BAILIFF: LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SEATED.

GOOD MORNING, LADIES AND GENTLEMEN. WELCOME TO THE FLORIDA SUPREME COURT. WE HAVE, ON HEARING THE FIRST CASE, MAZZONI FARMS AND FOLIAGE FOREST VERSUS E. I. DuPONT. THOSE CASES ARE CONSOLIDATED FOR THE PURPOSE OF ARGUMENT ARE YOU READY TO PROCEED?

THANK YOU. MAY IT PLEASE THE COURT. GOOD MORNING. MY NAME IS STEWART UNOFSKY, AND I AM HERE, TODAY, REPRESENTING SEVERAL GROWERS OF ORNAMENTAL TREES, WHO WERE INVOLVED IN THE PURCHASE ENYA OF DuPONT'S -- IN THE PURCHASE OF DuPONT'S TREES, AND THIS IS FROM THE CIRCUIT COURT OF APPEALS, WHICH CERTIFIED TO THIS COURT TWO OF THE QUESTIONS, SO WE HAVE, IN ESSENCE, SEVEN SEPARATE LAWSUITS BUT TWO SEPARATE QUESTIONS FROM THE U.S. COURT OF APPEALS, AND THOSE QUESTIONS, FOR THE COURT'S REMINDER ARE, DOES A CHOICE OF LAW PROVISION IN A SETTLEMENT AGREEMENT CONTROL DISPOSITION OF A CLAIM THAT THE AGREEMENT WAS FRAUDULENTLY PRO CURED, EVEN IF THERE WAS NO ALLEGATION THAT THE CHOICE, ITSELF, WAS FRAUDULENTLY PROCURED, AND THE SECOND QUESTION IS, UNDER FLORIDA LAW, DOES THE RELEASE IN THE SETTLEMENT AGREEMENTS BAR THE PLAINTIFF'S FRAUDULENT INDUCEMENT TO CLAIMS. UNDERSTANDING THAT THE PANEL, THAT THE COURT, HAS, CERTAINLY, READ THE BRIEFS, I WOULD ONLY TAKE A MOMENT TO SAY THAT THESE CASES, SEVEN IN ALL, WERE DISMISSED, BASED ON DuPONT'S 12 B 6 MOTIONS AND THE ONLY FACTS THAT RERELY IN THE CASE ARE THOSE CONTAINED IN THE PLEADINGS AND THOSE MUST BE CONSIDERED TO BE TRUE. AS I SAID BRIEFLY THESE ARE EXPERIMENTAL GROWERS OF TREES, WHO USED THE FUNGICIDE. THEY INQUIRED OF DuPONT WHETHER, IN FACT, THE BEN LATE COULD HAVE DONE IT, AND DuPONT AFFIRMATIVELY REPRESENTED, IN FACT, THAT THE BENLATE COULD NOT HAVE CAUSED THE HARM THAT THE GROWERS WERE EXPERIENCING. IN ANY EVENT, BENLATE OFFERED, TO THE GROWERS, A SETTLEMENT AND A RELEASE. THEY ARE, IN SOME WAYS, DIFFERENT BUT, IN FACT, THE APT ATTEMPT TO RELEASE DuPONT IS THE SAME. FOUR OF THE SEVEN RELEASES CONTAIN A CHOICE OF LAW PROVISION, INDICATEING THAT DEL WEAR SHOULD -- THAT DELAWARE SHOULD BE THE CHOICE OF LAW USED TO INTERPRET THE CASES. THE CASES WERE FILED IN STATE COURT, SEEKING DAMAGES FOR THE HARM THAT WAS EXPERIENCED BY THE GROWERS. DuPONT MOVED IT TO THE UNITED STATES DISTRICT COURT, AND, THERE, THE CASES WERE DISMISSED. THE DISTRICT COURT FOUND THAT THE LANGUAGE IN THE RELEASES BARED THE PLAINTIFF'S CAUSE OF ACTION FOR FRAUDULENT INDUCEMENT. THE CASES, THEN, WENT TO THE ELEVENTH CIRCUIT COURT OF APPEALS, AND WE ARE HERE ON THOSE CERTIFIED QUESTIONS.

ARE THE LANGUAGE ON THE RELEASES IDENTICAL? I KNOW THERE IS ONE THAT DOESN'T HAVE THE CHOICE OF LAW, BUT OTHER THAN THAT IS THE LANGUAGE IDENTICAL IN ALL OF THE RELEASES IN THE CONSOLIDATED CASES?

THEY ARE NOT, YOUR HONOR. IN FACT, AS YOU POINTED OUT, SOME OF THEM CONTAIN CHOICE OF LAW, BUT BEYOND THAT, THERE ARE VARIOUS VARIETIES OF RELEASE IN THERE. SOME SAY YOU ARE RELEASING US FOR EVERYTHING THAT COMES UNTIL THIS DATE, THE DATE OF THE RELEASE, AND SOME SAY YOU ARE RELEASING US FOR EVERYTHING RELATED TO THE USE OR PURCHASE OF BEN LATE. IN ESSENCE, IN FACT, THEY MEAN NOTHING, BECAUSE THE VARIETY HAS NO SUBSTANCE, BECAUSE THIS IS A FRAUDULENT INDUCEMENT CLAIM, AND SO EACH OF THE PLAINTIFFS, EACH OF THE GROWERS, HAS SAID, REGARDLESS OF THE LANGUAGE THAT IS USED IN THE RELEASES, NONE OF THEM SAY YOU ARE RELEASING US FOR OUR OWN INTENTIONAL ACTS.

BUT YOU WOULD AGREE THAT, IF THE RELEASES THAT SAY ARISING OUT OF THE USE OF BENLATE

MAY BE A STRONGER ARGUMENT FOR THE PLAINTIFFS THAN ONES THAT ARE MORE GENERAL?

IN FACT, YOUR HONOR, I WOULDN'T CONCEDE THAT. I WOULD SAY THAT THOSE RELEASES THAT SAY YOU ARE RELEASING US FOR THE USE AND PURCHASE OF BENLATE ARE, IN FACT, AN EVEN GREATER FRAUDULENT INDUCEMENT, BAUT HARM THAT THE GROWERS ARE HAVING TO SUFFER, NOW, FROM HAVING GONE TO DuPONT AND SAY DID YOUR PRODUCT CAUSE THE PROBLEM, AND DuPONT SAYING NO, IT DID NOT, DESPITE THE FACT THAT

ISN'T THE QUESTION THAT IS CERTIFIED, HERE, BY THE ELEVENTH CIRCUIT, MUCH NARROWER AND IN THAT? IT IS REALLY FOCUSED UPON WHETHER YOU HAVE TO HAVE AN ALLEGATION. THAT A SPECIFIC PROVISION OF CHOICE OF LAW IS SOMETHING THAT, WITHOUT THAT ALLEGATION, THEN THE CHOICE OF LAW STANDS. ISN'T THAT BASICALLY THE NARROW ISSUE THAT THEY HAVE CERTIFIED US?

IN FACT, QUESTION ONE, WHICH IS THE CHOICE OF LAW QUESTION THAT YOUR HONOR HAS RAISED, ACTUALLY SAYS, EVEN THOUGH YOU DON'T ALONG THAT THE CHOICE OF LAW -- YOU DON'T ALLEGE THAT THE CHOICE OF LAW PROVISION WAS, IN ITSELF, DOES IT, IN ITSELF, ALLOW TO STAND IN THE TOTAL RELEASE THAT IT WAS PROCURED. OUR ARGUMENT IS THAT WE HAVE, IN FACT, ALLEGED THAT THE RELEASE, ITSELF, WAS FRAUDULENTLY PROCURED, IN THAT IT DOES AN INJUSTICE TO PARSE OUT THE CHOICE OF LAW AND SAY WE ARE GOING TO USE A CHOICE OF LAW TO] TECHNICAL TROUBLES] IN ORDER TO ALLOW DuPONT TO WORK FRAUD ON FLORIDA RESIDENTS VIOLATES OUR PUBLIC POLICY, BECAUSE FLORIDA WILL NOT ALLOW YOU, AS WE ALL KNOW, TO CONTRACT AGAINST YOUR OWN INTENTIONAL TORTS OR CERTAINLY NOT AGAINST FRAUD, WHICH WE HAVE HELD TO BE SO ABHORRENT TO FLORIDA LAW THAT IT HAS BEEN THE SUBJECT OF SEVERAL OPINIONS, SAYING YOU HAVE TO PLEAD IT SPECIFICALLY. YOU HAVE TO ALLEGE IT SPECIFICALLY. YOU CANNOT CONTRACT AGAINST YOUR LIABILITY FOR YOUR OWN FRAUD, AND THE REASON IS WE DON'T WANT PEOPLE TO COME INTO THE STATE AND BE ABLE TO USE OTHER STATE'S JURISDICTIONAL LAWS TO DEFRAUD OUR CITIZENS, SO IF, IN FACT, THAT CHOICE OF LAW POLICY OR THE CHOICE OF LAW SELECTION VIOLATES OUR PUBLIC POLICY, THEN THIS STATE WON'T EVEN FORCE IT, BUT AS A SEPARATE ARGUMENT, I WOULD ASK THE COURT TO CONSIDER THAT DuPONT HAS MADE NO-SHOWING THAT DELAWARE LAW IS ANY DIFFERENT THAN FLORIDA LAW. IN FACT, WHAT THEY RELIED UPON, WHEN THEY WENT OUT AND GOT THESE RELEASES FROM THE GROWERS, WAS THE EXPECTATION THAT DELAWARE LAW WOULD ALLOW THEM TO SAY, I AM SORRY, YOU SIGNED A RELEASE, AND NOW YOU ARE, FOREVER, BARRED FROM ANY SORT OF ACTION FOR ANY UNDERLYING TORT OR FOR ANY FRAUDULENT ACTION THAT MIGHT HAVE HAPPENED IN THE RELEASE. SO THAT IS A VERY BROAD STATEMENT.

AS A PARTY ATTEMPTING TO GET OUT FROM UNDER, AS IT WERE, THE CHOICE OF LAW PROVISION, WHY ISN'T IT YOUR BURDEN TO DEMONSTRATE THAT? WHY DO YOU CONTEND, AS THE DEFENDANT'S BURDEN, TO SHOW THAT THERE IS A DIFFERENT IN -- A DIFFERENCE IN THE LAW?

WELL, BECAUSE THEY ARE TRYING TO IMPOSE THE CHOICE OF LAW. WE ARE PERFECTLY HAPPY TO SAY THAT, IN FACT, THERE IS NO DIFFERENCE IN THE CHOICE OF LAW.

BUT BOTH OF YOU ARE THE CONTRACTING PARTIES HERE, AND YOU ARE THE PARTY WHO DOES NOT WANT TO ENFORCE THAT PARTICULAR PROVISION. SHOULDN'T IT BE YOUR BURDEN?

IT WOULD BE OUR BURDEN, IF THE LAW WERE DIFFERENT AND THERE WERE A DIFFERENCE IN THE REMEDIES. I BELIEVE IN THIS CASE, AS I SAID, IT REALLY MAKES NO DIFFERENCE, BECAUSE THE LAW HAS BEEN RATHER HARMONIZED OF LATE. THE NINTH CIRCUIT REVERSED THE CASE THAT DuPONT WAS RELYING ON WHEN IT WENT TO GET THESE CASES AND HAS AFFIRMED IN ANOTHER CASE CALLED FUKU BONZAI. AND THE CASE OF FUKU BONZAI WAS THE REPLETE LAW IN FLORIDA, AND IF I MIGHT READ FROM THAT CASE, WE TOLD HOLED, AS WE DID IN MANSURA, THAT PLAINTIFF'S CLAIM FOR INDUCEMENT IS NOT BARRED BY THE RELEASE LANGUAGE IN THE

SETTLEMENT LIABILITY AGREEMENT. DuPONT'S FRAUDULENT ACTIONS AND LACK OF GOOD FAITH NEGOTIATIONS UNDERMINE PLAINTIFF'S ABILITY TO BARGAIN FREELY FOR A FAIR SETTLEMENT. WE REITERATE DELAWARE'S POLICY OF FAVORING THE VOLUNTARY SETTLEMENT OF LEGAL DISPUTES IS ADVANCED BY ALLOWING FUKU BONZAI'S VICTIM SETTLEMENT IN THE DIRECT NEGOTIATIONS.

THE QUESTION THAT HAS BEEN CERTIFIED TO US, SHOULD IT MAKE A DIFFERENCE, IN THE CONCEPT OF APPLICATION OF FOREIGN LAW, DEPENDING UPON THE REMEDY THAT A PARTICULAR PLAINTIFF SELECTS, FOR EXAMPLE, IF YOU STAND ON THE CONTRACT AND THEN SUE FOR DAMAGES, IS -- SHOULD THAT BE A DIFFERENT RESULT THAN IF ONE WOULD COME IN AND SEEK TO RESCIND THE CONTRACT? BECAUSE IN ONE INSTANCE, YOU SEEM TO BE STANDING ON THE CONTRACT, ITSELF, AND ON THE OTHER, YOU ARE SAYING THAT THE CONTRACT NEVER EXISTED, SO SHOULD THAT HAVE ANY -- PLAY ANY PART IN WHAT WE ARE TALKING ABOUT HERE? BECAUSE WE HAVE A BRDER POLICY QUESTION THAN JUST DELAWARE -- A BROADER POLICY QUESTION THAN JUST DELAWARE CASE LAW, DELAWARE LAW, IN THIS CASE. THIS IS GOING TO ESTABLISH THIS FOR OTHER SITUATIONS.

IF I UNDERSTAND YOU CORRECTLY, YOU ARE ASKING WHETHER THE RESULT SHOULD JUSTIFY OR SHOULD IT WORK FORWARD?

SHOULD IT CHANGE, DEPENDING UPON THE REMEDY SOUGHT, BECAUSE YOU ARE SUGGESTING THAT THE PLAINTIFF HAS MULTIPLE REMEDIES HERE.

YES, AND I WOULD SUGGEST THAT, IN MANY OF THE LAWS IN THIS CASE, THE PLAINTIFF HAS MANY REMEDIES. HOWEVER, FOR PURPOSES OF ANSWERING THE CHOICE OF LAW QUESTION, I THINK THAT THE ANSWER MUST BE THAT, IF YOU ALONG THAT A SETTLEMENT AGREEMENT, IN AND OF ITSELF, WAS FRAUDULENTLY OBTAINED FROM YOU, IT SHOULD MAKE NO DIFFERENCE AS TO THE REMEDY. IT SHOULD, ALSO, NOT BE REQUIRED OF YOU THAT YOU SAY THIS PARAGRAPH WAS FRAUDULENTLY OBTAINED BUT THIS PARAGRAPH WAS NOT. IN THIS CASE, AS I EXPECT IN MOST CASES WHERE SOMEBODY MAKES THE ARGUMENT THAT, IN A CONTRACTOR A SETTLEMENT AGREEMENT HAS BEEN FRAUDULENTLY OBTAINED FROM THEM, THE TRUE ARGUMENT IS THAT THE OVERALL AGREEMENT WAS FRAUDULENTLY OBTAINED, THAT WHAT DuPONT DID, AND I WILL TAKE IT OUT OF THE DuPONT CONTEXT, FOR THE COURT'S CONCERN, WHAT THE SETTLING PARTY DID, WHEN IT OFFERED ME THE RELEASE, WAS MISLEAD ME AND NOT GIVE ME THE OPPORTUNITY TO ENTER INTO GOOD FAITH NEGOTIATIONS. SO I DON'T SEE ANY WORKABLE MEANS TO SEPARATE OUT CHOICE OF LAW PROVISION AND SAY THE REST OF THE CONTRACT WAS FRAUDULENTLY OBTAINED BUT NOT THAT CHOICE OF LAW PROVISION, WHICH, THAT IS OKAY. IN FACT, IT IS ALL ONE AGREEMENT, AND BARRING THE USUALLY SEVERABILITY ANALYSIS, THE FACT REMAINS THAT THE AGREEMENT, ITSELF, WAS FRAUDULENTLY OBTAINED. NOW, IF I MIGHT TAKE IT BACK INTO THE DuPONT CASE FOR JUST A SECOND, IN THIS CASE, THE GROWERS HAVE ALLEGED THAT WHAT DuPONT DID WAS CONDUCT ITS OWN TEST, FIND OUT THAT IT HAD A BAD FUNGICIDE, AND GO TO THEM AND SAY DON'T HIRE ATTORNEYS. WE ARE JUST GOING TO GIVE A SETTLEMENT, BECAUSE WE ARE OPERATING IN GOOD FAITH. YOU DON'T HAVE TO EXAMINE ANYTHING BUT TRUST US THAT OUR BENLATE IS NOT A DANGEROUS PRODUCT. THAT IS THE PLEADINGS AND THAT IS WHAT WE HAVE TO ACCEPT AS BEING TRUE, THAT THEY WERE TOLD NOT TO GET ATTORNEYS. NOW, FOR THE CHOICE OF LAW PROVISION, THE DuPONT WAS RELYING, AS I SAID, UPON THE EXPECTATION, REASONABLE OR OTHERWISE, DuPONT RELIED UPON THE EXPECTATION THAT DELAWARE LAW WOULD FAVOR IT, IN THE END, IF ANY OF THE GROWERS DISCOVERED THE TESTING RESULTS. IF ANY OF THE GROWERS DISCOVERED THAT THERE HAD BEEN COSTA RICAN TESTS CONDUCTED THAT SHOWED THAT BENLATE WAS A BAD PRODUCT AND THAT IT HAD NOT ONLY CAUSED WHAT IT DID CAUSE, BUT IT COULD HAVE CAUSED EVEN MORE PROBLEMS AND MIGHT, LATER, HAVE CAUSED EVEN GRAVER CONSEQUENCES. THEY, THEN, SAID WE WANT THE DELAWARE LAW TO APPLY IN THOSE FOUR INSTANCES, WHERE THEY WERE ABLE TO NEGOTIATE A DELAWARE CHOICE OF LAW PROVISION. ON THE EXPECTATION, AGAIN, THAT

DELAWARE LAW WHAT FAVOR THEIR POSITION THAT THERE WOULD BE NO FURTHER LAWSUITS.

BUT IS THERE ANYTHING WRONG WITH THE PRINCIPLE OF DuPONT IS GETTING TOGETHER AND SAYING, FIRST PARTY SAYING, WE HAVE DONE TERRIBLE THINGS, AND WE RECOGNIZE THIS, BUT WE WANT TO SETTLE THIS. WE WANT TO GET IT ALL BEHIND US NOW. AND THIS IS WHAT WE ARE WILLING TO PAY FOR WHAT WE HAVE DONE. AND IT IS ALL IN THIS BALL OF WAX. ISN'T THAT PRINCIPLY WHAT HAPPENED HERE? THE PARTIES SAY WE WANT TO GET OUT OF IT. WE KNOW WE HAVE DONE BAD THINGS.

THERE WOULD BE NOTHING WRONG WITH YOUR ANALYSIS, IF THEY SAID WE KNOW WE HAVE DONE BAD THINGS AND WE WANT TO GET OUT, AND YOU GROWERS UNDERSTAND THAT, WHATEVER BAD THINGS WE HAVE DONE, YOU ARE RELEASING US FOR. IT IS ANOTHER THING TO SAY TO PEOPLE WE DIDN'T DO ANYTHING WRONG, BUT WE ARE GIVING YOU THIS MONEY BECAUSE WE ARE A GOOD FAITH COMPANY AND WE ARE NOT ACKNOWLEDGING THE BAD THAT WE DID, AND EVEN THOUGH YOU CAME TO ME AND SAID COULD MY PRODUCT HAVE CAUSED ROOT DAMAGE? TREE DAMAGE? WE ARE SAYING, NO, NOTHING LIKE THAT HAPPENED. WE DID NOT CAUSE ANY PROBLEMS. WE ARE JUST WILLING, BECAUSE WE ARE A GOOD COMPANY, TO GO AHEAD AND SETTLE IT. THAT WOULD BE DIFFERENT.

DIDN'T YOU HAVE AN OBLIGATION, ON YOUR PART, BEFORE YOU ENTERED INTO THIS TYPE OF AGREEMENT, TO KNOW WHAT DAMAGE THIS PRODUCT HAS CAUSED?

YOU DO, IN FACT --

YOU HAD SOME IDEA OF WHAT IT WAS DOING, DIDN'T YOU, OR ELSE --

THERE WAS A SUSPICION OR ELSE THERE WOULDN'T HAVE BEEN AN INQUIRY, BUT YOU, ALSO, HAVE THE RIGHT, AS THE PARTY TO THE DISPUTE, TO SAY TO THE OTHER PARTY, TELL ME WHAT IS GOING ON. IT WASN'T IN LITIGATION YET, BUT YOU HAVE THE RIGHT TO SAY I WANT TO BARGAIN IN GOOD FAITH. TELL ME WHAT THE PROBLEM IS, SO THAT I KNOW WHAT I FACE.

I RECOGNIZE. THAT I MEAN, YOUR REBUTTAL TIME --

I SEE MY YELLOW LIGHT HAS GONE OFF.

BUT HOW FINITE DO YOU HAVE TO GET IN MAKING THESE DISCLOSURES? I GUESS THAT IS THE QUESTION. WHAT DO YOU HAVE TO SAY? WHAT DOES THE PARTY HAVE TO SAY? ALL RIGHT? THE PRODUCT WE HAVE WILL CAUSE DAMAGE IN THE FUTURE? IT WILL DESTROY YOUR LAND? YOU WON'T BE ABLE TO PLAN ON IT FOR THE NEXT 100 YEARS, OR HOW FINITE DOES THIS --

IT WOULD BE NICE, IF THAT WERE THE TRUTH. IF THAT WERE THE TRUE WAY THAT WE REQUIRE PEOPLE TO DISCLOSE. I UNDERSTAND THE CONCERN IS THAT HOW MUCH DISCLOSURE IS ENOUGH DISCLOSURE.

RIGHT.

AND IN THIS CASE, IT RAISES THE BAR, BECAUSE THESE GROWERS ACTUALLY WENT TO THE COMPANY THAT PRODUCED THE PRODUCT AND SAID PLEASE TELL US WHAT THE PROBLEMS ARE, AND THEY SAID NOTHING, EVEN THOUGH THEY KNEW, AT THE TIME, AND NOT ONLY DID THEY KNOW BUT THEY CONDUCTED THESE TESTS, AS THE PLEADINGS RECITE, IN SECRET, SO THAT THEY DID NOT HAVE TO DISCLOSE IT TO ANYBODY ELSE, AND THAT IS THE PROBLEM. WHEN YOU NEGOTIATE A SETTLEMENT AND YOU SAY I DID NOTHING WRONG BUT I WANT TO SETTLE IT IN ONE BALL OF WAX, BECAUSE THAT IS HOW I WANT TO BE RID OF THIS WHOLE LAWSUIT.

WELL, ISN'T THAT WHAT THE ADVERSARY SYSTEM IS ALL ABOUT, THOUGH, THAT THIS IS AN

ARM'S LENGTH TRANSACTION, WHERE ONE SIDE BRINGS THE CLAIM, REALIZING IT HAS GOT THE RESPONSIBILITY TO INVESTIGATE AND PROVE UP, AND IT IS NOT GOING TO HAVE OR RELY ON WHAT THE DEFENDANT SAYS IN DENYING THE CLAIM? DON'T WE, REALLY, IMPEDE THE ADVERSARIAL SYSTEM, IF WE RULE THAT THEY CAN'T CONDUCT TESTS OR DO OTHER THINGS OR HAVE WORK PRODUCT OR WHATEVER AND NOT DISCLOSE IT? ISN'T THAT WHAT ALL THOSE COMPLEX RULES ARE SET UP TO DO? THAT IS THAT YOU, FOR INSTANCE, CAN HIRE A CONSULTING EXPERT, AND THAT INFORMATION, BY THAT CONSULTING EXPERT, IS PROTECTED. YOU DON'T HAVE TO DISCLOSE IT. EVEN THOUGH IT MAY GIVE YOU NEWS, YOU KNOW, THAT YOU ARE IN TROUBLE, YOU KNOW, IN THIS CASE.

CERTAINLY I WOULDN'T ASK THE COURT TO UPSET THE ADVERSARIAL SYSTEM, BUT I WOULD LIKE TO POINT OUT A BRIEF QUOTE FROM THE TENTH CIRCUIT COURT OF APPEALS, WHICH SAID, IN CHASE VERSUS DOW CHEMICAL COMPANY, ACKNOWLEDGING THAT WE ARE -- EVERY DISPUTE IS, TO SOME EXTENT, ADVERSARIAL, BECAUSE I SAY ONE THING AND YOU SAY ANOTHER. EVERY DISPUTE, WHILE BEING ADVERSARIAL, PARTIES MUST HAVE SOME ASSURANCE OF LEGAL RECOURSE, IF THEY ARE INDUCED TO SETTLE THE DISPUTE, ON THE BASIS OF FALSE REPRESENTATION OF MATERIAL FACT. IN THIS CASE IT MUST BE REMEMBERED THAT THESE WERE NOT NECESSARILY THE TYPES OF ARM'S LENGTH TRANSACTIONS THAT WERE CONTEMPLATED BY THOSE COMPLEX RULES. THEY WERE NOT ATTORNEYS ARGUING WITH ATTORNEYS. THEY WERE, IN FACT, A FUNGICIDE PRODUCER, SAYING TO ITS GROWERS THAT HAD PURCHASED ITS FUNGICIDE, DON'T GET ATTORNEYS, BECAUSE IF YOU GET ATTORNEYS, THE DEAL IS OFF. AND PERHAPS THAT SHOULD HAVE LED THEM TO BELIEVE SOMETHING MORE, BUT THE REQUIREMENT THAT ONE NEGOTIATE IN GOOD FAITH REMAINS THE SAME, THAT WHETHER IT IS AN ATTORNEY OR AN UNREPRESENTED PARTY, I AM NOT PERMITTED TO MAKE MATERIAL MISREPRESENTATIONS TO YOU AND THEN SAY HERE IS A DOLLAR. THAT SETTLES IT. RIGHT?

THANK YOU VERY MUCH. I AM GOING TO GIVE YOU TWO EXTRA MINUTES FOR REBUTTAL, IN LIGHT OF THE QUESTIONS. CLAY.

GOOD MORNING, YOUR HONOR.

GOOD MORNING.

MY NAME IS STEVE CLAY. I AM HERE REPRESENTING DuPONT ON THESE CERTIFIED QUESTIONS, AND I WOULD LIKE TO BEGIN BY RESPONDING TO SOME OF THE QUESTIONS THAT THE COURT HAS HAD THIS MORNING. JUSTICE QUINCE ASKED WHOSE BURDEN IS IT IN A CASE SUCH AS THIS, TO SHOW THAT THE LAW IS DIFFERENT, IF THERE IS A CHOICE OF LAW DISPUTE. THAT QUESTION DOES NOT ARISE IN A CASE WHERE THE PARTIES HAVE EXPLICITLY PROVIDED FOR THE APPLICATION OF A PARTICULAR STATE'S LAW. THE QUESTION DOES ARISE IN SOME CASES, WHERE THERE WAS NO PROVISION IN THE CONTRACT, CONCERNING THE CHOICE OF LAW, BUT IN FLORIDA, IN STURIANO, FOR EXAMPLE, IN THE STURIANO DECISION AND IN OTHER CASES RECOGNIZING THE APPLICATION ON CONCEPTS, THE COURTS HAVE HELD THAT THE PARTY'S CHOICE OF LAW WILL BE RESPECTED AND THAT INFLECTIONIBLE RESPECT WILL BE ACCORDED TO THAT DECISION, UNLESS PUBLIC POLICY OF FLORIDA IS IMPERILED.

HOW COULD WE DETERMINE IF THE PUBLIC POLICY IS IMPERILED, UNLESS WE KNOW WHAT DELAWARE LAW WOULD BE ON THE SUBJECT? THEN WE, IN ORDER, I GUESS, WHETHER -- WHOEVER'S BURDEN IT IS, DON'T WE HAVE TO, IN REACHING THE DECISION ON THE PUBLIC POLICY BASIS, DECIDE OR DETERMINE WHAT DELAWARE LAW WOULD BE?

IN SOME CASES, THAT MIGHT BE TRUE, BUT IN A CASE WHERE THE ISSUE THAT IS BEFORE THE COURT IS HOW TO INTERPRET A RELEASE AGREEMENT AND WHERE WE KNOW, FROM THE CASE LAW THAT HAS ALREADY BEAN CITED TO THE ELEVENTH CIRCUIT AND TO THE DISTRICT COURT THAT, BOTH STATES FOLLOW A SIMILAR APPROACH, THAT IS THAT THEY CONSIDER THAT

GENERAL RELEASES ARE TYPICALLY ENFORCEMENTABLE, THAT THEY CAN BE -- TYPICALLY ENFORCEABLE AND THAT THEY CAN BE ENFORCEABLE AGAINST CLAIMS OF FRAUD AND WHAT THE INTENT OF THE PARTIES WAS WITH RESPECT TO THAT DOCUMENT, THEN THERE IS NO CONFLICT BETWEEN THE POLICIES OF THE TWO STATES THAT WOULD CAUSE ONE TO PREFER ONE AS OPPOSED TO THE OTHER. IN A CASE WHERE A CHOICE HAS BEEN MADE IN THE CONTRACT, AND THERE IS NO CONFLICT DEMONSTRATED, AND THE BURDEN WOULD CLEARLY HAVE TO BE ON THE PARTY SEEKING TO AVOID THE CHOICE IN THE CONTRACT, BUT WHERE NO CONFLICT, WHERE A CHOICE IS MADE AND NO CONFLICT IS DEMONSTRATED, THEN THAT CHOICE SHOULD BE RESPECTED, ACCORDING TO THE STURIANO DECISION.

WE, OF COURSE, WITH ALL DUE DEFERENCE, THE ELEVENTH CIRCUIT, ANSWER QUESTIONS THAT THEY ASK US TO ANSWER, BUT IF I AM UNDERSTANDING, AT LEAST, THE APPELLANT'S POSITION, AND LOOKING AT THE NINTH CIRCUIT CASE, IT WOULD APPEAR THAT DuPONT IS IN THE SAME POSITION, WHETHER DELAWARE LAW IS APPLIED OR FLORIDA LAW IS APPLIED, IN THAT DELAWARE LAW DOES, IF ANYTHING, MAY BE, BASED ON THE NINTH CIRCUIT INTERPRETATION, DOESN'T HELP YOU OUT, SO COULD YOU JUST ENLIGHTEN ME AS TO WHAT DuPONT'S INTEREST IS ON THIS ISSUE.

ABSOLUTELY. AT THE TIME THE CHOICE OF LAW DECISION WAS MADE IN THE RELEASE, NEITHER PARTY COULD KNOW HOW THE COURTS WOULD ULTIMATELY INTERPRET THE RELEASE, EITHER IN FLORIDA OR IN DELAWARE. THE CHOICE OF DELAWARE LAW WAS MADE BECAUSE DuPONT WAS SETTLING 400 CASES THAT WERE ALL TO BE CON TREELED -- CONTROLLED BY DELAWARE LAW, SOME OF THEM IN GEORGIA, SOME OF THEM IN TEXAS, SOME OF THEM IN FLORIDA, SOME OF THEM IN HAWAII. THE DuPONT CASE IS NOT IN OBTAINING A PARTICULARLY SUBSTANTIVE ADVANTAGE IN THE CASE BUT RATHER AN UNIFORMITY, WITH RESPECT TO INTERPRETATION OF THOSE CONTRACTS, AND THAT THEY WOULD ALL BE INTERPRETED THE SAME WAY. THE NINTH CIRCUIT DECISION IS AN EXAMPLE OF DuPONT'S CONCERN, IN THAT A FEDERAL COURT, WHICH WAS ASKED TO DEFER ON CERTIFICATION TO THE DELAWARE SUPREME COURT COURT, REFUSED TO DO SO AND DECIDED, ITSELF, TO DECIDE WHAT UNDECIDED DELAWARE LAW WAS, THEMSELVES. AT THEY -- AS THEY SAID, WE ARE TRYING TO PREDICT IT. NOW, THE CASE HAS BEEN SUBMITTED TO THE DELAWARE SUPREME COURT. A BRIEFING, ARGUMENT, ALL HAS BEEN COMPLETED ABOUT FIVE WEEKS AGO, AND A DECISION IS EXPECTED MOMENTARILY ON WHAT THEIR LAW S MY ONLY POINT IS THAT, WITH RESPECT TO THE CHOICE OF LAW, IF THE PARTIES HAVE CHOSEN IT, AND IT IS EXPLICIT IN THE CONTRACT, THEN THAT CHOICE IS TO BE RESPECTED, ABS SOME PROOF THAT A POLICY OF THE STATE THAT WHERE IN IT WOULD BE ENFORCED, IS -- U ARE SAYING THE CHOICE IS THAT THE FLORIDA PUBLIC POLICY WOULD BE OFFENDED BY ENFORCING OR ALLOWING A CONTRACT TO BE ALLOWED TO BE INTERPRETED, ACCORDING TO DELAWARE LAW.

I WOULD, AND THERE ARE TWO CASES THAT THE FLORIDA SUPREME COURT COURT HAS DECIDED THAT SHOW THAT THE FLORIDA PUBLIC POLICY COULD NOT BE OFFENDED, EVEN IF DELAWARE COULD NOT REACH THAT CONCLUSION. ONE IS THE OCEANIC CASE, IN WHICH THE SUPREME COURT, IN 1941, I BELIEVE IT WAS, EXPRESSLY SAID THAT PARTIES CAN NOT ONLY ENTER INTO RELEASES OF FRAUD, THEY CAN PROVIDE THAT DECISIONS WILL PREVAIL, THAT THERE BE NO REMEDY FOR FRAUD, IF IT IS EXPLICITLY SAID IN THE CONTRACT, AND THE SECOND CASE IS A CASE DECIDED BY THIS COURT IN 1996, THE FANIGIA CASE, IN WHICH THE COURT SAID THAT THE RELEASE DID NOT REFER TO FRAUD BY ITS TERMS, A RELEASE SAYING SIMPLY WE ARE RELEASING ANY AND ALL CLAIMS, FRAUDULENT DISCHARGE, AND IF YOU LOOK AT THE OPINION, THEY WERE FRAUDULENTLY INDUCED CLAIMS DIRECTED TOWARDS THE WIFE IN DECIDING HER CASE, SO FLORIDA PUBLIC POLICY IS NOT OFF ENDED BY THE ENFORCEMENT OF A RELIEF DISCHARGING FRAUD. IT IS THE APPELLANT'S BURDEN BUT IT COULD NOT BE CARRIED UNDER THE LAW HERE. JUSTICE QUINCE, I INTERPRETED YOU.

YOU SAID THAT THE PURPOSE OF PUTTING IN THE DELAWARE CHOICE OF LAWS WAS SO THAT YOU WOULD HAVE SOME UNIFORMITY IN ALL OF THESE CLAIMS. DON'T WE HAVE THE MORNING

GLORY AND COUNTRY JOANNE ONE OR TWO OTHERS OF THESE, WHERE WE DON'T HAVE THAT DELAWARE'S CHOICE OF LAW PROVISION, AND I AM WONDERING HOW WE GOT TO THAT POINT.

YES. YOU ARE CORRECT. THERE WERE A TOTAL OF APPROXIMATELY 50 ON CASES SETTLED, 400 OF WHICH WERE SUBJECT TO DELAWARE LAW, AND THEN THERE WERE ABOUT 100, MOST OF THEM MUCH EARLIER IN TIME OR IN HAWAII, ONE OR THE OTHER, IN WHICH DELAWARE LAW WAS NOT SPECIFIED. THE THREE CASES TO WHICH YOU REFER WERE CASES IN WHICH THERE WAS ACTUALLY NO LITGATION LITGATION. THE CASES WERE SETTLED IN 1992, ON THE BASIS OF CLAIMS MADE BY GROWERS, WHO SAID THEY THOUGHT THEY HAD BEEN DAMAGED BY BENLATE. THEY HAD NOT FILED ANY LAWSUITS. THOSE SETTLEMENT LITTLE WERE NEGOTIATED BY THE -- THOSE SETTLEMENTS WERE NEGOTIATED BY THE GROWERS, WITHOUT COUNSEL, AND YOU HAVE HEARD THE POINT ABOUT THE FACT THAT THEY WEREN'T REPRESENTED.

WERE THE OTHERS REPRESENTED BY COUNSEL, THE OBJECTS THAT DO HAVE A CHOICE OF -- THE ONES THAT DO HAVE A CHOICE OF LAW PROVISION?

YES. CHOICE OF LAW PROVISIONS, THEY WERE REPRESENTED BY COUNSEL. THEY WERE NEGOTIATED AND CHOSE DELAWARE LAW N THE THREE CASES THAT WERE FLORIDA CASES IN 1992, COUNSEL WERE NOT INVOLVED IN THE ORIGINAL NEGOTIATION, BUT I WOULD LIKE TO POINT OUT THAT THE DECISION, THEN, HAD TO BE MADE, IN 1997, WHEN THOSE THREE GROWERS FILED SUIT, AS TO WHAT THEORY THEY WOULD PURSUE. THEY COULD HAVE CHOSEN, AT THAT TIME, TO PURSUE A RESCISSION THEORY, AND COULD HAVE POINTED OUT THAT, AMONG OTHER THINGS, THAT IN THE ORIGINAL AGREEMENT, THEY WERE NOT REPRESENTED BY COUNSEL, AND THAT THAT SHOULD BE AN ELEMENT FOR THE COURT TO CONSIDER IN WHETHER RESCISSION SHOULD BE GRANTED. THEY DID NOT CHOOSE TO DO SO. NOW, HAVING THE ADVICE OF COUNSEL IN 1997, THEY TOOK THE CONTRACTS THAT THEY HAD SIGNED, THE RELEASES AND SETTLEMENT AGREEMENTS THAT THEY HAD SIGNED IN 1992, AND THEY AFFIRMED THEM, SO WHATEVER INJURY THEY TECHNICALLY CLAIMED THEY MIGHT HAVE SUFFERED BY NEGOTIATING THESE CONTRACTS IN 1992, WITHOUT BENEFIT OF COUNSEL, WAS THAT THE INJURY THEY GAVE UP BY ELECTING TO STAND ON THE CONTRACTS IN 1997, AFTER THE ADVICE OF COUNSEL HAD BEEN RECEIVED. AND TO PURSUE A THEORY THAT WAS CONTRACTUAL INNATE, RATHER THAN RESCISSION-BASED. NOW, FLORIDA, LIKE MOST STATES, FLORIDA, LIKE DELAWARE, HAS, ALWAYS, RECOGNIZED THAT RESCISSION IS AN APPROPRIATE REMEDY FOR A FRAUDULENT INDUCEMENT CLAIM, AND WE DON'T QUESTION WHETHER RESCISSION COULD HAVE BEEN PURSUED, HAD THEY PURSUED IT AT THE TIME. WE MAY QUESTION WHETHER OR NOT THEY WOULD HAVE PROVED THE FACTS NECESSARY, BUT WE DON'T QUESTION WHETHER THEY MIGHT HAVE MADE THAT ELECTION. THEY DID NOT MAKE THAT ELECTION. AND THE FLORIDA COURTS MAKE IT CLEAR THAT YOU MUST ELECT RESCISSION AT THE TIME THAT YOU FIRST KNOW THAT THERE ARE ANY BASIS OR FACTS UPON WHICH RESCISSION COULD BE GRANTED, AND YOU MUST PURSUE IT UNWAIVERINGLY.

LET ME MAKE SURE THAT I UNDERSTAND THE PLEADINGS BELOW. I UNDERSTAND THAT THE FEDERAL DISTRICT COURT DISMISSED IT ON THE BASIS OF THE -- THAT THERE WERE NO ALLEGATIONS THAT WOULD SUPPORT RESCISSION AND THEREFORE IT WAS SUBJECT TO DISMISSAL, BUT WAS THIS THEORY OF THE PLAINTIFF IN THAT COURT THAT IT WAS SUING ON THE CONTRACT AND SEPARATELY IN COURT FOR FRAUD?

YES. IT WAS A TORT --

ON A HTP-TYPE THEORY. IS THAT CORRECT?

YES. HTP-TYPE THEORY. ECONOMIC THEORY. THERE WAS AN ECONOMIC LOSS IN COURT, BUT THAT WAS NOT AN ARGUMENT, AND WE ARE NOT ARGUING THAT THE ECONOMIC LOSS RULE IS A BASIS FOR COMPLAINT.

THEIR THEORY BELOW, IN THE TRIAL COURT, WAS THAT THEY COULD GO FORWARD ON THE

BASIS OF THE FACT THAT ENTERING INTO THIS RELEASE DAMAGED THEM.

CORRECT.

BECAUSE OF THE FRAUD PERPETRATED ON THEM BY BEING SUBJECT TO THIS RELEASE.

THAT'S CORRECT. AND IN THE PROCESS OF DOING SO, THEY AFFIRMED THE RELEASE. AND IN AFFIRMING THE RELEASE, AFFIRMED ALL OF THE RELEASING PROVISIONS. WHICH WE WOULD CONTEND, EVEN THOUGH THE LANGUAGE OF THE RELEASES ARE DIFFERENT, IS DIFFERENT, THAT THE RELEASES ARE EACH, UNDER FLORIDA LAW, EQUALLY BROAD OR SUFFICIENTLY BROAD TO DISCHARGE FRAUD CLAIMS.

I AM HAVING A HARD TIME UNDERSTANDING HOW A FRAUDULENT INDUCEMENT CLAIM, WHICH IS BASED IN TORT, COULD BE CONSTRUED TO BE AN AFFIRMANCE OF THE CONTRACT, WHEN THE VERY BASIS FOR THE FRAUDULENT INDUCEMENT IS THAT REPRESENTATIONS WERE MADE THAT CAUSED THE PLAINTIFF TO ENTER INTO THIS AGREEMENT THAT, AFFIRMATIVE REPRESENTATIONS, WHICH IS DIFFERENT THAN MANY OTHER SETTLEMENTS, THAT, IF THEY WERE NOT FRAUDULENT REPRESENTATIONS, WOULD NOT HAVE OCCURRED, SO WHY IS THAT A AFFIRMATION OF THE CONTRACT? I MEAN, IN THE END, IF WE WENT TO DAMAGES, CERTAINLY THERE WOULD BE A RIGHT TO, I WOULD THINK, A SET-OFF FOR, OR POSSIBLY, DEPENDING ON WHAT THE DAMAGES WERE, FOR THE AMOUNTS THAT THEY OBTAINED, COULD YOU HELP ME ON THAT, BECAUSE I GUESS THAT GOES TO THE SECOND QUESTION OF WHAT FLORIDA LAW ALLOWS AND HOW BROAD THE RELEASE HAS TO BE, IN ORDER TO DISALLOW THE FRAUDULENT INDUCEMENT CLAIM.

YES.

THE CASES THAT WE HAVE CITED IN OUR BRIEF, ON THE RESCISSION ISSUE AND THE ELEMENTS OF RESCISSION IN FLORIDA, AND I WOULD SPECIFICALLY REFER, HERE, I THINK, TO THE RUDD COMPANY CASE, THE COLUMBUS HOTEL CASE, BASS VERSUS FARISH AND THE CASES THAT ARE CITED IN THOSE DECISIONS, MAKE IT CLEAR THAT, WHEN A PARTY CLAIMS THEY HAVE BEEN FRAUDULENTLY INDUCED INTO A CONTRACT, THEY HAVE ONLY TWO CHOICES. BOTH OF THEM INCLUDE PROVING FRAUDULENT INDUCEMENT, SO WHICHEVER THEORY THEY CHOOSE FOR PURSUING THE CASE, THEY ARE GOING TO HAVE TO PROVE FRAUDULENT INDUCEMENT. CHOICE NUMBER ONE IS, AS A RESULT OF FRAUDULENT INDUCEMENT, I WANT TO SET THE CONTRACT ASIDE IN ITS ENTIRETY, WHICH AS A RESULT OF THE REQUIREMENTS OF RESCISSION, MEANS THAT THEY HAVE TO RETURN WHAT THEY RECEIVED. THE PLAINTIFFS OBVIOUSLY DID NOT WANT TO RETURN WHAT THEY HAD RECEIVED, WHICH WAS $22 MILLION FOR THESE SEVEN PLAINTIFFS. THESE WERE NOT INCONSEQUENTIAL SETTLEMENTS. THEY DID NOT WANT TO RETURN THE $22 MILLION. THE ONLY DEFENSE THEY WOULD HAVE TO NOT RETURNING THE $22 MILL ION IS TO SAY THAT I RECEIVED IT PURSUANT TO A CONTRACT. I RECEIVED IT PURSUANT TO A LAWFUL RELEASE. SO TO PROTECT THEMSELVES, FROM ANY OBLIGATION TO HAVE TO RETURN WHAT THEY HAD RECEIVED, THEY CHOSE THE OTHER ALTERNATIVE. THE ONLY OTHER ALTERNATIVE ALLOWED TO THEM UNDER, EITHER, FLORIDA OR DELAWARE LAW, AND THEY EXPRESSLY AFFIRMED THE CONTRACT, AND THEY HAVE SAID SO IN THEIR COMPLAINT AND IN THEIR BRIEFING, THAT THEY AFFIRMED THE CONTRACT, NOTWITHSTANDING THE FRAUDULENT INDUCEMENT. NOW, WHAT THE LAW, THEN, ALLOWS THEM TO DO IS TO SHOW WHETHER OR NOT THEY WERE DAMAGED BY THE FRAUDULENT INDUCEMENT. THEY CAN AFFIRM THE CONTRACT, BUT, STILL, PURSUE A DAMAGE CLAIM, UNLESS, IN THE AFFIRMATION --

SO IS THE DAMAGE CLAIM, IS THE TORT -- IS BASED ON A TORT THEREY?

IT IS, BUT IT IS STILL MEASURED BY WHATEVER THE -- AND AFFECTED BY WHATEVER THE PROVISIONS ARE IN THE CONTRACT.

NOW, THAT IS WHERE, NOW, THAT IS WHERE, I GUESS, YOUR OPPONENT WOULD DISAGREE.

WELL, OUR OPPONENT WOULD SAY THAT THE RELEASE SIMPLY DOESN'T EXTEND TO FRAUD. BUT -- AND HAS MADE ARGUMENTS THAT IT SHOULDN'T EXTEND TO FRAUD, BECAUSE THERE IS NO EXPLICIT REFERENCE TO FRAUD, AND SAYS, EVEN TO THIS COURT, THAT, UNLESS DuPONT ADMITS THAT IT HAS COMMITTED FRAUD, IT CAN'T REALLY SETTLE THE CASE, THAT THE CONDITION OF AN EFFECTIVE SETTLEMENT IS TOED A MIGHT THAT YOU DID NOT ONLY -- SETTLEMENT IS TO ADMIT THAT YOU DID NOT ONLY WRONG BUT THAT YOU PUT THIS PRODUCT INTO THEIR FIELDS THAT IS DEFECTIVE. THAT HAS NEVER BEEN A CONDITION OF SETTLING ANY CASE AND CERTAINLY NOT A CONDITION IN FLORIDA OF SETTLING A FRAUD CASE.

BUT WHAT YOU ARE SAYING IS THE GIST OF THE PLAINTIFF'S CAUSE OF ACTION IN THE DISTRICT COURT IS THAT, IN ORDER FOR THE PLAINTIFF TO PROVE FRAUD, THEY HAVE GOT TO PROVE THIS CONTRACT.

CORRECT.

AND IF THEY PROVE THE CONTRACT, THEN THEY HAVE GOT TO ACCEPT THE CHOICE OF LAWS -- THEY HAVE GOT TO ACCEPT ALL OF THE PROVISIONS OF THE CONTRACT.

YES. THEY HAVE TO ACCEPT BOTH THE CHOICE OF LAW PROVISION, AND THEY HAVE TO ACCEPT THE RELEASE. NOW, THERE ARE CONTRACTS, AND LET ME GIVE YOU AN EXAMPLE. THERE ARE CONTRACTS WHERE THE CONTRACT, ITSELF, IN SETTLING THE CASE, MAY HAVE MADE REPRESENTATIONS IN WHICH DuPONT SAID THAT WE REPRESENT THAT THE PRODUCT IS NOT DEFECTIVE OR WE REPRESENT THAT WE DIDN'T SELL THE PRODUCT DURING THESE YEARS OR WHATEVER, AND THAT THOSE REPRESENTATIONS WITHIN THE CONTRACT PROVE TO BE MISREPRESENTATIONS. THOSE ARE THE TYPICAL CASES IN WHICH A PARTY CHOOSES TO AFFIRM THE CONTRACT AND SUE FOR DAMAGES. HE SAYS YOU HAVE MADE A MISREPRESENTATION TO ME THAT IS WITHIN THE BODY OF THE CONTRACT, SO I CAN AFFIRM THE CONTRACT AND STILL SUE YOU FOR THAT MISREPRESENTATION. DuPONT MADE NO REPRESENTATIONS IN THE SETTLEMENT AGREEMENT. THESE WERE PURELY AGREEMENTS IN WHICH DuPONT SAID I WILL PAY YOU, IN THE INSTANCE OF SOME OF THESE PLAINTIFFS, AS MUCH AS $10 MILLION, ONE OF THE THREE CASES THAT WAS SETTLED IN 1992, WITHOUT BENEFIT OF LITIGATION. I WILL PAY YOU AS MUCH AS $10 MILLION, BUT WHAT I WANT, AND I AM MAKING NO REPRESENTATIONS WHATSOEVER. I DENY LIABILITY. I DENY THAT THE PRODUCT IS DEFECTIVE, AND I REQUIRE OF YOU A RELEASE OF ANY AND ALL CLAIMS THAT YOU HAVE RELATED IN ANY WAY TO THE USE OF BENLATE. NOW, NO FRAUDULENT INDUCEMENT CLAIM COULD SHOW DAMAGES, WITHOUT SHOWING THAT THE PLAINTIFF HAD BEEN MORE INJURED BY THE USE OF BENLATE THAN THE VALUE OF THE SETTLEMENT HE RECEIVED. THAT WOULD HAVE TO BE THE THEORY OF ANY DAMAGE RECOVERY, SO THAT BRINGS HIM SQUARELY WITHIN THE LANGUAGE OF THE RELEASE, EVEN IN THE 1992 MORE LIMIT THE -- MORE LIMITED VERSION OF THE RELEASE, SO IN RESPONDING, I MUST ADMIT THAT, FROM THE CLOCK I HAVE NO IDEA HOW MUCH TIME I HAVE LEFT. SO FOUR MINUTES. THANK YOU VERY MUCH. AN ARGUMENT WAS MADE BY APPELLANTS THAT THE RELEASE WOULD NOT APPLY TO THE FRAUDULENT INDUCEMENT, ITSELF, BECAUSE THE FRAUDULENT INDUCEMENT WAS NOT COMPLETE UNTIL THE RELEASE WAS EXECUTED. THAT IS NOT THE LAW IN FLORIDA. RELEASES APPLY TO EVERYTHING UP TO THE TIME OF THE EXECUTION OF THE RELEASE, AND AS A MATTER OF LOGIC AND LAW, THAT WOULD HAVE TO BE THE CASE. NO PARTY WOULD ENTER INTO A RELEASE IN WHICH HE WAS NOT BEING PROTECTED FROM EVERYTHING THAT HAD GONE BEFORE, EVERYTHING THAT HAD HAPPENED, AND IN ONE OF THESE RELEASES, IT SAYS KNOWN OR UNKNOWN AND EVEN PROVIDES THAT THE RELEASES ARE EFFECTIVE TO ANYTHING THAT OCCURS THROUGH THE DATE ON WHICH THIS RELEASE IS SIGNED. THAT IS -- GOVERNS FOUR OF THE RELEASES, THROUGH THE DATE ON WHICH THE RELEASE IS SIGNED, SO THAT WOULD HAVE COVERED ALL OF THOSE RELEASES EXPLICITLY, BUT THE LAW IS OTHERWISE. THE LAW IS THAT, IF YOU SIGN A RELEASE AND THE RELEASE IS GENERAL AND IT

RELEASES ALL CAUSES OF ACTION, THEN IT IS APPLICABLE UP TO THE TIME THE RELEASE IS SIGNED AND EVERYTHING THAT OCCURS, INCLUDING THE ALLEGED ACTION THAT INDUCED THE RELEASE.

YOUR ARGUMENT ON THE NINTH CIRCUIT CASE, CASES, THEY ARE JUST WRONG?

THEY ARE WRONG, AND I THINK THAT THEY SHOULD BE TREATED, ESSENTIALLY, AS AN INTERIMMEDIATE APPELLATE COURT IN THE STATE OF DELAWARE. THEY ARE, NOW, BEING REVIEWED BY THE HIGHEST COURT IN DELAWARE, IN WHICH WE WILL HAVE AN OPPORTUNITY TO SHOW --

THROUGH THAT MECHANISM OR THOSE CASES ARE FINAL?

THOSE CASES ARE NOT FINAL, UPON OUR PARTICIPATION OF THE UNITED STATES COURT SEEKING TO REFER THOSE CASES TO DELAWARE, ITSELF, IS PENDING. IN ANY EVENT, THOUGH, UNDER THE LAW OF THE CASE DOCTRINE, IF THE DELAWARE SUPREME COURT ANSWERS ON THE SAME EXACT RELEASE, ANSWERS THE QUESTION CERTIFIED TO IT BY JUDGE GOLD OF THE DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, IN, AND ANSWERS THAT QUESTION AS WE EXPECT THEM TO ANSWER IT, THE DELAWARE SUPREME COURT LAW WILL, THEN, BECOME CONTROLLING, AND THE NINTH CIRCUIT DECISION WILL BE OF NO EFFECT. AND THAT IS WHAT THE LAW OF THE CASE DOCTRINE PROVIDES. IT WILL NOT BE A FINAL DECISION. WE WILL BE ENTITLED TO GO BACK TO THE DISTRICT COURT OR TO THE NINTH CIRCUIT AND SAY THERE IS INTERVEENING LAW ON THIS PRECISE POINT. THEY HAVE TAKEN THE EXACT SAME RELEASE, AND THEY HAVE SAID THAT YOU WERE WRONG, WITH YOUR RESPECT TO CONSTRUCTION OF IT. SO WE EXPECT TO BE IN THAT POSITION AND EXPECT THAT THE NINTH CIRCUIT DECISION WILL BE EFFECTIVELY REVERSED, BY VIRTUE OF THE DELAWARE --

IN THOSE NINTH CIRCUIT CASES, WHICH TYPE OF RELEASE WAS IT? IS IT THE RELEASE THAT WE HAVE IN FOLIAGE OR THE RELEASE THAT WE HAVE IN COUNTRY JOE?

FOLIAGE. IT IS THE BROADER RELEASE, THE KIND THAT WAS NEGOTIATED, TYPICALLY, IN THE CONTEXT OF LITIGATION. IN CASES WHERE THE DISPUTES HAD BEEN LITIGATED. I THINK, IN TWO OF THESE CASES, ACTUALLY, THERE IS A RELEASE OF THAT KIND IN A NONLITIGATED CASE, BUT FOR THE MOST PART THEY WERE IN LITIGATED CASES.

YOU ARE AGREEING, THEN, THAT FRAUD, AND INDUCEMENT, IN PRINCIPLE, IS NOT BARED BY -- BARRED BY THE AGREEMENT. YOURS IS A MATTER OF PROOF, AND THAT IS MORE OR LESS YOUR ARGUMENT, THAT THEY HAVE TO PROVE IF THEY GO THAT ROUTE.

WHAT OUR POSITION IS THIS, THAT IF THEY SEEK RESCISSION. IF THEY SEEK TO SET ASIDE THE AGREEMENT, ON THE GROUNDS OF FRAUDULENT INDUCEMENT, THEY HAVE THE RIGHT TO PROCEED HAD, IN THE COURTS, IT TO TRY TO DO THAT. THEY HAVE TO MAKE THAT DECISION FIRST. THEY HAVE TO ELECT IT BEFORE THEY ELECT TO STAND ON THE CONTRACT. BUT THAT, ONCE THEY STAND ON THE CONTRACT, THEY NO LONGER HAVE A CLAIM FOR FRAUDULENT INDUCEMENT, NOT BECAUSE OF LEGAL THEORY BUT BECAUSE OF THE TERMS OF THE CONTRACT. THE CONTRACT, IN ESSENCE, EXTINGUISHEST CLAIM. AND I THINK THAT WHAT THE APPELLANTS -- EXCUSE ME --

THAT IS IF YOU INTERPRET THE CONTRACT TO INCLUDE, TO BE ALL INCLUSIVE.

YES. IN THAT RESPECT, SURNIGLIA IS THE MOST IMPORTANT OF OUR CASES, BECAUSE LANGUAGE QUITE SIMILAR TO SURNIGLIA, I MEAN, TO OUR RELEASE IN THE EARLIER TWO CASES, IN THE 1992 CASES, WHERE WE HAVE THE MORE LIMITED RELEASE, SURNIGLIA HAS RELEASES. IT BASICALLY SAYS ANY AND ALL CLAIMS ARE BEING DISMISSED. THE WIFE, WHO CLAIMED THAT SHE HAD BEEN DEFRAUDED BY HER HUSBAND WITH RESPECT TO MARITAL PROPERTY, SUBSEQUENTLY BROUGHT

ANOTHER LAWSUIT AND SAID MY HUSBAND LIED TO ME. THE COURT HELD THAT, BECAUSE SHE HAD GIVEN A GENERAL RELEASE OF ANY AND ALL CLAIMS, THAT EVEN HER FRAUD CLAIMS, WITH REFERENCE TO THE FACT THAT HER HUSBAND HAD LIED TO INDUCE HER TO SIGN THE RELEASE, THAT EVEN THOSE FRAUD CLAIMS WERE WITHIN THE SCOPE OF THE RELEASE AND SUBJECT TO DISPOSITION BY SUMMARY JUDGMENT IN FAVOR OF THE HUSBAND. NOW, THAT CASE WAS NOT -- THAT CASE WAS WHAT FLORIDA FLORIDA'S JURISPRUDENCE DOES. IT WASN'T BASED ON WHO THE PARTIES WERE. IT WASN'T A CASE FOR HUSBANDS OR AGAINST WIVES. IT WOULD HAVE BEEN THE SAME DECISION, IF IT WAS THE WIFE CLAIMING -- I MEAN THE HUSBAND CLAIMING THAT THE WIFE HAD DEFRAUDED HIM. IT WASN'T A CASE BASED ON BEING AN INDIVIDUAL AS OPPOSED TO A CORPORATION. IT WASN'T BASED ON BEING DuPONT AS OPPOSED TO BEING A GROWER. AND IT WASN'T BASED ON HOW MUCH MONEY WAS INVOLVED, BECAUSE WE DON'T KNOW WHETHER IT WAS ONE MILLION OR TEN MILLION OR 100,000. IT WAS A CASE BASED ON PRINCIPLE, AND IT SAID IF YOU HAVE BEEN PAID TO RELEASE CLAIMS, THEN THOSE CLAIMS ARE RELEASED AND YOU CAN'T EXPECT TO COME BACK FOR A SECOND BITE AT THE APPLE. ALL DuPONT ASKS, IN THESE CASES, IS THAT WE HAVE PAID, IN THESE CASES $22 MILLION. WE HAVE PAID TO SETTLE THESE CASES. WE SHOULD NOT BE ASKED TO PAY AGAIN. THANK YOU VERY MUCH.

THANK YOU. MR. CLAY. YOU HAVE TWO MINUTES.

THANK YOU FOR THE TWO MINUTES. I WILL FOCUS, PRIMARILY, ON THE SECOND PORTION OF THE ARGUMENT AND THE SECOND CERTIFIED QUESTION, BECAUSE, AS I HAVE TOLD THE COURT, I BELIEVE THAT IT MAKES NO DISTINCTION OF WHETHER WE APPLY DELAWARE OR FLORIDA LAW AT THIS POINT. I WILL, HOWEVER, POINT TO THE COURT THAT, ALTHOUGH THERE MAY BE INTERVENING CASES AND ALTHOUGH THE APPELLANT MAY ARGUE THAT, WELL, THE MATSURA AND FUKU BANZAI CASES ARE ABRASIONS AND WE INTEND TO BRING THOSE TO ANOTHER COURT, IN 1986, THE UNITED STATES DISTRICT COURT, IN APPLYING DELAWARE'S OWN LAW, IN ITS OWN JURISDICTION, IN DE SABITANO VERSUS UNITED STATES FIDELITY COMPANY RULED THAT THE REMEDIES IMMEDIATELY AVAILABLE TO SOMEONE INDUCED TO SETTLE A MEDICAL MALPRACTICE CLAIM WERE EXACTLY THOSE APPLIED BY FLORIDA IN THE HTP CASE. YOU MAY EITHER SEEK TO RESCIND, IN WHICH CASE YOU RETURN THE BENEFIT THAT YOU RECEIVED FROM THE CONTRACT, TREAT IT AS IF THERE IS NO CONTRACT, AND YOU LITIGATE THE UNDERLYING CLAIMS, OR YOU MAY STAND ON THE CONTRACT THAT YOU MAKE, THE SETTLEMENT THAT YOU MAKE FOR THOSE UNDERLYING CLAIMS, AND SEEK ADDITIONAL DAMAGES FOR THE FRAUDULENT INDUCEMENT.

HOW COULD THAT BE THE CASE? IN OTHER WORDS HOW COULD SOMEBODY GET TO KEEP THE MONEY, VOID THE RELEASE, AND GET ADDITIONAL DAMAGES? WHY WOULD ANYONE EVER CHOOSE RESCISSION, IF IT MADE NO DIFFERENCE WHETHER THEY KEPT THE MONEY AND SUED ON THE CONTRACTOR SOUGHT RESCISSION? I AM JUST HAVING TROUBLE WITH THAT, THE EQUITIES IN THAT SITUATION.

IN THAT FACT, YOUR HONOR, DE SABITINO VERSUS FIDELITY WAS VERY INSTRUCTIVE ON THAT EXACT QUESTION. YOU ARE KEEPING THE MONEY, BECAUSE WHEN SOMEONE COMES TO YOU AND SAYS I AM WILLING TO MAKE A SETTLEMENT AT LESS THAN THE AMOUNT, BECAUSE WE ALL KNOW THAT SETTLEMENTS ARE NOT DOLLAR FOR DOLLAR VALUE. YOU DON'T SAY I HAVE $20 MILLION IN DAMAGES. THEY SAY HERE IS A CHECK FOR $20 MILLION. BY SAYING WE DIDN'T DO ANYTHING WRONG. OUR PRODUCT WAS NOT A BAD PRODUCT, THEY INDUCED THE GROWERS TO SAY YOU HAVE $20 MILLION' WORTH OF DAMAGES BUT HERE IS A CHECK FOR $10 MILLION. CAN I COMPLETE THE ANSWER?

YOU MAY CONCLUDE.

YOU HAVE $20 MILLION IN DAMAGES. THE DAMAGES THAT YOU ARGUE ON A FRAD LENT INDUCEMENT CLAIM ARE SEPARATE AND APART FROM THE DAMAGES THAT UNDERLYING

CLAIMS, BUT IN FACT THEY MAY BE SEPARATEABLE BUT THEY DO NOT BAR YOU FROM RECOVERY. AGAIN, IN FACT, DE SABITINO WAS REFLECTIVE ON THE RECOVERY, AS OPPOSED TO PURSUING RESCISSION AGAINST PURSUING DAMAGES.

YOU HAVE COMPLETED YOUR ARGUMENT AND MR. CLAY'S, AS WELL. THE NEXT COURT ON THE CALENDAR