Wachovia Insurance Services v. Richard L. Toomey

SC06-1110

LADIES AND GENTLEMEN, THE
FLORIDA SUPREME COURT.
PLEASE BE SEATED.
>>> OKAY.
THE NEXT CASE ON THE
CALENDAR THIS MORNING IS
WACHOVIA VERSUS TOOMEY.
>>> GOOD MORNING.
MAY IT PLEASE THE COURT MY
NAME IS JOHN PELZER ON THIS
QUESTION THAT HAS BEEN
CERTIFIED BY THE 11th
CIRCUIT OF THIS COURT AND
THAT FIRST QUESTION IS
WHETHER A PLAINTIFF MAY
MAINTAIN A DERIVATIVE ACTION
OR DERIVATIVE CLAIM THAT AN
ORIGINAL PLAINTIFF HAD
AGAINST THE THIRD PARTY BUT
ASOONED TO THE PLAINTIFF AS
PART OF A SETTLEMENT
AGREEMENT IF THAT SETTLEMENT
AGREEMENT ALSO RELEASED THE
AREA IN LYING POINT.
>> THERE ARE TWO QUESTIONS.
FIRST OF ALL, THE AGREEMENT
ITSELF SAID IT SHOULD BE
CONSTRUED ACCORDING TO LAWS
OF MARRY LAP.
HAS SOMEWHERE ALONG THE WAY
WAS IT STIPULATED THAT IT
WOULD BE FLORIDA LAW THIS
WOULD CONTROL?
>> NO, YOUR HONOR, IN FACT,
IN THE BRIEFING IN THE 11th
CIRCUIT, IT BECAME CLEAR
THAT MARYLAND LAW SIMILAR TO
FLORIDA LAW IN THE ISSUE OF
DISTINCTION BETWEEN RELEASE.
>> IT IS A LITTLE ODD FOR
THIS COURT TO BE GETTING
CERTIFIED QUESTION WHETHER
THIS SETTLEMENT AGREEMENT
SAYS THE SIDE IS BASED ON

MARYLAND LAW.
>> THAT WOULD BE AS TO
SETTLEMENT AGREEMENT.
THAT SETTLEMENT AGREEMENT IS
BETWEEN HOLMAN AND TOOMEY ON
THE ONE HAND AND IMC ON THE
OTHER THAT DOES NOT EFFECT
WACHOVIA'S RIGHT, WITH A
COVE VE WHY'S RIGHTS ARE
COMMON LAW RIGHTS IN THIS
INSTANCE WHICH ARISE IN THE
STATE OF FLORIDA.
>> WELL EXCEPT THAT THE
FIRST CERTIFIED QUESTION
ASKS US TO DECIDE WHETHER
UNDER FLORIDA LAW AN
AGREEMENT THAT IS SUPPOSED
TO RELEASE AN ASSIGNMENT IS
CAN CREATE A CAUSE OF ACTION
OR WHETHER BECAUSE THE
RELEASE ON THE ASSIGNMENT
WAS SIMULTANEOUS THAT THE
RELEASED EXTINGUISHED ANY IN
INTERESTS, ISN'T THAT THE
ISSUE?
THE AGREEMENT, THE
INTERPRETATION OF THE
AGREEMENT?
>> WELL, IT IS NOT
INTERPRETATION OF THE ANY
AMBIGUITY IN THE AGREEMENT
BETWEEN IMC AND TOOMEY AND
HOLMAN, WHETHER IT IS A
QUESTION OF FLORIDA COMMON
LAW, DOES THIS AGREEMENT
UNDER FLORIDA COMMON LAW
EXTINGUISH THE UNDERLYING
FIDUCIARY DUTIES.
>> YOUR OPPONENTS SAY IT WAS
NOT A COMPLETE RELEASE.
THEY SAID IT SHOULD BE READ
NOT TO SUE IMC AND
ASSIGNMENT OF IMC.
I AM READING FROM PAGE 16 OF
THE BRIEF.
I ASSUME YOU DISAGREE.
>> COMPLETELY, YOUR HONOR.
IF YOU READ PARAGRAPH 2 OF
THAT AGREEMENT, IT SAYS
RELEASEORS DUE HEAR BYE
RELEASE EQUIPMENT DISCHARGE,
ET CETERA, GUESS ON,
EVENTUALLY FOR THE KIND OF
LANGUAGE YOU WOULD FIND IN A

CODE OF GENERAL RELEASE.
SEN IT SAYS PROVIDED
HOWEVER.
>> RIGHT.
>> THAT NOTHING CONTAINS TO
RELEASE CLAIMS MIGHT HAVE OR
HEARIN ACQUIRE AGAINST THE
INSURANCE COMPANIES SES
SESFIED IN 3 D AN E BELOW
WACHOVIA OR ANY OTHER
PARTNER, ET CETERA, SO IT
SEEMS TO SAY THAT WE ARE
RELEASING OUR CLAIMS;
HOWEVER, LET'S CLARIFY, WE
ARE NOT RELEASING ANY CLAIMS
THAT YOU ARE GIVING US HERE
IN THIS AGREEMENT.
>> AND THEY DID NOT RELEASE
THOSE CLAIMS BY RELEASING
THE UNDERLYING CLAIM, THEY
HAVE MADE THOSE CLAIMS
NON-VIABLE.
WE NEVER ASSERTED IN THE
CASE THAT WACHOVIA IS
BENEFICIARY OF RELEASE TO
WACHOVIA, WHETHER THERE WAS
RELEASE TO IMC WHICH HAD THE
EFFECT OF UNDERMINING
REMOVING THE VIABILITY OF
ANY DERIVE TOUGHER CLAIM
THAT IMC WOULD THEN HAVE
OVER AGAINST WACHOVIA.
>> THE JUDGE, THERE WAS
ALREADY A JUDGMENT AGAINST
IMC.
>> THAT IS CORRECT.
>> A JUDGMENT WAS NOT
SATISFIED.
>> THAT IS CORRECT.
>> SO ISN'T IMC UNDER OUR
CASE LAW STILL SUBJECT TO
HARM WHICH IS THAT THEY ARE
HAVING UNSATISFIED JUDGMENT
ON THE BOOKS.
>> IT IS NOT SATISFIED OF
RECORD, BUT IT IS RELEASED.
THIS RELEASE RELEASES IT.
SO THERE IS THAT UNSATISFIED
JUDGMENT ON THE BOOKS AND
WHAT HOLMAN AND TOMB ZY BEEN
SEEKING TO RECOVER HERE HAVE
NEVER BEEN ANY SORT OF
COLLATERAL INJURY THAT I IMC
SUFFERED AS A RESULT OF

HAVING THIS UNSATISFIED BUT RELEASED JUDGMENT ON THE BOOKS ON THE STATE OF MARYLAND WHICH MIGHT BE DAMAGE TO IMC'S CREDIT RATING OR IMPAIRING HOME PROPERTY.

>> WHY COULDN'T WE TREAT THIS REALLY ALMOST AS JUST THE REAL PARTY AND INTERESTS ISSUE AS FAR AS BOTH THE AGREEMENT AND THE ISSUE WITH REFERENCE TO WHETHER OR NOT IT CAN BE ASSIGNMENT HERE? IN OTHER RECORDS THE PARTY THAT IS DEALING WITH INSURANCE COMPANY OR BROKER HAS HAD A JUDGMENT ENTERED AGAINST THEM, IT REALLY IS THEIR CLAIM THAT THEY HAVE A CLAIM AGAINST THE INSURANCE COMPANY AND IN ORDER TO BE RESPONSIBLE FOR THIS, BUT THEY ARE NOT THE ONES THAT ULTIMATELY WILL RECOVER HERE AND SO IT IS IN THEIR INTERESTS REALLY TO STEP OUT IF THEY CAN AND JUST LET THE PEOPLE THAT REALLY CLAIM THEY HAVE BEEN DAMAGED AND HAVE THE JUDGMENT AGAINST THEM PURSUE THIS CLAIM AND SO WHY ISN'T IT JUST SORT OF A, A REAL PARTY AND INTERESTS THING, AS OPPOSED TO FORCING, YOU KNOW, THE INSURER TO GO THROUGH THIS SORT OF FOR THE USE AN BENEFIT OR WHATEVER, WHY SHOULDN'T WE TREAT IT THAT WAY?

>> I THINK WE CAN AND SHOULD TREAT THINK IT WAY, YOUR HONOR, REACH THE RESULT, THERE ISS NO VIABLE CLAIM AGAINST WACHOVIA, I WOULD CITE TO THIS COURT, THAT IS EXACTLY THE SITUATION THAT OCCURRED.

THAT WAS A THIRD PARTY INSURANCE CASE.

AND THE LOGIC OF COMMON LAW THIRD PARTY INSURANCE IS TO LOOK TO THE REAL PARTY AN

INTERESTS, HE INJURED PARTY LEAVE THE INSURED OUT OF IT AND HAVE THE INJURED PARTY GO DIRECTLY AGAINST THE INSURANCE COMPANY.
>> WOULDN'T AGREE THEN THAT THERE WAS NO ASSIGNMENT.
>> THAT IS CORRECT, YOUR HONOR.
>> THERE WAS NO ASSIGNMENT OF ANYTHING THAT RELEASED MAY HAVE HAD AGAINST THE THIRD PARTY.
SO HOW DO YOU SAY THAT COKE REALLY IS THIS SITUATION?
>> IF WE ARE GOING TO TREAT IT AS LOOKING AT THE REAL PARTY AN INTERESTS.
THE REASON THERE IS NO ASSIGN BECAUSE WE WERE DOING THAT, LOOKING TO THE REAL PARTY OF INTEREST, THE INJURED PARTY GOING DIRECTLY AGAINST THE INSURED, LEAVING THE UNSURED OUT OF IT, THERE THE RELEASE OF THE INSURED ARE WHEN THE FIRST INSURANCE COMPANY SETTLED, AND GOT A RELEASE OF THE SECOND INSURANCE COMPANY OPERATED TO ELIMINATE ANY THIRD PARTY CLAIM.
>> ANY ISSUE OF SUPPLICATION OR ANYTHING LIKE THAT HERE.
>> SO SET UP THIS JUST AN AGREEMENT BY THE PEOPLE THAT HAVE THE JUDGMENT WITH THE PEOPLE THAT HAVE THE JUDGMENT AGAINST THEM TO INTERN POTENTIALLY HAVE A CLAIM AGAINST THEIR INSURANCE COMPANY TO SAY IN EXCHANGE FOR LETTING YOU PURSUE THE CLIMB AGAINST THE INSURANCE COMPANY, I WILL STEP OUT AN ASSIGN MY RIGHTS TO YOU AND IN EXCHANGE FOR YOU HAVING THOSE RIGHTS, YOU AGREE THAT YOU WILL NO LONGER PURSUE ANYTHING OR TRY COLLECT THE JUDGMENT AGAINST ME.
>> THAT WOULD BE WHAT THEY COULD DO.

THAT IS THE ROSSEN CASE,.
YOU DON'T THINK THAT IS WHAT THEY DID DO?
>> NO, YOUR HONOR.
THEY RELEASED.
THAT IS WHAT THE PARAGRAPH DOES.
THEY COULD HAVE DONE THAT.
DHOOE HAVE, BUT THEY DID NOT ACCOMPLISH IT HERE.
>> WOULD YOU AGREE OR DISAGREE THAT WAS THEIR CLEAR INTENT?
I WOULD SAY THAT IT IS CLEAR FROM THE LANGUAGE OF THIS SETTLE AMMENT AGREEMENT BETWEEN IMC AN HOLMAN AND TOOMEY, THEY DID INTEND TO PURSUE WACHOVIA AND VARIOUS OTHER INSURANCE COMPANIES AS WELL.
BUT THAT INTENT DOES NOT UNDERLINE THIS RELEASE.
THE CASES FROM THIS COURT ON THAT POINT WHERE THIS COURT NOTED THAT WHEN THE SECOND INSURANCE COMPANIES INSUREER WAS RELEASED BY THE INJURED PARTY THEY DID NOT INTEND TO INITIATE THE CLIMB AGAINST THE SECOND INSURER'S INSURANCE COMPANY.
>> IN THE TYPICAL CONTRACT ALL RELATIONSHIP.
YOU WOULD ALLOW IF THE CONTRACT DOESN'T FULLY STATE YOUR INTENT TO REFORM THE AGREEMENT, WHAT PROHIBITS JUST REF FORMATION, SO IT IS CLEAR IF YOU ADMIT THIS WAS THE INTENT THAT THIS OCCURRED, WHY WOULD WE NOT ALLOW IT OR WHY WOULD THERE NOT BE A REF FORMATION BY THE PARTY.
>> FOR ONE REASON, IMC IS NOT BEFORE THE COURT.
I MCI C IS THE PARTY THAT THE AGREEMENT WOULD HAVE TO BE BROUGHT IN TO REFORM THE AGREEMENT.
THAT IS, AGAIN, THAT IS WHAT HAPPENED.
FORD EXPRESSLY SAID THERE

WAS NO INTENT TO UNDERMINE
THAT CLAIM AGAINST THE
SECOND INSURANCE COMPANY
WHEN THE FIRST INSURANCE
COMPANY SETTLED AND
SIMILARLY, THE CASE THAT WAS
UPHELD BY THIS COURT WAS THE
KELLY CASE FROM THE 5th
DISTRICT, THERE THEY HAD
SOMETHING SIMILAR TO WHAT WE
HAD IN THE CASE, A VERY
ELABORATE STIPULATION IN THE
PARTIES THAT REVIDED FOR THE
INJURED PARTY GOING ON
ENSUING THE INSURANCE
COMPANY FOR THE EXCESS
AMOUNT THAT THE INSURED IS
NOT GOING TO BE RESPONSE
FOR.
>> IS IT SIG CAT, THOUGH,
THAT COKE INVOLVED THE
RELEASE AND THE SATISFACTION
OF JUDGMENT?
I MEAN, WE UNDERSTAND WHAT
IS GOING ON IN THESE CASES,
MANY OF US HERE NEGOTIATED
THESE IN MAKING SURE WE WERE
NOT GOING TO CROSS THE LINES
AN IT SEEMS, I MEAN, AGAIN
IN A FORM OF A SITUATION
BECAUSE IN THE END THE
INTENT OF THE AGREEMENTS IS
TO MAKE SURE THE PARTY TO
THAT AGREEMENT HA HAS NO
MORE EXPOSURE AND THE REAL
PART CAN PURSUE THE CLAIM I
THINK THE FACT THERE WAS NO
JUDGMENT THAT REMAINED
OUTSTABBEDING MEANT THERE
WAS SOMETHING TO ASSIGN
WHICH WAS THE RIGHT AND THE
JUDGMENT WHEREAS THERE WAS
NOTHING LEFT TO ASSIGN
BECAUSE THERE WAS RELEASE
AND A SATISFACTION OF
JUDGMENT.
WOULD I SAY THE RELEASE
ALONE IS SUFFICIENT THAT THE
PAPER JUDGMENT REMAINED ON
THE BOOKS AN THE ISSUE OF
WHETHER THERE IS SOME
ADDITIONAL DAMAGE ONER THAT
IN THIS LIABILITY FOR THE
JUDGMENT IFL OF STL THAT

WOULD BE ASSIGNABLE FROM IMC TO HOLMAN AND TOOMEY IS NOT BEFORE THE COURT.
>> BECAUSE THEY WERE ASSIGNING THEIR RIGHTS IN THE JUDGMENT.
THERE WAS, THERE WAS STILL A JUDGMENT THAT WAS OUTSTANDING.
THAT IS NOT WHAT THE CERTIFIED QUESTION DOESN'T DEAL WITH THAT SDINTION, IT IS ASKING IF THERE IS A COMPLETE RELEASE AN ASSIGNMENT IN ONE DOCUMENT.
THAT IS WHAT IT IS ASKING?
>> OF COURSE, THERE IS REALLY NOT AN ASSIGNMENT.
IT IS AGREEMENT TO ASSIGN.
THE ASSIGNMENT DOESN'T TAKE PLACE UNTIL THREE MONTHS LATER.
>> ACTUALLY, THE ASSIGNMENT IN THIS CASE IT WAS PART BETWEEN IMC, HOL MACHINE AN TOOMEY, BUT THE -- YOU AGREE ON AGAIN ON THE DAY BEFORE THE ASSIGNMENT HAD TAKEN PLACE THEN THE NEXT DAY THIS AGREEMENT HAD TAKEN PLACE, THEY WOULD BE FINED?
ASSIGNMENT, NEXT DAY, RELEASE.
>> I WOULD SAY, NO, YOUR HONOR, UNDER THE AVILA CASE, I THINK, THE TIMING OF THE ASSIGNMENT VERSUS THE RELEASE COMES INTO PLAY, IF FOR EXAMPLE, THERE IS ASSIGNMENT TO A FOURTH PARTY TO A CODEFENDANT OR SOMETHING LIKE THAT, I DON'T THAT I WHAT IS THE TIMING LINE OR COPE WAS THE ANTICIPATING ROSSEN THAT RELEASE WOULDN'T COME UNTIL AFTER THE FULL LITCATION OF THE DERIVATIVE ACTION, SO I THAT I WHAT IS THE LANGUAGE THERE IS.
UNDER THE AVILA CASE, THIS IS THE 4th DISTRICT OPINION, THE LACK OF DAMAGE, SO TO SPEAK, TO THE DOCTOR CAME

ABOUT WHEN HIS DEBT WAS FORGIVEN, SO THAT WAS ENOUGH TO OPERATE EVENTUALLY AS RELEASE EVEN THOUGH IT CAME AFTER THE ASSIGNMENT TO HIS CODEFENDANT AND THEN BACK AGAIN.
>> SO LET ME MAKE SURE WE UNDERSTAND.
YOUR VIEW OF FLORIDA LAW IS THAT IT IS THE DISTINCTION BETWEEN THE RELEASE AND THE AGREEMENT NOT TO ENFORCE THAT REALLY MAKE THESE DIFFERENCE.
YOU REALLY HAVE TO READ THESE CASES AN IF YOU GET THEM CONFUSED AND MIXED UP ALL ON THE RELEASE, YOU MAY HAVE DONE SOMETHING, BUT YOU HAVE GOT A DIFFERENT RESULT.
>> THAT IS RIGHT.
>> IT IS THAT UNDER THE CIRCUMSTANCES, THIS OR THE THIRD PARTY, ANY OF THOSE CASE IS THAT YOU MUST HAVE AN AGREEMENT NOT TO ENFORCE AND THE RELEASE COMING AFTER YOU FINISH WITH WHATEVER IS GOING ON IS THE OM WAY NOW AT SOME OF THESE OTHERS TO PRESERVE THAT CLAIM.
>> ABSOLUTELY CORRECT, YOUR HONOR.
>> OKAY.
>> AND IF YOU LOOK AT THE LINE, THIS COURT SAID IN ROSSEN, THAT IS THE DISPOSITIVE QUESTION AND THE CASE IS FALLING ON EITHER SIDE OF THAT DISTINCTION.
>> IN THAT CASE, YOU HAVE BOTH, RIGHT?
THERE IS ANOTHER PARAGRAPH 3 C WHERE THEY NOT ENFORCE.
>> THAT IS RIGHT.
IT MAKES REF RENS TO THAT IN THE CONTEXT OF ALLOCATING THE SETTLEMENT BETWEEN THE SECURITIES CLAIMS WHICH THEY ALLOCATED THEM TO AND EMPLOYMENT CLAIMS WHICH THEY AL LE INDICATED THEM AWAY FROM AND SO THAT DOESN'T

INITIATE THE LANGUAGE OF THE RELEASE AT ALL.
>> WHY WOULD YOU NEED THAT NOT TO ENFORCE -- IT SAYS THAT TO ENFORCE AGAINST DEFENDANT IMC THE $1.8 MILLION JUDGMENT ENTERED BY THE COURT IN LITIGATION, WHY WOULD YOU NEED THAT LANGUAGE IF THE RELEASE ACCOMPLISHED EVEN MORE?
>> WELL I WOULD SAY, YOUR HONOR, THE REASON WHY THAT LANGUAGE IS IN PARAGRAPH 3 C IS BECAUSE THAT IS WHERE THEY WERE DOING THE ALLEGATION, THEY WERE SAYING THIS 1.2, I BELIEVE IT WAS 1. 2, I COULD BE INCORRECT, REGARDING THE SECURITY CLAIM, WHAT IS BEING PAID IN SECURITY CLAIMSEN ALONE THE 1.8 REMAINS.
DON'T WORRY ABOUT IT.
WE'LL NOT ENFORCE THAT.
THAT IS WHAT THAT PARAGRAPH IS TALKING ABOUT.
THEN, YOU HAVE TO LOOK BACK TO PARAGRAPH 2 TO SEE THE OPERATIVE PORTION WHICH US THE RELEASE.
NO INCONSUS SY THERE IS WHAT I AM SAYING.
>> YOU ARE ASKING US NOW TO INTERPRET SOMETHING THAT IS NOT ON THE LANGUAGE OF THE AGLIMENT WHICH YOU SAY WE SHOULDN'T DO EARLIER IN THE AGREEMENT, IT SEEMS IF WE WERE STICKING BY THE PLAIN LANGUAGE OF THE AGREEMENT, WE CAN'T SAY THIS WAS INTENDED TO DO THIS OR THE OTHER, IT SAYS WHAT IT SAYS, WE'LL NOT ENFORCE THE $1.8 MILLION JUDGMENT.
>> IF IT DOES BOTH, YOUR HONOR, THEY THEN RELEASE IS STILL SUFFICIENT TO DEFEAT THE UNDERLYING CLAIM AND THE UNDERLYING DERIVATIVE CLAIM.
>> US WHAT THE POLICY REASON CUE ARGUE FOR US TO HAVE THAT RULE OF LAW?

>> WELL, ESSENTIALLY, IT IS RULE RF LOGIC, YOU CAN'T HAVE DERIVE IS THERE IS NO UNDERLYING CLAIM REMAINING. AS IF AS MAKING DISSTRIPTION BETWEEN THE TWO, IT IS RELATIVELY RECENT DIVISION FROM THE COURT IN 2001 IN ROSSEN IS JUST MAKING THE POINT THAT IF THAT UNDERLYING CLAIMS GONE, THERE HAS BEEN A RELEASE, THERE IS NO LONGER ANY LIABILITY OR RESPONSIBILITY TO PAY THAT JUDGMENT THEN THERE IS NOTHING UPON WHICH YOU CAN PREDICATE ANY DERIVATIVE CLAIM IN WAY THAT WOULD BE THE DAMAGE.
>> WHAT DO WE DO WITH THE LANGUAGE IN RONS WHICH TALKS ABOUT THE FACT THAT THE PARTIES IS THE CONTROLLING INTERPRETATION OF THESE RELEASESS?
AND IT SEEMS TO ME THAT IT IS PRETTY CLEAR HERE THAT THE PARTIES INTENDED TO ACTUALLY FOREGO EXECUTION OF THE JUDGMENT AGAINST IMC AN ALLOW THE PLAINTIFFS TO IN FACT GO AGAINST WACHOVIA THAT THAT SEEMS TO BE THE INTENT OF THE PARTIES HERE.
I THINK YOU HAVE TO READ THAT LANGUAGE IN ROSSEN AGAINST THE FACTS IN ROSSEN, THE ARGUE AM THAT WAS BEING MADE.
THE ARGUMENT THAT WAS BEING MADE THAT IS THE AGREEMENT CAN GIVE RELEASE LATER THAT CAN BE CONSTRUED TO BE A RELEASE NOW AND SO THEREFORE ELIMINATING THE UNDERLYING CLAIM AND THUS ELIMINATING THE DERIVATIVE CLAIM, THE COURT SAID, NO YOU HAVE TO LOOK AT THE INTENT OF THE PARTY.
THE INTENT WAS TO CONTINUE TO PURSUE THE CLAIM, THAT IS WHY THE RELEASE IS NOT GIVEN UNTIL LATER.

THERE WAS NO RELEASE GIVEN FROM THE PLAINTIFF TO THE OR RIDGE ORIGINAL DEFENDANT IN THE ROSSEN CLASS, THAT IS WHY, THAT IS WHAT DISTINGUISHES THAT CASE FROM THIS ONE, WE HAVE TO LOOK AT THAT LANGUAGE IN THEIR AGREEMENT TO DETERMINE WHAT THEY MET.
NOW AGAIN, THIS GOES DIRECTLY, I AM INTO REBUTAL.
>> I I ASSUME IT IS YOUR POSITION THAT TO RULE AGAINST WHAT YOUR ARGUMENT IS TO WE HAVE TO RECEDE.
>> ABSOLUTELY, YOUR HONOR.
>> THAT IS RYE.
>> FOR THAT MATTER, THE CUNNINGHAM CASE AS WELL. VARIED ONE SECOND ON THE ASSIGNMENT OF THE FIDUCIARY CLAIMS.
AS TO WHETHER OR NOT IT IS A PERSON OR CONFIDENTIAL DUTY THAT GIVE IS RISE TO THE CLAIM.
IN THIS INSTANCE, ONE-ON-ONE SITUATION CLEARLY IS A PERSONAL DUTY, THAT IS THE ESSENCE OF THE BREACH, OF A IF I DISH UR ADUTY.
>> SINCE YOU ARE ON THIS ISSUE, HOW IS IT ANY DIFFERENT IN GIONI.
IT WAS A NEGLIGENT DUTY NOT A FIDUCIARY DUTY.
>> WITH INSURANCE AGENT?
>> YES, IT WAS.
>> BUT THAT IS AN IDENTIFICATION OF THE PARTY.
>> IT SEEMS TO ME THAT WHEN WE ARE DEALING WITH THIS, THERE IS POLICY INVOLVED. WOULD YOU DISTINGUISH BETWEEN SOMEBODY WHO IS $LY THIRD PARTY BENEFICIARY OF THIS ARRANGEMENT THE INDIVIDUALS WHO RECEIVED THE JUDGMENT VERSUS IF THEY WENT ON THE OPEN MARKET AND SIGNED A DUTY CLAIM.
DO YOU THINK THE LAW SHOULD MAKE ANY DISTINCTION BETWEEN

WHO THE ASSIGNMENT IS TO?
IN TERMS OF SAYING WHETHER
IT IS PROHIBITED OR NOT?
>> I DON'T THINK SO, YOUR
HONOR, THE UNDERLYING POLICY
REASONS ARE THE SAME.
YOU WOULD STILL HAVE
FIDUCIARY LITIGATING OVER
PERSONAL CLAIMS AN DUTIES
WITH THE STRANGER TO THAT
DUTY.
>> WELL, THEY ARE ALREADY,
THE JUDGMENT WAS ALREADY
OBTAINED, SO THEY FOUND A
BREACH OF FIDUCIARY DUTY,
DIDN'T THEY?
>> NO, YOUR HONOR, THAT IS
WHAT IS ON APPEAL IN THE
CIRCUIT NOW IS THE BREACH OF
THE FIDUCIARY CLAIM, THAT IS
NOT OVER YET.
THE $1.8 MILLION WAS
ENTIRELY SEPARATE.
THAT WAS FOR BREACH OF
VARIOUS EMPLOYMENT CONTRACTS
THAT TOOMEY AND HOLMAN HAD
WITH IMC.
>> GO INTO THE CONCEPT THAT
WAS DISCUSSED BY THE
MAJORITY WITH REGARD TO
PERMITTING OR REFUSING TO
PERMIT AN ASSIGNMENT OF
THESE KINDS OF CLAIMS IN
CONNECTION WITH A PERSONAL
RELATIONSHIP.
>> WE CERTAINLY DON'T HAVE
IN A CASE LIKE THIS WITH
INSURANCE BROKER THE PROBLEM
OF DIMINISHING THE INTEGRITY
OF THE LAWYERS OR LEGAL
SYSTEM.
THAT MUCH IS DIFFERENT
BETWEEN THOSE TWO CASE BUT
WE HAVE THE PROBLEM.
>> WE ALLOWED IT.
>> THEN THE REASON WAS
BECAUSE IN THAT CASE,
ALTHOUGH IT WITH AS LAWYER,
THE DUT DUTY WAS NOTqHHA
PERSONAL ONE.
AND IT WAS NOT FIDUCIARY
CONFIDENCE ONE.
THROWS THE VARIOUS WORDS
USED THROUGHOUT THE OPINION

TO DESCRIBE THAT
RELATIONSHIP.
THAT SORT OF BECOMES THE
LINCHPIN.
>> JUST IS?
>> DIDN'T WE ACTUALLY IN
COHEN EXAMINE THE ACTUAL
KIND OF SERVICE THAT WAS
RENDERED THERE SO AND THE
FACT THAT SERVICE WAS NOT SO
PERSONAL THAT WE COULD SAY
ITS WITH ASSIGNABLE, WHAT
WAS PERSONABLE ABOUT THIS
RELATIONSHIP BETWEEN IMC AND
WACHOVIA WHEN IN ESSENCE
THEY WERE INSURANCE
BROKERING, I MEAN, THERES
NOTHING OUT OF THE ORDINARY
THAT CAN I SEE ABOUT THEIR
RELATIONSHIP?
>>
>> YOUR HONOR, THAT WOULD BE
THE BASIS OF DISMISSING THE
CLAIM IN THE FIRST INSTANCE,
THERE IS NO FIDUCIARY DUTY
AT ALL.
>> A FIDUCIARY CUTIE,
REALLY, I MEAN, THE
DEFINITION AFFY DOUCHEARY IS
GENERAL ISN'T IT?
> IT IS ACCEPTED.
IT IS OPPOSED BY BEN FINISH
BENEFICIARY AND ACCEPTED BY
THE FIDUCIARY.
IT IS INTERPRETED BROADLY
BAIT IS A HIGHER DUTY THAT
FIDUCIARY OWES TO
BENEFICIARY IN THIS INSTANCE
THE U.S. DISTRICT COURT
ALLOWED THAT FIDUCIARY DUTY
CLAIM TO STAND FIT WAS
NEGLIGENCE CLAIM THEN I
WOULD SAY UNDER THE COW HEN
CASE CLEARLY ASSIGNMENT.
>> YOU HAVE USED YOUR TIME.
>> MY APOLOGIES.
>> THANKS.
>>>
>>> MAY IT PLEASE THE COURT.
MY NAME IS LISA HSIAO AS THE
COURT HAS OBSERVED AS CLEAR
BY THE QUESTIONS THE
SETTLEMENT AGREEMENT IS
INTENDED TO DEAL WITH TWO

TYPES OF CLAIMS ON THE
LITIGATION BETWEEN HOLMAN
AND TOOMEY.
>> CAN YOU CLARIFY YOUR VIEW
ON THE FIDUCIARY
RELATIONSHIP AND THE
ASSIGNMENTABILITY HELP ME
UNDERAND WHAT THE STATUS
WHICH IS THE 11th CIRCUIT?
>> IS A UNDERSTAND IT, THE
11th CIRCUIT CERTIFYS
WHETHER THE BRECH AGAINST AN
INSURANCE BROKER IS
ASSIGNABLE.
AND I DON'T KNOW WHY THEY
DECLINED TO INTERPRET THE
APPLICABLE WHILE WE BELIEVE
THE CONTROL ON THE
CIRCUMSTANCES.
>> THEY LIKE TO DO THIS IN
THESE KIND OF CASES.
IF INSURANCE CASE THEY SEND
IT TO US.
>> WELL, LET ME TRY CLARIFY.
YOU DID FILE ULTIMATE CLAIMS
FOR BREACH OF CONTRACT,
NEGLIGENCE, AND THEN,
FIDUCIARY DUTY?
>> CORRECT.
IT WASN'T EXACTLY ALL
CLAIMS.
WE FILED OUR OWN CLAIMS
AGAINST WACHOVIA AS TOOMEY
AND HOLMAN INSURANCE
BROKERS, THEY ARE ALSO THE
BROKER FOR US.
WE WERE EMPLOYEES AN
OFFICERS OF IMC, WE ALSO
FILED NEGLIGENCE CLAIMS AND
CONTRACT CLAIMS AGAINST
WACHOVIA.
WE ALSO FILED ASSIGNED
CLAIMS AGAINST WACHOVIA AS
IMC TO ENFORCE THE ENFORCE
$1.8 MILLION JUDGMENT OR TO
CO LOOK THE AMOUNT THAT WE
WERE OWED UNDER THAT AS WELL
AS DEFENSE CONTRACT.
>> JUSTICE ASKING ABOUT IF I
DURBARY DUTY.
I GUESS MY QUESTION IN THE
ASSIGNMENT AREA THAT WE'RE
DEALING WITH TODAY.
YOU FOUND BASED ON THAT

ASSIGNMENT, MORE THAN A
BREACH OF FIDUCIARY DUTY.
>> YES.
WE FILED BOTH AS WELL AS THE
BREACH OF FIDUCIARY DUTY
CLAIM.
>> THE ISSUE IS NOT WHETHER
YOU HAVE A REMEDY OR NOT BUT
THE QUESTION OF WHETHER YOU
HAVE BOTH, WHETHER YOU HAVE
IF I DURBARY, WHERE THE
FIDUCIARY RELATIONSHIP COULD
BE SIGNED?
>> THAT IS CORRECT.
>> I THOUGHT THE ONLY THING
THAT WENT TO TRIAL WAS THE
BREACH OF FIDUCIARY DUTY.
>> THAT IS CORRECT.
> THE JUDGMENT BASED ON THE
BREACH OF FIDUCIARY DUTY NOT
ON THE NEGLIGENCE CLAIM.
>> CORRECT.
THE DISTRICT COURT CITED TO
DISMISS THE NEGLIGENCE
BECAUSE UNDER FLORIDA LAW,
YOU CAN'T BRING THE
NEGLIGENCE AND IF I GURB A
FIDUCIARY DUT TIE.
>> THAT IS NOT AN ISSUE YOU
CROSS APPEALED?
>> WE DID CROSS APPEAL TO
THE 11th COURT BUT NOT
BEFORE YOU.
>> THE QUESTION THAT I HAVE
IS THAT THE FIRST CERTIFIED
QUESTION SAYS WHAT IS THE
EEFFECT OF SETTLEMENT
AGREEMENT?
IT CONTAINS AN ASSIGNMENT
AND IMMEDIATE RELEASE.
YOU HAVE IN YOUR BRIEF
ADVOCATED FOR THE PIECING
THAT THE SETTLEMENT
AGREEMENT IS NOT AN
IMMEDIATE RELEASE ON THE
SAME COURSE OF ACTION:
>> THAT IS CORRECT.
>> YOU ARGUED THAT NO IT
DIDN'T RELEASE ALL CLAIMS.
THE SCOPE OF OUR AUTHORITY
HERE IN TERMS OF THE
CERTIFIED QUESTION IS TO
ANSWER IT AS IT IS POSED.
YOU ARE ASKING US TO

REINTERPRET THE AGREEMENT DIFFERENTLY THAN THE 11th CIRCUIT HAS, AREN'T YOU?
>> WITH ALL DO RESPECT TO THE 11th CIRCUIT.
FIRST OF ALL, ITS ORDER OF CERTIFICATION EXPRESSLY STATED THAT THIS COURT IS NOT LIMITED TO THE PHRASING.
>> TRUE.
>> BUT IF THEY DIDN'T THINK IT WAS TOTAL RELEASE OUR OTHER CASES ARE SO CLEAR THAT ABOUT OF COURSE THE ASSIGNMENT IS ALLOWED AS THE RELEASE IS DEFERRED UNTIL AFTER THE JUDGMENT IS COLLECTED, THEY DIDN'T NEED US TO ANSWER THAT.
THEY CLEARLY INTERPRETED THE SETTLEMENT AGREEMENT AS BEING COMPLETE RELEASE OF ALL OF THE CLAIMS AGAINST IMC AS WELL AS ASSIGNMENT.
>> WELL, WE SUBMIT THAT THAT IS NOT A READING THAT WE STRESS THE ACTUAL LANGUAGE AS READ IN CONTEXT AND AS A WHOLE.
>> WELL, INDULGE ME FOR A MINUTE LET'S ASSUME THE AGREEMENT OPERATES AS RELEASE.
I DON'T SEE ANY OF OUR CASES THAT WOULD ALLOW A CAUSE OF ACTION TO BE ASSIGNED IF THE RELEASE HAS ALREADY OCCURRED AND CULL COMPANY IS VERY CLEAR THAT ABSENCE PRIOR ASSIGNMENT, IN THIS CASE, THE ASSIGNMENT OCCURRED, THE ACTUAL ASSIGNMENT OCCURRED THREE MONTHS LATER, IT SEEMS WHOEVER DRAFTED THIS AGREEMENT JUST AS THEY WERE INTENDED FOR FLORIDA WOULD APPLY JUST CLEARLY HAVEN'T READ FLORIDA AS TO WHAT STEPS NEED TO BE TAKEN TO PRESERVE THESE CLAIMS.
>> WELL, FIRST OF ALL, THE -- WITH RESPECT TO THE TIMING OF THE ASSIGN, ALTHOUGH, IT IS THE ACTUAL

ASSIGNMENT DOCUMENT WAS NOT SIGNED UNTIL AUGUST, IF YOU LOOK AT PARAGRAPH 9 OF THE SETTLEMENT AGREEMENT WHICH IS ON PAGE, ON PAGE 14, IT SAY ITS THE AGREEMENT MAY BE EXECUTED ALL OF WHICH WILL BE DEEMED TO BE A PART OF THIS AGREEMENT SO IT IN WERE OPERATES THAT.
>> THAT GOES BACK AND REALLY SPEAKS AGAIN TO CLEAR FYVATION.
THIS IS NOT SOMETHING THAT IS NEW IN FLORIDA LAW.
IT IS SOMETHING THAT HAS BEEN APPLIED FOR YEARS AT LEAST SINCE COKE AND THAT APPARENTLY TO THOSE DOING THIS KIND OF DOCUMENT BECAME VERY CLEAR THAT ONCE YOU DO THE RELEASE, YOU CAN'T ASSIGN AFTER THAT, THAT IS WHAT I AM TRYING TO UNDERSTAND, THE REAL THRUST OF THIS, IN THAT DOCUMENT, THERE IS A GENERAL RELEASE.
AND COKE WOULD NOT HAVE TO RECEIVE CONTROL BECAUSE THESE ARE DONE GENERALLY AS AGREEMENTS NOT TO ENFORCE.
NOT RELEASE THEM.
>> WELL, YOU KNOW, OUR POSITION IS THAT THERE WAS NOT A GENERAL RELEASE, THE PROVIDED LANGUAGE AS WELL AS THE OTHER LANGUAGE WITH THE EXPLICIT COVENANT TOT TO ENFORCE THE JUDGMENT INTENDED TO PRESERVICE THE JUDGMENT AND IN FACT THE PARTIES DID PRESERVE IT REMAINS OUTSTANDING ON THE BOOKS TODAY.
TO ANSWER JUSTICE PARIENTE'S QUESTION IF IN FACT THERE WAS A COMPLETE RELEASE, WE WOULD ARGUE THAT IT DIDN'T, IT WOULDN'T MATTER ANYWAY BECAUSE THE CLAIMS AGAINST THE INSURANCE BROKER BY IMC HERE ARE AGAINST WACHOVIA AS AN INDEPENDENT TORT BECAUSE OF THE WRONG THAT IT

INFLICTED UPON ITS CLIENT
FOR FAILING TO PROVIDE IT
WITH INFORMATION REGARDING
THE ELIMINATION OF COVERAGE,
FAILING TO PROVIDE DEFENSE
COST, SO IMC WOULD HAVE A
PLAN AGAINST THE BROKER
REGARDLESS, YOU KNOW, AGAIN,
THAT IS NOT OUR POSITION,
THAT IS ASSUMING THE
QUESTION THAT YOU GAVE ME.
THE HYPOTHETICAL.
>> AGAIN, IT GOES BACK TO
THAT ASK A NONSENSE CALL
QUESTION THEN, IT DOESN'T
RELEASE THE CLAIMS YOU ARE
ASSERTING?
>> WE ASSERT THAT THIS DOES
NOT -- THIS AGREEMENT DOES
NOT RELEASE THE JUDGMENT.
THERE WAS A COVENANT NOT TO
ENFORCE THE EMPLOYMENT
JUDGMENT AND THE INTENT OF
THE PARTY.
>> LET ME HAVE A CRACK AT
THAT IN THAT WE ARE HERE TO
ANSWER THEIR QUESTIONS ABOUT
FLORIDA LAW AND REALLY IT
STRAYS FROM THE PURPOSE OF
OUR CERTAIN CASE PROCESS
HERE FOR US TO GET INTO
DECIDING THEIR CASE SO HOW,
WHAT IS THE POSITION ON THE
ANSWER TO THEIR QUESTIONS?
>> THE ANSWER TO THEIR
QUESTION SHOULD BE THAT
WHERE THE SETTLEMENT
AGREEMENT ALSO CONTAINS A OF
NENT NOT TO ENFORCE THE
SETTLEMENT AGREEMENT DOES
NOT EXTINGUISH THE
UNDERLYING CLAIM AS IN
ROSSEN AND THE CASE THEY ARE
IN.
THAT WOULD BE HOW WE WOULD
SUBMIT YOU SHOULD ANSWER THE
QUESTION.
>> ON THE ISSUE OF THE
INTERPRETATION OF THE
SETTLEMENT AGREEMENT, THE
DISTRICT COURT ENTERED A
JUDGMENT AGAINST WACHOVIA AS
A MATTER OF LAW, WAS THERE
CROSS MOTIONS FOR SUMMARY

JUDGMENT ON -- I MEAN, AFTER THE -- ON THE ISSUE OF THE ASSIGNMENTABILITY, WAS THAT RAISED BY MOTION TO DISMISS THAT YOU CAN'T ASSIGN, THIS CAN'T BE A VALID ASSIGNMENT BECAUSE IT WAS RELEASED WAS THE ISSUE OF THE INTENT OF THE PARTIES AND THE AMBIGUITY IN THE AGREEMENT RAISED, ARGUED BY ANYBODY BEFORE THE FEDERAL DISTRICT COURT JUDGE.
>> AT THE BEGINNING OF THE LITIGATION, THE FILING OF THE ORIGINAL COMPLAINT. WACHOVIA MOVED TO DISMISS AND THE GROUNDS WAS THE BREACH OF THE DUTY IS NOT ASSIGNABLE.
>> NOT ON THAT ISSUE.
>> THERE WERE MOTIONS FOR SUMMARY JUDGMENT BEFORE TRIAL, THE COURT DENIED BOTH PARTIES MOTIONS FOR SUMMARY JUDGMENT, THEN, UPON --
>> AND THE MOTIONS WERE BASED ON THE LANGUAGE OF THE SETTLEMENT AGREEMENT.
>> YES.
>> ALL RIGHT.
THEN THE JUDGMENT IS OBTAINED BASED ON THE BREACH OF IF I GURBARY DUTY.
>> CORRECT.
>> WHAT HAPPENED?
>> IT WENT UPON APPEAL. BOTH SIDES CROSSED THE FIELD.
>> SO AT ANY POINT, DID BOTH PARTIES BY SAYING A SUMMARY JUDGMENT CONCEDED THAT THE AGREEMENT DID NOT NEED IN TERP OPERATION.
THIS IS WHAT, WE GET THIS PIECE OF THIS CASE AND A PIECE OF IT AND THEN SOMEONE THROW AS CURVE AND SAYS BUT GOT TO LACK AT THIS AGREEMENT, I AM LOOKING AT IT, I THINK, YOU KNOW, I THINK IT MEANS IT IS COMPLETE RELEASE, BUT I AM WILLING TO ENTERTAIN

ARGUMENT THAT NOT ON A
CERTIFIED QUESTION TO THIS
COURT WHETHER THE CIRCUIT IS
CLEAR THAT THEY HAVE
INTERPRETED THE AGREEMENT TO
PROVIDE FOR A COMPLETE
RELEASE, I AM TRYING TO SEE
FIT WAS EVER, IF THAT ISSUE
WAS LIT GATED OR THIS
OCCURRED CURVE BEING THROWN
IN NOW THIS COURT.
>> IT WAS LIT GATED ON
SUMMARY JUDGMENT BY
WACHOVIA, THE DISTRICT COURT
ISSUED AN ORDER ON THE
JUDGMENT DENYING BOTH SIDES
MOTIONS.
>> WHICH WOULD SEEM TO MEAN
THERE WOULD BE NEED TO BE
EVIDENTIARY HEARING ON WHAT
THE AGREEMENT MEANT.
YOU SAID THAT DID NOT
HAPPEN.
>> THAT DID NOT HAPPEN.
THEN THERE WAS PRETRIAL
ORDER FROM RAISING THE
ARGUMENT THAT THEY WERE
RELEASED, THE UNDERLYING
CLAIM WAS RELEASED.
THE CASE WENT TO TRIAL ON
THE CLAIMS.
>> HAS EITHER PARTY ARGUED
THE STATE OF FLORIDA WANTS
TO YOU COMPLY INTERPRETING
THE AGREEMENT.
I BELIEVE IT WAS RAIDS BUT
BOTH PARTIES HAVE CONCEDED
THAT SUBSTANTIALLY SIMILAR
TO FLORIDA LAW IN ITS
INTERPRETATION.
>> WHY NOT TRANSFER THIS?
>> WELL IT SEEMS THE 11th
SIR KIT DIDN'T KNOW WHAT THE
FLORIDA LAW WAS.
HOW DID THEY KNOW?
>> I DON'T BELIEVE THAT -- I
KNOW IT WAS RAISED IN ORAL
ARGUMENT AT THE 11th SY ARE
CIRCUIT BUT NOT REACHED BY
THE PARTIES THAT MARYLAND
LAW APPLIES HERE OR AS A
RESULT WOULD BE ANY
DIFFERENT.
>> HOW ABOUT COMING BACK TO

CHIEF JUSTICE LEWIS'S
QUESTION WITH A FEW MINUTES
TO GO.
LET ME ASK IT IN A DIFFERENT
WAY.
WE THROUGH A SERIES OF CASES
HAVE REALLY SET OUT THAT IF
THE PARTY IS IN A SITUATION
LIKE THIS WANT TO EN NEAR
AGREEMENT, AN AGREEMENT THAT
REALLY DOES ALLOW THE
JUDGMENT HOLDER FOR THE
PARTIES OR WHATEVER YOU WANT
TO CALL IT, YOUR CLIENT,
OKAY, TO GO GAINS THE
INSURANCE AGENT OR THE
INSURANCE COMPANY HERE, THAT
THERE IS A WAY TO DO IT, IT
CAN BE DONE.
IN ORDER TO DO IT, YOU HAVE
GOT TO CROSS ALL YOUR Ts AN
DOT ALL OF YOUR Is IN THE
FOLLOWING MANNER.
OF COURSE, PART OF THIS IS
THAT YOU HAD TO BE CAREFUL
NOT TO HAVE A RELEASE.
SO IF YOU ARE THE LAWYER
ADVISING THE CLIENTS ABOUT
HOW TO CONSTRUCT THIS
AGREEMENT IN ORDER TO COMPLY
WITH OUR CASE LAW, ISN'T
THERE A PROBLEM WITH THIS
PARTICULAR AGREEMENT IN
TERMS OF COMPLYING WITH OUR
CASE LAW THAT PROVIDES A
ROAD MAP OF THOUSAND DO IT?
DO UNDERSTAND MY QUESTION?
>> I DO.
>> SO DOESN'T THIS AGREEMENT
DOESN'T FOLLOW THE ROAD MAP
THAT WE HAVE SET OUT IN OUR
CASE LAW.
IT HAS TWIST TO IT BECAUSE
IT APPEARS TO GRANT AN
ABSOLUTE RELEASE, SO HELP US
WITH THAT PROPOSITION THAT
WE HAVE SET OUT A ROAD MAP
IN THOUSAND DO IT AN WE MORE
OR LESS SAID YOU GOT TO BE
CAREFUL NOT TO INCLUDE A
RELEASE IN THERE.
THIS AGREEMENT DOES IN CLUD
A RELEASE SO HELP US WITH
WHETHER THIS COMPLIES WITH

OUR CASE LAW.
>> WELL, IS A STATED AT THE OUTSET, THE SETTLEMENT AGREEMENT DEALS WITH THE DIFFERENT TYPES OF CLAIMS IN THESE LITIGATIONS BETWEEN IMC AND TOOMEY-HOLMAN IN DIFFERENT WAYS, THERE WAS A RELEASE WITH RESPECT TOP THE SECURITY CLAIMS AND OTHER POSSIBLE FEATURED CLAIMS SPRX HOWEVER, WITH RESPECT TO THE UNDERLYING JUDGMENT, THE $1.8 MILLION JUDGMENT, THERE WAS A OF NENT NOT TO ENFORCES THAT JUDGMENT AN EXCHANGE THE CONSIDERATION FOR THAT PART.
>> SO YOU KEEP ON COMING BACK TO REINTERPRETING THE AGREEMENT IN THE WAY THE 11th CIRCUIT CLEARLY DIDN'T INTERPRET IT.
BECAUSE IF IT WAS A RELEASE OF THAT CLIMB SIMULTANEOUSLY, THEY WOULDN'T HAVE CERTIFIED THE QUESTION.
I JUST REREAD THE ENTIRE VERY SHORT OPINION AND IT IS CLEAR THAT THEY ARE BASING IT ON ASSUMING THAT THIS AGREEMENT, SO IN GULLG YOU, THE OM THING THAT WE HAVE TO ANSWER IS WHETHER, YOU KNOW, MAYBE WE GO BACK, YOU GOT IT WRONG BECAUSE YOU NEED TO REINTERPRET THAT AGREEMENT, BUT LET'S ASSUME WE ANSWER THAT QUESTION, IF THERE IS UNCONDITIONAL RELEASE IN THE SAMENT DOCUMENT.
NOW YOU CAN ANSWER THAT QUESTION WITHOUT CHANGING THE CERTIFIED QUESTION?
EYE MEAN, PUSH DIME SHOVE, I HAD TO DO IT, I WOULD SAY THAT -- WELL, WE HAVE TO DO IT.
YOU ARE GOING TO HAVE TO DO IT.
>> THE ANSWER WOULD BE THAT THE RELEASE CANNOT BE INTERPRETED THAT WAY,

THEREFORE, THE ASSIGNMENT SHOULD NOT EXTINGUISH THE UNDERLYING CLAIM.
YOU KNOW?
IF THAT PUSH CAME TO SHOVE.
>> HOW DOES THAT COMPORT WITH COKE?
>> WOULD YOU HAVE TO RETREAT.
>> ALL RIGHT.
THAT TOOK A LOT TO GET THERE.
>> JUST A FEW MINUTES ON THE BREACH FIDUCIARY DUTY.
AS I STATED EARLIER, I BELIEVE THAT THE BREACH OF FIDUCIARY DUTY CLAIM IS ASOONABLE, THIS COURT HELD, THAT NEGLIGENCE CLAIM AGAINST INSURANCE BROKERS ARE ASSIGNABLE AND THAT OPINION -- THE ANSWER TO THE QUESTION THAT I POSED TO MR. PEL ZER, HIS ANSWER WAS, WELL, IT WAS A NEGLIGENCE CLAIM, IT DIDN'T CONCERN FIDUCIARY DUTY CLAIM, HERE WE HAVE A FIDUCIARY DUTY CLAIM.
>> WELL, WACHOVIA OFFERED NOTHING.
I DON'T BELIEVE THERE IS ANY SPORT FOR SOME SUBSTANTIAL DIFFERENCE BETWEEN A NEGLIGENT CLAIM AND IF I DIRBARY DUTY CLAIM.
>> WELL, IF YOU LOOK AT CAPLAN AND THOSE CASES, IT SEEMS TO ME THAT WHAT WE SAID IS PURELY PERSONAL TORT IS NOT ASSIGNMENTABLE.
YOU CAN CERTAINLY, UNONE WHICH WITH A TO INTERPRET TOWARD ARRIVING AT FIDUCIARY DUTY, YOU REACHED YOUR PERSONAL DUTY, TO ME, YOU ARE MY ADVISER.
>> YES, BUT FIRST OF ALL, THE COURT HELD THAT INSURANCE BROKER'S RELATIONSHIP WITH ITS INSURED WAS NOT PERSONAL AND CONFIDENTIAL AS TO PRECLUDE ASSIGNMENT AND FRANKLY

DISTINGUISH QUITE STRONGLY
THE DIFFERENCE BETWEEN THE
INSURANCE BROKER INSURED
RELATIONSHIP AND AN
ATTORNEY'S RELATIONSHIP.
>> HOW WOULD YOU, UM, HOW
WOULD YOU SUGGEST WE
INTERPRET THAT PHRASE
PERSONALLY PERSONAL TORT?
WHAT WOULD BE THE PURELY
PERSONAL TORT THAT WOULD NOT
BE ASSIGNABLE?
WELL, IN THE CASE, WE DON'T
BELIEVE THERE ARE.
>> I UNDERSTAND THAT.
WE HAVE TO MAKE THE LAW THAT
APPLIES IN OTHER CASE, HOW
DO WE IN DERP OPERATE THAT?
>> WELL, I HEARD FROM THE
ATTORNEY-CLIENT, YOU KNOW,
IT IS YOUR PROVISION OF
PERSONAL INFORMATION TO YOUR
LAWYER AS THE PERSONAL COURT
AND THAT LAWYER'S BREACH OF
THAT TRUST.
>> THERE IS ANY OTHER
CONTEXT?
>> I MEAN, THIS ISN'T
ATTORNEY-CLIENT CONTER, BUT,
YOU KNOW, THE COURT OBSERVED
IN THE '6Os THERE ARE MANY
DIFFERENT TYPES OF FIDUCIARY
RELATIONSHIPS THAT INVOLVE
TRUST AND THE IF I DOUCHE
ARY, SO I SUPPOSE THERE ARE
PROBABLY MANY OTHER
FIDUCIARY RELATIONSHIPS BUT
NOT ALL OF THEM ARE SO
PERSONAL AS TO PRECLUDE
ASSIGNMENT.
>> DO YOU THINK IT MATTERS
WHO WAS ASSIGNED TO?
DOES THAT FACTOR?
I MEAN, FOR ME, IT MAKE AS
DIFFERENCE THINK OF THIS AS
SO CLOSE TO A BAD FAITH
CAUSE OF ACTION WHERE YOU
ARE LOOKING AT WHO THE THIRD
PARTY BENEFICIARY IS, IT IS
CLEARLY YOUR CLIENT, I DON'T
SEE, DO YOU SEE ANY ROOM IN
THE LAW FOR DISTINGUISHING
WHO THE SIGNMENT IS MADE TO
SINCE PART OF THE POLICIES

YOU DON'T WANT MARABILITY LIKE CLAIMS AGAINST LAWYERS, DO YOU SEE THAT AS BEG A FACTOR TO CONSIDER OR DOES IT NOT COME INTO OUR ANALYSIS?
>> WELL, TO THE EXTENT YOU WANT TO CONSIDER IT AND THE FACT THAT THIS CASE, YOU KNOW, OUR CLIENTS HAD THEIR OWN FIDUCIARY RELATIONSHIP WITH WACHOVIA AND THAT WAS RELATED TO IMC'S RELATIONSHIP, SO THE EXTENT THAT YOU ARE GOING TO SAY CERTAIN PARTIES THAT DO HAVE SOME SORT OF PERSONAL RELATIONSHIP WITH THE FIDUCIARY SHOULD BE THE BENEFICIARY.
>> HAS THAN ABOUT ALLUDED TO OR DISCUSSED ANY CASES?
>> NO, I DON'T BELIEVE, YOUR HONOR, I DON'T BELIEVE IT WAS BRIEFED.
WE WOULD SUBMIT THAT IN FACT THE PLANS ARE CLEARLY ASSIGNABLE, THIS COURT REFERRED TO IN ROSSEN ACTUALLY INVOLVED AN ASSIGNMENT OF BREACH OF FIDUCIARY DUTY CLAIM AGAINST INSURANCE BROKER IN THAT CASE.
THE COURT REVIEWED THAT CASE AND STATE CITED IT WAS APPROVAL IN THE ROSSEN OPINION.
>> SO YOU ARE BASICALLY ASSERTING THAT THE CONNECTION OR THE NES XUS BETWEEN THE INDIVIDUALS AN IMC IS SO CLOSE THAT THIS IS EVEN A DIFFERENT SITUATION THAN IF I HAD TOTAL VANGERS AN IS MORE REASON TO APLOY OI LOY THE ASSIGNMENT?
>> IF YOU WERE TO DECIDE OR TO DEFINE THAT THERE WAS SOME REASON TO LIMIT WHO AN ASSIGNMENT MIGHT BE.
YES.
I WOULD SUBMIT THAT THESE SITUATION HERE.

IN CLOSING, I WOULD LIKE TO
RESTATE THAT AGAIN, WE
BELIEVE THAT THE COURT IS
NOT LIMITED TO THE
PARTICULAR QUESTION HA WAS
PHRASED BY THE 11th CIRCUIT
AND THAT THAT QUESTION
SIGNIFICANTLY OMITED THAT
THIS WAS A COV VENT NOT TO
ENFORCE HERE THAT ROSSEN AND
THE CASES CREATED THEREIN
CONTROL AND THE UNDERLYING
CLAIM WAS NOT EXTINGUISHED
AND SHOULD BE ALLOWED IN
THAT THE BREACH OF FIDUCIARY
DUTY CLAIMS WERE ASSIGNMENTABLE.
>> DO WE READ; HOWEVER,
THEIR QUESTION AS INDING
INDICATING THEIR IN TERP
TATION OF THE FACTS AT ALL?
CAN WE USE UP WHAT THEY SAID
IN THEIR CERTIFIED QUESTION
AS ON INDICATION OF HOW THEY
VIEW THE FACTS OF THIS CASE?
THAT IS THIS WAS AN
AGREEMENT THAT CONTAINED
BOTH AN ASSIGNMENT AND
IMMEDIATE RELEASE?
THE FACTS THAT THEY ARE
OPERATING ON.
>> CERTAINLY YOU COULD.
I BELIEVE THAT THEY IN FACT
DID REFER TO THE LANGUAGE OF
THE OF NENT NOT TO ENFORCE.
IN THE OPINION.
YOU OBVIOUSLY HAVE THE
RECORD BEFORE YOU AS WELL.
>> AREN'T WE DECIDING THEIR
CASE?
>> WELL, YOU ARE DECIDING
THEIR CASE IN TERMS OF
WHETHER THE UNDERLYING CLAIM
IS EXTINGUISHED BUT THERE
YOU ARE STILL OUTSTANDING
ISSUES BEFORE THE 11th
CIRCUIT ON THE CROSS APPEAL.
>> LIKE THE SECOND QUESTION,
CAN THE CLAIM AGAINST
WACHOVIA BE ASSIGNED BY
JUSTICE PARIENTE, WE ANSWER
THAT PA SPECIFIC QUESTION,
WE'RE BASICALLY DECIDE
THAURK SHOE IN THE CASE.
>> THAT IS CORRECT.

>> THEY DECLINED TO DECIDE IT.
>> THANK YOU.
>> THANK YOU.
>> WITH OUR HEN, YOU HAVE EXHAUSTED YOUR TIME.
COUNSEL, YOU UX HAUSED YOUR TIME AS WELL.
WE THANK YOU FOR YOUR PRESENTATIONS, EXCELLENT PRESENTATIONS ON BOTH SIDES.
THANK YOU VERY MUCH.
WE'LL TAKE THE CASE UNDER ADVISEMENT, THANK YOU.