>> ALL RISE.
>> SUPREME COURT OF FLORIDA IS NOW IN SESSION.
PLEASE BE SEATED.
>> WE NOW COME TO THE THIRD AND FINAL CASE ON TODAY'S DOCKET, INTERVEST CONSTRUCTION OF JAX, INC. V. GENERAL FIDELITY INSURANCE COMPANY.
>> GOOD MORNING.
MY NAME'S BRAXTON GILLAM, I'M HERE ON BEHALF OF INTERVEST CONSTRUCTION OF JAX, INC.
THE 11TH CIRCUIT POSES TWO QUESTIONS FOR THE COURT.
ONE, CAN ICI UNDER THIS POLICY USE A CUSTOM CUT TO MEET OBLIGATION, AND IF IT CAN, IS THERE ANYTHING A LIMITED-FUND SCENARIO ABOUT THE TRANSFER OF RIGHT DIVISION IN THIS POLICY THAT GRANTS PRIORITY TO ICI OR LIMITED FIDELITY, AGAIN, IN A LIMITED-FUND SCENARIO?
I SUGGEST TO THE COURT THAT WHEN IN EVALUATING THE QUESTION WHETHER THE CUSTOM-CUTTING PAYMENT CAN MEET THE SIR, THE COURT REALLY HAS TO CONSIDER WHETHER OR NOT THERE'S ANYTHING IN THE POLICY THAT PREVENTS ICI FROM USING THIS MONEY TO MEET ITS SELF-INSURED RETENTION.
THE POLICY SAYS THAT ICI -- ACTUALLY, IT SAYS THE SELF-INSURED RETENTION MUST BE MET BY YOU, REFERRING TO ICI.
IN NO PLACE IT SAYS SELF-INSURED RETENTION MUST BE PAID BY THE INSURER, AGAIN, REFERRING TO THE ICI.
ICI SPENT TIME IN THE BRIEF EXPLAINING THE CUSTOM CUTTING BELONGED TO IT.
ULTIMATELY WHEN IT WAS MADE, THE ONLY PARTY WHO HAD A CLAIM TO THAT MONEY WAS ICI.
>> WHAT ABOUT -- LET ME ASK YOU ABOUT THE TRANSFER OF RIGHTS.
NOW, I UNDERSTAND THAT WE'VE GOT THESE TWO DIFFERENT QUESTIONS, BUT IT SEEMS LIKE, TO ME AT LEAST ARGUABLY, THEIR REALLY, YOU'VE GOT TO BE MERGED INTO ONE QUESTION BECAUSE YOU'VE GOT TO

LOOK AT ALL OF THESE PROVISIONS
TOGETHER.
UM, AND TO FOCUS ON ONE ASPECT
OF IT, JUST THE SIR WITHOUT ALSO
LOOKING AT THE TRANSFER OF
RIGHTS IS TO NOT LOOK AT THE
POLICY AS A WHOLE.
BUT WHEN IN THE TRANSFER OF
RIGHTS PROVISION, WHAT DOES THE
WORD "TRANSFER" MEAN?
>> WELL, JUDGE, I THINK WHAT IT
IS, EFFECTIVELY, A
CONTRACTUAL --
>> NO.
"TRANSFER" MEANS SUBROGATE?
>> WELL, IT MEANS MY CLIENT HAS
TO GIVE AND/OR THEY'RE OWED MY
CLIENT'S RIGHT TO RECOVER MONEY
AS THEY PAY ON MY CLIENT'S
BEHALF.
BUT ONLY AT SUCH TIME THAT
THEY'VE MADE A PAYMENT ON MY
CLIENT'S BEHALF.
>> WELL, THEY'VE PAID $300,000,
HAVEN'T THEY?
>> AFTER THE RESOLUTION OF MY
CLIENT'S CLAIM OF CUSTOM
CUTTING.
>> WELL, BUT IF PART OF THE
RESOLUTION OF THAT, OF THE
SETTLEMENT WITH THE PLAINTIFF
AND THE UNDERLYING CASE, THEY
PAID $300,000.
NOW THEY WANT IT BACK, RIGHT?
>> THAT'S THE ISSUE, JUDGE.
>> AND YOU PAID $300,000, AND
YOU WANT THAT BACK.
THAT'S WHY WE'RE HERE.
THAT'S A LITTLE DETOUR FROM THE
FEDERAL COURT.
BUT I'M STILL, BACK TO MY
QUESTION ABOUT TRANSFER.
BECAUSE IN THE TRANSFER OF
RIGHTS PROVISION, IT SEEM LIKE
TO ME THAT THAT IS TALKING ABOUT
THE RIGHT THAT THEY WOULD --
THAT WOULD ENCOMPASS THE RIGHTS
THEY HAD UNDER THE
INDEMNIFICATION PROVISION WITH,
OR THE RIGHT YOUR CLIENT HAD
UNDER THE INDEMNIFICATION
PROVISION WITH THE
SUBCONTRACTOR, AND YOU, YOUR
CLIENT, HAS TRANSFERRED THAT
RIGHT TO THE INSURER, AND IT

SEEMS LIKE "TRANSFER" MEANS
TRANSFER.
THE RIGHT YOU HAD TO THAT HAS
BEEN GIVEN OVER TO THEM.
THAT'S WHAT "TRANSFER" MEANS.
I'VE GOT, IF I TRANSFER
SOMETHING, I'VE GOT IT, I GIVE
IT TO THE TRANSFEREE.
AND THEY PAY $300,000, THEY HAD
A RIGHT, THEY'VE GOT YOUR RIGHT
TO THE INDEMNIFICATION, SO WHY
AREN'T THEY ENTITLED TO IT ON
THAT BASIS?
>> BECAUSE, JUDGE, NOTHING IN
THE POLICY SAYS WE TRANSFER ALL
OF OUR RIGHTS UNDER THE
INDEMNIFICATION PROVISION TO
THEM.
>> WELL, IT SAYS, IT SAYS
WITHOUT LIMITATION THAT YOU
TRANSFER YOUR RIGHTS.
>> IT SAYS WE TRANSFER SUCH
RIGHTS AS IN THE MONEY THEY PAY.
IN OTHER WORDS, IF THEY PAY
MONEY, WE TRANSFER THE RIGHT TO
THEM TO GO AND COLLECT THAT
MONEY THEY PAID.
THAT'S ALL.
>> OKAY.
IF THE INSURED HAS RIGHTS TO
RECOVER ALL OR PART OF ANY
PAYMENT WE HAVE MADE UNDER THIS
COVERAGE PART, THOSE RIGHTS ARE
TRANSFERRED TO US.
>> I AGREE, JUDGE.
>> WELL, I MEAN -- OKAY --
>> I'M SORRY.
>> YOU LOOKED TRIUMPHANT WHEN I
READ IT, BUT I'M MISSING
SOMETHING.
EXPLAIN TO ME HOW THAT
ESTABLISHES YOUR POINT.
BECAUSE, BECAUSE -- EXPLAIN THAT
FURTHER.
>> JUDGE, IN THE WORDS YOU READ
IT SAID WE TRANSFER THE RIGHTS
TO THEM TO COLLECT THE MONEY
THEY PAID.
ONLY THE MONEY THEY PAID.
WE DIDN'T TRANSFER OUR ENTIRE
RIGHT, NOR DOES IT REQUEST US TO
TRANSFER OUR ENTIRE RIGHT TO
RECOVER UNDER OUR CONTRACT OF
INDEMNITY.
THERE'S MORE PIECES TO RECOVER

AGAINST THE THIRD PARTY, IN THIS CASE CUSTOM CUTTING, THAN JUST THE $300,000 THAT WAS PAID BY GENERAL FIDELITY.
>> WELL, LET ME ASK YOU THIS. IF THE PAYMENT FROM NORTH POINT TO ICI HAD BEEN $160,000, I MEAN, $1,600,000, WOULD YOUR GENERAL INSURANCE COMPANY BE ENTITLED TO THAT $600,000?
>> ABSOLUTELY.
I MEAN, I THINK THE ISSUE IN THIS CASE -- AND REALLY IT WAS THE SECONDARY QUESTION, I APPRECIATE THE COMMENTS SEEM TO BE MERGED -- BUT, YOU KNOW, THIS ISSUE ABOUT WHO'S GOT PRIORITY UNDER THE TRANSFER OF RIGHTS PROVISION ONLY COMES UP IN A LIMITED-FUND SCENARIO.
THIS TRULY MADE-WHOLE CONTEXT.
IF THERE WAS $1.6 MILLION OF COVERAGE AVAILABLE TO CUSTOM CUTTING AND/OR CUSTOM CUTTING HAD A MILLION SIX IN THEIR BANK ACCOUNT, WE WOULDN'T BE HERE BECAUSE THERE'D BE PLENTY OF MONEY TO REPAY MY CLIENT WHAT IT WAS OUT.
THAT'S NOT THE CASE.
THEY WERE INSOLVENT.
THERE WAS ONLY A MILLION DOLLARS AVAILABLE THROUGH INSURANCE TO PAY CLAIMS.
SO WHO GETS THE MONEY, THAT'S THE QUESTION.
AND THE ISSUE REALLY TURNS ON, AGAIN, I MEAN, WE WERE -- [INAUDIBLE] RECOGNIZED A WASHINGTON SUPREME COURT CASE, BUT THAT DEPENDS ON THIS CASE TO REACH THE OPINION THAT WHEN YOU'VE GOT A POLICY THAT'S SILENT AS THE 11TH CIRCUIT ACKNOWLEDGED, WE ACKNOWLEDGED IN OUR BRIEF, WHEN THE TRANSFER OF RIGHTS PROVISION IS SILENT, YOU'VE GOT TO GO TO DEFAULT PROVISIONS.
AND AS UNDER WASHINGTON LAW IS THE MADE-WHOLE DOCTRINE.
YOU'VE GOT SHORT FUNDS --
>> BUT HOW DOES THAT MADE-WHOLE DOCTRINE MAKE ANY SENSE AT ALL IN THE CONTEXT OF A POLICY THAT

HAS AN SRI PROVISION IN IT?
I MEAN, BECAUSE THERE THE NOTION IS IF YOU'VE GOT A SELF-INSURED RETENTION, THE NOTION IS THAT THE INSURED IS SELF-INSURING UP TO THE AMOUNT OF THE RETENTION, ISN'T THAT CORRECT?
NOW, HOW ARE THEY GOING TO BE -- I DON'T UNDERSTAND HOW THEY'RE TO BE MADE WHOLE AT THE EXPENSE OF THE INSURER WHEN THEY HAVE NOT SATISFIED THEIR SELF-INSURANCE OBLIGATIONS.
>> YOUR QUESTION FALLS IN LINE WITH THE COMMENTS OF GENERAL FIDELITY IN THEIR BRIEF WHEN THEY SAY THING LIKE -- GENERALLY SPEAKING.
>> VERY OBSERVANT OF YOU.
[LAUGHTER]
>> GENERALLY SPEAKING, SELF-INSURANCE LOOKS LIKE PRIMARY INSURANCE.
WHAT THEY'RE REALLY SAYING THERE IS UNDER CALIFORNIA LAW.
IT'S JUST NOT THE CASE UNDER WASHINGTON LAW AND, FRANKLY, BORDEAUX RELIES ON THE PROPOSITION THAT --
>> BUT THERE ARE CASES THAT REALLY DON'T INVOLVE THE SAME ISSUE HERE, AND HOW YOU CHARACTERIZE IT WHETHER IT'S SELF-INSURANCE IS INSURANCE FOR SOME PURPOSES AND NOT FOR OTHER PURPOSES, YOU KNOW, WE'VE GOT TO LOOK AT IT IN THE CONTEXT OF THIS CASE AND THE AUTHORITIES THAT BEAR ON THIS KIND OF ISSUE.
AND YOU DON'T REALLY HAVE ANYTHING LIKE THAT FROM FLORIDA, DO YOU?
>> I DON'T THINK THERE'S ANY CASE LIKE IT IN FLORIDA, I AGREE WITH YOU.
BUT I'LL TELL YOU WHAT I DO THINK WE HAVE BEFORE THIS COURT IS A CONTRACT THAT SPEAKS SPECIFICALLY TO THE ISSUE.
>> I THINK OPPOSING COUNSEL AGREES WITH YOU ABOUT THAT, AND PROBABLY EVERYBODY WILL AGREE WITH YOU ABOUT THAT.
WE MAY DISAGREE ABOUT WHAT IT SAYS --

[LAUGHTER]
>> WELL, WHAT I MEAN BY THAT, JUDGE, IS IF YOU TAKE A LOOK AT THE OTHER INSURANCE PROVISIONS OF THE POLICY WHICH EVERYBODY AGREES -- INCLUDING GENERAL FIDELITY ON PAGE 19 OF THEIR BRIEF -- DOESN'T APPLY BECAUSE MY CLIENT DOESN'T HAVE ANY OTHER INSURANCE.
THEY'RE NOT ADDITIONALLY INSURED UNDER ANY POLICY.
YOU LOOK AT THAT PROVISION, AND IT SAYS EXCEPT AND ONLY WHEN THE INSURED, MY CLIENT, HAS OTHER INSURANCE AVAILABLE TO IT.
IN THAT CASE, THE GENERAL FIDELITY POLICY IN -- THEY SAY EVEN IF YOU TALK ABOUT PRIMARY LEVEL OF INSURANCE.
NOT SURE IF YOU HAVE IT IN FRONT OF YOU, I'D READ IT TO YOU.
>> SURE.
>> IT'S THAT OTHER INSURANCE.
OTHER VALID INSURANCE AVAILABLE TO THE INSURED FOR LAWS WE COVER UNDER COVERAGES A AND B OF THIS COVERAGE PART, OUR OBLIGATION IS AS FOLLOWS: A, PRIMARY INSURANCE.
THIS INSURANCE SAYS PRIMARY EXCEPT WHEN B APPLIES.
AND B TALKS ABOUT WHEN THERE'S OTHER INSURANCE AVAILABLE TO MY CLIENT.
>> ARE YOU A THIRD PARTY BENEFICIARY OF NORTH POINT INSURANCE POLICY?
>> NO, JUDGE.
>> YOU'RE NOT?
>> WE'RE NOT AN ADDITIONAL INSURER OF THAT POLICY.
>> HE DIDN'T SAY ADDITIONAL INSURER, HE SAID THIRD PARTY BENEFICIARY.
>> NOT --
[INAUDIBLE CONVERSATIONS]
I'M SORRY.
>> NOT IN MY BRIEF, JUDGE, BUT I THINK LAW TALKS ABOUT.
WHEN YOU'RE TALKING ABOUT THIRD PARTY BENEFICIARY STATUS, YOU'VE GOT TO BE INTENDED --
>> HIS QUESTION IS, IS A CLAIMANT UNDER THE POLICY A

THIRD PARTY BENEFICIARY OF
THE --
>> THAT'S EXACTLY RIGHT.
>> THAT'S WHAT HE'S ASKING.
>> I DON'T THINK THAT'S WHAT
FLORIDA LAW SAYS, JUDGE.
[LAUGHTER]
MY CLIENTS ARE PURSUANT TO A
CONTRACTUAL INDEMNIFICATION
PROVISION.
WE MADE A CLAIM ON THEM, THEY
MADE A CLAIM ON THEIR INSURANCE.
>> IF YOU WERE A THIRD PARTY
BENEFICIARY, AND I APPRECIATE
YOUR CANDOR THAT YOU'RE NOT, BUT
IF YOU WERE, I THINK THAT'D MAKE
A BIG DIFFERENCE.
>> I'M NOT SURE IT WOULDN'T HURT
ME, JUDGE.
CLEARLY, UNDER THIS PROVISION OF
INSURANCE THEY HAVE A GOOD
ARGUMENT -- THEY BEING GENERAL
FIDELITY -- THEY WERE EXCESS
OVER THAT COVERAGE.
BUT WE'RE NOT.
THE ONLY REASON WE WERE PAID THE
MONEY, WHAT I CALL A
CUSTOM-CUTTING PAYMENT
THROUGHOUT OUR BRIEFS AND ALSO
HERE IN CONVERSATION WITH YOU
TODAY, IS BECAUSE WE HAD A
CONTRACT THAT SAYS YOU
INDEMNIFIED US --
>> RIGHT, EXACTLY.
>> -- FROM YOUR NEGLIGENCE.
>> SO IF YOU HAD IN THE
SUBCONTRACT IN SOME WAY REQUIRED
A THIRD PARTY BENEFICIARY POLICY
IN SOME WAY, I THINK YOU'D BE IN
A DIFFERENT POSTURE.
BUT IT SEEMS TO ME YOU'VE GOT
SUBROGATION RIGHTS, YOU'RE IN AN
EQUAL POSTURE AS TO THIS THIRD
PARTY POT OF MONEY COMING IN THE
DOOR, SO I DON'T UNDERSTAND WHY
YOUR CLIENT SHOULDN'T BE ON THE
HOOK FOR THE SELF-RETENTION FOR
THE MILLION.
>> WELL, I MEAN, JUDGE, AGAIN,
IN THE CONTEXT OF WHEN YOU'VE
GOT A LIMITED FUND, WHO GETS THE
MONEY IN LIMITED FUNDS?
AND WHEN THE CONTRACT DOESN'T
SAY THEY'VE GOT THE MONEY IN
LIMITED FUND, THE INSURED GETS

IT.
>> YOU'VE GOT A MILLION SIX
TOTAL DAMAGE, RIGHT?
TOTAL CLAIM.
>> YES.
>> SO YOU'RE LEFT WITH $600,000
THAT HAS NOT BEEN SUPPLIED OR
PAID BY SOMEBODY ELSE.
SO THEN HOW DOES THAT GET
DISTRIBUTED?
YOUR CLIENT HAS A MILLION
SELF-RETENTION, AND THEN THE
INSURANCE COMPANY COMES IN
BEHIND THAT.
I DON'T SEE WHERE THERE'S ANY
OTHER CONTRACT OR POLICY THAT
ALTERS THAT.
>> THE MILLION THAT WAS PAID WAS
OUR MONEY, JUDGE.
WE PAID THE MILLION.
>> LET ME ASK YOU IN THIS WAY
BECAUSE -- HERE, OVER HERE.
>> SORRY.
>> YEAH.
YOU BUILT THIS HOUSE, YOUR
COMPANY BUILT THE HOUSE, AND YOU
CONTRACTED WITH THIS CUSTOM
CUTTING FOR THE STAIRCASE.
AT THAT TIME WHEN YOU WERE
BUILDING THE HOUSE, DID YOU HAVE
THE INSURANCE WITH THE INSURER
HERE?
>> NO, JUDGE.
>> SO THE AGREEMENT, HOW YOU
DECIDED TO PROTECT YOURSELF IF
YOU WERE SUED BY THE HOMEOWNER
WAS AN AGREEMENT BETWEEN YOU AND
CUSTOM CUTTING.
>> YES.
IRRESPECTIVE AND PRIOR TO OUR
RELATIONSHIP WITH GENERAL
FIDELITY.
>> OKAY.
SO THEN YOU'RE LOOKING FOR
INSURANCE IN CASE YOU GET SUED.
AND YOU ENTER INTO NEGOTIATIONS
WITH GENERAL FIDELITY TO LOOK AT
WHAT KIND OF POLICY YOUR COMPANY
WANTS TO HAVE, GENERAL LIABILITY
POLICY, CORRECT?
>> YES, JUDGE.
>> AND AT THAT TIME I GUESS, YOU
KNOW, WE LOOK AT WHAT THE
CONTRACT SAYS, BUT FROM THE
POINT OF VIEW OF THE INSURANCE

COMPANY AND WHAT KIND OF PREMIUM
THEY'RE GOING TO CHARGE, THEY
WANT TO KNOW ARE THEY ON THE
HOOK FOR THE FIRST MILLION OR
NOT, CORRECT?
THAT'S WHAT THE SELF-INSURED
RETENTION IS.
>> YES, JUDGE.
>> OKAY, THIS IS ALONG WITH A
FRIENDLY QUESTION HERE, I JUST
WANT TO -- BECAUSE -- DID THEY,
AT THAT POINT, DID THEY ASK,
WERE THEY, WOULD THE PREMIUM
HAVE CHANGED UPWARD OR DOWNWARD
DEPENDING ON WHAT OTHER, HOW
ELSE YOU HAD PROTECTED YOURSELF?
AND I THINK THIS IS AN IMPORTANT
THING ABOUT THE BENEFIT OF THE
BARGAIN.
IN OTHER WORDS, DID IT MAKE A
DIFFERENCE IN THE PREMIUM YOU'RE
CHARGED WHETHER YOU HAD ALREADY
HAD INDEMNIFICATION AGREEMENT
AND INSURANCE WITH YOUR
SUBCONTRACTOR AS TO WHAT THIS
TYPE OF INSURANCE CONTRACT YOU
WOULD GET AND WHAT KIND OF
PREMIUM YOU WOULD PAY?
OR IS THAT IN THE RECORD AT ALL?
>> I WOULD SAY, ABSOLUTELY.
I DON'T THINK IT'S IN THE RECORD
PER SE, BUT I WOULD SAY,
ABSOLUTELY.
BECAUSE THERE IS SPECIFIC
PROVISION IN THE POLICY WHERE
THEY PREVENT US FROM USING
CERTAIN PARTS OF MONEY TO MEET
OUR SIR, AND THERE'S NO
PROVISION THAT SAYS YOU CAN'T
USE INDEMNIFICATION FROM PRIOR
SUBS TO MEET YOUR SIR.
>> AND THAT'S WHERE, TO ME, THIS
WAS DIFFERENT THAN THE
CALIFORNIA CASES BECAUSE THE
INSURANCE COMPANY COULD HAVE
WRITTEN IT TO SAY INCLUDES
SPECIFICALLY MONEY YOU MIGHT GET
FROM ANY POLICIES THAT YOU
ALREADY HAD BENEFITING YOU.
>> YES, EXACTLY HOW THEY DID --
>> BUT I'M STILL TROUBLED --
LET'S GO -- SO I'M LESS TROUBLED
BY THAT ISSUE.
I THINK YOU GET THE
SELF-RETENTION.

THE TRANSFER OF RIGHTS DECISION.
ARE YOU SAYING THAT IF WHAT HAD HAPPENED WAS THEY -- BECAUSE I THINK THIS WAS GREAT BECAUSE THE PLAINTIFF, EVERYBODY AGREED THAT THE PLAINTIFF WOULD GET THE 1.6, AND THEN YOU'D WORRY ABOUT WHERE IT WAS GOING TO GET PAID.
SO I THINK YOU ALL MINIMIZED ANY KIND OF PROBLEMS FOR THE PLAINTIFF.
BUT ARE YOU SAYING THAT IF THE MONEY HAD NOT BEEN PAID OUT FIRST, SAY YOU DECIDE TO PAY THE MILLION AND THEN SOUGHT REIMBURSEMENT FROM THE CUSTOM CUTTING, THAT THAT, YOU WOULD HAVE, IT WOULD HAVE BEEN DIFFERENT AS TO WHETHER THE INSURANCE COMPANY WOULD HAVE GOTTEN THAT MONEY BECAUSE OF THE INDEMNIFICATION PROVISION?
>> NO.
THE RESULTS WOULD HAVE BEEN THE SAME.
>> SO IT WASN'T A QUESTION OF WHO PAID FIRST.
>> NO.
WE'VE ALREADY -- THIS PROVISION, TRANSFER OF RIGHTS PROVISION, DOES NOT APPLY BECAUSE OF THE TIMING OF PAYMENT.
BUT IRRESPECTIVE OF THAT, IT DOESN'T MATTER WHEN PAYMENT WAS MADE.
IT DOESN'T SAY WHO GETS PRIORITY --
>> -- $2 MILLION FROM CUSTOM CUTTING, THERE WOULDN'T BE A CASE HERE.
>> RIGHT.
RESERVE OUR TIME, JUDGE.
THANK YOU.
>> May it please the court.
My name is Louis Schulman and I'm here representing the General Fidelity Insurance Company.
>> If there was $2 million from custom cutting -- everyone says 1.6.
But you insisted they pay $1 million out of their pocket first or would you be content to have the million being paid,

like the Custom Cutting
insurance company?
>> In the context of the
settlement, Your Honor, Custom
Cutting was at the table.
>> I'm trying to see what we are
playing with here.
Would you still have insisted
that they pay $1 million?
It all happened simultaneously.
Here we were all -- and they, in
fact, still pay $1 million and
were reimbursed the million
dollars from Custom Cutting.
When you say they have to
physically write a check or can
they take the money from Custom
Cutting, that doesn't make any
sense.
>> You specifically identified
the identification as a source
that would be not part of the
limit.
Do you know what I'm saying?
>> Yes, maam.
>> There are policies that are
very explicit on that.
>> Yes and they are more
explicit in some of the
California cases about using
money from your own funds from
your own account.
>> I guess I go back to, if you
can be more explicit, and we are
really dealing with the
sophisticated insurers --
sophisticated contractor -- then
if that was what was intended
why would you be used more
explicit language?
Trying to understand why you get
the benefit of there being smart
about and an indemnification for
their subcontractor?
>> The answer to that Your Honor
is, policies could always be
written in retrospect better
than they are.
>> These were, some of the
California cases were a long
time ago.
They were explicit on that so
there was no question about
that.
>> We addressed that in the

transfer provision.
>> So now you are going to where Justice Canady was.
You may lose on the first but because of the transfer of rights provision --
>> That is not our argument. Our argument is you don't have -- the second part of that question answers the first part.
In other words if in fact now that the transfer price provision says once there is a loss, you must do everything in your power to protect our right to indemnity.
At that point the right is transferred.
As soon as there is a loss and, therefore, they have no right in the first instance to apply.
>> In that position?
What language in that provision says that?
>> It's in paragraph 8 under the commercial liability conditions.
The general liability main form and it says, the insured must not do anything after the loss to interfere with these rights referring back to the phrase that says if the insured has rights to recover all or part of any payment we have made, these rights are transferred to us and then it says the insured must not do anything after the loss to interfere with these rights.
In effect if they have taken the indemnity money, as soon as they take the indemnity money they have interfered with our rights.
Essentially they have taken the money.
We have no indemnity rights left, even though they been transferred to us.
The fact that they use the indemnity payment to satisfy their SIR --
>> You still are maintaining that assuming there was $100,000 -- a million dollars that was given by North Pointe -- that ICI could not use

that $1 million to satisfy their SIR.
>> Absolutely and that is for two reasons.
A, because of the definition of you and your money which admittedly is not as strong as the California cases but, B, also because the right to recover and dignity payment has been transferred to aspire to them even getting their hands on it and because they are not allowed to interfere with our rights in the indemnity payment. Therefore they obviously can't use it to satisfy the SIR.
>> The thing that is interesting about all these other cases that are talked about in the briefs is that they relate to different factual scenarios dealing with these specific areas of policy. In the Vaughn case which is the California case that is against as they talk about the other insurance provision in the talk about the insurance provision in the context of the SIR which I don't think has the language in it but also it talks about the other terms of the policy taking precedence over the SIR.
Our provision says the opposite of that.
Our provision in our policy says, to the extent there is an incompetent provision between the SIR and the principle policy, the SIR controls.
>> Let me ask you this question and let's follow this through on a little different settlement. If the contractor had been involved in litigation, the plaintiff sued for injuries, and there is in the nature of a third-party complaint indemnification but it is severed and this case goes to trial.
There is a judgment for 1.6 and a construction company goes out and borrows 1 million bucks and pays the million.

You have to pay the 600,000, correct?
>> Yes, Sir.
>> So that answers the SIR question, and then comes the next question when the action is filed with regard to the indemnification.
>> Exactly, so then you claim that this clause operates in that scenario to allow you to get back the 600 before the contractor can receive it.
It seems to me we really have two questions here and that is dangerous to combine the two because it may not always fit exactly and precisely with indemnification because under the SIR I could ask the chief to loan me a million bucks and to pay for my portion.
>> Fat chance.
>> He doesn't like me very much.
>> But you understand what I'm saying.
There are two provisions here and we have to be very careful because it will impact future cases.
Under just the SIR your contract doesn't say it has to come out of my pocket.
It just says I have to pay it, correct?
>> Exactly and frankly the limitation as to what funds would be the funds of the insured under this scenario where it word uses the word "you," or the insured, I can't tell you the limit on that if you borrowed it from somebody.
>> This case is really about the second indemnification concept and whether under that clause that you take prior to on obtaining the benefit of any monies obtained through the indemnification concept whether it's funded to insurance or not.
>> Yes, Your Honor.
If you are funded through insurance you would have to look at the other insurance clause.

>> Exactly.
>> It is not necessarily in the indemnification scenario.
>> No, it wouldn't necessarily unless they were named officially under that policy.
>> What concerns me about this transfer of rights provision is, it says if the insured has rights to recover all or part of any payment we have made under this coverage part, but your obligation under this contract really doesn't kick in until a million dollars has been paid.
And so it seems to me, you know, with that in mind, that you don't have any payment to be made until after a million dollars has been paid.
So that is when your rights kick in and it seems to me you would then have a right to any money that they are able to or could recover beyond the million dollars.
It just seems to me it would be a very simple context.
Explain to me why your client would be entitled to part of the $1 million when your obligation doesn't kick in until after the million dollars has been paid?
>> We are talking about two different million dollars I think, Your Honor.
We are talking about the million dollars that the insured has to pay.
>> We have already covered that the million dollars the insured has to pay can come from any source.
>> Our policy specifically, when we are talking about the second clause of this policy which deals with the transfer of rights.
>> That is your money.
>> That is our money, that's exactly correct.
>> Then your reading of that particular policy, is it really your money?
That is the real question.

>> You talked about in that provision the insured may not do anything to interfere with our rights to recover that money.
>> Again, those provisions, that really means they can't go out and get a general release or something of that nature.
The provision is clear that you have subrogation laws and I think the way the 11th Circuit said it, it gives no guidance as to the priority as to who is to recover when the indemnity is sufficient to make whole both parties.
That is what we are talking about.
>> Yes, Your Honor.
>> We are talking about you don't have subrogation rights but when there is a limited amount, they can't recover their amount on the insurance that they paid for, not you, to get theirs first before you.
If this is a question of the contract controlling, then tell me about the interpretation given by the Washington state case and that it's not consistent with the made whole doctrine that the state has recognized wasn't a limited amount of indemnification mailable.
That is where I thought the two came together.
The state has the made whole doctrine and the insurer gets money after the insurer is made whole.
>> Yes, I agree with you Your Honor, but that is the crux of the case.
The reason this case comes out different is because the allocation of the risk is different.
Here, under the terms of the policy, the first $1 million is self-insured by the insured and they have that initial risk.
It's the excess risk the general fidelity has agreed to take out.

Every case involving that type
of allocation of risk, the party
that has the risk is entitled to
reimbursement first.
>> You might've said this but
you are really saying that the
600,000 should be paid out of
the million, and that is why the
state -- if you just look to
that, you don't pay the million
and the 600,000 you get to be
paid out of the million first
before they are?
>> Exactly Your Honor.
>> At least, I mean I am seeing
how certainly it's a reasonable
argument.
Whether policy -- unambiguously
is where I have a concern.
>> I think to allocate the risk
and allocating the first million
dollars of the risk to the
insured is what this policy
does.
Once having allocated the first
million-dollar of risk it's the
case and I'll areas of primary
and excess insurance.
The right to reimbursement goes
first to the party entitled to
it because they have taken on
the secondary risk or certainly
excess, I understand that and I
understand self-contained
limits.
We never really got into the
fact that it all was the fault
of customs or whether the
builder was also at fault so
that we are not --
Whether everybody by compromise
has decided we are going to
handle it this way.
They have their own liability,
because they didn't inspect
itproperly or whatever, other
than just vicarious.
Does that change anything about
this case?
>> Yes, it definitely would
because the indemnity there --
they are entitled to is related
to the negligence of the
subcontractors so in fact guess
if they were actively negligent

we wouldn't be talking about indemnity and the whole case would come out.
Your Honor is also correct in the one factual issue that has been raised in the case or came up during negotiation, everyone made the presumption that the subcontractor did the work and they were not actively liable.
>> We don't know.
>> We don't know that, Your Honor.
>> They wouldn't have been entitled to indemnity.
>> Exactly.
>> Let me ask you this question. Which Florida case do you say supports the proposition that, if a judgment had been entered in this case, and let's say that the custom cabinets only had $500,000, the insured -- the contractor -- made the first million and he paid $600, but that first $500 goes to you as opposed to the contractor. Which Florida case is that?
>> I don't have that case. Is on the tip of my tongue but it would be the case involving not a case of SIR.
>> I understand.
>> Our case involving primary and excess insurance, which talked about the excess carrier being reimbursed.
We are and now adjusting this. This is, in fact, the policy that calls itself insurance.
And by the way, that, Your Honor, was brought up in the Bordeaux case in Washington and, indeed, that is essentially the same fact and comes out differently than we proposed that this case come out.
The reason we feel that's so is because the Bordeaux case did not analyze the case consistent with Florida law.
Under Florida law, we are looking at how indemnity rights are allocated and the Bordeaux case, they went to other

concepts dealing with the nature of insurance and whether or not the uninsured motorist statute had a definition of insurance or whether other statutes to find insurance.
Because they found that, because of this primary layer of self-insured retention amounts to insurance, therefore, that in and of itself allows the application of the main whole doctrine on the theory that, well, the insured always gets reimbursed first, that no matter how insurance is defined elsewhere, this first layer, self-insurance, the policy is all that is issued in this case.
Whether you call it insurance or not, the risk is allocated according to the definition of the policy.
The insured has the risk of the first million dollars.
Your Honor asked the question, if this would have made any difference in the premium.
The fact is that goes without saying people get these policies for the million-dollar self-insured reduction because they pay a lot less premium.
>> Well that we know, but the question of whether it made a difference in the premium as to whether there were other insured such as indemnification insurance with subcontractors I think is compelling at least at this policy that was in existence preceded your policy but there is no reference to it.
They are a contractor so obviously if you are concerned --
I mean, it wasn't excess insurance in the traditional sense.
They had to do everything until the first 1 million went out, right?
So there weren't two insurers that were looking at what was going on.

And I guess my concern is that they went out to do something for that benefit and now it means that was for our benefit too and what we are dealing with here is it's not enough money for both who gets first? That is what we are talking about.
>> It isn't the way insurance works in these cases which the policy that's in effect at the time of the accident is the one to provide coverage whereas policies or contracts in effect when the house was built our years before.
So there is no way that we could compel them to have insurance or not have insurance.
Go back and tell the contractor --
>> That is why it would seem to me it wasn't part of how you evaluated the risk because of what you said.
You are not looking backward and so now you are trying to take advantage of something that they already contracted to have and paid the premium on.
In terms of the contract insisting that there be insurance.
>> I don't know, Your Honor.
>> Whether it is part of the contemplation of what went into the premium was the fact that you didn't have to pay until the first million got paid out.
>> The indemnity provision or policy, which is also part of the policy, is something we contemplated in charging a premium which is if there were any indemnity to be have that right would be transferred to us.
That too figured into the calculation.
>> For money that you paid?
>> Excuse me?
>> For money that you paid?
>> Money that we paid, correct.
>> An interesting issue.

>> Thank you, Your Honor.
>> I want to go back to Justice Canady's question for a couple of reasons.
One, it was addressed in Mr. Schuler's comments.
There was no transfer.
The policy says, if the insured has rights to recover all or part of any payment we have made under this coverage part, it can be transferred.
But it goes on to say the insured must do nothing to compare them at our request, at our request.
The insurer will bring suit or transfer those rights to us, so you have the option to ask us to transfer to them or we can pursue it, either way so it is not a transfer that occurs at the time of loss.
Something that might happen in the future if they make a payment and if they ask us to make a transfer.
>> Counsel says that, if we assume this case in trial, and we only had half a million dollars in coverage in the indemnification claim, that they take advantage of the first $500 of that because they would have been paid out --
You would pay $1 million and they would kick in $600,000, and they get the first bite consistent with Florida law.
>> He also candidly admits this policy could have been written better.
>> I understand that, but is he correct?
Agree that is the status?
In which case would you then say is controlling, to say that the insured would receive the benefit of the first $500?
>> The case that we have sided Judge, the law in Florida says that.
If you don't have in a provision our insurance policy or some statute that says who has

priority come in this case the insurance has greater priority than my client in the limited fund if we get it.
And I would say to you that one way they could've written this policy better if they wanted to write it better for themselves or to write it better for the future is to say --
We get made whole before you get made whole.
>> Are you saying that any provision in the policy is ambiguous?
>> I am not, Judge.
>> Are there policies that have that language in their?
>> There are policies that say for instance, one of the policy cited by the council talks about what can be used to meet an SIR requirement and that limits what you can and cannot use for SIR.
That is what Judge Canady was asking before.
They say, like in that case, you can't use money you receive.
An additional insured cannot pay the SIR for name to ensure.
Those kinds of things can get them around the issue.
Again, I think the better way for them to do it if they really want to get around the made whole doctrine is to say in the policy is misabrogated.
They didn't do that.
I'm out of time.
>> Thank you both for your arguments.
The last case of the day, and of the week.
The court is now adjourned.
>> All rise.