WE NOW GO TO THE FOURTH AND
FINAL CASE ON TODAY'S DOCKET,
TIARA CONDOMINIUM ASSOCIATION V.
MARSH AND McLENNAN COMPANIES.
>> MAY IT PLEASE THE COURT, MARK
McALPINE ON BEHALF OF THE
ASSOCIATION.
WE'RE HERE ON A CERTIFIED
QUESTION FROM THE 11TH CIRCUIT
THAT ASKS THE QUESTION WHETHER
INSURANCE BROKERS ARE CONSIDERED
PROFESSIONALS FOR PURPOSES OF
THE ECONOMIC LOSS ROLE.
AS YOU KNOW FROM OUR BRIEF,
WE'VE SUGGESTED THAT'S THE WRONG
QUESTION TO ASK.
GIVEN THE FACT THAT THIS STATE
HAS RECOGNIZED THE INDEPENDENT
EXISTENCE OF A BREACH OF
FIDUCIARY DUTY CLAIM AS WELL AS
A NEGLIGENCE CLAIM IN ADDITION
TO A POSSIBLE BREACH OF CONTRACT
CLAIM IN THE CONTEXT OF THE
BROKER SERVICES AGREEMENT, THE
QUESTION ASSUMES THAT THE ONLY
WAY THAT A BROKER CAN BE HELD
LIABLE FOR BREACH OF FIDUCIARY
DUTY AND NEGLIGENCE IS IF
THEY'RE PROFESSIONAL.
>> NOW, DO YOU -- AND I REREAD
THE OPINION THAT I,
UNFORTUNATELY, AUTHORED,
INDEMNITY V. AMERICAN AVIATION.
DO YOU READ THAT CASE AS SAYING
WE LIMITED THE ECONOMIC LOSS
RULE TO PRODUCTS LIABILITY
CASES?
>> I DO NOT.
CLEARLY, THE COURT RECOGNIZED
TWO APPLICATIONS, ONE IN
PRODUCTS LIABILITY AND THE OTHER
WHERE --
[INAUDIBLE]
EXISTS.
BUT IT ALSO WENT ON TO SUGGEST
THAT THE EXEMPTIONS THAT HAD

BEEN PREVIOUSLY RECOGNIZED STILL
APPLY.
AND SOME OF THOSE EXEMPTIONINGS
STARTING ALL THE WAY BACK TO
MORANSAIS DEAL WITH CASES THAT
WERE WELL FOUNDED IN PRIOR LAW
IN FLORIDA LAW.
THE COURT IN AMERICAN AVIATION
ALSO NOTED THAT THERE WERE TWO
DECISIONS THAT HAD ALREADY
DECIDED THAT THE ECONOMIC CLAUSE
RULE DID NOT APPLY TO FIDUCIARY
RELATIONSHIP CLAIMS BASED ON THE
RATIONALE OF MORANSAIS THAT
EXISTING, ESTABLISHED COMMON LAW
TORT CLAIMS WERE UNAFFECTED BY
THE ECONOMIC LOSS RULE.
AND IT WAS INTERESTING, I THINK
NOTEWORTHY, THAT IN AMERICAN
AVIATION THOSE CASES WERE
SPECIFICALLY IDENTIFIED AND,
WITHOUT CRITICISM, THE
SUGGESTION IS -- I DON'T WANT TO
READ TOO MUCH INTO THAT
OPINION -- BUT THE SUGGESTION
WAS THAT THOSE WOULD, PERHAPS,
ALSO COUNT AS EXEMPTIONS.
AND, IN FACT, BOTH OF THOSE
CASES THAT WERE CITED, ONE A
FEDERAL CASE AND ONE A STATE
CASE, HAD THAT RULING, AND HAD
THAT RULING BEEN ON THE BOOKS
FOR SOME FIVE OR SIX YEARS PRIOR
TO THE RULING.
>> OKAY.
>> SO OUR SUGGESTION IS THIS,
THE QUESTION IS, NEEDS TO BE
REPHRASED.
LOOK, WE'RE NOT GOING TO PARSE
MATTERS HERE, OBVIOUSLY.
REGARDING DECISIONS, A FOUR-YEAR
DEGREE IS REQUIRED TO BE
CONSIDERED A PROFESSIONAL.
I DON'T REALLY THINK THE 11TH
CIRCUIT NEEDS US OR YOU TO
DECIDE THAT QUESTION.

WHAT THEY REALLY WANT TO KNOW IS
DOES THE ECONOMIC LOSS RULE BAR
THE BREACH OF FIDUCIARY DUTY AND
NEGLIGENCE CLAIMS THAT'S HERE AS
ASSERTED AGAINST MARSH.
>> IN THE COUNTRY HOW MANY
STATES HAVE APPLIED THE ECONOMIC
LOSS RULE AS THAT NAME, THAT
TERM TO MATTERS OUTSIDE OF THE
PRODUCTS LIABILITY?
>> I DON'T HAVE --
>> THE MAJORITY, THE MAJORITY
LIMIT IT TO PRODUCTS LIABILITY?
>> I DON'T THINK THE MAJORITY
DO, BUT I THINK IT'S PRETTY
CLOSE TO 50/50.
WE'VE CITED MOST OF THE CASES IN
OUR BRIEF.
>> ON THE ISSUE OF IF THERE IS
AN INDEPENDENT TORT FOR AN
INSURANCE BROKER, THAT'S BEEN A
PRETTY GARDEN VARIETY BREACH OF
DUTY FAILURE TO OBTAIN
INSURANCE, AND THAT'S WHAT THIS
CASE IS MOSTLY ABOUT, THEY
DIDN'T GET THE INSURANCE POLICY
THAT YOUR CLIENT THOUGHT THEY
SHOULD GET.
I MEAN, IS THAT WHAT THIS BOILS
DOWN TO?
>> THERE'S SOME CONFUSION IN THE
RECORD.
>> WELL, MAYBE -- WHY DON'T YOU
TELL US SINCE WE'RE DEALING WITH
THIS PARTICULAR CASE.
THERE WERE SOME ISSUES ABOUT
WHETHER THE POLICY THEY HAD WAS
A PER-OCCURRENCE OR WHETHER IT
COVERS $100 MILLION.
THAT'S NOT -- AS I UNDERSTAND
IT, THAT ISSUE ABOUT THAT
CONTRACT INTERPRETATION IS
NOT -- AND THAT'S NOT AN ISSUE
WE HAVE TO DECIDE.
>> RIGHT.
>> SO THE FEDERAL DISTRICT COURT

AND THE APPELLATE COURT SAID, NO, YOU KNOW, EVEN IF YOU THOUGHT YOU WERE LIMITED TO 50 MILLION, NO, YOU'VE GOT 100 MILLION.
SO WHAT IS THE CAUSE OF ACTION THAT WE ARE, THAT THE 11TH CIRCUIT HAS ASKED US TO LOOK AT? IT'S THE CAUSE OF ACTION AGAINST THE BROKER OR DOING WHAT OR NOT DOING WHAT?
>> IT WAS FAILURE TO DISCLOSE. THE CONFUSION IN THE RECORD IS THAT THERE WERE MULTIPLE CLAIMS AT THE TRIAL COURT LEVEL.
THE TRIAL COURT CHOSE TO FOCUS ON THE PER-OCCURRENCE ISSUE AND EFFECTIVELY TRIVIALIZED THE REMAINING CLAIMS.
PERHAPS THE MORE IMPORTANT CLAIM IS THE FACT THAT THE INSURANCE BROKER TESTIFIED IN DEPOSITION THAT HE KNEW THAT TIARA WAS UNDERINSURED BECAUSE IT HAD NOT USED A CURRENT APPRAISAL TO OBTAIN THE POLICY.
THE YEAR AFTER THE HURRICANES HIT, HE INCREASED THEIR COVERAGE FROM 49 MILLION TO 68 MILLION.
WE BELIEVE THAT IT WAS FAILURE TO DISCLOSE HIS BELIEF, HIS ACTUAL ADMITTED BELIEF, THAT THEY WERE UNDERINSURED THAT WAS THE BREACH OF FIDUCIARY DUTY.
NOW, HE CLAIMS HE DISCLOSED IT, BUT THE RECORD SUGGESTS CONTRARY.
>> AND IS THAT THE NEGLIGENCE CLAIM THAT THE 11TH CIRCUIT SAYS WE'RE SUPPOSED TO LOOK AT --
>> THAT'S PART OF IT. THERE'S A FEW MORE ELEMENTS TO IT.
>> WHY ISN'T THAT A BREACH OF CONTRACT?
>> WELL, THAT GOES BACK TO THE

LAW OF THE STATE.
IN TOOMEY, THIS COURT DECIDED SEVERAL YEARS AGO THAT AN INDEPENDENT BREACH OF FIDUCIARY DUTY AND POSSIBLY A NEGLIGENCE CLAIM IN THE ALTERNATIVE ARE ALL AVAILABLE.
THIS GOES TO THE SPECIAL NATURE OF WHAT HAPPENS IN A BROKERAGE SITUATION.
THE COMMON, EVERYDAY SITUATION WHERE A CONSUMER CALLS THE BROKER, DEFINES THE NEED, THE POLICY'S OBTAINED, AND THE TRANSACTION'S COMPLETED.
THERE'S NO NEGOTIATION ABOUT WHO'S GOING TO ACCEPT RESPONSIBILITY FOR LOSS.
THAT'S WHY WE THINK THE LAWS OF THIS STATE IMPOSE THAT FIDUCIARY DUTY.
BEYOND THAT, THE CUSTOMERS IN THESE SITUATIONS SIMPLY DON'T HAVE THE FINANCIAL, OR, I'M SORRY, THE SOPHISTICATION TO GO TOE TO TOE AND DEAL WITH THE BROKER.
>> WELL, THAT REALLY WOULDN'T APPLY IN A CONTEXT LIKE THIS WHERE, OBVIOUSLY, WE HAVE AN ENMITY THAT HAS AN EXTREMELY VALUABLE ASSET, AND THERE'S A LOT OF MONEY INVOLVED.
WE'D HAVE TO ASSUME THEY HAVE ACCESS TO SOPHISTICATED ADVICE.
>> WELL, THAT'S PRECISELY THE ISSUE IN THE CASE.
CONDOMINIUM ASSOCIATION BOARDS JUST LIKE THE TIARA SEEK EXPERT, PROFESSIONAL ASSISTANCE TO MAKE THOSE DECISIONS.
THAT'S WHY THEY HIRED MARSH IN THE FIRST PLACE.
THEY HIRED MARSH TO MAKE SURE THAT THEY WERE PROPERLY INSURED AND THEY WERE CARRYING OUT THEIR

RESPONSIBILITIES AS BOARD OF
GOVERNOR MEMBERS.
>> LET ME MAKE SURE I UNDERSTAND
THE DIFFERENCE WITH THE BREACH
OF CONTRACT AND THEN THE
NEGLIGENCE.
IF THERE ARE CASES WHERE YOU ASK
THE BROKER GET ME A POLICY FOR A
MILLION DOLLARS AND THAT'S THE
ORAL CONTRACT AND THEN THE
BROKER DOESN'T GET THE POLICY,
OKAY, THAT WOULD BE BOTH A
BREACH OF CONTRACT AND MIGHT BE
A NEGLIGENT FAILURE TO OBTAIN
COVERAGE HERE.
THERE ISN'T A DISPUTE, THE
COVERAGE THAT AT LEAST WAS ASKED
FOR WHICH WAS 150 MILLION WAS
OBTAINED, YOUR ARGUMENT IS THAT
THEY WERE NEGLIGENT IN NOT
ADVISING THEM TO GET MORE
INSURANCE, IS THAT THE CLAIM?
>> NO.
>> I MEAN, YOU OUGHT TO BE ABLE
TO FOR THIS COURT EVEN THOUGH WE
DON'T HAVE TO RULE ON THE
NATURE, I MEAN, WHETHER IT'S A
VIABLE CAUSE OF ACTION, BE ABLE
TO EXPLAIN TO US SO THAT WE ARE
NOT CONFUSED WHAT IS THE CAUSE
OF ACTION.
>> SURE.
IT, AS I SAID, IS A FAILURE TO
DISCLOSE.
IT'S NOT -- PUT YOURSELF IN A
NUMBER OF --
>> A FAILURE TO DISCLOSE THAT
THEY WERE UNDERINSURED.
>> YES.
>> IS THAT IT?
ANY OTHER CLAIM?
>> THERE IS ALSO A COINSURANCE
PROVISION THAT SHOWED UP IN THE
POLICY.
ACCORDING TO MARSH'S INTERNAL --
WHAT THEY CALL PROFESSIONAL

STANDARDS -- THEY'RE REQUIRED TO
DISCUSS IN WRITING WITH THE
INSURED THE IMPACT OF THAT
COINSURANCE PROVISION.
NONE OF IT WAS DISCLOSED.
AND, IN FACT, LATER AFTER THE
HURRICANES HIT CITIZENS
CONTACTED MARSH AND ASKED FOR
THE MOST CURRENT APPRAISAL
SPECIFICALLY FOR THE PURPOSE, AS
THEY STATED, TO DO A COINSURANCE
INVESTIGATION.
THE BROKER ADMITTED AGAIN IN
DEPOSITION THAT HE DID NOT
DISCLOSE THAT BACK TO TIARA.
>> MAYBE THE BETTER WAY TO DO
THIS SO WE DON'T HAVE YOU
AMENDING WHATEVER YOUR CAUSE OF
ACTION IS.
IN THE SECOND AMENDED COMPLAINT,
IS THAT WHAT WE'RE SUPPOSED TO
BE LOOKING AT?
>> YES, I BELIEVE.
>> OKAY.
IF YOU GO TO THE COUNTS OF
NEGLIGENCE AND BREACH OF
FIDUCIARY DUTY, WILL THAT TELL
US WHAT YOUR CAUSE OF ACTION IS?
>> YES.
>> IS THAT WHAT -- SO FOR THE
PURPOSES OF THE 11TH CIRCUIT
QUESTION, THE ONLY ISSUE IS,
THEN, WHETHER THAT CLAIM FOR
NEGLIGENCE OR BREACH OF
FIDUCIARY DUTY IS COVERED OR
EXEMPTED BECAUSE IT'S AN
ECONOMIC LOSS RULE?
>> YES, WHETHER THE ECONOMIC
LOSS --
>> AND YOU'RE SAYING THAT
SOMEHOW WE HAVE OVER A SERIES OF
CASES EQUATED PROFESSIONAL
SERVICES WITH WHETHER THEY'RE
PROFESSIONAL FOR THE PURPOSE OF
THE TWO-YEAR STATUTE OF
LIMITATIONS?

>> I DON'T THINK --
>> IS THAT WHAT WE'VE DONE?
>> I DON'T THINK SO.
THE COURT HAS USED, VARIOUS COURTS IN THE STATE HAVE USED LANGUAGES THAT ANALOGIZE BROKERS TO ATTORNEYS AND ACCOUNTANTS.
I'M NOT GOING TO SAY TO THIS COURT THAT YOU'VE MADE ANY FINDING ONE WAY OR THE OTHER.
I DON'T THINK IT HAS TO DO WITH WHETHER THEY'RE PROFESSIONAL, IT HAS TO DO WITH THE FACT THAT BREACH OF FIDUCIARY DUTY IS A LONGSTANDING COMMON LAW TORT, AND THIS COURT IN BOTH MORANSAIS AND AMERICAN AVIATION SAID THAT'S ANOTHER CATEGORY OF CLAIM.
WE DO NOT WANT TO EXTEND THE ECONOMIC LOSS RULE TO --
[INAUDIBLE]
AND WHEN YOU LOOK AT THE HISTORY OF THE DEVELOPMENT OF THE LAW STARTING WITH MORANSAIS AND FINISHING WITH -- THE COURT HAS EXPRESSED ITS VIEW THAT IT WANTS TO LIMIT THE APPLICATION OF THE ECONOMIC LOSS RULE.
THE PUBLIC POLICY ISSUE OF REMOVING THE LIABILITY OF BROKERS AND UNDERMINING YEARS OF CASE LAW ON THE EXISTENCE OF THAT FIDUCIARY DUTY IS, IS ENORMOUS.
>> [INAUDIBLE]
WE MENTIONED THE BREACH OF FIDUCIARY DUTY --
[INAUDIBLE]
FAILURE TO DISCLOSE THE FACT THAT THEY WERE UNDERINSURED.
WHO DECIDES HOW MUCH INSURANCE IS NEEDED IN A BUILDING?
DOES A BROKER DO THAT?
>> IN THIS CASE --
>> WHO DO THEY HIRE TO MAKE THAT

DETERMINATION?
>> IN THIS CASE, THE TIARA RETAINED MARSH TO EVALUATE ITS INSURANCE PROGRAM.
IT HAD BEEN DOING IT FOR SEVERAL YEARS PRIOR TO 2004.
EACH YEAR WHAT MARSH WOULD DO WOULD BE TO GO THROUGH AND LOOK AT ALL OF THE DIFFERENT INSURANCE PRODUCTS AND EVALUATE WHETHER THEY WERE THE RIGHT POLICY AND HOW MUCH SHOULD BE OBTAINED.
>> IS THERE A PROCESS INVOLVED IN DETERMINING HOW MUCH INSURANCE A BUILDING WILL REQUIRE?
>> WHEN IT COMES TO PROPERTY INSURANCE, YES.
THE PROCESS INVOLVES, TYPICALLY, AN APPRAISAL.
IN THIS PARTICULAR INSTANCE IN 2004, THE COMPANY THAT DID THE PRIOR APPRAISAL ACTUALLY CONTACTS THE TIARA AND SUGGESTED THAT THEY NEEDED A NEW APPRAISAL.
TIARA'S BOARD WENT TO MARSH IN WRITING AND SPECIFICALLY SAID, DO WE NEED TO GET A NEW APPRAISAL?
AND MARSH SAID IN WRITING, YOU DO NOT NEED TO GET AN APPRAISAL.
AND THAT WAS FROM THE GUY WHO TESTIFIED UNDER OATH THAT HE KNEW THEY WERE UNDERINSURED EVEN THOUGH HE TOLD THEM THEY DIDN'T NEED A NEW APPRAISAL WHICH WOULD HAVE BEEN THE BASIS FOR EVALUATION.
>> SO THE BASIS FOR THE BROKER TESTIFYING THAT THEY WERE UNDERINSURED, WAS THAT ON THE FACT THAT THERE WASN'T AN AGGREGATE AMOUNT OF 100 MILLION OR 50 MILLION?

HE DETERMINED THAT $50 MILLION
WAS NOT ENOUGH.
>> HE DETERMINED THAT $50
MILLION FOR A SINGLE LIMIT WAS
NOT ENOUGH.
HE TESTIFIED THAT HE BELIEVED IT
WOULD HAVE BEEN MORE, IF NOT
SUBSTANTIALLY MORE IF HE HAD
DONE A NEW APPRAISAL.
HE ALSO TESTIFIED THAT HE
BELIEVED HE HAD A DUTY TO
DISCLOSE THE FACT THAT HE
BELIEVED THEY WERE UNDERINSURED.
>> BUT I STILL DON'T UNDERSTAND
WHY THESE THINGS -- IF FACTS ARE
AS YOU PRESENT THEM, WHY THOSE
FACTS WOULD NOT CONSTITUTE A
CLAIM FOR BREACH OF CONTRACT.
>> WELL, YOUR HONOR, WE ARGUE
THAT THEY WOULD.
>> WELL, I'VE NOTICED THAT TOO.
>> BUT THE 11TH CIRCUIT AGREED
WITH THE TRIAL COURT AND SAID,
NO, THEY'RE NOT -- THEY
DIDN'T -- THEIR CONTRACTUAL DUTY
WAS NARROWER THAN THAT.
AND THAT'S WHY WE SAY IF THAT'S
TRUE, IT'S GOT TO BE A BREACH OF
FIDUCIARY --
>> WELL, WHAT YOU'RE SAYING, I
MEAN, THE CONTRACT WAS TO GET
THE INSURANCE THAT THEY GOT, YOU
KNOW, THE CITIZENS INSURANCE.
SO THEY'D HAVE BREACHED THEIR
CONTRACT IF THEY HADN'T GOTTEN
WHAT WAS CONTRACTED.
THIS ISSUE OF WHETHER THERE WAS
AN ADDITIONAL RELATIONSHIP,
WHICH YOU HAVE SAID YOU'RE
ASSERTED AND WE'VE GOT TO ACCEPT
IT AS TRUE, IS WHETHER THERE
WAS, THEY HAD AN OBLIGATION TO
RECOMMEND THAT THEY GET
ADDITIONAL INSURANCE, IS THAT
RIGHT?
>> I THINK THAT'S CORRECT.

I DON'T AGREE WITH WHAT THE 11TH CIRCUIT DID, BUT IF YOU'RE GOING TO LIMIT THE CONTRACT WITH MARSH TO ACTUALLY GOING OUT AND BUYING THE POLICY, THEN THAT ISN'T THE TOTALITY OF THE RELATIONSHIP.
THERE WAS A LOT OF TIME AND ENERGY PREDATING THE ORDER TO GO BY THE POLICY WHERE THIS FAILURE TO DISCLOSE OCCURRED.
AND THAT'S WHAT GETS PICKED UP WITH THE FIDUCIARY DUTY CLAIM.
WITH THAT, ALL I WANTED TO DO WAS FINISH ON THIS NOTION OF THE PUBLIC POLICY THAT DICTATES THE EXISTENCE OF THIS FIDUCIARY DUTY.
AND IT'S THE UNIQUE RELATIONSHIP THAT BROKERS HAVE TO THEIR CLIENTS, CUSTOMERS, HOWEVER YOU WANT TO PUT THEM.
CUSTOMERS AND WHOLE INDUSTRIES RELY ON ADVICE THAT THEY GET FROM THEIR BROKERS.
FOR INSTANCE, THE CONSTRUCTION INDUSTRY REGULARLY TURNS TO BROKERS TO ADVISE ON THE TYPES OF INSURANCE AND AMOUNT OF INSURANCE FOR PROJECTS.
IF BROKERS DON'T HAVE THESE KINDS OF FIDUCIARY OBLIGATIONS AND EXTRA CONTRACTUAL RIGHTS, THE WHOLE SYSTEM BEGINS TO CRUMBLE AND FAIL.
NONE OF US WANT TO KNOW HOW TO READ AN INSURANCE POLICY OR FIGURE OUT HOW MUCH INSURANCE TO GET, AND THAT'S WHAT'S AT STAKE HERE.
IF FIDUCIARY DUTY CLAIM IS UNDERMINED OR THE NEGLIGENCE CLAIM IS UNDERMINED, THEN THE ABILITY TO RELY IS REDUCED TO WHAT'S IN THE CONTRACT.
AND YOU CAN IMAGINE A SITUATION WHERE A LARGE, SOPHISTICATED

BROKER LIKE MARSH STARTS
BUILDING IN WAIVERS INTO THE
CONTRACT TO AVOID THIS
LIABILITY.
AND, IN FACT, A RECENT DECISION
OF ONE OF THE DISTRICT COURTS
HERE CONCLUDED THAT THEY DOUBTED
WHETHER A BROKER OR A FIDUCIARY
COULD LIMIT THEIR RESPONSIBILITY
BY CONTRACT.
AND THAT WAS ALSO A POINT THAT
WAS MADE IN MORANSAIS IN THE
CONTEXT OF AN ATTORNEY.
SO I'M NOT EVEN SURE WE'RE LEFT
WITH AN ENVIRONMENT IF THOSE
CLAIMS DISAPPEAR WHERE THERE
WOULD BE A CONTRACT THAT COULD
ACTUALLY REMOVE OR WIPE OUT
THOSE CLAIMS.
THANK YOU.
>> MAY IT PLEASE THE COURT,
CHRIS ST. JEANOS ON BEHALF OF
MARSH USA.
I'D LIKE TO SPEND A MINUTE, IF I
COULD, ON THE FACTS OF THE CASE
JUST TO PUT THE LEGAL QUESTION
BOTH RAISED BY THE APPELLANT AND
BY THE 11TH CIRCUIT IN CONTEXT.
THE AREA IS A 43-STORY,
OCEANFRONT CONDOMINIUM.
NOT SURPRISINGLY, IT'S DIFFICULT
TO OBTAIN SUCH THINGS AS
WINDSTORM, HURRICANE INSURANCE.
THEY HAVE AN INSURANCE COMMITTEE
OF THE BOARD THAT HAS ON IT,
AMONG OTHERS, A LAWYER WITH
DECADES OF EXPERIENCE, A RETIRED
PARTNER FROM AN AUDITING FIRM,
PriceWaterhouseCoopers, AS
WELL AS AN INSURANCE COMPANY
EXECUTIVE.
THEY HIRED MARSH IN 2002 TO,
AMONG OTHER THINGS, OBTAIN THIS
WINDSTORM POLICY, AND THEY
NEGOTIATED AND ENTERED INTO A
CONTRACT THAT WAS IN PLACE EACH

YEAR.
THE CONTRACT FOR THIS YEAR WHICH WAS SET FORTH IN A LETTER AGREEMENT IS IN THE DOCKET, DOCUMENT 952.
IMPORTANTLY, LAID OUT STEP BY STEP PRECISELY THOSE THINGS THAT MARSH WAS SUPPOSED TO DO.
IT APPORTIONED RESPONSIBILITY BETWEEN THE PARTIES BY, FOR EXAMPLE, NOTING THAT WHATEVER INFORMATION WAS GIVEN TO IT BY TIARA AND ITS OTHER EXPERTS, MARSH WAS NOT RESPONSIBLE TO VERIFY THE ACCURACY OF SUCH APPRAISALS.
IMPORTANTLY, THAT CONTRACT SAID IF THERE ARE ADDITIONAL THINGS YOU WANT US TO DO, WE SHOULD ENTER INTO ANOTHER AGREEMENT, AND WE SHOULD TALK ABOUT COMPENSATION FOR THAT AND PUT IT DOWN ON PAPER SO IT'S CLEAR.
>> WAIT, WAIT, WAIT, LET ME MAKE SURE I UNDERSTAND WHERE YOUR ARGUMENT'S GOING.
YOU'RE SUGGESTING THAT INSURANCE BROKERS IN THE STATE OF FLORIDA EVEN THOUGH THEY GET A 15-20% COMMISSION ON WHAT THEY SELL, THAT IT'S JUST TO SELL THE POLICY AND THAT'S IT?
>> NO.
NO, YOUR HONOR, I THINK, JUSTICE LEWIS, IT'S MORE THAN THAT.
I DO THINK, HOWEVER, WHEN THEY ENTER CONTRACTS THAT LAY OUT, FOR EXAMPLE, 15, 20 ACTIVITIES THEY HAVE TO ACCOMPLISH AND SAY THERE'S MORE, THAT THE CONTRACT DOES CONTROL.
>> BUT, YOU SEE, IF WE'RE HERE -- AND I APPRECIATE YOUR LETTING US KNOW THAT.
WE'RE NOT HERE AS SOMETHING THAT CAME UP FROM THE TRIAL COURT.

WE'VE BEEN ASKED TO ASSUME THAT
A BREACH OF CONTRACT CASE IS NOT
BEFORE US, BUT THAT THERE IS A
SEPARATE ACTION FOR NEGLIGENCE
AND BREACH OF FIDUCIARY DUTY
THAT THE 11TH CIRCUIT SAYS STILL
STANDS.
SO IF YOU COULD HELP ME ON, YOU
KNOW, YOUR ARGUMENT WILL
PROBABLY BE IF THIS EVER WENT TO
A JURY THAT THEY DIDN'T DO
ANYTHING WRONG.
THEY DID -- AND THAT'S A GOOD
ARGUMENT.
AND YOU MAY VERY WELL PREVAIL ON
THAT.
BUT WHAT WE'RE TRYING TO DO IS
SORT OUT THE LAW ON WHETHER
THERE CAN BE A SEPARATE ACTION
AGAINST AN INSURANCE BROKER
UNDER FLORIDA LAW FOR NEGLIGENCE
IN NOT ADVISING ON OTHER TYPES
OF INSURANCE OR A BREACH OF
FIDUCIARY DUTY OUTSIDE THE
CONTRACT.
SO IF YOU CAN INDULGE ME AND SAY
IF -- IS HE CORRECT IN WHAT HE'S
ALLEGING, THAT THEY WERE
NEGLIGENT IN, OR YOUR CLIENT WAS
INNOCENT IN NOT DOING?
YOU MAY NOT AGREE WITH IT, BUT
WE'VE GOT TO TAKE IT AS THESE
ARE THE ALLEGATIONS.
>> CERTAINLY, JUSTICE PARIENTE.
I DON'T AGREE THAT THE CLIENT
WAS NEGLIGENT.
THE DISTRICT COURT OR JUDGE
HURLEY DETERMINED UNDER THE
TERMS OF THE CONTRACT AS WELL AS
UNDER NEGLIGENCE --
>> WE'RE NOT, THIS IS ALWAYS
FRUSTRATING WHEN IT COMES TO THE
11TH CIRCUIT BECAUSE WE'RE SORT
OF LIMITED.
WE'VE GOT TO -- THEY'VE ALREADY
TOLD US THAT WE ARE TO ASSUME, I

MEAN, I GUESS WE COULD TRY TO
SAY, LISTEN, PLEASE, TELL THEM
THERE'S NO CLAIM FOR NEGLIGENCE
AND BREACH OF FIDUCIARY DUTY
REGARDLESS OF THE ECONOMIC LOSS
RULE THAT, YOU KNOW, THE
CONTRACT IS DISPOSITIVE.
BUT IF THERE -- WHAT DID THE
11TH CIRCUIT TELL US?
THEY SAID THAT WE NEED TO LOOK
AT WHETHER THE NEGLIGENCE CLAIM
AND THE BREACH OF FIDUCIARY
CLAIM IS BARRED BY THIS, QUOTE,
"ECONOMIC LOSS RULE."
>> THAT'S CORRECT.
>> IS THAT CORRECT?
>> YES.
>> SO IT'S UP TO THIS COURT THEN
TO DECIDE IF ECONOMIC LOSS RULE
EVEN HAS ANY APPLICABILITY IN A
CASE LIKE THIS, CORRECT?
>> ABSOLUTELY.
>> OKAY.
AND SO WHAT I WOULD -- BECAUSE,
YOU KNOW, AND THIS WILL BE
SOMETHING I GUESS I'LL HAVE TO
TALK TO MY COLLEAGUES ABOUT.
YOU KNOW, IT'S AN EMBARRASSMENT
TO ME.
BUT IN THE 2004 OPINION IN
INDEMNITY INSURANCE WHICH ALSO
CAME THROUGH CERTIFIED
QUESTIONS, AND IT DID HAVE TO DO
WITH DEFECT OR A PROBLEM WITH
THE AIRCRAFT, WE MADE A
STATEMENT IN, TOWARDS THE END OF
THE OPINION WHICH IS SEVERAL
JUSTICES ON THIS COURT HAVE
SUPPORTED EXPRESSLY LIMITING THE
ECONOMIC LOSS RULE TO IT
PRINCIPLED ORIGINS.
AND AS JUSTICE WELLS STATED, THE
ECONOMIC LOSS RULE SHOULD BE
LIMITED TO CASES INVOLVING A
PRODUCT WHICH DAMAGES ITSELF BY
REASON OF A DEFECT.

TWO JUSTICES SUBSEQUENTLY JOINED JUSTICE WELLS WHEN HE REITERATED HIS POSITION IN CONTEXT IN WHICH JUSTICE LEWIS AND MYSELF JOINED. WE NOW AGREE THAT THE ECONOMIC LOSS RULE SHOULD BE EXPRESSLY LIMITED.

NOW, OBVIOUSLY, COUNSEL WAS VERY HONEST TO SAY HE DIDN'T READ THAT AS SAYING WE WERE INTENDING TO LIMIT IT TO THE PRODUCTS LIABILITY CONTEXT, BUT WE DID GO ON AND SAY THAT WE AFM, WHICH IS A CASE WHERE YOU'VE GOT A SITUATION THAT YOU CAN'T HAVE A SEPARATE RULE OF LAW, IF YOU HAVE A BREACH OF CONTRACT WHICH PROVIDES SOME REMEDIES, YOU DON'T HAVE THEN EXTRACONTRACTUAL -- YOU CAN'T GET AROUND THE CONTRACT BY SAYING IT'S A NEGLIGENT BREACH OF CONTRACT.

THAT WE SAID THAT REALLY, THAT'S A RULE -- NOT THE ECONOMIC LOSS RULE, BUT THAT'S A RULE THAT ALSO STILL IS VALID.

SO INDULGE ME, IF ECONOMIC LOSS RULE ONLY APPLIES IN FLORIDA TO PRODUCTS LIABILITY CASES, WHAT IS THE OTHER PRINCIPLE THAT YOU'RE ALLEGING WOULD PREVENT A SUIT FOR IN THIS CONTEXT FOR BREACH OF FIDUCIARY DUTY AND NEGLIGENCE?

>> THE QUESTION CERTIFIED BY THE 11TH CIRCUIT, I THINK THE ONLY QUESTION IS WHETHER THE ECONOMIC LOSS RULE APPLIES OR DOES NOT --

>> AND IF WE SAY IT DOESN'T APPLY BECAUSE IT'S NOT A PRODUCTS LIABILITY CASE, THAT WOULDN'T MAKE YOU VERY -- THAT'S NOT THE END OF THE STORY.

IT MAY APPLY NOT THE ECONOMIC LOSS RULE, BUT OTHER THEORIES OF

LIMITING DAMAGES TO CONTRACTS
MAY APPLY WHERE THERE ARE
PARTIES OF CONTRACT, IT'S NOT
CALLED THE ECONOMIC LOSS RULE.
>> I THINK, YOUR HONOR, IF I
UNDERSTAND THE QUESTION, IF THE
CASE WAS SENT BACK TO THE 11TH
CIRCUIT WITH AN ANSWER IN THE
AFFIRMATIVE THAT A BROKER IS A
PROFESSIONAL, THE ECONOMIC LOSS
RULE DOESN'T APPLY, I DO THINK
THE 11TH CIRCUIT OR DISTRICT
COURT WOULD HAVE TO DETERMINE
UNDER ARE THAT CIRCUMSTANCE
WHETHER A BROKER OWES OR
NEGLIGENCE DUTY WAS MET HERE.
THE DISTRICT COURT DETERMINED IT
WAS NOT.
THE 11TH CIRCUIT HASN'T SPOKEN
ON THAT.
I THINK JUST A BIT MORE CONTEXT,
BOTH THE 11TH CIRCUIT AND THE
DISTRICT COURT SAID YOU GOT
EXACTLY WHAT YOU BARGAINED FOR,
TIARA.
THEY THEN TOOK THOSE EXACT
CLAIMS.
THEY DID ALLEGE WE -- NO MORE
THAN A STATEMENT OF THE
CONTRACT, SAME DAMAGES, SAME
COMPLAINTS.
FINE, IF IT WASN'T IN OUR
CONTRACTS, WE ALLEGE IT AS
NEGLIGENCE AND BREACH OF
FIDUCIARY DUTY.
SO THE QUESTION BECOMES, AND I
THINK THE 11TH CIRCUIT SAW AN
ISSUE OF WHETHER OR NOT UNDER
PERHAPS THREE QUESTIONS DOES THE
ECONOMIC LOSS RULE BAR THAT
CLAIM.
THE FIRST, WHICH THEY DID SPEND
A GOOD PORTION OF THEIR BRIEF
ON, WAS AN ARGUMENT THAT AN
EXAMINATION OF THIS COURT'S
JURISPRUDENCE ON THE ECONOMIC

LOSS RULE INDICATES THAT IT NO
LONGER APPLIES TO A CONTRACT FOR
SERVICES.
I THINK, AS COUNSEL CONCEDED,
THAT IS INCORRECT.
THE COURT IN ITS DECISION IN
INDEMNITY DID LAY OUT PRODUCTS
LIABILITY --
>> BUT DID YOU READ THE END OF
THE OPINION?
>> I DID, YOUR HONOR.
AND INCURRED IN JUSTICE QUINCE'S
OPINION IT WAS SPECIFICALLY
STATED THERE ARE TWO VERY
SPECIFIC TIMES WHEN IT APPLIES.
ONE IS PRODUCTS LIABILITY, THE
OTHER IS WHEN THE PARTIES ARE IN
CONTRACTUAL PRIVITY AND THE
PARTY IS SEEKING TO DO BETTER
THROUGH TORT.
>> WELL, IS THAT ANOTHER -- YOU
KNOW, MAYBE MY PROBLEM IS
CALLING IT THE ECONOMIC LOSS
RULE AS OPPOSED TO CALLING IT
WHAT WE, YOU KNOW, THE AFM WHERE
WE ARE, WHERE IT IS THAT WHEN
PARTIES CONTRACT THEY CANNOT --
IN MANY CASES THERE'S NOT A
SEPARATE ACTION FOR NEGLIGENT
BREACH OF THE CONTRACT BECAUSE
IT'S THE CONTRACT THAT WOULD
CONTROL IF THEY'RE IN
CONTRACTUAL PRIVITY.
NOW, I DON'T KNOW WHAT I'D NAME
THAT DOCTRINE, BUT FOR MY
PURPOSES IT'S BETTER NOT TO CALL
IT THE ECONOMIC LOSS RULE.
>> UNDERSTOOD.
>> IT MIGHT BE THE CONTRACTUAL
PRIVITY RULE.
BUT I DID, YOU KNOW, WHICH SAYS
THE PARTIES ARE -- YOU KNOW,
THEY'VE MADE THE BENEFIT OF THE
BARGAIN, EITHER THEY'VE BREACHED
THAT CONTRACT OR THEY HAVEN'T.
BUT HERE WE'VE HAD CASE AFTER

CASE WHICH HAS INSURANCE BROKERS HAVING MAYBE EITHER GOTTEN THE INSURANCE THAT THEY AGREED ON, BUT WHERE PARTIES HAVE SUED THEM BECAUSE THEY HAVEN'T DONE OTHER THINGS IN THE COURSE OF THE RELATIONSHIP THAT THEY SAY WERE A BREACH OF FIDUCIARY DUTY.
AND, YOU KNOW, THAT'S WHEN WE SAID INDEMNITY THAT WE NOTED THAT EVEN WHERE THERE'S AN UNDERLYING ORAL OR WRITTEN CONTRACT THAT THERE CAN BE ACTIONS FOR BREACH OF FIDUCIARY DUTY.
SO HOW DO THOSE TWO CONCEPTS GO SIDE BY SIDE?
>> SURE.
I DON'T THINK THIS COURT'S RULING IN INDEMNITY BARRED, FOR EXAMPLE, FIDUCIARY DUTY AND NEGLIGENCE CLAIMS IN EVERY SINGLE CASE.
WE ARE NOT SUGGESTING THERE IS A BRIGHT LINE RULE THAT THE TORTS IN FLORIDA OF FIDUCIARY DUTY AND NEGLIGENCE HAVE GONE OUT THE WINDOW.
IN THE SAME RESPECT, I THINK TIARA IS WRONG TO SAY THAT EITHER IN THAT DECISION OR OTHERS ANY COURT HAS PUT A BRIGHT LINE RULE UP THAT SAYS FIDUCIARY DUTY AND NEGLIGENCE CLAIMS ARE NEVER BARRED.
THERE ARE A NUMBER OF DECISIONS, AND INCLUDING LANGUAGE FROM THIS COURT'S DECISIONS IN BOTH CASA CLARA AND HTP THAT I THINK LAY OUT WHAT THE RULE IS.
AND WHETHER WE CALL IT ECONOMIC LOSS RULE OR PERHAPS BEING STUCK WITH THE BARGAIN YOU STRUCK RULE, I THINK IT'S CLEAR TO THE EXTENT YOU'RE ALLEGING A CLAIM, FIDUCIARY DUTY OR NEGLIGENCE, IT

REALLY IS NO MORE THAN A
RESTATEMENT OF YOUR CONTRACT
PLAN.
>> BUT THAT WOULD ALWAYS BE THE
CASE BECAUSE YOU WOULD HAVE NO
FIDUCIARY DUTY OR NEGLIGENCE
CLAIM BECAUSE THE RELATIONSHIP
THAT YOU ENTER INTO THAT CREATES
THOSE DUTIES IS ALWAYS BASED ON
SOME DISCUSSION THAT YOU'RE
GOING TO DO SOMETHING.
>> I AGREE.
>> SO WHAT YOU'RE SAYING IS THAT
THAT RULE SWALLOWS EVERYTHING,
AND THERE'S NO LONGER FIDUCIARY
DUTY OR NEGLIGENCE CLAIMS UNDER
THESE CIRCUMSTANCES.
AND, I MEAN, FLORIDA HAS
RECOGNIZED, I MEAN, PROBABLY
SINCE BACK IN THE '20s THAT AN
INSURANCE BROKER HAS AN
OBLIGATION TO PROCURE COVERAGE
FOR THE CLIENT.
AND IT'S NOT JUST GETTING, I
MEAN, YOU GO TO BROKERS TO FIND
OUT WHAT KIND OF INSURANCE IS IN
THE MARKET, WHAT'S IN THE
MARKETPLACE.
THAT'S THE DIFFERENCE OF DEALING
WITH AGENTS.
AND YOU CAN TAKE, THE BROKERS
CAN TAKE IT WHEREVER THEY WANT.
BUT TO SAY THAT ANYTIME THAT
THERE IS AN AGREEMENT THERE'S NO
FIDUCIARY DUTY OR TORT JUST RUNS
CONTRARY TO FLORIDA LAW SINCE
THE '20s ANYWAY.
>> THAT'S WHY I THINK, JUSTICE
LEWIS, THAT'S NOT THE RULE.
THE RULE IS IF IT'S INEXTRICABLY
INTERTWINED, AND LET ME GIVE YOU
AN EXAMPLE BASED ON A CASE THAT
THEY CITE, THE INVO CASE.
IN INVO THERE WAS A SETTLEMENT
AGREEMENT THAT GAVE THE
PLAINTIFF IN THAT CASE THE RIGHT

OF FIRST REFUSAL IF CERTAIN
PROPERTY WAS SOLD.
THEY SUED FOR BREACH OF PROPERTY
SAYING THE PROPERTY WAS SOLD
WITHOUT THE RIGHT OF FIRST
REFUSAL BEING GIVEN.
SUBSEQUENT TO THE THAT, THEY
CLAIMED THE INDIVIDUALS WHO WERE
SUPPOSED TO GIVE THEM THAT RIGHT
BECAME THE TRUSTEES, HAD A
FIDUCIARY DUTY AND SUBSEQUENTLY
SQUIRRELED AWAY THE ASSETS,
SELLING IT TO A COUSIN AND A
WIFE OF THE DEFENDANT.
SO THERE'S, CLEARLY, A CONTRACT
THERE, BUT THE FIDUCIARY DUTY
CLAIM WAS AN EFFORT AFTER THE
CONTRACT HAD BEEN BREACHED TO
SORT OF KEEP SUCCESSFUL HERE
SLIGHTLY DIFFERENT.
>> IT'S TOTALLY DIFFERENT
BECAUSE WE RECOGNIZE IN FLORIDA
LAW THE OBLIGATIONS OF INSURANCE
BROKERS TO CUSTOMERS.
AND HAVE SINCE THE '20s.
>> I AGREE, BUT --
>> YOU'RE SAYING BECAUSE
SOMEBODY ENTERS A CONTRACT TO
BUY A PIECE OF REAL PROPERTY,
THEY TRY TO CONVERT THAT INTO A
TRUSTEE.
WE HAVE WELL ESTABLISHED LAW
ABOUT THE OBLIGATIONS OF BROKERS
TO CLIENTS IN FLORIDA.
>> ABSOLUTELY, JUSTICE LEWIS,
AND IT'S BEEN STATED OVER AND
OVER THAT A BROKER OWES AN
OBLIGATION TO GET THE INSURANCE
REQUESTED, AND IN THAT CASE THEY
DID.
THIS WAS ONE CARRIER --
>> WELL, THAT'S GOING TO BE, I
GUESS, DISPUTED.
YOU GO TO A BROKER, AND WHEN YOU
SAY, I NEED A POLICY, IT'S
BROADER THAN JUST POLICY X.

IF THAT, THEY DON'T NEED YOU.
THEY CAN GET THAT SOMEWHERE
ELSE.
SO THE LAW HAS DEVELOPED SO THAT
THERE ARE, YOU GO TO INSURANCE
PROFESSIONALS JUST LIKE YOU GO
TO A DENTIST.
>> AND PERHAPS TWO POINTS.
ONE IS THE BREACH HERE, JUST SO
WE'RE CLEAR, THE ALLEGED PROBLEM
IS WE GOT THEM THE ONLY POLICY
THAT EXISTED, CITIZENS --
>> WELL, THAT'S A DEFENSE.
AGAIN, THAT'S A DEFENSE TO
WHAT'S THERE.
>> BUT THE DISPUTE WAS THAT THEY
SAID THE APPRAISAL THAT THE
EXPERT APPRAISER GOT --
>> SEE, WE'RE NOT GOING BACK
INTO THE VALIDITY OF THE CAUSE
OF ACTION, WHO'S GOING TO
PREVAIL, AND THIS CASE MIGHT BE
GOING TO TAKE US DOWN A PATH TO
ESTABLISH FLORIDA LAW THAT'D BE
AWFUL.
>> NO, I THINK, JUSTICE LEWIS,
THE QUESTION YOU RAISE IS, I
THINK, EXACTLY WHAT THE 11TH
CIRCUIT MEANT BECAUSE YOU
MENTIONED A DENTIST OR A DOCTOR.
SO MAYBE IT BRINGS US RIGHT BACK
TO THE QUESTION OF WHETHER AN
INSURANCE BROKER IS A
PROFESSIONAL IN THIS STATE.
AND THE ANSWER TO THAT QUESTION,
I DO THINK, GETS TO WHAT YOU'RE
GETTING AT.
IF YOU GO TO A LAWYER, YOU GO TO
A DOCTOR, YOU DO SOMETIMES
EXPECT MORE.
YOU SAY GIVE ME KIDNEY SURGERY
BUT YOU NEED LIVER SURGERY --
>> BUT IN THE CONTEXT WE'VE BEEN
USING, THE PROFESSIONAL IS A
STATUTE OF LIMITATIONS ISSUE.
>> THAT'S ABSOLUTELY CORRECT.

>> YEAH.
SO IT HAS NOTHING TO DO -- WHAT YOU'RE DEALING WITH IS SOMEONE WHO'S TRAINED IN A SUBJECT MATTER BEYOND YOUR ABILITIES.
>> AND I RESPECTFULLY DISAGREE THAT THIS COURT'S DECISION IN BOTH PIERCE AND MORANSAIS ON WHO WAS A PROFESSIONAL DON'T APPLY TO THE EXCEPTION.
THIS COURT HAS SET UP AN EXCEPTION TO THE ECONOMIC LOSS RULE TO ADDRESS WHAT YOU'RE SAYING.
>> AND, YOU KNOW, IT CONSTANTLY AMAZES ME HOW WE TRY TO GET EVERYTHING RIGHT, AND YOU GO BACK AND READ JURISPRUDENCE.
I CAN USUALLY BEFORE 15 YEARS AGO I WASN'T INVOLVED --
[LAUGHTER]
WE WANT TO MAKE SOME SENSE OUT OF IT.
AND I'M STILL HUNG UP ON THIS THING.
I CAN BUY THE IDEA, AND I WAS JUST READING JUSTICE CANTERO'S OCCURRENCE.
EVEN WITHOUT THE ECONOMIC LOSS RULE, COURTS CONTINUE TO DENY RELIEF OF PLAINTIFFS WHO CANNOT PROVE A BREACH OF DUTY INDEPENDENT OF THE CONTRACT.
AND ISN'T THAT REALLY BOILED DOWN TO, IN ESSENCE, WHAT THE POLICY THAT WE'RE TALKING ABOUT IN CASES WHERE PARTIES ARE IN CONTRACTUAL PRIVITY WHERE THERE ARE PURELY ECONOMIC LOSSES IS THAT IF CONTRACT ENCOMPASSES THE ENTIRE RELATIONSHIP, THEN -- AND THEY TRY TO ALLEGE IT'S BREACH OF DUTY WITHIN THAT CONTRACT -- THEN IT MAY BE THERE IS NO OTHER DUTY THAT CAN BE ALLEGED.
BUT IF IN THE CASE OF INSURANCE

DEALINGS, AND AGAIN, I HAVE TO TAKE THAT THE 11TH CIRCUIT ASSUMED THERE WAS A SEPARATE OBLIGATION BECAUSE OTHERWISE THEY WOULD HAVE, THEY WOULDN'T HAVE CERTIFIED THIS.
IN OTHER WORDS, IF THEY THOUGHT THERE WAS NO SEPARATE FIDUCIARY DUTY, THEN THEY WOULD HAVE, THEY COULD HAVE AFFIRMED WHAT JUDGE HURLEY DID.
SO DON'T WE HAVE TO, FOR THE SAKE OF THIS, ASSUME THAT THERE IS A SEPARATE FIDUCIARY DUTY AND CLAIM OF NEGLIGENCE SEPARATE FROM THE CONTRACT?
>> BECAUSE THE 11TH CIRCUIT HAS NOT SAID, WELL, YOU KNOW, HASN'T ASKED US TO ADVISE ON THAT ISSUE.
>> I THINK, JUSTICE PARIENTE, IT'S THE OPPOSITE.
THE ECONOMIC LOSS RULE THIS COURT HAS SAID DOESN'T APPLY WHEN THE CLAIM AT ISSUE IS EXTRA CONTRACTUAL, THE TORT CLAIM.
SO IF IT HAD DETERMINED THAT THE TORT CLAIMS HERE WERE EXTRACONTRACTUAL, WHETHER OR NOT MARSH WAS A PROFESSIONAL WOULD NOT MAKE A DIFFERENCE.
>> BUT I THINK MAYBE WE HAVE MUDDIED THIS UP BECAUSE WE SAID ONLY A CONTRACT FOR SERVICES THAT INVOLVES A PROFESSIONAL, THEN THEY'RE SAYING, WELL, TELL US THAT AN INSURANCE BROKER IS A PROFESSIONAL AS OPPOSED TO THE ISSUE OF WHEN TWO PARTIES ENTER A CONTRACT, IF THEY'VE SET THEIR REMEDIES, ORDINARILY THEY'RE NOT GOING TO BE ABLE TO SUE IN TORT.
>> CORRECT.
>> OKAY, THAT'S THE CONCEPT.
THAT WAS THE CONCEPT WHEN, YOU KNOW, FOR THE LAST 100 YEARS.

THIS ECONOMIC LOSS RULE CAME OUT
OF PRODUCTS LIABILITY.
SO I ENDEAVOR TO TRY TO SEPARATE
THE TWO CONCEPTS, AND SO I'M
ASKING YOU AGAIN, IF WE DECIDE
THAT THE ECONOMIC LOSS RULE
DOESN'T APPLY IN THIS CASE
BECAUSE IT DOESN'T HAVE ANYTHING
TO DO WITH PRODUCTS CASES BUT WE
SAY THAT IT IS, IF THERE WAS A
CONTRACT, DO WE HAVE TO THEN
DECIDE WHETHER THE BREACH OF
FIDUCIARY DUTY WAS SEPARATE FROM
THE CONTRACT OR AROSE FROM THE
CONTRACT?
IS THAT, IS THAT SOMETHING
THAT --
>> I THINK, I THINK, JUSTICE
PARIENTE, IF WE DON'T CALL IT
THE ECONOMIC LOSS RULE BUT STILL
LOOK AT THOSE SAME PRINCIPLES
YOU'VE JUST DISCUSSED AND YOU
SET FORTH IN THE DECISION YOU
WROTE IN INDEMNITY WHICH IS A
PARTY TO A CONTRACT CANNOT BE
PERMITTED TO CIRCUMVENT THE
AGREEMENT, THAT IS IN EFFECT
SEEKING TO OBTAIN A BETTER
BARGAIN THAN ORIGINALLY MADE AND
NOTING THAT CONTRACT PRINCIPLES
ARE MORE APPROPRIATE THAN TORT
PRINCIPLES THEN, NO, I THINK THE
RULING HERE ONE THE SAME WHICH
IS THAT THERE ARE TORT CLAIMS
HERE ARE BARRED.
BECAUSE ALL THEY DID HERE WAS
SAY YOU BREACHED THE CONTRACT BY
NOT TELLING THAT OUR
APPRAISAL -- THAT OUR EXPERT
APPRAISER DID WAS IMPROPER.
BOTH COURTS, DISTRICT COURT,
CIRCUIT COURT SAID THAT YOU
HAVEN'T ALLEGED A BREACH OF
CONTRACT AND, IN FACT, WE'VE GOT
ATTORNEYS' FEES --
>> SO WHY, WHAT IS THE BREACH OF

FIDUCIARY DUTY THAT THE 11TH CIRCUIT'S ASKING US TO CONSIDER? WHAT'S THIS SEPARATE BREACH OF FIDUCIARY DUTY?
>> I THINK THEY'RE ASKING -- YOUR HONOR, THE 11TH CIRCUIT HASN'T RULED YET ON WHETHER THE ALLEGATIONS WOULD CONSTITUTE THE A BREACH OF FIDUCIARY DUTY.
I THINK THEY HAVE RULED THAT IT IS THE SAME CLAIM AS THE BREACH OF CONTRACT, AND THE ONLY EXCEPTION TO THAT THEN THAT THIS COURT SET FORTH IS IF WHERE A PROFESSIONAL -- I WOULD AGREE THAT IF WHERE A PROFESSIONAL LIKE A DOCTOR, LIKE AN ENGINEER THAT A CONTRACT THAT SAYS I WILL BE A GOOD ENGINEER, A GOOD LAWYER FOR YOU IS BROADER THAT BE WHAT THE TERMS OF THE CONTRACT ARE, AND FLORIDA PUBLIC POLICY IS NOT TO LIMIT THAT TO THE TERMS OF A CONTRACT.
>> WHEN WHAT DOES FLORIDA LAW SAY THE DUTY OF AN INSURANCE BROKER?
>> IT IS TO PROCURE THE COVERAGE REQUESTED BY THE CLIENT IN A PRUDENT MANNER.
THERE'S NO CASE THAT EXTEND THE DUTIES BEYOND THAT.
EVEN THE FIDUCIARY DUTY CASES -- EXCEPT FOR CASES WHERE THERE'S A LIE, LIKE RANDOLPH V. MITCHELL IN WHICH THE INSURANCE BROKER, AGENT LIED ABOUT WHAT WAS COVERED TO GET THE INDIVIDUAL TO ACCEPT THE POLICY.
IT'S TO PROCURE THE COVERAGE REQUESTED.
IT'S NOT TO MAKE SURE THAT IN ALL CIRCUMSTANCES UNDER ANY INSTANCE THAT THE INSURED IS COVERED.
>> WELL, THAT'S NOT THE -- I

MEAN, THAT'S NOT THE ALLEGATION HERE.
OF COURSE YOU CAN'T BE A GUARANTOR OF EVERYTHING IN THE WORLD.
BUT IF WE, IF WE STRIKE OUT DOWN THE PATH THAT INSURANCE BROKERS ARE NOT SPECIALISTS AT ASSISTING THE PUBLIC IN PROCURING INSURANCE COVERAGE IS SOMETHING THAT HAS BECOME TREMENDOUSLY COMPLEX AND CONVOLUTED, THEN WE HAVE GONE BACK TO THE '20s BECAUSE THERE ARE CASES THAT SAY THEY HAVE A DUTY TO USE REASONABLE CARE IN PROCURING THE INSURANCE.
SO THE QUESTION IS, WHAT IS THAT REASONABLE CARE THAT'S OWED?
>> I SEE MY TIME IS EXPIRED. COULD I JUST BRIEFLY RESPOND?
>> I'LL GIVE YOU ANOTHER COUPLE MINUTES.
>> THANK YOU, CHIEF JUSTICE.
TO USE THE SAME CARE AS OTHER PROFESSIONALS IN THE SAME AREA, IT IS TO PROCURE THE COVERAGE REQUESTED.
AND UNDERSTAND, JUSTICE LEWIS, WHAT WAS DONE HERE WAS THEY GOT THE POLICY THEY ASKED FOR --
>> AGAIN, WE'RE NOT -- AGAIN, YOU'RE TRYING TO GET US TO RULE ON THE MERITS OF IT.
>> I'M NOT, JUDGE.
>> I DON'T REALLY CARE ABOUT THE CASE ON AN INDIVIDUAL BASIS --
>> I DO THINK IT'S IMPORTANT TO UNDERSTAND WHAT THE ALLEGED BREACH IS HERE BECAUSE WHATEVER THE EXACT LINE IS, A BROKER MUST DO AND WHAT IT MUST DO TO, I THINK IF WE'RE CLEAR ON THIS SIDE, THIS IS NOT ONE OF THE DUTIES A BROKER HAS WHICH IS THEY HIRE AN APPRAISER, THE

APPRAISER SAYS THE BUILDING'S WORTH $50 MILLION, THEY GET A POLICY THAT DOESN'T PAY THEM 50, IT PAYS THEM 90.
AND THEY SAY, OH, THAT WASN'T ENOUGH TO REBUILD OUR BUILDING PRIMARILY BECAUSE THEY ENGAGED IN A DRAWING-OUT PROCESS AT THE URGING OF THEIR INSURANCE COMPANY --
>> IF THAT'S ALL THERE IS, YOU WIN.
BUT NOT BECAUSE OF THE ECONOMIC -- YOU WIN BECAUSE THERE'S, THEY DID WHAT THEY WERE SUPPOSED TO DO, AND THEY DID IT WITH, YOU KNOW, APPROPRIATE STANDARD OF CARE.
>> THAT'S WHY WE'VE GOT ATTORNEYS' FEES, JUSTICE PARIENTE.
I THINK HERE IF WE ARE DEEMED TO BE A PROFESSIONAL, THE DUTY IS TO INSURE THE WAY THEY ARE INSURED THE WAY THEY SHOULD BE AS COMPARED TO WORKING WITH A PROFESSIONAL BOARD AND SAY, YOU KNOW WHAT?
YOUR APPRAISER IS WRONG --
>> AGAIN, WE GET SO DOWN INTO THESE THINGS WE CREATE BAD LAW BECAUSE THERE HAPPENS TO BE ON THE BOARD WHERE GENERALLY IN FLORIDA YOU HAVE JUST RETIRED, ELDERLY FOLKS WHO GO TO PROFESSIONALS TO HELP THEM DO WHAT THEY'RE SUPPOSED TO DO.
SO, AGAIN, WE GET INTO THESE THINGS ABOUT DECIDING THIS CASE BECAUSE THEY HAD IT APPRAISED, I MEAN, THAT CAN PERVERT FLORIDA LAW.
SO, AGAIN, DO YOU DISPUTE THAT GOING BACK TO THE '20s THAT THERE ARE CASES, A LEGION OF CASES THAT SAY BROKERS MUST USE

DUE CARE IN THIS PROCURING THE INSURANCE?
>> I DISPUTE THAT THAT REQUIRES THEM TO INSURE --
>> WELL, AGAIN, I'M SORRY, YOU'RE GOING INTO THE --
>> NO, I SAY DUE CARE.
I GUESS THE REAL QUESTION IS, WHAT DOES THAT MEAN?
IF THEY ARE PROFESSIONAL, IT COULD MEAN WHAT YOU WERE SUGGESTING, AND YOU USED THE EXAMPLE OF A DENTIST.
IF THEY'RE NOT A PROFESSIONAL, THEN IT DOESN'T MEAN MORE THAN WHAT I'VE SAID, AND SO I DO THINK THE 11TH CIRCUIT PROBABLY HIT IT RIGHT ON THE HEAD WHICH IS ARE WE A PROFESSIONAL, AND I THINK THIS --
>> ARE YOU IN A CATEGORY OF HAVING SKILL AND BACKGROUND --
>> YOU CAN BECOME AN INSURANCE BROKER IN THE STATE BY WORKING FOR ONE YEAR AT AN INSURANCE AGENCY.
THAT'S THE ONLY LICENSING REQUIREMENT WHICH IS NO DIFFERENT --
>> [INAUDIBLE]
>> I'M SORRY, JUSTICE?
>> THAT'S PROBABLY WHAT WE OUGHT TO LET THE PUBLIC KNOW.
DON'T EXPECT ANYTHING FROM YOUR INSURANCE BROKER.
>> I THINK YOU CAN EXPECT THE BENEFIT OF YOUR BARGAIN AND NO MORE THAN THAT.
THANK YOU VERY MUCH.
>> THANK YOU.
>> I WILL GIVE YOU A COUPLE OF EXTRA MINUTES ALSO.
>> I'M ONLY GOING TO NEED A FEW, BUT THANK YOU.
LET'S BE CLEAR ABOUT SOMETHING.
THE RECORD IN THIS CASE

DEMONSTRATES THAT THIS WAS AN ORAL CONTRACT.
THE FACTS OF THIS CASE SHOW THAT THE BOARD MET WITH MARSH, AND UNLIKE WHAT YOU'VE HEARD FROM MARSH'S ATTORNEY --
>> YOU SAID IT WAS AN ORAL CONTRACT?
>> YES.
>> DIDN'T THE 11TH CIRCUIT COURT RULE THAT IT WASN'T?
>> I BELIEVE THEY SAID IT WAS AN ORAL CONTRACT, AND IT ENDED UP BEING CONSISTENT WITH WHAT MARSH PUT INTO LETTERS THAT WERE SENT TO THE TIARA LATER.
>> THE DISTRICT COURT WAS ALSO CORRECT IN REJECTING THE REMAINING BREACH OF CONTRACT CLAIMS BASED ON INADEQUATE EVIDENCE REGARDING THE SCOPE OF THE ORAL AGREEMENT.
>> WE DISAGREE WITH THAT RULING, OBVIOUSLY.
BUT THE POINT WE WANT TO MAKE --
>> WE'RE BOUND BY THAT.
WE CAN'T SAY SOMETHING DIFFERENT THAN WHAT THE 11TH CIRCUIT'S RULED ON.
>> I APPRECIATE THAT.
COUNSEL MADE A BIG DEAL OF THIS, AND I'M TELLING YOU THE FACTS OF THE MATTER ARE THE TESTIMONY FROM THE TIARA BOARD WAS THERE WAS NEVER A WRITTEN CONTRACT, AND NOBODY FROM MARSH HAS EVER BEEN ABLE TO POINT TO A DOCUMENT TIARA ASSIGNED.
MARSH WOULD SEND A LETTER ONCE A YEAR SAYING THIS IS WHAT WE AGREED TO DO.
NO ONE EVER SIGNED IT OR AGREED TO IT, BUT, YOU'RE RIGHT, IT'S NOT GERMANE TO THE DECISION YOU'RE MAKING HERE, I JUST NEEDED TO SET THE RECORD CLEAR.

THE OTHER THING, EVEN IF THAT DOCUMENT WERE THE CONTRACT, THERE'S NO REMEDIES.
THIS NOTION THAT THERE'S A BARGAIN FOR REMEDY OR LIMITATION OR WAIVER FOR A RIGHT OR CLAIM IN THAT DOCUMENT IS FALSE.
>> WHAT ABOUT HIS ARGUMENT THAT BROKERS IN FLORIDA CAN GET A LICENSE, IT'S NOT THAT HIGH OF A BAR TO GET A LICENSE IN FLORIDA TO BECOME A BROKER?
>> WELL, IN THIS PARTICULAR CASE I DON'T DISPUTE THAT THAT'S THE FACTUAL SITUATION.
IN THIS PARTICULAR CASE, MARSH COMPETED WITH OTHER BROKERAGE FIRMS TO GET THIS BUSINESS.
IT WAS VERY LUCRATIVE TO THEM.
AND SO THEY CAME IN AND REPRESENTED WE'RE NOT YOUR ORDINARY BROKER, AND WE WOULD ARGUE THAT IN TERMS OF ESTABLISHING THE FIDUCIARY RELATIONSHIP WHICH IS SOMETHING WE HAVE TO SHOW IN ADDITION TO THE FORMATION OF A CONTRACT.
>> WELL, IT SEEMS TO ME LOOKING BACK AT THIS 11TH CIRCUIT DECISION THAT THEY'VE, AT LEAST FOR THE PURPOSE OF OUR ARGUMENT HERE, THAT THE ISSUE OF -- IT WAS NOT WHETHER THEY SECURED THAT POLICY, BUT WHETHER THEY WERE NEGLIGENT IN DOING OTHER THINGS, SUCH AS THE BELIEF THEY WERE UNDERINSURED AND SO FORTH.
AND THAT'S NOT COVERED IN THE CONTRACT.
>> RIGHT.
>> I MEAN, THAT MUST BE WHAT THE 11TH -- IT SEEMS TO ME WHAT THEY'RE SAYING, IS IT'S SOMETHING SEPARATE FROM THE AGREEMENT TO GET THIS 50 MILLION THAT THERE WAS OTHER

RELATIONSHIPS THAT, IN WHICH
THEY WERE NEGLIGENT.
>> PRECISELY.
IT WAS THE FAILURE TO DISCLOSE,
AND I WOULD ANSWER ONE OF THE
QUESTIONS EARLIER THAT THERE ARE
OTHER CASES IN THIS JURISDICTION
THAT IN ADDITION TO TALKING
ABOUT NEGLIGENT PROCUREMENT OF A
POLICY TALK ABOUT A FAILURE TO
DISCLOSE KNOWLEDGE THAT WOULD
CAUSE A CHANGE IN THE DECISION
TO BUY THAT POLICY OR HOW MUCH
OF THAT POLICY TO BUY.
I WOULD JUST, UNLESS THE COURT
HAS ANY OTHER QUESTIONS, I THINK
THE ANSWER IS IN THE TOOMEY
DECISION.
>> WELL, IT CAN'T BE IN THE
TOOMEY DECISION BECAUSE THAT
DECISION HAD TO DO WITH
ASSIGNABILITY, AND THE ISSUE AS
TO WHETHER THE ECONOMIC LOSS
RULE APPLIED WASN'T RAISED.
SO TELL ME HOW IT'S IN THE
TOOMEY DECISION.
>> IN THIS RESPECT; TOOMEY
RECOGNIZED THE FACT THAT EVEN
WITH THE EXISTENCE OF A
CONTRACT, ORAL OR WRITTEN, A
BREACH OF FIDUCIARY CLAIM STOOD
SEPARATE FROM THE CONTRACT AND
COULD BE PURSUED AT THE VERY
SAME TIME.
>> BUT, AGAIN, THAT WAS ANOTHER
CERTIFIED QUESTION FROM THE 11TH
CIRCUIT.
WE'RE SEEING A PIECE OF
SOMETHING, AND WE END UP MAYBE
SEEING -- AND WE WEREN'T --
ISSUE BEFORE US WAS NOT WHETHER
IT WAS BARRED BY SOME OTHER
DOCTRINE, WAS IT?
>> NO, THERE WERE OTHER
COMPLICATING ISSUES, BUT THE
POINT IS TOOMEY IS THE

CULMINATION OF MANY DECISIONS
THAT CAME TO THE SAME
CONCLUSION, THAT THE FIDUCIARY
DECISION CLAIM IS STANDING
SEPARATE AND APART FROM THE
CONTRACT, AND THAT'S REALLY THE
QUESTION HERE.
>> IF YOU CAN ALLEGE SOMETHING
THAT'S DIFFERENT FROM WHAT'S IN
THE CONTRACT, SEE, THAT'S WHERE
I'M NOT -- I CANNOT ACCEPT THAT
IF THE CONTRACT SAYS THAT THEY
WERE TO GET $25 MILLION IN
COVERAGE AND THAT WAS THE
CONTRACT AND THERE WAS NO OTHER
DISCUSSION, YOU CAN'T ALLEGE
THAT THEY NEGLIGENTLY BREACHED
THE CONTRACT.
>> WELL, YOUR HONOR, WE'RE LEFT
IN THAT SITUATION HERE --
>> NO, I THOUGHT IT WAS THE
CONTRACT ONLY COVERED WHETHER
YOU WERE GOING TO GET THE SOLACE
THAT YOU ACTUALLY GOT, THERE
WERE OTHER DEALINGS THAT GAVE
RISE TO A BREACH OF FIDUCIARY --
>> PRECISELY.
AS A RESULT OF THE DISTRICT AND
11TH CIRCUIT RULINGS, WHAT YOU
LEFT WITH A CONTRACT NARROW
ENOUGH TO GO OUT AND BUY THE
POLICY.
WE'RE TALKING ABOUT THINGS THAT
LED UP TO THE POLICY, THE ADVICE
THAT WAS GIVEN, THE FAILURE TO
GIVE PROPER ADVICE DURING THE
CLAIMS PROCESS.
THOSE ARE ALL OUTSIDE OF WHAT
NOW HAS BEEN DECIDED IS A
CONTRACT.
I MEAN, THAT'S WHAT WE SAY IS
THE FIDUCIARY DUTY CLAIM.
>> WE THANK YOU.
>> THANK YOU.
>> THANK BOTH SIDES FOR YOUR
ARGUMENT.

THE LAST CASE FOR TODAY, COURT
IS ADJOURNED.
>> PLEASE RISE.