF YOUR CLIENT SPENDING THE MONEY WAS THE CITATION BY THE CITY.

THAT IS WHAT TOLD US SOMETHING WAS WRONG. THERE WAS PEER REVIEW AND WE FOUND OUT SOMETHING WAS WRONG AND THAT ALL OF THE STRUCTURAL STEEL HAD TO BE REPLACED.

IF IT HADN'T --

THE BUILDING WAS IN DANGER OF COLLAPSE.

IF THERE HADN'T BEEN, YOUR CLIENT COULDN'T HAVE GONE ANY FURTHER IN ITS DEVELOPMENT, THERE WOULD HAVE BEEN NO CERTIFICATE OF OCCUPANCY.

THE BUILDING WAS IN DANGER OF COLLAPSE, WHICH IS WHY WE WOULDN'T GET A CERTIFICATE OF OCCUPANCY.

I AM NOT SURE I UNDERSTOOD JUSTICE QUINCE'S QUESTION WHEN SHE ASKED YOU ABOUT THE OPERATION OF EXCLUSION. YOU SAID, IF IT WAS A DESIGN DEFECT THAT ONLY APPEARED LATER IN SOME MANNER, AFTER THE BUILDING WAS UP AND RUNNING OR WHATEVER AND THERE WAS A PROBLEM, THAT THE EXCLUSION WOULD APPLY. BUT THAT IF IT WAS A DESIGN DEFECT UNDER THE EXCLUSION TO PUT THE BUILDING IN IMMINENT PERIL AS IT DID HERE, THAT THE EXCLUSION WOULD NOT APPLY. IS THAT --

JUSTICE ANSTEAD, LET ME BE PERFECTLY CLEAR.

IN OTHER WORDS I AM HAVING DIFFICULTY, BECAUSE IF I UNDERSTOOD, IF THAT WAS YOUR ANSWER TO THAT QUESTION, IT WOULD APPEAR THAT YOU ARE ASSERTING SORT OF GRADATIONS OF THE EFFECT OF A DESIGN DEFECT, AND THAT IS IF IT WAS IMMINENT, AND IT APPEARED SOON RESULTED AS IT DID HERE, IN, PERHAPS, A CATASTROPHIC, BUT THAT IF IT ONLY AROSE AND

APPEARED AND SHOWED ITS EFFECTS, YOU KNOW, SOMETIME LATER IN SOMETHING THAT COULD BE REMEDIED, I AM HAVING TROUBLE WITH SORT OF THE CHAMELEON-LIKE EFFECT OF THAT APPROACH, SO HELP ME. STRAIGHTEN ME OUT WITH DID I MISUNDERSTAND YOUR ANSWER?

NUMBER ONE, IT WASN'T A TEMPORAL ANSWER. IT WAS NATURE OF THE DEFECT, BUT LET ME BE PERFECTLY CLEAR. IF ZURICH CAN PREVAIL ON THE DESIGN DEFECT EXCLUSION, OUR POSITION IS WE STILL PREVAIL UNDER THE SUE AND LABOR CLAUSE BECAUSE WHAT YOU HAVE IS THE CLASSIC INSTANCE OF DENIAL OF COVERAGE UNDER ONE ASPECT OF THE POLICY AND A GRANT OF COVERAGE UNDER ANOTHER ASPECT OF THE POLICY AND WITH THE INSURED AND WITH THEM AS THE DRAFTER, WE PREVAIL.

WORK US THROUGH THAT, YOUR THEORY THERE, IN OTHER WORDS AS FAR AS THAT YOU HAVE COVERAGE TO BEGIN WITH. OKAY. BUT THAT THERE IS AN EXCLUSION THAT APPEARS TO PREVAIL BUT THAT WHEN YOU COME BACK AND CONSIDER THE OVERALL TERMS OF THE POLICY, THAT YOU PREVAIL? I AM NOT SURE --

NO, SIR. SUE AND LABOR CLAUSE IS NOT A COVERAGE CLAUSE. IT IS A REIMBURSEMENT. WE ARE ENTITLED TO REIMBURSEMENT FOR OUR COSTS, IF WE ARE SUING AND LABORING TO PREVENT THE COVERED LOSS. IT IS NOT --

YOU KEEP USING THE WORD PREVENT. WHERE DOES THE WORD PREVENT COME IN, IN THIS CLAUSE? IT TALKS ABOUT PRESERVING IN CASE OF A LOSS. THE ONLY PLACE I HAVE SEEN PREVENTING IS IN THOSE CASES WHERE IT IS MITIGATION, AND THAT IS WHERE THAT LANGUAGE SEEMS TO COME FROM. COULD YOU HELP ME WITH THAT?

YES, SIR. ACTUALLY THE CASES THAT WE RELY ON, THE RELIANCE CASE AND THE BLASSO BROTHERS CASE AND EVERY CASE THAT WE CAN FIND ON SUE AND LABOR CLAUSES, IS EVEN WHEN THEY ARE WRITTEN LIKE OURS IN CASES OF LOSS OR DAMAGE IS THE COURTS ALWAYS CONSTRUE THEM IMPOSING A DUTY ON THE INSURED TO PRESERVE THE PROPERTY FROM LOSS.

THAT IS THE NATURE OF MITIGATION, THOUGH, IS IT NOT?

THOSE WERE MITIGATION CASES, BUT THE WICHER CASE WHICH THE CLAUSE WAS EVEN WORSE THAN OURS AND SEEMED TO CONTEMPLATE AFTER DAMAGE OCCURRED, THE MINNESOTA COURT OF APPEALS SAID BUT THAT DOESN'T TAKE AWAY THE INSURED'S DUTY TO PREVENT AGAINST COVERED LOSSES AND IT DOESN'T TAKE AWAY THE INSURER'S DUTY TO DO THAT WORK. THERE IS A VERY GOOD REASON WHY TO SUE AGAINST LOSS. IT PUTS THE INSURED IN A HORRENDOUS POSITION AND BASICALLY WOULD HAVE PUT SWIRE IN THE POSITION OF SAYING FINE. WE WILL WAIT UNTIL THE BUILDING COLLAPSES AND THEN WE HAVE A COVERED LOSS AND THEN OF COURSE ZURICH SAYS NO, THEN WE GIVE YOU KNOW COVERAGE BECAUSE OF YOUR DUE DILIGENCE REQUIREMENT.

AREN'T THERE OTHER LAWS AND POLICY REASONS AND BUSINESS REASONS WHY THE COMPANY WOULD PROTECT THE BUILDING AGAINST A COLLAPSE ANYWAY, AND THAT IS WHY THE POLICY DOESN'T COVER THAT, BECAUSE YOU HAVE GOT YOUR OWN BUSINESS REASONS AND INCENTIVES TO PROTECT IT AGAINST A LOSS OF COLLAPSE FROM DESIGN DEFECTS. YOU ARE GOING TO GET SUED. YOU MAY EVEN GET PROSECUTED. YOU MAY NOT BE ABLE TO BUILD ANOTHER BUILDING. THERE ARE SEVERAL REASONS WHY YOU HAVE YOUR OWN INCENTIVES TO PROTECT THE BUILDING FROM COLLAPSE.

JUSTICE CANTERO, THAT GOES TO EXACTLY WHAT JUDGE CARNES CALLED MIXED MOTIVES IN THE ELEVENTH CIRCUIT'S OPINION, AND EVERY SUE AND LABOR CLAUSE PROVIDES THAT THE REIMBURSEMENT SHALL BE ALLOCATED AS EACH PARTY'S INTERESTS APPEAR. WE WERE BEFORE THE ELEVENTH CIRCUIT PURELY ON THE QUOTE/UNQUOTE COVERAGE OR REIMBURSEMENT ISSUE ON THE SUN LABOR CLAUSE AND NEVER REACHED THE QUESTION OF WHO PAYS HOW MUCH AND

WHY. IF YOU LOOK AT THE WALLSTEIN CASE FROM WASHINGTON, THAT WAS THE YACHT CASE WHERE THE FELLOW HAD A YACHT BUILT AND THE SHIPYARD WENT OUT OF BUSINESS AND HE PULLED THE YACHT OUT OF SHIPYARD AND PUT IT UNDER GUARD AND DID ALL OF THESE THINGS TO PROTECT IT SO IT DIDN'T GET DESTROYED BEFORE A LOSS HAD OCCURRED, AND THEN THE COURT, AFTER GRANTING RELIEF, WENT THROUGH THE VARIOUS PERMUTATIONS OF WHO GETS WHAT AMOUNT OF MONEY. WE NEVER GOT THAT FAR.

BUT YOU AGREE AND HAVE USED THE PHRASE REPEATEDLY, EVEN IN THE WAY THAT YOU PHRASED IT, THAT IT IS TO PREVENT A COVERED LOSS.

YES.

THEN WHY WOULDN'T THE EXCLUSION TAKE TOUT OF THE CATEGORY OF A COVERED LOSS, IF -- TAKE IT OUT OF THE CATEGORY OFAL COVERED LOSS, IF IT IS A LOSS --

WE WERE NOT SUING TO PREVENT A DESIGN DEFECT. IF THERE IS A DESIGN DEFECT, THEN WE WERE SUING AND LABORING TO PREVENT A COVERED LOSS, AND THAT IS THE QUESTION.

THAT NECESSARILY CONVERTS THE SUE AND LABOR CLAUSE INTO A SEPARATE PROVISION FOR COVERAGE, DOES IT NOT? HOW CAN YOU ESCAPE?

IT IS A SEPARATE PROVISION. IT IS NOT COVERAGE BUT IT IS SEPARATE. IT IS NOT EXCLUSIVE AND ALL OF THE CASES SAY SO.

IT SEEMS TO ME THAT YOU HAVE A HARD TIME SLICING IT, BY SAYING THAT IT IS A SEPARATE CLAUSE BUT IT IS NOT FOR COVERAGE, BECAUSE WHAT YOU ARE SAYING IS, AS I UNDERSTAND WHAT YOU ARE SAYING, THAT THIS IS SOMETHING THAT GIVES YOU A BASIS TO RECEIVE PAYMENT THAT IS SEPARATE AND APART FROM WHAT ACTIVATES THE CUFF HANDLE UNDER THE -- THE COVERAGE UNDER THE INSURED PART OF THE COVERAGE.

WHAT WE ARE SAYING IS THAT IT IS SEPARATE BECAUSE IT IS A COMPLETELY DIFFERENT OBLIGATION. THE RELATIONSHIP OF INSUROR AND INSURED ON COVERAGE ISSUES IS ONE THING. THIS IS AN OBLIGATION THAT THE INSURED HAS FOR THE BENEFIT OF THE INSUROR. THAT IS AN OBLIGATION THAT IS PLACED ON US FOR THEIR BENEFIT.

IS IT STILL TIED, IS IT NOT, TO COVERAGE?

ABSOLUTELY.

THAT IS IT IS TIED TO WE ANTICIPATE A COVERED LOSS. THAT IS A LOSS FOR DAMAGE THAT IS COVERED UNDER THE POLICY.

ABSOLUTELY.

THERE, DON'T YOU NEED TO GO AND SEE WHAT IT IS THAT YOU WERE TRYING TO PREVENT?

WE WERE TRYING --

YOU WERE TRYING TO PREVENT, IF THERE WAS AN EXCLUSION HERE, FOR INSTANCE, FROM DAMAGE CAUSED BY BIRD LIFE AND WHATEVER, ALL RIGHT, AND YOU FOUND HAWKS NESTS AT PLACES HERE AND YOU HAD AN EXTERMINATING COMPANY COME OUT AND CLEAN OFF ALL OF THAT. ALL RIGHT. BUT THERE WAS A STRICT EXCLUSION FOR THAT. THEN YOUR ANTS PENNSYLVANIATORY WORK -- YOUR ANTICIPATORY WORK IN DOING THAT WOULD NOT HAVE DONE AWAY WITH THAT EXCLUSION, WOULD IT NOT? THAT STILL WOULD HAVE BEEN EXCLUDED UNDER THE POLICY, IF YOU HAD AN EXPRESS EXCLUSION FOR THAT KIND.

YES BUT PLEASE UNDERSTAND. IT IS NOT OUR POSITION THAT WE CAN GET REIMBURSEMENT UNDER THE SUE AND LABOR CLAUSE FOR DOING WORK, LET ME PHRASE THIS VERY CAREFULLY, ON SOMETHING TO WHICH WE ARE NOT ENTITLED TO COVERAGE. THAT IS THE SOUTHERN CALIFORNIA EDISON CASE, WHERE THE WORK THAT WAS DONE WAS EXPRESSLY EXCLUDED, THE ACTUAL WORK THAT WAS DONE. IT IS OUR POSITION THAT WE WERE SUING AND LABORING, AND THIS IS THE CONTEXT IN WHICH THE CIRCUIT COURT, TO PREVENT COVERED LOSS OF THE COLLAPSE OF THE BUILDING.

I DON'T WANT TO USE YOUR TIME WITH THIS QUESTION.

SO WHATEVER REPLACEMENT OF WHATEVER WAS DEFECTIVE, YOU ARE NOT CLAIMING REIMBURSEMENT FOR THAT? -- REIMBURSEMENT FOR THAT? SAY IT IS STEEL BEAMS, I ASSUME, THAT ARE ACTUALLY DEFECTIVE. YOUR REPLACEMENT OF THOSE STEEL BEAMS ARE NOT A PART OF THE DAMAGES THAT YOU WOULD BE CLAIMING?

I CAN'T ANSWER THAT QUESTION BECAUSE WE NEVER GOT THAT FAR IN THE CASE. I CAN SAY THAT THE CASE LAW ALLOWS FOR ALLOCATION BETWEEN INSURED AND SHALL INSUROR, AND I THINK THE CLAUSE ITSELF, SAYS AS EACH INTEREST SHALL APPEAR. SO, AND THE WALL STEEN AND WICHER CASES CAN PROVIDE THAT GUIDE FOR THE COURT BUT THE ISSUE BEFORE THE COURT RIGHT NOW IS PURELY A LEGAL ONE, WHICH IS CAN THIS SUE AND LABOR CLAUSE APPLY, WHEN WE ARE ATTEMPTING TO PREVENT WHAT IS, WHAT WOULD IN DISPUTEABLY BE A COVERED LOSS.

I WANT TO BE CERTAIN YOU HAVE SOME TIME FOR REBUTTAL.

THANK YOU, YOUR HONOR.

CHIEF JUSTICE: THANK YOU. GOOD MORNING.

GOOD MORNING, YOUR HONOR. MAY IT PLEASE THE COURT. I AM THOMAS BRUNER. I REPRESENT ZURICH, THE INSUROR IN THIS CASE. I HAVE BEEN REPRESENTING ZURICH AND OTHER INSURORS FOR QUITE A LONG TIME, AND FROM TIME TO TIME WE SEE CASE LIKE THIS ONE, WHERE YOU HAVE AN AGGRESSIVE POLICYHOLDER, TRYING TO UNDERCUT THE BASIC STRUCTURE AND FUNCTION OF ONE OF THE BASIC FORMS OF KORM SHALL INSURANCE. HERE WE ARE DEALING WITH THE BUILDER'S RISK POLICY.

DO YOU AGREE THAT THE SUE AND LABOR CLAUSE ONLY APPLIES TO COVERED AND IS A REIMBURSEMENT TYPE OF THING AS INTERESTS APPEAR?

YOUR HONOR, YES, I AGREE 100 PERCENT. IT IS A CONDITION OF COVERAGE. THE THRUST OF THE PROVISION IS TO GUARD AGAINST MORAL HAZARD, BY REQUIRING THE POLICYHOLDER NOT TO SIT BACK AND, IN THE TYPICAL MARINE SITUATION, ALLOW THE SHIP TO SINK, BUT TO CONTAIN THE LOSS, ONCE, AND TO INCUR WHATEVER EXPENSE IS NECESSARY TO DO THAT, AND THEN INEQUITY, IT PROVIDES THAT, SINCE THE BENEFIT OF THAT IS TO AVOID A COVERED LOSS, THE INSUROR WILL REIMBURSE HIM.

WHAT IF THERE WERE HURRICANE SHUTTERS OR SOMETHING ON THE BUILDING AND THERE WAS NEWS OF A PENDING HURRICANE AND THEY WERE LOOSE AND THE MONEY WAS THEN EXPENDED FOR, TO REINFORCE THE HURRICANE SHUTTERS? IS THAT, WOULD THAT BE COVERED UNDER THE SUE AND LABOR CLAUSE?

NOT UNDER THIS ONE, YOUR HONOR, AND I THINK THAT REFLECTS WHY THIS MORE TRUNCATED FORM OF THE SUE AND LABOR CLAUSE IS APPROPRIATE IN A BUILDER'S RISK POLICY THIS. IS A POLICY REGARDING A SITE UNDER CONSTRUCTION. IT TOOK SEVERAL YEARS TO BUILD THIS CONDOMINIUM. IT WAS NOT DESIGNED TO AVOID POTENTIAL LOSSES, IMMINENT LOSSES. THINGS

LIKE THAT ARE COVERED THERE. IS THE DUE DILIGENCE CLAUSE THAT REQUIRES THEM TO EXERCISE DUE DILIGENCE AT THEIR OWN EXPENSE, BUT BECAUSE THIS IS CONSTRUCTION, THIS IS A MORE NARROW CLAUSE, AND IT SAYS ONLY THAT THE SUE AND LABOR CLAUSE COMES INTO PLAY IN A CIRCUMSTANCE WHERE SOMETHING HAS ACTUALLY HAPPENED. THERE HAS BEEN A FIRE. THERE HAS BEEN A HURRICANE, NOT THERE MIGHT BE A HURRICANE.

SO THIS CONCEPT OF IT BEING, SO THE MOTIVATION OF THE INSURED IN THIS CASE, SAY THERE WAS A FACTUAL DISPUTE WHETHER THE PRIMARY MOTIVATION WAS TO PREVENT THE BUILDING COLLAPSE OR, AS IT APPEARS UNDISPUTEDLY, BECAUSE THERE WAS BUILDING CODE VIOLATIONS, AND THEY NEEDED TO COME UP TO CODE.

I DON'T THINK WE HAVE GET TO THE FACTUAL DISPUTE.

YOU DON'T THINK THAT MATTERS.

BUT I ALSO THINK YOUR HONOR WAS RIGHT IN YOUR QUESTION TO OPPOSING COUNSEL, AND I THINK IT IS UNAVOIDABLE, AS READING OF THE WAY THE QUESTION WAS POSED TO THIS COURT BY THE TENTH CIRCUIT, THAT THEY -- BY THE TENTH CIRCUIT, THAT THEY DON'T BUY, THE ELEVENTH CIRCUIT IN POSING THE QUESTION DIDN'T BUY THE SPECULATION, WHICH IS FRANKLY A LITTLE FANTASTIC, THAT AS JUSTICE CANTERO POINTED OUT THAT WHAT WAS GOING ON HERE WAS NOT THE SWIRE PACIFIC HAD TO GET THIS PROJECT BACK ON TRACK, THAT THEY WEREN'T GOING TO GET A CERTIFICATE OF OCCUPANCY, THAT THEY HAD HUNDREDS OF MILLIONS OF DOLLARS OF INVESTMENT SITTING ISLANDS THAT, THEY WERE WORRIED THAT, SINCE THEIR STRUCTURAL ENGINEER HAD BEEN INDICTED THAT THEY WOULD GET ADVERSE PUBLICITY, IF THEY DIDN'T FIX IT, THAT NONE OF THAT WAS THE PRIMARY MOTIVATION BUT WHAT WAS REALLY GOING ON WAS TO DEAL WITH THE SPECULATIVE POSSIBILITY THAT THE SITE MIGHT COLLAPSE, BUT WE DON'T GET TO THAT.

SO THE MOTIVATION IN THIS CASE, BASED ON THIS WHOLE POLICY, WHICH IS MORE AFTER CONSTRUCTION TYPE POLICY, IS THAT THERE HAD TO HAVE, FIRST, BEEN LOSS, AND THEN THE SUE AND LABOR CLAUSE COMES INTO EFFECT?

RIGHT. THAT IS THE QUESTION POSED BY THE ELEVENTH CIRCUIT, AND I THINK IF THIS COURT ANSWER THAT IS, THAT THIS CLAUSE, AS IT SAYS ON ITS FACE, IF YOU READ THE WORDS, AS JUSTICE LEWIS KEPT POINTING OUT, IF YOU JUST READ THE WORDS, BEFORE WE EVEN GET TO THE CASE LAW, DOESN'T APPLY IN THIS CIRCUMSTANCE.

CAN WE SWITCH YOU TO THE DESIGN DEFECT AND EXCLUSION CLAUSE, AND LOSS OF DAMAGES SHALL NOT APPLY TO PHYSICAL LOSS OF OR DAMAGE RESULTING FROM SUCH FAULT. WHAT ARE WE TALKING ABOUT THERE?

WELL, YOUR HONOR, THAT WAS THE LANGUAGE THAT SWIRE RATHER FAST ITALY ATTEMPTED TO CHARACTERIZE AS CREATING AN AMBIGUITY. THERE IS NO AMBIGUITY. THE EXCLUSION APPLIES TO ALL LOSS. THE RESTORATION OF COVERAGE IN SOME CIRCUMSTANCES, NOT PRESENT HERE, IN THE EXCEPTION, IS SLIGHTLY NARROWER. IT ONLY APPLIES TO RESTORE COVERAGE IN THE EVENT OF A PHYSICAL LOSS.

SO WOULD THAT PROVIDE, IN THE EVENT THAT, FOR EXAMPLE, THE DESIGN DEFECTS IN THIS CASE, RESULTED IN ONE OF THE EXTERIOR WALLS COLLAPSING, AND THEY HAD TO REBUILD THAT EX-EXTERIOR WALL, THE POLICY WOULD PAY FOR REBUILDING THE EXTERIOR WALL, BECAUSE THE DESIGN -- THAT EXTERIOR WALL, THE POLICY WOULD PAY FOR REBUILDING THE EXTERIOR WALL, BECAUSE THE DESIGN DAMAGE?

THERE ARE SOME OTHER IS SITUATIONS WHERE IT MIGHT NOT HAVE BEEN COVERED. FOR EXAMPLE, THERE WAS ONLY ELEVEN MONTHS LEFT ON THE POLICY.

I KNOW THAT POLICIES HAVE SEVERAL DIFFERENT KINDS OF EXCLUSIONS, BUT IF WE ARE JUST LOOKING AT THIS?

I THINK, YOUR HONOR THAT, THAT IS A FAIR EXAMPLE. AGAIN, THAT IS A CONSTRUCTION SITE. PEOPLE INSURE BUILDERS RISKS FOR BUILDERS RISK ON CONSTRUCTION SITES, NOT BECAUSE THERE ARE ANTICIPATED LOSSES, AND CERTAINLY THERE ARE BIGGER DOLLARS HERE, BUT ON ANY CONSTRUCTION SITE, SOME WORK IS SUBSTANDARD AND WILL HAVE TO BE RIPPED OUT AND DONE OVER. THAT IS ALL WELL ARE TALKING ABOUT HERE. WHAT MAKES THIS CASE DIFFERENT, THE REASON WE ARE SEEING THE KIND OF CREATIVE LAWYERING THAT WENT INTO THESE ALLEGATION ASIANS IN -- THE ALLEGATIONS IN THE TRIAL COURT, IS BECAUSE THE DOLLARS ARE LARGE, AS JUSTICE QUINCE POINTED OUT, PRECISELY TO REPLACE THE STEEL BEAMS. THERE IS NOTHING ELSE INVOLVED HERE, AND BECAUSE SWIRE PACIFIC FAILED TO ENSURE THAT ITS STRUCTURAL ENGINEER, WHO ENDED UP BEING INDICTED, HAD ADEQUATE PROFESSIONAL LIABILITY, MALPRACTICE INSURANCE, AND BECAUSE THAT STRUCTURAL ENGINEER WAS UNDERINSURED, WE FIND THIS VERY CREATIVE ATTEMPT TO DO WHAT HAS NEVER BEEN DONE IN 400 YEARS. NOT OFTEN THAT THE COURT GETS TO CONSTRUE A TYPE OF CONTRACTUAL PROVISION THAT HAS BEEN AROUND FOR 400 YEARS. IN 400 YEARS, THEY CAN'T FIND ONE EXAMPLE OF A SUE IN LABOR CLAUSE -- OF A SUE AND LABOR CLAUSE BEING INVOKED FOR THE PURPOSE THAT IT IS BEING INVOKED HERE.

YOU ARE SAYING, BY THAT, THAT THERE IS NO EXAMPLE AFTER SUE IN LABOR CLAUSE WAS ACTUALLY INVOKED BEFORE DAMAGE WAS DONE?

NO, YOUR HONOR, BECAUSE THIS ONLY COVERS THE CONSEQUENCES AFTER LOSS, BUT WHAT HAS NEVER BEEN DONE IS THE USE OF A SUE IN LABOR CLAUSE TO COVER WHERE IT OTHERWISE ISN'T PRESENT, TO COVER THE ROUTINE COSTS OF ORDINARY PROPHYLACTIC ACTIVITIES THAT ARE THE REGULAR KOURBS IN THIS CASE -- THAT ARE THE REGULAR COURSE OF BUSINESS, IN THIS CASE A SHIP OWNER, A BUILDER, THAT KIND OF THING. THERE HAS NEVER BEEN AN INSTANCE IN WHICH THAT KIND OF CIRCUMSTANCE --

THE ELEVENTH CIRCUIT SEEMED TO FEEL THAT, OF COURSE THIS IS HERE ON A CERTIFIED QUESTION THAT, THERE ARE SOME ASPECTS OF FLORIDA LAW THAT WOULD BE OPEN TO QUESTION, AND SO COULD YOU --

YOUR HONOR, I RESPECTFULLY WOULD DISAGREE WITH THAT CHARACTERIZATION. I THINK WHAT THE ELEVENTH CIRCUIT SAID WAS THAT THIS IS A FEDERAL SYSTEM. WE OPERATE IN THE SCHEME OF COMEDY. WHILE THERE IS, AND THEY CITED A LARGE VOLUME OR NUMBER OF SIGNIFICANT CASES THAT SUPPORT OUR POSITION FROM OTHER JURISDICTIONS, THIS IS FLORIDA, AND THEY COULD NOT FIND THE DECISION OF THIS COURT OR THE INTERMEDIATE COURT, THAT HELD THE POINTS THAT ARE ESTABLISHED, AND THAT IS FAIR, AND THEREFORE FOR COMEDY -- COMET I -- -- FOR COMEFY --

YOU SAY THERE IS NO -- FOR COMITY --

YOU ARE SAYING THERE IS NO PRINCIPLE IN FLORIDA LAW, IN OTHER WORDS YOUR VIEW IS YOU ARE SAYING THIS IS THE PLAIN LANGUAGE OF THIS PROPERLY IS EXCLUDES COVERAGE UNDER THE DESIGN DEFECT EXCLUSION, AND THAT THE SUE IN LABOR CLAUSE IS ABSOLUTELY, IN THIS CASE, BECAUSE OF THE LANGUAGE OF THIS POLICY, DOES NOT COME INTO EFFECT UNTIL THERE IS ACTUALLY DAMAGE THAT WOULD BE A COVERED LOSS. IS THAT YOUR POSITION?

THAT IS OUR POSITION, YOUR HONOR, AND WE FRANKLY THOUGHT IT WAS UNNECESSARY TO CERTIFY IT TO THIS COURT, BUT I THINK IT IS PRETTY CLEAR ON THEIR CERTAINFICATION -- CERTIFICATION OPINION THEIR VIEW IS IN AN INSTANCE WHERE THERE IS NO FLORIDA CASE ON POINT, THEY WERE NOT PREPARED TO EXTEND THE CORPUS OF DECISIONS EXISTING IN OTHER

JURISDICTIONS TO SAY THAT THIS COURT, THEY PREFERRED TO CERTIFY IT AS A MATTER OF COMITY TO CERTIFY IT IT ON THOSE POSITIONS. WE BELIEVE IT IS APPROPRIATE TO AFFIRM THE COURT BELOW, BUT IT IS ALSO EQUALLY TRUE THAT THE SCOPE OF THE DESIGN DEFECT EXCLUSION, SINCE THERE IS NOT AN INDEPENDENT GRANT OF COVERAGE ABSENT THE EXISTENCE OF A COVERED LOSS, ALSO TAKES THE CASE OUT OF THE --

ACTUALLY WE ARE NOT HERE TO AFFIRM OR REVERSE THE U.S. DISTRICT COURT. WE HERE TO ANSWER THE CERTIFIED QUESTION.

I STAND CORRECTED.

AND MY, I DO HAVE A CONCERN ABOUT THE PHRASING OF THE FIRST QUESTION, WHICH LOOSE TO ME LIKE IT IS SOMEWHAT OF A FACTUAL QUESTION, UNLESS THERE IS A STIPULATION HERE THAT GAVE RISE TO THE SUMMARY JUDGMENT IN THE DISTRICT COURT, AS TO THE FACT THAT THE STRUCTURAL DEFICIENCIES WERE RELATED TO A SPECIFIC CAUSE. IS THAT, HAS THAT BEEN, I MEAN, IS THAT UNDISPUTED IN THE RECORD, THAT THE REPLACEMENT OF THE STEEL WAS RELATED TO WHAT THE ENGINEER DID, THAT IT WAS A DESIGN --

YOUR HONOR, THERE WAS A STIPULATED SET OF FACTS IN THE TRIAL COURT, AND I THINK THAT IS CLEARLY SET FORTH IN THAT. I BELIEVE THAT IS IN THE RECORD, AND AT LEAST THE HIGHLIGHTS OF IT ARE, I RECOGNIZE THE COURT MAY NOT WANT TO IT TAKE OUR HIGHLIGHTS, BUT WE HAVE SET FORTH MOST OF THAT STIPULATION IN THE STATEMENT OF FACTS, IN OUR BRIEF. I DON'T THINK THERE IS A FACTUAL DISPUTE THAT WHAT HAPPENED HERE IN TERMS OF THE SEQUENCE OF EVENTS, IS THAT THIS ENGINEER WAS FOUND TO HAVE ENGAGED IN SUBSTANDARD PRACTICES. THE CITY HALTED THE PROJECT, INDICATED IT WOULD NOT ISSUE A CERTIFICATE OF OCCUPANCY, \$4.5 MILLION WAS SPENT TO PULL OUT THE STEEL BEAMS AND REDO THE WORK, AND THEN --

THE ISSUE AS TO WHETHER THERE WOULD BE, WHETHER THE ENSUEING LOSS PROVISION COMES INTO PLAY WOULD NORMALLY BE A FACTUAL, WOULD IT NOT?

THE ENSUING LOSS CERTAINLY WOULD HAVE A FACTUAL DIMENSION TO IT, BUT THE COURTS HAVE GUARDED AGAINST THIS KIND OF SPECULATIVE ATTEMPT TO INVOKE THE POSSIBILITY OF AN ENVIEWING LOSS, IN A WHOLE BUNCH OF IN STANDS. IN THOSE -- INSTANCES. THOSE CASES HAVE BEEN PREPARED, SINCE WE ARE DEALING IN THE REALM NOT OF FACT, THERE HAS NOT BEEN A COLLAPSE AND NO INDICATION THAT THERE EVER WOULD HAVE BEEN A COLLAPSE, WE ARE DEALING WITH AN ASSESSMENT OF SPECULATION. A LARGE NUMBER OF COURTS WOULD HAVE BEEN WILLING TO SAY WE ARE NOT GOING TO GET INTO THOSE SPECULATIONS. ENSUING LOSS DOESN'T COME INTO PLAY UNTIL AND UNLESS SOMETHING HAS ACTUALLY HAPPENED, AND IT IS INDISPUTABLE THAT NOTHING EVER ACTUALLY HOOPED HERE. AS FAR AS I KNOW, THE SITE WAS NEVER EVEN CLOSED OFF AS A DANGEROUS LOCATION.

WAS THERE ANY INDICATION IN THIS WHOLE SCENARIO, IT THAT THE BUILDING WAS IN SOME IMMINENT DANGER OF COLLAPSE?

THERE IS CERTAINLY NOTHING IN THE RECORD TO INDICATE THAT, AND I DON'T BELIEVE THAT IS THE CASE.

THERE WAS NO CERTIFICATE ISSUED OR ENGINEER'S LETTER SAYING THAT?

I AM SORRY, YOUR HONOR, SAYING THAT THERE WAS AN IMMINENT RISK OF COLLAPSE?

YEAH.

I AM NOT AWARE OF ANYTHING LIKE THAT. NO. I THINK THIS WAS SIMPLY A SITUATION WHERE,

BECAUSE THE ENGINEER HAD BEEN FOUND TO DO SUBSTANDARD WORK. IN OTHER INSTANCES, SWIRE WAS ASKED TO BRING IN OTHER ENGINEERS TO LOOK AT IT. THEY CONCLUDED THE WORK WAS SUBSTANDARD. THE CITY WAS NOT PREPARED TO ISSUE THE CERTIFICATE. THE WORK WAS TORN OUT AND REBUILT. BUT FOR THE FACT THAT THE DOLLARS ARE LARGE, THAT IS THE KIND OF THING THAT HAPPENS ON A CONSTRUCTION SITE EVERYDAY. NATIONWIDE. JUST TO GO BACK TO JUSTICE WELLS'S QUESTION, I PULLED UP SOME OF THE KINDS OF TERMS THAT OTHER COURTS HAVE USED IN DEALING WITH THESE KINDS OF SPECULATIONS THAT THE, AN ENSUING LOSS MIGHT AT SOME POINT ARISE, AND THEREFORE AN EXCLUSION LIKE THIS DESIGN DEFECT EXCLUSION CAN BE UNDERCUT BY THAT BASIS, AND HERE ARE SOME OF THE PHRASES. LAQUILA SAID THAT THE POLICYHOLDER WANTED THE EXCEPTION TO SWALLOW UP THE EXCLUSION AND THAT WAS NOT ALLOWED. THE SCHLOSS CASE, BOLTY IS HOLDER, QUOTE, STRAINED THE MEANING OF THE POLICY BEYOND RECOGNITION, BY ATTEMPTING TO USE THE SPECULATION ABOUT ENSUING LOSS TO SWALLOW UP THE EXCLUSION. THE DISTRICT COURT HERE SAID THAT SWIRE WAS ATTEMPTING TO USE THE SPECULATION ABOUT THE EXCEPTION TO EVISCERATE THE EXCLUSION. JUDGE FRIENDLY, CERTAINLY ONE OF THE JITS OF THE APPELLATE BAR, SAID, IN AETNA VERSUS YATES THAT, THE POLICYHOLDER IS TRYING TO USE THE ENSUING LOSS EXCEPTION TO DESTROY THE EXCLUSION, AND THE DeNIRO CASE TALKED ABOUT THE POLICYHOLDER TRYING TO USE THE EXCEPTION TO SUPERSEDE THE EXCEPTION. THOSE ARE ALL FINDINGS OF LAW, BASED ON A REJECTION OF THE KIND OF SPECULATION.

YOU ARE SAYING IT IS NOT JUST A QUESTION OF NEEDING TO EVEN LOOK AT THE POLICY AS A WHOLE, OR DO YOU? IN OTHER WORDS DO YOU LOOK AT THE DESIGN DEFECT EXCLUSION, TOGETHER WITH THE SUE IN LABOR CLAUSE, OR IS IT YOUR POSITION THAT YOU CAN LOOK AT THE SUE IN LABOR CLAUSE LON AND KNOW THAT IT CANNOT BE EX -- CLAUSE ALONE AND KNOW THAT IT CANNOT BE EXTENDED TO PREVENT A COVERED LOSS, ASSUMING THAT THOSE WERE THE FACTS HERE, IN OTHER WORDS THAT THEY HAD HEARD, THEY WERE TOLD, THEY ALREADY HAD THEIR CERTIFICATE OF OCCUPANCY AND NOW, NO QUESTION, THAT THEY HAVE BEEN TOLD THAT, IF THEY DON'T DO THIS, THE BUILDING IS GOING TO COLLAPSE.

YOUR HONOR, ABSOLUTELY WE WOULD BE LEAVE THAT THE CASE BELOW COULD BE DECIDED JUST ON THAT BASIS, AND THAT IS THE WAY WE ARGUED IT TO THE ELEVENTH CIRCUIT. I WAS JUST TRYING TO BE RESPONSIVE TO THE WAY THEY STRUCTURED THE THREE QUESTIONS, AND THEY HAVE A SEQUENCE OF THE QUESTION. BUT, YES, THIS COURT, IF IT CHOSE, COULD ANSWER THE SECOND QUESTION AND SAY IT DOESN'T, DIDN'T BELIEVE IT NECESSARY TO REACH OUT TO ADDRESS THE OTHER TWO, AND THAT, I THINK, IS --

BUT I AM ASKING AND I HAVE GOT TO GO BACK AND LOOK AGAIN, THAT WE CAN JUST READ THAT CLAUSE AND FIND THAT THERE IS NO AMBIGUITY IN THE SUE IN LABOR CLAUSE.

YES, YOUR HONOR. I THINK THE, IF YOU SIMPLY LOOK AT THE WORDS OF THE SUE IN LABOR CLAUSE, IN THIS POLICY, NOT IN SOME OTHER POLICY, THERE IS NO INDICATION THAT IT APPLIES, EXCEPT WHERE THERE HAS BEEN AN ACTUAL LOSS. AND THE STRUCTURE OF THE POLICY REINFORCES THAT, BY VIRTUE YOUTHFUL THE FACT THAT THERE IS THIS DUE DILIGENCE CLAUSE THIS REQUIRES THE POLICYHOLDER, AT ITS OWN EXPENSE, TO DEAL WITH THE KINDS OF THINGS, IMPENDING HURRICANE, THE KINDS OF THINGS THAT YOU WERE TALKING ABOUT BEFORE, SO THAT THE POLICY MAKES A CLEAR, ON ITS FACE, JUST LOOKING AT THE WORDS, MAKES A CLEAR DISTINCTION IN THAT CIRCUMSTANCE.

DON'T YOU BELIEVE THAT IT IS NECESSARY, THOUGH, TO TAKE THIS IN THIS CONTEXT, BECAUSE WE ARE DEALING WITH A SPECIALTY KIND OF INSURANCE. WOULD WE NOD NOT POSSIBLY GO FAR ASTRAY IN JUST TRAYING IT TO SAY LET'S TAKE THIS CLAUSE OUT OF THE AIR, WITHIN ITS CONTEXT, OUT OF THE BUILDER'S RISK CONTEXT AND THAT IS A PROPERTY COVERAGE?

YOUR HONOR, I CERTAINLY AGREE THAT WHAT IS BEING ATTEMPTED BY SWIRE HERE, FLIES IN

THE FACE OF THE WHOLE BUILDERS RISK COVERAGE AS WELL, AND LET ME JUST QUOTE --

MY QUESTION IS, IF WE CAN ANSWER A VERY LIMITED QUESTION AND NOT HAVE TO DEAL WITH THE OTHERS, DOES THAT POSE A RISK TO US, IF THAT IS WHAT WE WERE DOING, I GUESS THAT IS WHAT MY QUESTION IS, DOES THAT POSE A RISK TO THE LAW, IF WE COULD DO IT THAT WAY, BECAUSE THAT WOULD BE A VERY EASY WAY TO APPROACH THIS CASE.

YOUR HONOR, NOT A LOT OF PEOPLE HAVE ATTEMPTED WHAT SWIRE IS ATTEMPTING HERE. THIS WHOLE THING, IF I CAN GIVE YOU A LITTLE BIT OF BACKGROUND, GROWS OUT OF THE ATTEMPT THAT WAS MADE BY SOME POLICYHOLDER COUNSELS IN THE CONTEXT OF Y2K, TO SHOE HORN REMEDIAL EXPENSES, AND IN THAT CASE THE HUNDREDS OF MILLIONS OF DOLLARS THAT SOME COMPANIES SPENT TO FIX THEIR Y2K PROBLEMS, INTO THE SUE IN LABOR CLAUSE, AND WHAT THEY DID IN THOSE CIRCUMSTANCES WAS ESSENTIALLY SWIRE NOW TRIES IN A MORE CONVENTIONAL SETTING, IN A CONSTRUCTION CIRCUMSTANCE, WHERE THEY HAVE TOLL RIP OUT SOME WORK, TO SAY THAT THEIR ORDINARY BUSINESS EXPENSES, THE COST OF RUNNING THEIR BUSINESS, IN THAT CASE GETTING COMPUTERS IN COMPLIANCE WITH Y2K,, BECAUSE ONE COULD SPECULATE ABOUT HOW SOMEWHERE DOWN THE ROAD THE COMPUTERS MIGHT CRASH OR THE BUILDING MIGHT COLLAPSE OR WHO KNOWS THAT, THAT THERE FOR FALLS UNDER THE SUE IN LABOR CLAUSE. THAT, EVERY COURT HAS REJECTED IT AND WE PROVIDED A SUPPLEMENTAL AUTHORITY IN THE SEATTLE CASE, WHICH THAT IS THE ONLY APPELLATE CASE WHERE IT EVER EVEN GOT TO AN APPELLATE COURT, AND I THINK THIS COURT SHOULD EQUALLY REJECT IT, SHOULD EQUALLY REJECT THAT ATTEMPT TO TRY TO BUILD A MECHANISM TO EXTERNALIZE THE SHIFT TO OTHERS, THE COST OF ROUTINE BUSINESS OPERATION, BUT I DON'T THINK THIS IS SOMETHING THAT IS GOING TO COME UP VERY OFTEN, AND I THINK IF THE COURT WERE TO TAKE JUSTICE PARIENTE'S APPROACH AND SIMPLY SAY WE CAN ANSWER QUESTION TWO AND WE DON'T HAVE TO GET TO THE REST OF IT, I THINK WE WOULDN'T HEAR ABOUT THIS FROM THE POLICYHOLDERS IN OTHER INSTANCES. YOUR HONOR, I HAVE VERY LITTLE TIME LEFT, AND I THINK THE COURT IS -- THE COURT HAS PRETTY WELL RUN ME OVER THE COALS, SO WHY DON'T I, THANK YOU.

CHIEF JUSTICE: COUNSEL, WANT TO THROW IN SOME Y2K HERE?

JUSTICE, I WILL BE HAPPY TO. ON PAGE 13 OF OUR BRIEF WE QUOTE FROM ONE OF THE LEADING COMMENTATORS ON Y2K INSURANCE ISSUE REGARDING RECOVERY AND THE ARTICLES SAY THAT THE SUE IN LABOR PROVIDE COVERAGE TO SAFEGUARD, SAVE AND INSURE PROPERTY. IT WILL PAY FOR THE SAND BAGS TO PUT IN FRONT OF YOUR HOUSE TO PREVENT THE FLOODWATERS FROM ENTERING. NOT A HUGE DIFFERENCE FROM WHAT WE ARE TALKING ABOUT HERE AT ALL. NOW, JUSTICE QUINCE CAN IN TERMS OF WHAT WAS GOING TO -- JUSTICE QUINCE, IN TERMS OF WHAT WAS GOING TO HAPPEN TO THIS ABOUT, AND I DIRECT YOU TO FOOTNOTE ONE OF THE CIRCUIT COURT'S OPINION, AND I SAID EARLIER WHETHER THE COLLAPSE WOULD HAVE OCCURRED AND UNDER THE PERIOD, IS NOT KNOWN AND NOT KNOWN ON THIS RECORD, AND THAT THE COST OF REPAIRING THE STRUCTURAL DEFECTS UNDER THE SUE IN LABOR CLAUSE IS DEPENDENT ON WHETHER THE BUILDING WOULD HAVE COLLAPSED OR WOULD HAVE DONE SO DURING THE PERIOD OF COVERAGE. A REMAND FOR THAT FACT WILL BE NECESSARY, SO THAT IS OUTSIDE THE SCOPE OF THE PURELY LEGAL QUESTIONS THAT THE CIRCUIT COURT HAS ASKED THIS COURT TO ADDRESS. JUSTICE CANTERO, I BELIEVE IN RESPONSE TO YOUR QUESTION TO OPPOSING COUNSEL, CONCEDING THAT A COLLAPSING WALL WOULD BE A RECOVERED LOSS UNDER THIS POLICY. THAT IS EXACTLY THE SUM AND SUBSTANCE OF SWIRE'S CLAIM. WERE WE REQUIRED TO WAIT FOR THE WALL WAUL TO COLLAPSE, IN -- FOR THE WALL TO COLLAPSE, IN ORDER TO CLAIM REIMBURSEMENT UNDER THE SUE IN LABOR CHRAURX AND OPPOSING COUNSEL, I THINK -- SUE IN LABOR CLAUSE, AND OPPOSING COUNSEL, I THINK, GIVES ME TOO MUCH CREDIT, WHEN HE -- CAN YOU TRANSFER THIS TO A BUILDERS RISK WARRANTY TYPE OF COVERAGE? WHAT IS OUR OUR RISK, IF WE ACCEPT YOUR ARGUMENT, BECAUSE THAT SEEMS TO BE WHERE IT TAKES US, IS IT NOT?

JUSTICE LEWIS, I DON'T THINK SO, BECAUSE, AGAIN, WE HAVE TO HAVE A COVERED LOSS. WE HAVE TO HAVE AN IMMINENT COVERED LOSS OR AN ACTUAL COVERED LOSS.

OKAY, WELL, THE DIFFERENCE THEN, IN ACTUAL AND IMMINENT.

THE SAND BAGS IN FRONT OF YOUR HOUSE. IF THE FLOOD DOESN'T COME, YOU ARE STILL COVERED.

I AM SORRY. I DIDN'T MEAN TO INTERRUPT. PLEASE GO AHEAD.

IT IS EXACTLY SAME CONCEPT.

ARE WE NOT TRANSFERRING THAT INTO A BUILDERS WARRANTY KIND OF COVERAGE THAT, WELL, YOU ARE BUILDING THIS BUILDING AND COME ACROSS SOMETHING THAT MAYBE NEEDS TO BE REDONE, WE WILL USE THE SUE IN LABOR CLAUSE AND THAT WILL REBUILD THE BUILDING.

ONLY IF IT IS TO PREVENT A COVERED LOSS.

I AM UNDERSTANDING THAT MR. SCHERKER THAT THE BUILDING WOULD NOT BE COVERED.

IF THE LOSS DOESN'T ACTUALLY OCCUR, YOU ARE STILL SLUING -- SUING AND LABORING FOR THE BENEFIT FIT OF THE INSURED.

IF I UNDERSTAND, IN THIS CASE WITH THIS POLICY, THERE HAD TO HAVE ALREADY BEEN A COVERED LOSS, BEFORE THE SUE IN LABOR CLAUSE WOULD COME INTO EFFECT. NOW, I UNDERSTAND YOU DISAGREE WITH THAT, BUT --

I THINK I DISAGREE WITH THAT ON GOOD PRECEDENT. AS I SAID, I AM NOT AS CREATIVE AS THIS EVENING I AM. THE WALL STEEN DECISION FROM THE WASHINGTON COURT OF APPEALS. THE WALL STEEN CASE SAID SHOULD THERE BE LOSS OR MISFORTUNE UNION, IT SHALL BE NECESSARY. AND, QUOTE, A COVERED LOSS DOES NOT HAVE TO OCCUR IN ORDER TO INVOKE COVERAGE UNDER THE SUE IN LABOR PROVISION. RATHER THE ACTIONS TAKEN TO PREVENT SUCH DEVICE WILL INVOKE THE SUE IN LABOR COVERAGE.

CHIEF JUSTICE: WE WILL HAVE TO END ON THAT THE. THANK YOU ALL VERY MUCH.