

THE NEXT CASE ON OUR DOCKET

TODAY IS FLORIDA INSURANCE
GUARANTY ASSOCIATION V. DEVON
NEIGHBORHOOD ASSOCIATION.

>> GOOD MORNING.

MAY IT PLEASE THE COURT, MY NAME
IS JEFF KOON, ON BEHALF OF
FLORIDA INSURANCE GUARANTY
ASSOCIATION.

WE ARE HERE TODAY TO REVIEW THE
FOURTH DISTRICT'S OPINION
RELATING TO AN AMENDMENT TO A
STATUTE WHICH IMPOSED NEW
OBLIGATIONS PRIOR TO THE INSURER
TO PAY FOR CARRYING OUT THOSE
OBLIGATIONS AND IMPOSED A
PENALTY BY WAIVING A CONTRACTUAL
PROVISION.

THE OBLIGATION WASN'T CARRIED
OUT, OR IF THEY CARRIED IT OUT,
THE MEDIATION WAS NOT
SUCCESSFUL.

WE BELIEVE THAT THE FOURTH
DISTRICT ERRED WHEN IT CONCLUDED
THAT THAT STATUTE COULD BE
RETROACTIVELY APPLIED.

A TWO-PART TEST THAT HAS BEEN
CONSISTENTLY IMPOSED TO
DETERMINE WHETHER A STATUTE CAN
BE RETROACTIVELY APPLIED.

FIRST, THAT THE LEGISLATURE
INTENDS FOR IT TO BE
RETROACTIVELY APPLIED AND,
SECOND, CAN IT BE
CONSTITUTIONALLY APPLIED?

IN THIS CASE, THERE IS NOTHING
ON THE FACE OF THE BILL TO
INDICATE THAT IT COULD BE
RETROACTIVELY APPLIED AND, IN
FACT, THE STATUTE SPECIFICALLY
SAYS THE LAW WILL BECOME, BE
EFFECTIVE UPON BECOMING LAW
UNLESS OTHERWISE INDICATED.

>> WAS THAT ARGUED TO THE TRIAL

COURT OR TO THE APPELLATE COURT?

>> YOUR HONOR, THE ARGUMENT

REALLY AS A RETROACTIVE APPLICATION WAS ARGUED. IN THE FOURTH DISTRICT, THE WAIVER ISSUE HAS BEEN RAISED. FIGA ARGUED YOU COULD NOT RETROACTIVELY -- THE INSURANCE CONTRACT, THE LAW AT THE TIME THIS INSURANCE CONTRACT WAS ENTERED AND GOVERNED, YOU COULD NOT RETROACTIVELY APPLY A NEW STATUTE WITHOUT --

>> SO THE ISSUE OF WHEN THIS

STATUTE BECAME EFFECTIVE WAS SPECIFICALLY BRIEFED AND ARGUED? I'M NOT TALKING ABOUT YOU USED, YOU KNOW, A CASE OR NOT, BUT I'M JUST TRYING TO SEE HOW THE FOURTH DISTRICT CAME TO JUST IGNORE THE FIRST PRONG OF THIS RETROACTIVITY ANALYSIS.

>> WELL, YOUR HONOR, AND I WILL

CERTAINLY CONFIRM.

MY MEMORY AND MY NOTES INDICATE THAT IT WAS ARGUED THAT IT COULD NOT BE APPLIED BECAUSE THE STATUTE WAS NOT EFFECTIVE.

UNFORTUNATELY, DEVON DID NOT ADDRESS THAT IN THEIR ANSWER BRIEF, SO NOTHING FURTHER WAS IN THE FOURTH DISTRICT, SO NOTHING FURTHER WAS STATED.

THE TRIAL COURT, IT WAS NOT THE CRUX OF THE ARGUMENT.

THE MAIN PART OF THE ARGUMENT IN THE HEARING OF THE TRIAL COURT WAS IT WAIVED BY ACTION, WAS THE RIGHT TO APPRAISAL, THE ALTERNATIVE FEE RESOLUTION WAIVED BY ACTION?

FOURTH DISTRICT THE BRIEF, THE TRIAL COURT ORDER SIMPLY DENIES EVERY ARGUMENT THAT WAS RAISED.

WITH REGARD TO THIS ARGUMENT, IT WAS NOT RESPONDED TO BY DEVON.

THEREFORE, THE FOURTH DISTRICT'S ANALYSIS, I BELIEVE POMPONIO, THE CASE THEY RELIED UPON, WAS

NOT CITED BY FIGA IN ITS INITIAL BRIEF.

THE ARGUMENT WAS RAISED, BUT IT CERTAINLY WASN'T RAISED IN ANY OF THE ANSWER BRIEFS.

SO THE ARGUMENT WAS MADE, AND I BELIEVE THE EFFECTIVE DATE OF THE STATUTE WAS INCLUDED IN THE FIGA'S INITIAL BRIEF.

THE POINT WAS NOT ADDRESSED BY DEVON AND, THEREFORE, WAS NOT RESPONDED THAT WOULD GOVERN, BUT IT CLEARLY WAS RAISED THAT THE LAW IN EFFECT AT THE TIME THIS INSURANCE POLICY WAS ENTERED GOVERNED.

>> BUT WAS THE FOCUS OF THE

ARGUMENT A BLOW REALLY WHETHER THIS WOULD BE AND THAT APPLICATION OF THIS WOULD BE AN IMPAIRMENT OF CONTRACT? I THOUGHT THAT'S WHAT THE FOCUS HAD BEEN BEFORE.

>> IT WAS CERTAINLY THE FOCUS OF

THE FOURTH DISTRICT'S OPINION. THE FOCUS OF THE BRIEF, AND THERE WAS A SENSE OF BRIEFING IN ONLY A VERY SMALL PORTION DISCUSSED THE STATUTE WAS FIRST PARAGRAPH WAS YOU CANNOT RETROACTIVELY APPLY IT BECAUSE OF THE INSURANCE CONTRACTS CONTROLLED BY THE LAW IN THE PLACE ON THE DAY IT BECOMES EFFECTIVE.

THE SECOND PARAGRAPH OF THIS SECTION WAS IT WOULD IMPAIR THE OBLIGATION OF CONTRACTS CITING TO, I BELIEVE, A SECOND DISTRICT OPINION THAT QUOTED DEWBERRY IN THIS COURT.

>> LET ME MAKE SURE I UNDERSTAND ON YOUR ARGUMENT WHEN YOU SAY "NOT THE FOCUS."

WAS THE ISSUE OF RETROACTIVITY PART OF ANY MOTION, PLEADING, PIECE OF PAPER THAT FIGA MAY

HAVE ASSERTED IN RESPONSE OR IN ATTEMPTING TO FORCE THE APPRAISAL?

I'VE GOT TO ASSUME THAT THIS ISSUE, SOMETHING CAME UP ABOUT THE STATUTE, DIDN'T IT?

AT THE TRIAL LEVEL?

>> YES, YOUR HONOR.

RETROACTIVITY WAS CERTAINLY RAISED.

>> AND WHETHER IT COULD OR COULD

NOT BE.

>> CORRECT, YOUR HONOR.

>> SO I'M TRYING TO UNDERSTAND,

MAKE SURE -- I DON'T KNOW THE CASE THAT SAYS IF YOU DON'T CITE THE RIGHT CASE, YOU LOSE, BUT YOU CERTAINLY HAVE TO PRESERVE THE ARGUMENT.

THAT'S WHERE ALL THIS IS GOING.

>> THAT WAS A POINT I INTENDED

TO MAKE.

YOU DON'T HAVE TO CITE A CASE, YOU HAVE TO RAISE THE ISSUE.

CITING THE CASE IS SOMEWHAT --

>> IT CAN BE HELPFUL, NOT

ESSENTIAL.

>> AND I GUESS THAT WAS THE

POINT OF MY STATEMENT, THAT IT WAS NOT THE FOCUS --

>> BUT IF I LOOK AT THE RECORD,

BECAUSE I HAVEN'T LOOKED AT THOSE PIECES OF PAPER, IT'S GOING TO BE SOMEWHERE IN THERE WITH REGARD TO THE ATTEMPT BY FIGA TO FORCE THIS INTO APPRAISAL?

>> CORRECT, YOUR HONOR.

THERE IS A MOTION THAT WAS FILED IN THE TRIAL COURT RELATING TO APPRAISAL AND A REPLY AFTER THAT ISSUE WAS RAISED ALSO DISCUSSED AT THE HEARING BEFORE THE TRIAL JUDGE.

AND BEFORE THE FOURTH DISTRICT,

IT WAS --

>> WHAT YOU'RE SAYING IS THE

FIRST THING HAPPENS, YOU TRY TO
GET THE APPRAISAL.

THEY SAY BECAUSE YOU
PARTICIPATED IN THE LITIGATION,
YOU'VE WAIVED THE RIGHT TO
APPRAISAL.

>> THE FOCUS OF THE ARGUMENT AT

THAT POINT WAS BECAUSE YOU
PARTICIPATED, YOU WAIVED THE
RIGHT TO --

>> BUT DID THEY WAIVE THE

STATUTE THAT SAYS YOU HAD TO
PROVIDE NOTICE?

>> CORRECT, YOUR HONOR.

THERE'S NO QUESTION THEY RAISED
THAT, IT'S NOT --

>> OKAY.

IN THE TRIAL COURT DID YOU ARGUE
THAT, NO, THAT STATUTE DOESN'T
APPLY BECAUSE IT CAME INTO
EFFECT AFTER THE CONTRACT?

>> CORRECT, YOUR HONOR.

>> WE'LL SEE THIS IF WE -- ARE

THERE PLEADINGS THAT --

>> THERE WAS A MOTION OR A

REPLY, EXCUSE ME, YOUR HONOR,
THE TRANSCRIPTS OF THE TRIAL
COURT HEARING.

>> YOU UNDERSTAND WHY WE'RE

ASKING THESE QUESTIONS, BECAUSE
YOU READ, YOU KNOW, THEY HAVE
GOT AN OPINION BY JUDGE WARNER,
AND THEY JUST ASSUME, MAYBE THEY
ASSUME IT WAS RETROACTIVE AND
THEN GO INTO THE SECOND PRONG,
YOU KNOW?

SO THAT THAT'S -- IS THAT WHAT
YOU THINK?

DOES IT LOOK LIKE THAT'S WHAT
HAPPENED?

DID THEY HAVE AN ORAL ARGUMENT?

>> THERE WAS NOT AN ORAL

ARGUMENT, YOUR HONOR, AND I CERTAINLY DON'T WANT TO IMPLY THAT I KNOW WHAT JUDGE WARNER OR THE PANEL WAS THINKING. BECAUSE IT WAS NOT AN ISSUE THAT WAS ADDRESSED IN THE ANSWER BRIEF.

I ASSUME THAT THE PORTION OF THE INITIAL BRIEF IS WHAT THEY DISCUSSED, AND THE REMAINDER OF THEIR DISCUSSION WAS OUTSIDE OF ANY OF THE BRIEF.

>> IT DOES STATE IN THE OPINION

THAT FIGA CLAIMS IT WAS NOT BOUND BY THE NOTICED PROVISIONS OF THE SECTION, AND IT CITES THE SECTION AS THE AMENDMENT WHICH WOULD HAVE APPLIED THE STATUTE TO THE INSURANCE CONTRACT IN THIS CASE WAS ENACTED AFTER THE POLICY WENT INTO EFFECT.

>> CORRECT, YOUR HONOR.

THAT WAS ARGUED TO THE TRIAL COURT AND THE FOURTH DISTRICT.

>> WAS THERE ANY DISCUSSION EVER

IN THIS CASE ANYWHERE THAT THIS WHOLE APPRAISAL ISSUE IS TOTALLY ILLUSORY?

I MEAN, HERE WE'VE GOT AN APPRAISAL PROVISION, IF I'M READING THE POLICY CORRECT, THE INSURANCE COMPANY CAN FORCE AN APPRAISAL, BUT THEY STILL CAN ENFORCE THE CLAIM.

>> YOUR HONOR, WHILE THAT'S NOT

AN ISSUE BEFORE THE COURT, IT HAS BEEN, AND THE COURT REACHED THE OPPOSITE CONCLUSION IN 1996, THEREFORE --

>> WELL, IT'S PART OF THIS CASE.

THAT'S THE CLAUSE IN THIS CASE, AND THIS CASE IS ABOUT WHETHER WE'RE GOING TO ENFORCE APPRAISAL, IS IT NOT?

>> CORRECT, YOUR HONOR, AND IF YOU WOULD LIKE --

>> NO, I JUST ASKED THE QUESTION.

>> IT HAS BEEN CONSIDERED AND DETERMINED THAT IT IS NOT ILLUSORY.

THE COURT IN 1996 REACHED THE SAME --

>> BUT THAT IS WHAT, IN FACT, THE POLICY PROVIDES.

YOU AGREE THAT IT'S LIKE THEY GET THIS APPRAISAL, GO THROUGH THE WHOLE THING, AND THEN THEY CAN SAY, NO, GOING TO TRIAL.

>> I WOULD AGREE IN PART THE

COURT HAS HELD THAT ABSENT CERTAIN CIRCUMSTANCES, THE APPRAISAL PROVISION WOULD BE CONTROLLING AS TO THE AMOUNT OF LOSS.

WHETHER THERE'S COVERAGE IS A DIFFERENT ISSUE.

THERE WAS A SECOND DISTRICT OPINION WRITTEN BY JUSTICE CANADY AND, MORE RECENTLY, A FOURTH DISTRICT OPINION THAT COVERS THE ISSUE THAT'S ALWAYS RELYING ON THIS COURT'S AUTHORITY.

THE AMOUNT OF LOSS ABSENT CERTAIN CIRCUMSTANCES -- MISTAKE, FRAUD, ERROR, THINGS OF THAT NATURE -- WOULD BE CONTROLLING THE AMOUNT OF LOSS WHICH IS WHAT THE POLICY PROVISION SAYS.

THAT IS WHAT THE APPRAISAL --

>> WELL, IT DOESN'T SAY THAT CLEARLY.

NO, NOT AS CLEARLY --

[LAUGHTER]

AND I UNDERSTAND YOU DIDN'T WRITE IT, YOU'VE GOT TO DEAL WITH WHAT YOU HAVE.

PLEASE, GO AHEAD, I DON'T WANT TO BELABOR THAT KIND OF POINT, SO --

>> WE BELIEVE IT WAS DEFINITELY
RAISED.
THE SECTION STATED THAT IT WOULD
NOT, THAT IT WOULD BE EFFECTIVE
AFTER THE REMAINDER OF THE
LEGISLATION.

WE BELIEVE THAT IT IMPOSED
SUBSTANTIVE CHANGES AND
SUBSTANTIVE POLICIES.
THIS COURT HAS HELD THAT WHEN
THERE IS ANY IMPAIRMENT OF
CONTRACT, IT IS NOT PERMISSIBLE.
IN THIS CASE THERE WAS THE
IMPAIRMENT BY REQUIRING
AFFIRMATIVE ACTION, OR THIS
POLICY WOULD NOT BE -- POLICY
PROVISION WOULD NOT BE
ENFORCEABLE.

ADDITIONALLY, THERE WAS THE --
AND THAT WOULD, THIS COURT'S
DEWBERRY CASE SAID ANY CONDUCT
ON THE PART OF THE LEGISLATURE
BY FORCING AN INSURANCE COMPANY
OR FIGA AFTER THE CARRIER GOES
INSOLVENT TO TAKE THAT CONDUCT.

>> HOW DO YOU IN TERMS OF THE

TEST THAT IS APPLIED, HOW --
DEWBERRY CAME OUT, I THINK, A
YEAR BEFORE POMPONIO, AND UNTIL
LAST WEEK WE HADN'T CITED
POMPONIO FOR ABOUT 25 YEARS.

I GUESS IT MUST BE ONE OF
ROSENBAUM'S FAVORITES.

BUT WHAT IS, WHAT ARE THE TWO --
HOW DID THOSE CASES MESH
TOGETHER IN TERMS OF WHAT THE --
WHAT SHOULD BE APPLIED UNDER
WHAT CIRCUMSTANCES?

AND THEN WHERE DOES MENENDEZ FIT
IN?

>> MY INTERPRETATION OF THE

COURT'S VARIOUS OPINIONS IS THAT
THERE ARE TWO PARTS IN THE
IMPAIRMENT OF CONTRACT TEST
WOULD FIT INTO THE SECOND PART
OF THE TEST.

IS THERE, IS IT CONSTITUTIONAL,

AND IN THIS CASE, IS THE
CONSTITUTIONALITY CHALLENGED ON
THE IMPAIRMENT OF CONTRACT
BASIS?

THE FIRST PART OF THE TEST STILL
APPLIES, AND EVEN THE POLICE
POWERS CASE THAT WAS CITED BY
DEVON IN THIS CASE WHILE THE
LEGISLATURE DOES HAVE THE POWER
TO REGULATE INSURANCE, I BELIEVE
IT WAS THE SPRINGER CASE.

THAT COURT RECOGNIZED BECAUSE
THE LEGISLATURE IN THAT CASE
HADN'T INTENDED RETROACTIVE
APPLICATION, IT WOULDN'T APPLY.
>> RIGHT.

IF WE AGREE WITH YOU THAT THIS
IS NOT, WAS NOT INTENDED BY THE
LEGISLATURE TO BE RETROACTIVE,
THERE'S NOTHING ELSE THAT NEEDS
TO BE DISCUSSED.

>> CORRECT, YOUR HONOR.

I BELIEVE IF YOU AGREE WITH
THAT, THERE'S NOTHING ELSE TO BE
DISCUSSED.

IT WAS STATED IN THE ANSWER
BRIEF THAT WE ARE ASKING THE
COURT TO OVERRULE IN POMPONIO.
I DON'T BELIEVE THAT'S WHAT'S
HAPPENED HERE.

>> SO WHAT WOULD HAPPEN?

IF WE SAY, IN FACT, THAT THIS
STATUTE DOES NOT APPLY
RETROACTIVELY, WE WOULD GO BACK
TO THE TRIAL COURT, AND YOU
WOULD AGAIN ASK FOR AN
APPRAISAL, AND YOU WOULD BE
ENTITLED TO THE APPRAISAL UNDER
THE INSURANCE CONTRACT.

AND THEN --

>> CORRECT, YOUR HONOR.

>> -- WE GET TO THE POINT OF

WHETHER YOU ABIDE BY IT OR NOT.

>> AND AT THAT POINT THERE IS A

DISTRICT CONFLICT, BUT THE COURT
EITHER PROCEEDS WITH COVERAGE

CHALLENGES OR STAYS THE CASE,
ENDING THE COMPLETION OF THE
APPRAISAL.

THAT'S SOMETHING THAT THE COURT
WILL BE DECIDING SOON.

BUT --

>> WHAT ISSUE?

>> WHETHER, WHETHER THE CASE

WILL BE STAYED TO ALLOW THE
APPRAISAL OR WHETHER THE
APPRAISAL WILL PROCEED ON THE
AMOUNT --

>> YOU SAY THAT'S THE CONFLICT

BETWEEN THE DISTRICTS?

>> YES, YOUR HONOR.

I DON'T KNOW IF SOMEONE HAS
BROUGHT IT TO THE COURT, BUT IT
HAS BEEN CERTIFIED RECENTLY BY
THE THIRD DISTRICT.

>> IN WHAT CASE?

>> YOUR HONOR, I APOLOGIZE --

>> BUT IT'S NOT AN ISSUE --

>> IT'S NOT AN ISSUE IN THIS

CASE, CERTAINLY.

>> OKAY.

>> SO THIS IS, AGAIN, WE BELIEVE

THIS IS A SIMPLE ANALYSIS AS IT
WAS IN THE OLD PORT COVE CASE,
ALSO MR. ROSENBAUM'S CASE WITH
JUSTICE CANTERO'S OPINION A
COUPLE YEARS AGO.

IT CAN STOP AFTER THE FIRST
PRONG.

THERE WAS NO RETROACTIVE INTENT.

IN FACT, WE BELIEVE IT'S THE
EXACT OPPOSITE.

BUT IF IT DOES PROCEED, WE
BELIEVE IT WOULD FAIL THERE AS
WELL DUE TO THESE OBLIGATIONS --

>> AGAIN, DID YOU EXPLAIN WHY IF

WE HAD TO GET TO THE SECOND
PRONG WHICH -- WHAT THE NEXT
INQUIRY IS?

>> THE NEXT, THE NEXT INQUIRY

WOULD BE DOES IT ACTUALLY IMPAIR

THE CONTRACT.

>> SO IF THERE'S AN IMPAIRMENT,

THEN YOU DON'T GET TO -- THEN
WHEN DO YOU USE POMPONIO?

>> IF THERE IS AN IMPAIRMENT,

THERE WOULD BE -- THE
CONSTITUTION WOULD PROHIBIT IT.
POMPONIO PROVIDES A TEST TO
DETERMINE IF IT IS A REASONABLE,
SUBJECTIVE IMPAIRMENT OF THE
CONTRACT.

I BELIEVE, WE BELIEVE THAT THE
COURT HAS HELD THAT WHEN THERE
IS AN IMPAIRMENT SUCH AS THIS --
A SUBJECTIVE IMPAIRMENT -- NOT
SOMETHING THAT IS MERE
PROCEDURE, WHICH THIS IS NOT.

THIS IS A SUBSTANTIVE
OBLIGATION --

>> THIS IS SUBJECTIVE

IMPAIRMENT.

YOU MEAN SUBJECTIVE IMPAIRMENT?

>> SUBSTANTIVE IMPAIRMENT.

I APOLOGIZE, YOUR HONOR.

THIS IS A SUBSTANTIVE IMPAIRMENT
OF THE CONTRACT.

IT REQUIRES ACTION, IMPOSES
PENALTIES, IT REQUIRES THE
INSURER OR FIGA TO PAY FOR A
MEDIATION.

AND THOSE ARE SUBSTANTIVE ISSUES
THAT ARE MORE THAN MERE METHOD
OR PROCEDURE WHICH IS WHAT WOULD
FALL OUT OF THE IMPAIRMENT TEST
IF IT WAS A PROCEDURAL ISSUE.

BUT IN THE CASE IT WOULD NOT
BE --

>> BUT UNDER THE STATUTE, LET'S

JUST INDULGE ME FOR A MOMENT.

>> OF COURSE.

>> THE MEDIATION PROVISIONS

WOULD APPLY, AND I WANT YOU TO
GO THROUGH THAT.

THEN ARE YOU STILL ENTITLED TO
APPRAISAL IF YOU WANT TO?

>> IF --

>> IF ONE OF THE PARTIES WAS --
>> [INAUDIBLE]
>> IF MEDIATION FAILS, YOU CAN
STILL ASK FOR APPRAISAL?
>> THAT IS NOT.

IF THE INSURER REQUESTS
MEDIATION AFTER THE NOTICE IS
GIVEN AND THE MEDIATION IS
UNSUCCESSFUL, THE STATUTE ALSO
PROVIDES FOR A WAIVER OF THE
APPRAISAL PROVISION.

SO EVEN IF YOU DO COMPLY WITH
THE NOTICE, YOU ASK FOR THE
MEDIATION AND YOU GO AND IT'S
NOT SUCCESSFUL, IT'S ALSO
WAIVED.

>> SO YOU HAVE, SO THIS IS IN
TERMS OF THE IMPORTANCE OF THIS
TO INSUREDS, THIS PROVISION,
IT'S A METHOD TO ESCAPE FROM
WHAT, I GUESS, THE LEGISLATURE
THOUGHT WAS AN ONEROUS PROVISION
IN THE CONTRACT, THE APPRAISAL
PROVISION?

>> YES, YOUR HONOR.

>> SO THEY, THIS IS AN EXAMPLE
OF THE LEGISLATURE DOING
SOMETHING THAT WAS TO HELP THE
INSUREDS ESCAPE FROM A PROVISION
THAT WOULD OTHERWISE BE COSTLY
AND TIME CONSUMING?

>> PRESUMABLY, THAT'S CORRECT.

>> WELL, I MEAN, THAT'S WHAT
MAKES IT SUBSTANTIVE BECAUSE
THIS IS A PART OF THE INSURANCE
POLICY THAT THEY'RE NOW SAYING
REALLY IT CAN BE AVOIDED.

>> CORRECT, YOUR HONOR.

THEY ARE ALLOWING THE AVOIDED --

>> REALLY REWRITING THE POLICY.

>> CORRECT, YOUR HONOR.

>> BUT LET ME MAKE SURE I

UNDERSTAND WHAT YOU SAID BECAUSE
I THOUGHT THE WAY THE STATUTE
READ IS THAT IF YOU GIVE THE

NOTICE AND THERE'S MEDIATION,
YOU COULD STILL HAVE APPRAISAL.
BUT IF YOU DON'T GIVE THE
NOTICE, THAT'S WHEN YOU
CANNOT -- THE INSURED DOES NOT
HAVE TO GO THROUGH THE APPRAISAL
PROCESS.

THAT'S NOT CORRECT?

>> THAT IS CORRECT, YOUR HONOR,

WITH THE EXCEPTION THAT IT ALSO
SAYS IF INSURER REQUESTED
MEDIATION AND YOU GO AND DON'T,
AREN'T SUCCESSFUL, THAT IS ALSO
A WAIVER OF THE RIGHT TO
APPRAISAL.

SO YOUR STATEMENT WAS CORRECT
WITH THE EXCEPTION OF WHEN THE
INSURER --

>> SO THE STATUTE ACTUALLY DOES

AWAY WITH APPRAISALS?

>> IT DOES AWAY WITH APPRAISAL

UNLESS THE -- IF NOTICE IS
PROVIDED AND THE INSURED
REQUESTS MEDIATION OR IF NO ONE
REQUESTS MEDIATION, THEN
APPRAISAL WOULD STILL EXIST.

ONLY IF THE INSURER -- THE
INSURANCE COMPANY IS THE ONE
THAT REQUESTS THE MEDIATION, AND
YOU GO AND ARE UNSUCCESSFUL,
THAT IS THE SECOND INSTANCE WHEN
APPRAISAL IS WAIVED.

HOWEVER, IF NO ONE --

>> [INAUDIBLE]

>> LET ME MAKE SURE I UNDERSTOOD

CORRECTLY.

IF INSURED REQUESTS IT?

>> YES, YOUR HONOR.

>> INSURED QUESTIONS

MEDIATION --

[INAUDIBLE]

FIGA WOULD STILL BE ENTITLED TO
GO IN AND ASK FOR THE
ARBITRATION, OR WHAT DO YOU CALL
IT?

>> APPRAISAL, YOUR HONOR.

>> APPRAISAL.

CALL IT WHAT IT IS, ARBITRATION.
BINDING.

>> ARBITRATION OR APPRAISAL IS
ONLY TROUBLESOME BECAUSE THE
COURT HAS HELD THAT THEY ARE
DIFFERENT.

>> OKAY, WELL, WHATEVER.

BUT THE ONLY -- ONLY WHEN THE
INSURED REQUESTS MEDIATION AND
IS NOT SUCCESSFUL DO THEY WAIVE
THE APPRAISAL?

>> YES, YOUR HONOR.

>> SO WHY ISN'T THE IMPOSITION

OF ANOTHER STEP MEDIATION, WHY
ISN'T THAT JUST PROCEDURAL?
I MEAN, WE JUST REQUIRED IN
MORTGAGE CASES MORTGAGE HOLDERS
TO GO THROUGH MEDIATION.

MEDIATION IS A
REGULARLY-ACCEPTED WAY OF
BUSINESS.

WHY ISN'T THAT JUST NEUTRAL
STEP, NOT SUBSTANTIVE?

>> I THINK FOR A COUPLE REASONS.

ONE, WHEN THE COURT REQUIRED
EXERCISING CONSTITUTIONAL RIGHT
TO IMPOSE PROCEDURAL REQUIREMENT
AFTER A SUIT WAS FILED, I THINK
THAT'S DIFFERENT THAN THE
LEGISLATURE IMPOSING UPON THE
INSURANCE INDUSTRY THE
REQUIREMENT TO HAVE A MEDIATION
PROGRAM FUNDED BY THE INSURANCE
INDUSTRY, AND IF THEY DO NOT
GIVE NOTICE WITHIN FIVE DAYS OF
THE CLAIM OR THE DISPUTE,
THEY'RE NOT ENTITLED TO ENFORCE
THAT CONTRACTUAL PROVISION.
THERE IS NOTHING -- WHEN THE
COURT REQUIRES AND MORTGAGE
COMPANY OR LENDERS TO GO TO
MEDIATION, THERE WAS NO WAIVER
OF ANY RIGHT.

IT WAS MERELY A WE ARE REQUIRING
YOU TO ATTEMPT TO SETTLE THIS

CLAIM WITH A NON-PARTY,
INDEPENDENT PERSON TO TRY TO
SETTLE IT.

HOWEVER, IF IT'S UNSUCCESSFUL,
THEN YOU WILL PROCEED WITH
LITIGATION, AND THE TRIAL COURT
JUDGE WILL MAKE A DETERMINATION.

>> YOU ARE JUST ABOUT OUT OF
TIME HERE.

I WILL, I'LL STILL GIVE YOU A
MINUTE TO CLOSE.

>> THANK YOU, YOUR HONOR.

>> MAY IT PLEASE THE COURT, DAN

ROSENBAUM HERE ON BEHALF OF
ROSENBAUM, JANSEN IN WEST PALM
BEACH FOR DEVON.

I'D LIKE TO, IF I CAN, START OFF
BY ANSWERING JUSTICE PARIENTE'S
QUESTION ABOUT THE DIFFERENT
STANDARDS.

WHAT OCCURED IN THIS CASE AND
WHY POMPONIO IS SO IMPORTANT IS
BECAUSE IN 1978 THE UNITED
STATES SUPREME COURT ADOPTED A
CASE CALLED ALLIED STRUCTURAL
STEEL, AND THERE'S A WHOLE
FEDERAL HISTORY THAT WENT TO THE
CONTRACTS CLAUSE ANALYSIS.

IN 1979 THIS COURT CAME OUT WITH
POMPONIO V. CLARIDGE WHICH SAID
WHEN WE LOOK AT CONTRACT CLAUSE
ISSUES, WE'RE GOING TO GO AHEAD
AND USE THE UNITED STATES
SUPREME COURT STANDARD FROM
ALLIED STRUCTURAL STEEL.

THAT STANDARD IS DIFFERENT THAN
THE TWO-PRONG TEST.

SO THE FIRST QUESTION IS, HOW
DAMAGED, IF YOU WILL, WHAT'S THE
IMPAIRMENT TO THE CONTRACT.

AND THEN WE GET INTO THE
BALANCING TEST TO SEE AT WHAT
POINT WE HAVE DAMAGED THE
CONTRACT SO BADLY THAT IT'S
UNCONSTITUTIONAL.

>> WELL, DON'T YOU FIRST,
THOUGH, HAVE TO DECIDE

WHETHER -- AND MAYBE THIS IS HOW YOU ARGUED IT IN THE FOURTH DISTRICT -- DON'T YOU FIRST HAVE TO DECIDE WHETHER THE LEGISLATURE INTENDED WHATEVER STATUTE THEY'RE ENACTING FOR IT TO BE RETROACTIVE?

>> NOT UNDER POMPONIO AND NOT UNDER ALLIED STEEL.

THAT TEST, THE TWO-PRONGED TEST IS A TEST WE HISTORICALLY --

>> LET'S JUST, YOU KNOW, I'LL

LOOK BACK AT THOSE CASES, BUT I DON'T KNOW OF ANY ANALYSIS OF LEGISLATION THAT DOESN'T START WITH WHAT THE LEGISLATIVE INTENT IS.

AND IF THE LEGISLATURE DOESN'T INTEND FOR A PROVISION TO APPLY RETROACTIVELY, THEN THERE'S, THEN THEY'RE NOT EVEN AFFECTING THE CONTRACT THAT WAS IN EXISTENCE.

YOU DON'T GET TO WHETHER THERE'S AN IMPAIRMENT OF CONTRACT IF THE LEGISLATURE DID NOT INTEND FOR THAT PROVISION TO APPLY.

>> WELL, WHEN WE TALK ABOUT

IMPAIRMENT OF CONTRACT, IT'S PRESUMED THAT THERE'S SOME LEVEL OF IMPAIRMENT.

IN OTHER WORDS --

>> YEAH, I THINK YOU'RE MISSING,

I THINK YOU'RE MISSING MY POINT.

THE LEGISLATURE MAKES A DECISION WHEN THEY ENACT A STATUTE.

IT'S GOING TO APPLY

PROSPECTIVELY, IT'S GOING TO APPLY RETROACTIVELY.

THAT'S THE FIRST ISSUE.

DO THEY INTEND OR, LIKE, IN YOUR CASE, THE COHN CASE, IT WAS CLEAR THAT THE LEGISLATURE INTENDED FOR THAT TO AFFECT CONDOMINIUM DOCUMENTS.

WE DIDN'T GET, WE DIDN'T NEED TO

GO TO LOOK AT THE FIRST TEST
BECAUSE IT WAS CLEAR THE
LEGISLATURE IN THAT CASE MADE IT
RETROACTIVE.

THEY SAID SO.

SO I'M NOT BUYING YOUR IDEA THAT
WE SOMEHOW DON'T FIRST LOOK AT
THE LEGISLATIVE INTENT.

>> AND THE THING IS, WE HAVE

SAID IN THE PAST IN THIS COURT
THAT WHEN THE LEGISLATURE
INCLUDES THE EFFECTIVE DATE OF
THE STATUTE AND WE GIVE THAT
INCLUSION, BASICALLY, IT
EFFECTIVELY REBUTS ANY ARGUMENTS
THAT IS NOT RETROACTIVE.

HERE THEY INCLUDED THE EFFECTIVE
DATE AS BEING JULY 1, 2005.

AND THE PROBLEM I HAVE WITH THE
ARGUMENT IS THAT LET'S SAY YOU
AND I ENTERED INTO A CONTRACT A
YEAR AGO, AND THE LEGISLATURE
FOR ALL WE KNOW COULD BE
CONTEMPLATING A STATUTE RIGHT
NOW AS WE SPEAK THAT WOULD
BENEFIT YOU TREMENDOUSLY IN THAT
CONTRACT.

AND UNLESS -- THAT'S THE PROBLEM
I HAVE WITH THE POMPONIO
COMPONENT OF YOUR ARGUMENT.

>> IT'S LIKE THE BIONETICS CASE,

JUSTICE LABARGA, THAT YOU
AUTHORED.

AND THE QUESTION THERE WAS WHEN
THE HARM OCCURRED.

IN OTHER WORDS, YOU HAVE SAFE
HARBOR, AND YOUR DECISION TURNED
ON WHEN THE HARM OCCURRED
BECAUSE YOU WENT WITH THE FIRST
DISTRICT IN WALKER, I BELIEVE,
AND NOT WITH THE FIFTH
DISTRICT'S OPINION.

THAT'S THE SAME THING HERE.

>> WAIT A MINUTE, WAIT A MINUTE.

THAT'S THE QUESTION OF WHICH LAW
APPLIES, AND WE'VE HELD THAT THE
LAW AT THE TIME OF THE EXECUTION

OF THE CONTRACT.

>> RIGHT.

>> NOT AT THE TIME OF HARM.

>> WELL, IN BIONETICS, YOU SEE,

THIS WAS THE DIFFERENCE THAT I
SEE IN THE CASE LAW.

WHEN WE LOOK AT THE CASES THAT
HAVE COME UP -- AND JUSTICE
PARIENTE MENTIONED MENDEZ --
OKAY, AND EVEN OLD PORT COVE.
THESE WERE NOT IMPAIRMENT OF
CONTRACT CASES.

THESE WERE CASES, FOR EXAMPLE,
IN MENDEZ WE'RE TALKING ABOUT
WHAT SOMEONE'S RIGHTS ARE UNDER
A STATUTE.

OLD PORT COVE SIMILARLY OR METRO
DADE COUNTY.

AGAIN, SHOULD SOMEONE BE FORCED
TO PAY FOR A CLEANUP?

OR BIONETICS WITH REGARD TO SAFE
HARBOR?

THESE ARE NOT IMPAIRMENT OF
CONTRACT CASES.

THESE ARE CASES IN THE LAW WHERE
THERE'S A STATUTORY SCHEME THAT
SOMEBODY'S EITHER UNDER OR NOT
UNDER.

THAT'S WHERE THE TWO-PART TEST
WAS --

>> THIS IS A CONTRACT CASE.

>> THAT'S RIGHT.

AND IT'S WHY POMPONIO APPLIES TO
THIS CASE.

>> YOU'RE GOING IN CIRCLES IN MY

MIND.

I'M TRYING TO FOLLOW YOU, I
REALLY AM.

BUT YOU'RE, YOU'VE LOST ME.

>> THE FOURTH DISTRICT APPLIED

POMPONIO.

THEY DIDN'T LOOK AT THE TWO-PART
TEST.

>> I UNDERSTAND.

>> AS WE DID BEFORE WHETHER THE

ISSUE WAS RAISED.

WHAT WE SAID IN OUR BRIEF WAS
THEY NEVER RAISED THE TEST.
IN OTHER WORDS, THEY NEVER CITED
TO OLD PORT COVE, AND THEY NEVER
CITED TO METRO DADE.
THAT CAME UP ON REHEARING.
MENDEZ, OBVIOUSLY, HAD AN ISSUE.
THAT WAS WHAT WE WERE SAYING.
WE'RE SAYING YOU NEVER HAD
BROUGHT UP THE TWO-PRONGED TEST
IN THE FOURTH DISTRICT.

WHAT THEY ARGUED WAS THE FLIP
SIDE OF POMPONIO.

THEY JUST SAID POMPONIO WOULD
APPLY, AND IT WOULD APPLY THE
OTHER WAY.

SO THE FOURTH DISTRICT LOOKED AT
ALL THESE DIFFERENT POSITIONS,
LOOKED AT ALL THE DIFFERENT
ISSUES AND DETERMINED THE
CONTRACT HAD NOT BEEN
SUFFICIENTLY DIMINISHED OR
IMPAIRED TO TAKE AWAY A RIGHT.

WHY?

BECAUSE IT'S NOT SO MUCH THE
QUESTION OF AN APPRAISAL.
WHEN YOU HAVE AN APPRAISAL, THE
INSURER IS STILL PERMITTED TO
RAISE COVERAGE AFTER THE DAMAGE.

>> WHAT IS THE STATEMENT IN THE

FOURTH DISTRICT'S OPINION THAT
SAYS FIGA CLAIMS IT IS NOT BOUND
BY THE NOTICE PROVISIONS AS THE
AMENDMENT WHICH WOULD HAVE BEEN
APPLIED TO THE STATUTE, TO THE
CONTRACT OF EVERYTHING IN THIS
CASE WHICH ENACTED AFTER THE
POLICY WENT INTO EFFECT?

IT SURE SOUNDS LIKE THEY'RE
RAISING, NOPE, YOU DO NOT APPLY
THIS STATUTE BECAUSE IT WENT
INTO EFFECT AFTER THE POLICY WAS
EXECUTED.

>> BUT IF YOU LOOK AT THE LAST

PARAGRAPH, WHAT THEY'RE SAYING
IS -- AND THIS IS THE WAY
SUBSECTION 7 OF THE STATUTE

READS -- IT SAYS YOU CAN'T RAISE APPRAISAL AS A PRECONDITION TO LITIGATION TO GO INTO COURT. HERE WHAT WAS HAPPENING WAS THE INSURED, FIGA, TRIED TO USE APPRAISAL TO STOP THE INSURED FROM GOING TO COURT. NOW, APPRAISAL ITSELF IN THE PROCESS YOU HAVE THE DETERMINATION OF DAMAGES IN THE APPRAISAL PROCESS, BUT THE INSURER ALWAYS HAS THE RIGHT UNDER THIS POLICY TO EITHER ACCEPT IT OR REJECT IT, AND EVEN IF THEY ACCEPTED THE APPRAISAL WHICH IS THE DETERMINATION OF DAMAGES, THEY STILL HAVE THE RIGHT TO GO TO COURT AND DETERMINE COVERAGE ISSUES. SO ALL THIS STATUTE REALLY DOES IS SAY, LOOK, WE JUST HAD FOUR HURRICANES IN FLORIDA, OKAY? JEANNE, IVAN, FRANCES, CHARLEY. NOW, YOU KNOW, WE'RE IN 2005 AND PRECIPITOUSLY WE HAD WILMA. SO THE COURTS WERE OVERLOADED. WHAT WAS HAPPENING TO INSUREDS WAS THEY COULDN'T GET THEIR CLAIMS ADJUSTED BECAUSE THERE WAS TENS OF THOUSANDS OF THEM. THEY WANTED TO PUT MEDIATION IN PROCESS SO WE COULD GET RID OF SOME OF THESE CASES. NOW, WHAT THEY'RE SAYING IS THE CARRIERS, IF YOU'RE NOT GOING TO GIVE THIS NOTICE, THEN YOU LOSE YOUR RIGHT TO RAISE THE APPRAISAL PROCESS AS A PRECONDITION TO THE INSURED GOING TO COURT. IN OTHER WORDS, WE'RE NOT GOING TO MAKE --

>> BUT YOU LOSE IT TOTALLY.

IT'S LIKE SAYING IT'S NOT THAT IT REVIVES ITSELF AFTERWARDS, APPRAISAL'S GONE.

>> IT'S NOT GONE BECAUSE THE

INSURED CAN ALWAYS BE IN BREACH OF IT.

IN OTHER WORDS, THE INSURER --
>> NO, NO, NO, YOU'RE TALKING

PAST ME AGAIN.

IF YOU DON'T DO AN APPRAISAL AND YOU TAKE YOUR DAMAGES TO COURT, YOUR BREACH OF CONTRACT ACTION TO COURT, ARE YOU SAYING THAT THIS ALLOWS THE INSURANCE COMPANY TO COME IN AGAIN LATER AND RAISE THE APPRAISAL?

>> NOT LATER, BUT --

>> NO, IT CAN'T.

AND THIS CLAUSE TERMINATES AN INSURANCE COMPANY'S RIGHTS TO AN APPRAISAL IF THEY DON'T FOLLOW THE STATUTE.

>> WELL, THIS --

>> IT DOESN'T PRESERVE IT.

>> -- PRECONDITION TO GOING TO

COURT.

>> WELL --

>> LET ME GIVE YOU AN EXAMPLE IF

I CAN.

MAYBE THIS'LL HELP.

LET'S SAY THERE WAS NO NOTICE GIVEN, AND THE INSURANCE COMPANY INVOKES APPRAISAL.

THERE'S NOTHING TO STOP THE INSURED FROM AGREEING TO THE APPRAISAL AND JUST GOING FORWARD WITHOUT RAISING THIS ISSUE.

>> THE INSURANCE COMPANY,

THAT'S WHAT WE'RE TALKING --

IT'S THE INSURANCE COMPANY'S RIGHT TO FOLLOW THE RIGHT OF APPRAISAL.

IF THEY DON'T FOLLOW THE STATUTE, THIS STATUTE ELIMINATES BECAUSE IT THEN ELIMINATES THAT AS A PRECONDITION FOR LEGAL ACTION AND THE RIGHT TO APPRAISAL IS GONE.

>> UNLESS THE INSURED AGREES,

CORRECT.

>> OKAY.

WELL, THAT'S ALL I'M SAYING IS
THAT IT ELIMINATES THAT RIGHT
FOREVER.

>> THAT'S CORRECT.

>> OKAY.

>> SO WHY ISN'T THAT A CORE
SUBSTANTIVE RIGHT THAT CANNOT BE
RETROACTIVELY APPLIED?

>> BECAUSE, NUMBER ONE, IT'S

WHERE THE STATUTE'S REMEDIAL.

IT'S NOT, PER SE, EFFECTING --

>> YOU JUST WENT THROUGH WITH

JUSTICE LEWIS HOW IT IS AN
ELIMINATION OF A RIGHT.

>> WELL, WHAT I'M SAYING WITH

JUSTICE LEWIS THE QUESTION HERE
UNDER POMPONIO IS THE QUESTION
OF THE AMOUNT OF DIMINUTION TO
THE CONTRACT.

>> THAT HAS TO DO WITH WHETHER

THERE'S A CONSTITUTIONAL
CONTRACT OR NOT.

WHAT WE'RE STRUGGLING WITH HERE
IS WHETHER OR NOT IT'S A
CONTRACT IN THE FIRST PLACE, AND
I HAVE YET TO HEAR YOU SAY WHY
IT SHOULD BE.

>> NUMBER ONE, IT'S PROCEDURAL

IN DUE RESPECT AND MOST OF THE
RESPECT AND TO THE EXTENT THAT
IT COULD BE ARGUED THAT
SUBSTANTIVE, IT'S REMEDIAL.

THOSE STATUTES DON'T BECOME,
THEY DON'T COME WITHIN THE
COURT'S AMBIT OF

UNCONSTITUTIONAL OR REMEDIAL.

>> LISTEN, I HAVE READ A LOT OF

CASES AND WRITTEN CASES.

THIS REMEDIAL ISSUE, IF IT'S
SUBSTANTIVE, THE FACT THAT IT'S
REMEDIAL DOESN'T MAKE IT ANY
LESS PROPER FOR THE LEGISLATURE
TO MAKE IT RETROACTIVE IF
THERE'S AN EXISTING RIGHT THAT

HAS BEEN, HAS BEEN DIMINISHED.

>> BUT THAT KIND OF GETS ME

RIGHT BACK TO WHERE I STARTED.
THE TEST THAT THIS COURT ADOPTED
IN 1979 WHICH MAKES GOOD SENSE
BECAUSE IT FOLLOWS THE UNITED
STATES SUPREME COURT TEST IS THE
QUESTION OF THE DIMINUTION TO
THE CONTRACT.

THAT'S THE FIRST PRONG OF
POMPONIO.

>> BUT ARE YOU TELLING ME WHY IS

THIS NOT UNDER DEWBERRY,
MENENDEZ, THOSE OTHER CASES?

>> AND WHAT I'M SUGGESTING IS

WHEN WE READ THOSE CASES, THOSE
CASES DON'T ATTACH TO THE WAY WE
ANALYZE CONTRACTS.

THOSE CASES HAVE APPLIED
HISTORICALLY A TWO-PRONGED TEST,
BUT THEY'VE NOT BEEN CONTRACT
LAWS CASES.

>> MENENDEZ DIDN'T INVOLVE AN
INSURANCE CONTRACT?

>> MENENDEZ WAS THE PIB

INSTITUTE.

SO IT WASN'T --

>> WELL, SURE IT IS.

PIB'S BASED --

>> IT WAS THE COMMON LAW --

>> IT'S JUST NOT OUT OF THE AIR.

AN INSURED HAS A CONTRACT FOR
PERSONAL INJURY BENEFITS, PIB,
AND THEN THE LEGISLATURE
ATTEMPTED TO CHANGE WHAT WAS IN
THAT POLICY.

AND WE SAID, NO, YOU CAN'T DO
THAT AFTER THE POLICY IS ISSUED,
CORRECT?

SO THAT WAS A STATUTE OPERATING
ON A CONTRACT, CORRECT?

>> I BELIEVE THAT IT'S NOT A --

IT'S A CONTRACT THAT WAS
DIFFERENT HERE BECAUSE IT
REPLACED THE COMMON LAW.

IN OTHER WORDS, PIB WAS THERE TO GIVE INSTANT MONEY.

>> WELL, I MEAN, THIS APPRAISAL

IS, I MEAN, THAT'S SOMETHING THAT'S NOT PART OF A RIGHT UNDER COMMON LAW, IT'S A CONTRACTUAL RIGHT.

>> RIGHT.

IT'S A --

>> AND PIB COMES FROM A

CONTRACTUAL RIGHT BECAUSE WE NOW HAVE THAT COVERAGE UNDER FLORIDA LAW.

>> BUT HISTORICALLY IF YOU LOOK

AT THESE CASES, AND I WENT BACK TO CHECK HOW THESE CASES CAME ABOUT, THESE HAVE BEEN THE TWO STANDARDS, AND MAYBE THAT'S WHY THE JURISDICTIONAL QUESTION WAS 4-3.

BECAUSE THIS IS NOT A CLEARLY-DEFINED AREA OF THE LAW.

THIS IS A DIFFICULT AREA OF THE LAW TO UNDERSTAND HOW YOU RECONCILE THESE TWO TESTS.

HOW I RECONCILE THEM IS GOING BACK AND LOOKING AT HOW THEY HISTORICALLY CAME TO BE.

>> LET'S JUST GO BACK TO THIS,

AND I THINK YOU MAY BE JUST TRYING TO ESCAPE THE FIRST ISSUE.

IN POMPONIO THE QUESTION I LOOK BACK AT IT, BUT I DON'T KNOW OF ANY ANALYSIS THAT DOESN'T START WITH AND I HATE TO GO BACK TO THIS, BUT I JUST WANT TO BECAUSE JUSTICE LEWIS -- JUSTICE LABARGA ASKED YOU ABOUT THIS.

IT DOESN'T START WITH WHETHER THE LEGISLATURE INTENDED THE STATUTE TO EFFECT CONTRACTS THAT WERE PREVIOUSLY IN EFFECT.

THAT ANYTHING THAT THE LEGISLATURE DO HAS TO START WITH THAT QUESTION.

>> WELL, I ANSWERED THAT --
>> DO YOU AGREE WITH THAT?
>> I AGREE WITH THAT TO THE
EXTENT THAT THE HARM, IF YOU
LOOK AT THE HARM --
>> NO, NOT ANY EXTENT.

STARTS WITH IF THIS LEGISLATURE
HERE SAID AND THIS WILL ONLY
EFFECT CONTRACTS THAT ARE SIGNED
AFTER FEBRUARY 1ST, LET'S JUST
SAY THEY PUT THAT IN, WOULD YOU
THEN SAY, NO, NO, YOU STILL
DON'T LOOK AT THAT, YOU LOOK AT
WHETHER IT'S IMPAIRED THE
CONTRACT TO A SIGNIFICANT
EXTENT?

>> I THINK THE COURT SHOULD HAVE
IMPAIRMENT, JUST TO ANSWER YOUR
QUESTION, JUSTICE PARIENTE, IF
YOU LOOK AT RETROACTIVITY, OKAY?
EVERYTHING, IF WE ONLY LOOK AT
THE LAWS AT THE TIME THE
CONTRACT WAS MADE, WE CAN -- FOR
EXAMPLE, IF WE HAD A PROBLEM
LIKE JAPAN HAS RIGHT NOW AND
SOMEBODY HAD A DAIRY CONTRACT TO
PROVIDE MILK IN AN AFFECTED
AREA, UNDER THAT ANALYSIS WE
COULD NO --
>> NO, THAT'S NOT TRUE AT ALL.

YOU HAVE ALL KINDS OF ACTS OF
GOD AND OTHER THINGS THAT MAY
OCCUR THAT INTERRUPT A CONTRACT,
OKAY?
THAT'S NOT WHAT WE'RE TALKING
ABOUT HERE.

>> NO, BUT IF WE HAD A SIMILAR
SITUATION.

I JUST USED THAT BECAUSE IT'S
ONE THAT'S IN THE NEWS.
BUT WE HAVE A SIMILAR SITUATION.
IMPAIRMENT OF CONTRACT IS NOT
COMPLETE.

IT'S NOT A TOTAL, TOTAL
DEVASTATION.

IF YOU HAVE THE LAWS THAT ARE IN

EFFECT AT THE TIME OF THE CONTRACT, WE KNOW THERE'S GOING TO BE SUBSEQUENT LAWS THAT CAN BE PASSED.

>> YOU KNOW, BUT YOU HAVEN'T

ANSWERED MY QUESTION.

IS THE LEGISLATURE THEN, IF JAPAN, IF THE LEGISLATURE OF JAPAN AND THEY OPERATE LIKE WE DO WOULD SAY AND THIS IS GOING TO -- THEY PUT INTO EFFECT UNDER THEIR POLICE POWER SOME CATASTROPHIC DECISION.

THE QUESTION WHAT YOU'RE SAYING IS, WELL, THAT'S WHAT THE LEGISLATURE MUST HAVE DONE BECAUSE THEY HAD ALL THESE HURRICANES GOING ON.

THEY MUST HAVE INTENDED --

>> YES.

>> -- THAT THIS BE APPLIED

RETROACTIVELY.

>> TO THE HARM THAT OCCURS,

THEREFORE, TO THAT EXTENT IT'S RETROACTIVE.

>> BUT YOU WOULD HAVE TO HAVE LEGISLATIVE INTENT THEY INTENDED THAT.

THAT'S ALL --

>> I THINK THEY HAVE IT.

>> WE'RE ALL SAYING THAT.

>> I THINK I AGREE WITH THAT TO

THE EXTENT THE HARM OCCURS UNDER THE CONTRACT LATER.

IN OTHER WORDS, I EQUATE THIS MORE WITH THE BIONETICS CASE IN TERMS OF THE ANALYSIS OF THIS COURT ON THAT PROVISION UNDER 57105, THE SAFE HARBOR PROVISION --

>> WELL, THE HARM OCCURS LATER,

THEN MAYBE IT'S MORE LIKELY THE LEGISLATURE INTENDED TO APPLY RETROACTIVELY, BUT THAT DOESN'T STILL DISPENSE WITH THE FIRST PART OF THE ANALYSIS WHAT THE

LEGISLATURE INTENDS.

>> WELL, THE INTENT, I THINK, IS SET FORTH IN THE STATUTE, AND I THINK THE INTENT WAS IF THERE'S GOING TO BE A HURRICANE OR DAMAGE THAT WOULD COME UNDER A PROPERTY POLICY AFTER THE EFFECTIVE DATE OF JULY 1, THEN IT WOULD BE SUBJECT TO THE MEDIATION NOTICE THAT'S REQUIRED.

YOU'RE SUPPOSED TO GIVE NOTICE OF THAT. AND THAT'S WHEN THE POLICY KICKS IN.

IT EITHER HAS TO BE A DAMAGE --

>> AND SO, AGAIN, THAT'S THE FIRST TIME I THINK ANSWERING THE FIRST QUESTION WHICH IS THE LEGISLATURE MUST HAVE INTENDED IT TO APPLY TO ANYTHING WHERE THE DAMAGE OCCURRED AFTER THE --

>> YES.

BECAUSE THAT'S WHEN THE NOTICE IS GIVEN.

>> BUT THAT'S, YOU KNOW, THAT IS STILL A STATUTORY CONSTRUCTION ANALYSIS.

>> WELL, YOU SEE, THE THING IS I THINK WE LOOK AT ALL THESE DIFFERENT CASES, AND IF YOU TRY TO RECONCILE THE TWO-PRONG ANALYSIS WITH THE, WITH POMPONIO WHICH IS FROM THE UNITED STATES SUPREME COURT EFFECTIVELY, THE TWO OF THEM DON'T PERFECTLY MESH.

AND THAT'S BECAUSE ONE STARTS OUT BY SAYING IS IT RETROACTIVE, AND THEN, IF SO, IS IT CONSTITUTIONAL.

THE OTHER ONE SAYS LOOK AT THE CONTRACT, IS THE CONTRACT SUBSTANTIALLY IMPAIRED, AND THEN WE BALANCE OUT --

>> I GUESS I'M NEVER GOING TO --

I WILL LOOK AT THE U.S. SUPREME COURT CASE, BUT I CAN'T BELIEVE THEY DON'T START WITH THE QUESTION, DOES THE LEGISLATURE INTEND THAT THIS IMPAIRED THE CONTRACT?

IS THAT THE FIRST --

>> WE'LL TAKE THAT AS A GIVEN.

>> OF COURSE, IT HAS TO BE.

IT HAS TO START THAT WAY.

>> JUST TAKEN AS A GIVEN, I'M

LOOKING AT THIS PARTICULAR STATUTE WHICH TALKS -- WHICH ONLY IMPLY CASES WHEN THERE'S HARM BECAUSE OTHERWISE THERE'S NO REASON TO GIVE THE NOTICE IF THERE'S NO HARM.

SO LET'S SAY IT'S RETROACTIVE, OKAY?

>> THAT TAKES US -- IF YOU GO TO

THE TWO-PART QUESTION, WHAT HAPPENS IS THE NEXT QUESTION IS, IS IT CONSTITUTIONAL?

IS IF YOU GO TO POMPONIO, THE QUESTION IS, HOW BADLY DID IT DAMAGE THE CONTRACT, AND IF IT DAMAGED THE CONTRACT BADLY, WE LOOK AT THESE THREE OR FOUR FACTORS.

>> BUT IT STILL SEEMS TO ME

THAT, YOU KNOW, AFTER SAYING ALL OF THAT I HAVEN'T HEARD ANYTHING THAT SAYS WHAT LANGUAGE IN THIS STATUTE WE CAN LOOK AT AND SAY THE LEGISLATURE INTENDED THIS TO APPLY RETROACTIVELY.

WHAT IS THE LANGUAGE IN THIS STATUTE?

BECAUSE OTHERWISE WE WOULD BE PULLING IT OUT OF THIN AIR.

>> THE LANGUAGE THAT THEY USED

SPECIFICALLY WAS A PROCEDURAL DEVICE, AND I COULD -- IT'S IN THE BRIEF, I'LL TRY TO FIND IT AS WE'RE SPEAKING.

BUT THERE'S A PROCEDURAL DEVICE

THAT WAS BEING IMPOSED OF
MEDIATION, PRECINCT MEDIATION,
TO AVOID THE COSTLY APPRAISAL
AND COSTLY COURT PROCESSES THAT
WERE THEN ONGOING.

SO WHAT THEY WERE TRYING TO DO
WAS TO ENCOURAGE THE INSURANCE
COMPANIES TO GIVE NOTICE, THEY
MANDATED GIVING NOTICE
SPECIFICALLY TO THE INSUREDS SO
WE COULD AVOID GETTING TO A
SITUATION WHERE THERE'S NO,
WHERE THERE IS A PROCESS THAT
THEY CAN COME INTO IN WHICH
THERE'S NO INTIMIDATION OR
COERCION OR EXPENSION.

>> OKAY.

SO YOU'RE TELLING US THAT THE
USE OF THE WORD "PROCEDURAL" IN
THIS STATUTE IS WHAT TELLS US
THAT THE LEGISLATURE INTENDED
THIS TO APPLY RETROACTIVELY?

>> WELL, THEY WENT THROUGH IT

REPEATEDLY THAT THIS WAS A
PROCEDURAL DEVICE.

THEY HAD THE DATE SPECIFIC AS TO
WHEN THE STATUTE WOULD TAKE
EFFECT WHICH WAS JULY 1 OF 2005.
THEY TALKED ABOUT -- AND HERE'S
THE LANGUAGE.

IT'S ON PAGE 20 OF OUR ANSWER
BRIEF.

IT PROVIDES AN ALTERNATIVE
PROCEDURE FOR RESOLUTION OF
DISPUTED PROPERTY INSURANCE
CLAIMS.

AND UNDER PURPOSE AND SCOPE IT
SAID THAT THE STATUTE SETS FORTH
A NONADVERSARIAL ALTERNATIVE
DISPUTE RESOLUTION PROCEDURE FOR
A MEDIATED CLAIM RESOLUTION
CONFERENCE PROMPTED BY THE NEED
FOR THE EFFECTIVE, TIMELY, FAIR
HANDLING OF PROPERTY INSURANCE
CLAIMS.

IT SAYS, "THE PURPOSE OF THE
PROCEDURE SET FORTH IN THE

STATUTE IS TO BRING THE PARTIES TOGETHER FOR REMEDIATED CLAIMS SETTLEMENT CONFERENCE WITHOUT ANY OF THE TRAPPINGS OR DRAWBACKS OF AN ADVERSARIAL PROCESS TO ENCOURAGE THE INSURED AND INSURERS TO RESOLVE CLAIMS AS QUICKLY AS POSSIBLE BEFORE RESORTING TO THESE PROCEDURES."

AND THE PREAMBLE TO THE LAW ENACTING THE PROVISION AT ISSUE HERE STATES THAT, "THE STATUTE'S BEING AMENDED TO REVISE THE PURPOSE AND SCOPE OF PROVISIONS RELATING TO AN ALTERNATIVE PROCEDURE, RESOLUTION OF DISPUTED PROPERTY INSURANCE CLAIMS PROVIDING THAT FAILURE OF INSURER TO NOTIFY CLAIMANT OF THE AVAILABILITY EXCLUDES FROM BEING REQUIRED TO SUBMIT TO CERTAIN PROCEDURES."

PROCESSES, I'M SORRY.

THAT'S, BASICALLY, PAGE --

>> SURE.

YOU HAVE NOW EXCEEDED YOUR TIME.

I'LL GIVE YOU 30 SECONDS TO SUM UP.

>> THANK YOU, JUSTICE CANADY.

I APOLOGIZE FOR EXCEEDING THE TIME.

WHAT I'M TRYING TO FOCUS THE COURT ON IS THESE TWO TESTS ARE OUT THERE.

ONE SPECIFICALLY HISTORICALLY APPLIES TO IMPAIRMENT OF CONTRACT.

IT ASSUMES RETROACTIVITY.

THE OTHER ONE DOES NOT INVOLVE CONTRACT HISTORICALLY.

THERE MAY BE SOME CROSSOVER ON OCCASIONAL CASES WHERE IT DID, BUT THAT TWO-PRONG TEST SAYS IS IT RETROACTIVE, AND THEN WE GET TO THE QUESTION OF IS IT CONSTITUTIONAL, AND THAT'S WHERE

WE'RE LEFT WITH A BLIND EYE.
THANK YOU VERY MUCH.
I JUST ASK THE COURT TO AFFIRM
THE FOURTH DISTRICT'S THOUGHTFUL
OPINION.

>> I KNOW I HAVE LIMITED TIME,

SO I'LL BE BRIEF.

TO THE EXTENT POMPONIO DID NOT
DISCUSS RETROACTIVITY, THE COURT
HAD DECIDED ONE YEAR EARLIER
DISCUSSING THE SAME STATUTE THAT
IT WAS INTENDED TO BE APPLIED
RETROACTIVELY, CENTURY VILLAGE
V. WELLINGTON, AND THAT WAS
INCLUDED IN A FOOTNOTE IN
JUSTICE ENGLAND'S DECISION THAT
RETROACTIVITY HAD ALREADY BEEN
DISCUSSED IN THE PRIOR OPINION.

>> HOW ABOUT COUNSEL'S OPINION

THAT YOU READ THIS STATUTE
THOROUGHLY, AND VIRTUALLY EVERY
SENTENCE CONTAINS PROCEDURE,
PROCEDURAL, PROCEDURE,
PROCEDURE, A PROCEDURE TO
ELIMINATE, A PROCEDURE TO DO
THUS AND SO?

>> I'D SAY A COUPLE THINGS.

ONE, WITH ALL DUE RESPECT TO THE
LEGISLATURE, THE LABELS THEY
ASCRIBE TO SOMETHING SHOULD NOT
BE TAKEN AS THE ANSWER.

THEY COULD GET AROUND EVERY
IMPAIRMENT OF CONTRACT TEST OR
QUESTION BY THE COURTS IF THEY
SIMPLY DESCRIBED IT OR LABELED
IT AS A PROCEDURAL DEVICE.

>> IF IT HADN'T TOUCHED UPON THE

APPRAISAL, WOULD THIS APPLY
RETROACTIVELY?

>> IF THERE WAS NO PENALTY?

IF THEY WERE JUST REQUIRED TO --

>> NO.

THEY DID NOT -- THE APPRAISAL
WASN'T MENTIONED.

>> THEY JUST REQUIRED INSURANCE

TO GO TO MEDIATION?
IT'S DIFFICULT TO ANSWER.
I MEAN, THERE STILL ARE THE
ISSUES OF THE PAYMENT WHICH THE
INSURER'S REQUIRED TO FUND THE
MEDIATION PROGRAM.
BUT I BELIEVE --
>> I THOUGHT IT SAID WHEN IT
TALKS -- OH, THE MEDIATION.
I'M SORRY.
>> IT, SO I THINK THAT WOULD BE
A MORE DIFFICULT TEST, BUT
THAT'S NOT WHAT'S IMPORTANT.
>> BUT IT DOES SEEM, AND YOU'RE
OUT OF YOUR TIME, BUT I THINK
THE BEST POINT THAT WAS MADE IS
THIS STATUTE WAS ENACTED IN THE
WAKE OF THESE HURRICANES, AND
ISN'T IT THEN PRETTY CLEAR THAT
THE LEGISLATURE WAS WANTING TO
DEAL WITH AN IMMEDIATE CRISIS
WHICH WAS THE THOUSANDS OF
CLAIMS BROUGHT ABOUT OR HUNDREDS
OF THOUSANDS OF CLAIMS BROUGHT
ABOUT BY THE HURRICANE, SO
WOULDN'T IT BE LOGICAL THAT THEY
INTENDED IT TO APPLY AS OF THAT
DATE TO THE CLAIMS BEING MADE AS
OF THAT DATE?
>> I THINK THE LEGISLATURE IS
PRESUMED TO KNOW THIS COURT'S
OPINIONS, AND THIS COURT HAS
SAID IF THE LEGISLATURE WANTS IT
TO BE RETROACTIVELY APPLIED,
THEY NEED TO SPECIFICALLY STATE
SO IN THE SPACE OF THE BILL.
THEY DID NOT, IN FACT, DO SO.
WE'D ASK THE COURT TO REVERSE OR
QUASH THE DECISION.
THANK YOU.
>> ALL RIGHT.
WE THANK YOU BOTH OF YOU FOR
YOUR ARGUMENTS.
THAT CONCLUDES TODAY'S DOCKET.
>> PLEASE, RISE.
COURT IS ADJOURNED UNTIL 9 A.M.

