THE NEXT CASE ON THE COURT'S CALENDAR IS KPMG PEAT MARWICK VERSUS NATIONAL UNION. MR. BROUCHBLT.

YES, SIR. --

MR. BROWN.

YES, SIR. MAY IT PLEASE THE COURT. LEWIS BROWN AND DYANNE FEINBERG OF THE LAW FIRM GILL BRIGHT HELLER AND BROWN OF MIAMI FOR THE PETITIONER KPMG PEAT MARWICK. THE CASE IS CERTIFIED QUESTION BY THE THIRD DISTRICT COURT OF APPEAL AS TO WHETHER THIS 1994 DECISION IN COLUMBIA LUMBER VERSUS NATIONAL CASUALTY IS STILL LAW AS IN DENZLER. DANZLER IS NO LONGER GOOD LAW TO THE EXTENT THAT THE OPINION HAD SUBJUGATION DUE TO A PENDING MALPRACTICE CLAIM.

WOULD YOU GIVE US, TO BEGIN WITH, AN UNDERSTANDING OF THE FACTUAL PATTERN THAT THIS CASE CAME TO THE DISTRICT COURT IN? I UNDERSTAND IT WAS A MATTER OF PLEADING. IS THAT CORRECT?

IT WAS A MOTION FOR JUDGMENT ON THE PLEADINGS. IT WAS GRANTED AND FINAL JUDGMENT WAS ENTERED BY THE CIRCUIT COURT.

OKAY. NOW, DO WE -- THIS IS ON A FED HE WILLITY BOND? -- ON A FIDELITY BOND? THAT WAS THE SUBJUGATION INSTRUMENT, CORRECT?

NATIONAL UNION FIRE INSURANCE COMPANY WAS THE BLANKET BOND INSUROR FOR BANK ATLANTIC, A FEDERAL SAVINGS BANK, AND THE CLAIM WAS MADE THAT THE BANK HAD SUFFERED APPROXIMATELY IN EXCESS OF $20 MILLION IN LOSSES, DUE, IN PART, TO WRONGFUL CONDUCT ON THE PART OF EMPLOYEES OF THE BANK BUT, ALSO, AN OUTSIDE FRAUD PERPETRATED BY A NEW YORK COMPANY, WHO WAS SELLING IN DIRECT CONSUMER DEALER PAPER. THE BANK BOUGHT APPROXIMATELY $60 MILLION OF THAT PAPER, OVER A THREE OR FOUR-YEAR PERIOD, AND PRIOR TO 1990, KPMG HAD BEEN THE AUDITORS, ACCOUNTANTS, TAX ADVISORS TO THE BANK FOR MANY, MANY YEARS.

SO THE ALLEGATION OF THE AMEND COMPLAINT WAS THAT THE AUDIT THIS BEEN PERFORMED IN -- HAD BEEN PERFORMED IN SUCH AWAY THAT THE RESULT HAD BEEN A LOSS, HAD BEEN -- THERE HAD BEEN A LOSS BY BANK ATLANTIC, FOR WHICH THE BONDING COMPANY RESPONDED, AND THEREFORE IT TOOK THE RIGHTS OF THE BANK AGAINST THE AUDITOR. IS THAT CORRECT?

YES. YOUR HONOR, THE -- WHAT HAPPENED WAS THE -- INITIALLY WHEN THE BANK MADE A CLAIM AGAINST THE BONDING COMPANY, THE BONDING COMPANY INITIALLY REJECTED THE COMPLAINT, WHICH RESULTED IN A LAWSUIT BEING FILED BY BANK ATLANTIC IN FEDERAL COURT IN MIAMI, SEEKING TO ENFORCE ITS RIGHTS UNDER THE POLICY OF INSURANCE. THE PRIMARY LOSS WAS CAUSED BY WRONGFUL CONDUCT ON THE PART OF THE NEW YORK COMPANY STERLING AND, ALLEGEDLY, CERTAIN EMPLOYEES OF THE BANK. AT THE TIME THE SETTLEMENT AGREEMENT WAS NEGOTIATED, IT IS IN OUR APPENDIX. IT IS TITLED A COVENANT NOT TO EXECUTE. THE BANK AND NATIONAL UNION ENTERED INTO AN AGREEMENT, IN WHICH THE BANK AGREED, IN ITS OWN NAME, TO SEEK RECOVERY IN WHAT IS CALLED SAVAGE LITIGATION AGAINST VARIOUS THIRD PARTIES. HOWEVER, THAT SETTLEMENT AGREEMENT DID NOT PROVIDE FOR THE BANK SUING ITS OWN AUDITORS AND ACCOUNTANTS, AND MY CLIENT CONTINUED DURING THAT PERIOD OF TIME AND CONTINUES, TO THIS DAY, TO BE THE ACCOUNTANTS AND AUDITORS FOR BANK ATLANTIC. WHAT, IN EFFECT, THE SETTLEMENT

AGREEMENT PROVIDED, AND I THINK QUOTING THE LANGUAGE IS VERY IMPORTANT TO UNDERSTAND THE POSITION BOTH THE BANK AND ITS AUDITORS FIND ITSELF. THE PARAGRAPH READS "THE INVESTIGATION BY NATIONAL UNION OF ITS EXPOSURE, IN CONNECTION WITH THE BA BOND CLAIM, HAS CAUSED NATIONAL UNION TO BELIEVE THAT BANK ATLANTIC MAY HAVE A CLAIM AGAINST ITS AUDITORS, KPMG, FOR BREACH OF CONTRACT, TO THE EXTENT THAT THE ACTS OR OMISSIONS OF KPMG MAY HAVE CRICKETED TO BANK ATLANTIC'S LOSSES." THAT PROVISION GOES ON TO PROVIDE THAT, IN CONNECTION WITH THE CARRIER'S INVESTIGATION OF THE CLAIM, THAT THE BANK AGREES TO SHARE OTHERWISE PRIVILEGED INFORMATION WITH THE CARRIER AND THE AGREEMENT PROVIDED THAT THAT WOULD NOT CONSTITUTE A WAIVER OF THE PRIVILEGE BUT THE PRIF RIDGE -- PRIVILEGE WOULD CONTINUE TO APPLY.

FOR PURPOSES OF THE ISSUE BEFORE US, DON'T WE HAVE TO ASSUME THAT THERE IS LIABILITY OF YOUR CLIENT EXTENDING TO THE BANK?

YES.

NOT THAT THERE IS OR WHATEVER, AS OPPOSED TO DEALING WITH THIS PARTICULAR CASE, AND ITS FACTS AND CIRCUMSTANCES, SO WE ASSUME, HERE, DO WE NOT, THAT THE BANK HAD A CAUSE OF ACTION OR HAS A CAUSE OF ACTION THAT COULD BE ASSIGNABLE IN THE FIRST INSTANCE, IN ORDER TO DECIDE THAT QUESTION? SO THIS --

YES.

THIS DOESN'T -- THIS IS, REALLY, COLLATERAL, IS IT NOT, TO THE ISSUE THAT WE HAVE, ABOUT ASSUMING THAT THERE IS A PROPER CAUSE OF ACTION OF WHETHER OR NOT IT IS SIGNABLE? IS THAT -- -- ASSIGN SNBL IS THAT --

YES. IT IS IMPORTANT THAT THE LANGUAGE THAT I QUOTED FROM THE COVENANT TO THE TO EXECUTE IS THAT THE BANK HAD AGREED TO PURSUE CAUSES OF ACTION AGAINST ALL THIRD PARTIES BUT APPARENTLY IN COURSE OF REGULATION OF THIS AGREEMENT REFUSEED TO FILE AGAINST ITS OWN AUDITORS, AND APPARENTLY THE CARRIER THINKS THE AUDITOR IS SOMEONE THAT MIGHT EXIST AS TO WHETHER IT COULD PASS ON SOME OF ITS LOSSES.

THAT IS ANOTHER ISSUE OF ASSUMING WHETHER OR NOT IT IS ASSIGNABLE AND WHETHER OR NOT THEY COULD PROVE UP A CLAIM. ANOTHER QUESTION BEFORE YOUR HONOR IN THE COURT TODAY IS WHETHER, IN LIGHT OF THE 1997 DECISION IN THIS COURT IN FORGIONI, WHERE THE COURT HELD THAT TORT CLAIMS CANNOT BE TRANSFERRED TO A THIRD PARTY, THE COURT ENTERED IN THE RECORD THAT CLAIMS CANNOT BE TRANSFERRED BECAUSE OF THE PERSONAL NATURE, THE CONFIDENTIAL NATURE OF THE RELATIONSHIP. UNDER FLORIDA LAW, THE SAME CONFIDENTIAL TREATMENT BETWEEN ACCOUNTANTS AND CLIENTS IS THE SAME AS IT IS FOR LAWYERS AND CLIENTS.

THE REASON I AM INTERESTED IN THE UNDERLYING ACTION IS TO, REALLY, GET INTO THE DISCUSSION OF WHETHER AN INDEPENDENT AUDIT, WHICH I UNDERSTAND IS THE FOCAL POINT OF THIS CAUSE OF ACTION, IS DIFFERENT THAN THE TYPE OF NORMAL CPA RELATIONSHIP WITH A CLIENT THAT IS PREPARING SOME TYPE OF FINANCIAL RECORD OR TAX RETURN. ISN'T THAT DIFFERENT?

YOUR HONOR, THERE IS NO QUESTION THAT THE ALLEGATIONS IN THE AMENDED COMPLAINT AGAINST KPMG WAS THAT THERE WAS NEGLIGENCE IN CONDUCTING AUDIT OF THE BANK. THE KPMG, THERE IS NO QUESTION, WERE AND ARE THE INDEPENDENT AUDITORS FOR BANK ATLANTIC, BUT THAT IS THE POSTURE TAKEN, ADOPTED BY THE THIRD DISTRICT IN ITS OPINION, WHICH IS BEFORE YOU AND, ALSO, THAT POSITION TAKEN BY NATIONAL UNION. I CAUTION THE COURT, IF YOU HEAD TOWARD A TASK-BASED ANALYSIS OF WHETHER OR NOT A PARTICULAR CLAIM IS TRANSFERABLE, YOU SLIDE DOWN A VERY SLIPPERY SLOPE, BECAUSE IN THE LAW,

LAWYERS OFTENTIMES RENDER SERVICES TO PUBLIC CLIENTS THAT HAVE THE SAME EXACT TYPE OF PUBLIC ATTRIBUTES THAT THE PERFORMANCE OF AN INDEPENDENT AUDIT. FOR EXAMPLE --

FOR INSTANCE SIGNING SOME TYPE OF PROSPECTUS THAT GOES TO THE SEC. I WOULD ASSUME THAT THAT IS WHAT YOU ARE REFERRING TO.

A MUNICIPAL BOND LAWYER, WHO WRITES AN OPINION TO THE PUBLIC ABOUT THE TAX-EXEMPT STATUS AFTER PARTICULAR BOND OFFERING. WHAT YOU HAVE TO LOOK AT IS THE EXPECTATION THAT THE CLIENT HAS, WHEN THEY ENTERED INTO THE RELATIONSHIP. I URGE THE COURT NOT TO TAKE A TASK-BASED APPROACH TO DETERMINING WHETHER OR NOT A PARTICULAR CLAIM IS ASSIGNABLE, BECAUSE THEN THERE HAS TO BE, IN MANY INSTANCES, AN INVASION OF THE ACCOUNTANT OR ATTORNEY-CLIENT PRIVILEGE, MERELY FOR THE PROFESSIONAL TO BEGIN TO RAISE A DEFENSE THAT THE TYPE OF CLAIM THAT WAS TRANSFERRED SHOULDN'T BE TRANSFERRED IN THE FIRST INSTANCE.

IS IT IMPORTANT IN THIS CASE, OF COURSE WE -- IN THE PLEADINGS, BUT YOU MENTIONED THAT YOUR CLIENT WAS NOT ONLY THE INDEPENDENT AUDITOR BUT, ALSO, PERFORMED MULTIPLE FUNCTIONS, INCLUDING TAX ADVICE, AND WILL YOU SUGGEST THAT THESE ALL BECOME INTERTWINED, WHEN YOU ARE EVALUATING THE REASONABLENESS OF THE CONDUCT IN THIS CASE?

LET'S TAKE A FOR INSTANCE. THE KPMG IS BEFORE THE COURT AND IN TRUTH EVERY ACCOUNTANT IN THE STATE OF FLORIDA IS BEFORE THE COURT. AS WE HAVE INDICATED IN OUR BRIEF, AUDITS OF PUBLIC COMPANIES IS ONE OF THE SMALLEST PERCENTAGES THAT MOST TYPES OF BUSINESSES AND ACCOUNTING FIRMS IN THE STATE OF FLORIDA PERFORM. IN FACT IN KPMG'S CASE, AND PROXHATLY -- APPROXIMATELY 20% OR LESS OF THE REVENUES OF THE FIRM ARE IN CONDUCTING AUDITS OF SMALL BUSINESS OWNERS. WHEN A SMALL BUSINESS OWNER WALKS INTO AN ACCOUNTANT, NO MATTER HOW BIG OR SMALL THAT PRACTICE IS, AND HE TALKS ABOUT HOW THE AUDIT IS GOING, HIS MIND IS NOT SHIFTING FROM WHAT HE BELIEVES TO BE AN OTHERWISE PRIVILEGED CONVERSATION AND WHAT IS OR ISN'T A PERSONAL RELATIONSHIP WITH HIS ACCOUNTANT. TYPICALLY IT IS OFTENTIMES DIFFICULT TO UNDERSTAND WHAT AN AUDITOR DOES, WHEN HE PERFORMS OR PLANS AN AUDIT. IN THE PLANNING PHASE OF AN AUDIT, AUDITOR SITS DOWN WITH THE OWNERS AND MANAGE PRESIDENT OF THE COMPANY AND DISCUSSES WHAT TYPES OF RESULTS WERE FOR THE YEAR AND WHAT TYPES OF BUSINESS AND STRATEGIST COMPANY WILL FAUX INTO FOR THE SUBSEQUENT YEAR SO THAT THE AUDITOR CAN SUBSCRIBE CRITICAL AREAS OVER WHICH THEY CAN LIKEWISE GIVE ATTENTION. A MANAGEMENT LETTER IS GIVEN BY THE AUDITOR TO THE MANAGE PRESIDENT OF THE COMPANY, SHOWING AN INSTANCE THAT HE MAY SEE IN A FEW YEARS ON THEIR ABILITY TO REPORT ACCURATELY FINANCIAL STATEMENTS, SO THE FACT THAT WE MIGHT ISSUE A REPORT IN FINANCIAL STATEMENTS ON THE POSITION OF THE COMPANY, THERE IS OTHERWISE A TREMENDOUS AMOUNT OF OTHERWISE PRIVILEGED INFORMATION THAT IS EXCHANGED BETWEEN THE ACCOUNTANT, THE AUDITOR AND THE CLIENT. IT IS, ALSO, IMPORTANT TO UNDERSTAND THAT THE CASES RELIED UPON BY THE THIRD DISTRICT AND URGED BY MY ABLE COLLEAGUES ARE PRINCE WLI -- PRINCEBLY THE U.S. THIRD DISTRICT RELIED HEAVILY ON THE UNITED STATES VERSUS ARTHUR YOUNG. WE MUST UNDERSTAND IN FEDERAL LAW THERE IS NO ACCOUNTANT ACCOUNTANT-CLIENT STATUTORY PRIVILEGE N ARTHUR YOUNG, IT WAS AN ACTION BROUGHT BY THE INTERNAL REVENUE SERVICE, UNDER SECTION 7 6 ON 2 OF THE U.S. CODE, UNDER -- 7602 OF THE U.S. CODE, UNDERTAKING AN INVESTIGATION. WHAT THE COURT SAID, THE U.S. SUPREME COURT, SAID THAT WE NEED TO HAVE AN UNDERSTANDING FROM CONGRESS, IF WE ARE TO PARCEL OUT SOME JUDICIAL PRIVILEGE. WE HAD TO PARCEL OUT AN ATTEMPT TO CREATE A COMMON LAW WORK PRIVILEGE THAT WASN'T OTHERWISE RECOGNIZED UNDER FEDERAL LAW, AND OF COURSE THE U.S. SUPREME COURT REJECTED IT.

IS THAT THE PEG THAT YOU HANG YOUR HAT ON IS THAT THERE IS A STATUTORY PRIVILEGE OR

THE NATURE OF THE SERVICES ARE, REALLY, VERY PERSONAL AND INTERRELATED AND VERY SIMILAR TO WHAT AN ATTORNEY MIGHT DO IN RENDERING ADVICE, AND THAT IS THE ANALOGY THAT WE WOULD BE LOOKING TO? I GUESS.

I THINK ONE CREATED THE OTHER. THE FACT THAT THE LEGISLATURE AND, INDEED, THIS COURT, WHEN IT ADOPTED THE EVIDENCE CODE TO THE EXTENT THAT IT WAS NOT IN CONFLICT WITH OTHER RULINGS OF THIS COURT AND THEREFORE EMBRACED AN ACCOUNTANT-CLIENT PRIVILEGE, ALONG WITH THAT, I MIGHT ADD, ATTORNEY-CLIENT PRIVILEGE, PSYCHO ANALYST-PATIENT PRIVILEGE, DOMESTIC VIOLENCE COUNSELOR AND CLIENT. THE LEGISLATURE AND THE COURT LOOKED AT THESE RAELINGS SHIPS AND -- RILINGS SHIP ANSWER -- RELATIONSHIPS AND SAID THESE ARE RELATIONSHIPS THAT HAVE AN EXPECTATION OF PRIVACY AND ARE PERSONAL. NOTING THAT, THE LEGISLATURE ENACTED AND ADOPTED A PRIVILEGE, PROTECTING THAT RELATIONSHIP, SO I THINK, YOUR HONOR, ONE GOES HAND-IN-HAND WITH THE OTHER AND THEREFORE THE EXACT SAME POLICY CONSIDERATIONS THAT HAD LED THE FOURTH DISTRICT IN THE WASHINGTON CASE TO SAY THAT LAWYER MALPRACTICE CASES WERE NOT ASSIGNABLE.

IS THERE ANYTHING THAT, ASSUMING THAT WE DECIDED THE CASE IN YOUR FAVOR, IS THERE ANYTHING THAT WOULD PREVENT INSURORS FROM PUTTING CONDITIONAL LANGUAGE IN THEIR POLICIES THAT MANDATED, AS A CONDITION OF THE POLICY, THAT THE INSURED'S BRING ACTIONS AGAINST OTHER PARTIES THAT MAY BE LIABLE FOR THE LOSS THAT THE INSURORS ARE PAYING, AND THEREFORE IN ESSENCE, YOU KNOW, DOING AN END RUN OR DOING THE SAME THING, BUT IN THE WAY THAT YEARS AGO MANY POLICIES WERE WRITTEN? THAT IS THE INSURED'S BRINGING THESE CAUSES OF ACTION OR THE INSURORS BRINGING THEM IN THE NAME OF OR THE INSURED'S BRINGING THEM FOR THE USE AND BENEFIT OF THE INSURANCE COMPANY? IS THERE ANYTHING THAT WOULD PREVENT A COMPANY FROM DOING THAT?

THERE WOULD BE NOTHING TO PREVENT, OF COURSE, THE DRAFTING OF THAT TYPE OF LANGUAGE INTO A POLICY. I WOULD SUGGEST THAT SUCH A CLAUSE WOULD BE, IN ESSENCE, AN ABDICATION OF CONTROL BY THE CLIENT, OVER THE VERY PERSONAL RELATIONSHIP OF THE RULES REGARDING NO ASSIGNMENT AND NO TRANSFER OF SUBROGATION IS DESIGNED TO PREVENT.

BECAUSE YOU ARE NOT ARGUING HERE, AS WE ESTABLISHED BEFORE, THAT THE CLIENT, THE INSURED, COULDN'T BRING A CAUSE OF ACTION AGAINST YOUR COMPANY.

ABSOLUTELY NOT. THE CLIENT CAN SUE FOR MALPRACTICE, IF THE CLIENT BELIEVES THERE IS A BASIS FOR IT, BUT OFTENTIMES BECAUSE OF THE LENGTHY TIME PERIOD OF THE RELATIONSHIP BETWEEN A CLIENT AND A PROFESSIONAL, THE FACT THAT THEY HAVE SHARED INFORMATION OVER THE YEARS AND BECOME FAMILIAR WITH THE BUSINESS, THE CLIENT IS IN THE UNIQUE POSITION AND SHOULD BE LEFT TO DECIDE WHETHER OR NOT IT IS APPROPRIATE FOR THEM TO COMPMIZE THAT -- TO COMPROMISE THAT RELATIONSHIP AND BREAK THE RELATIONSHIP AND WAIVE A VERY VIABLE PRIVILEGE. I THINK THAT IS A DECISION THAT THE COURT SHOULD LEAVE TO THE DECISION OF WHETHER OR NOT TAKE IS A PERSONAL AND HIGHLY CONFIDENTIAL RELATIONSHIP.

ISN'T THAT DECISION MADE IF THE CLIENT CHOOSES TO ASSIGN THOSE RIGHTS? WHY ISN'T THAT THE ANSWER TO THAT QUESTION, WHEN A CLIENT DECIDES THAT, ALTHOUGH THEIR PERSONAL RIGHTS, I AM CHOOSING TO ASSIGN IT, BECAUSE I DON'T WANT TO HAVE TO BE BOTHERED WITH THE LITIGATION, AND MY INSURANCE COMPANY IS WILLING TO PAY THE MONEY, THEN WHAT IS WRONG WITH THAT? WHAT IS -- WHAT IS THE POLICY THAT PREVENTS SOMETHING LIKE THAT FROM HAPSOMETHING.

IT IS THE SAME POLICY THAT THIS COURT HAS ADOPTED INCITING, WITH APPROVAL, INTERMEDIATE APPELLATE COURT'S DECISIONS IN THIS STATE THAT SAY CLAIMS AGAINST

ATTORNEYS CANNOT BE TRANSFERRED VOLUNTARILY, BECAUSE THE SAME ARGUMENT CAN BE MADE THAT THE CLIENT KNOWS HE IS WAIVING CERTAIN PRIVILEGES, THAT THE PRIVILEGE IS GOING TO BE INVADED BUT YET HE DECIDED TO SELL HIS CLAIM TO SOMEONE ELSE AGAINST HIS OWN LAWYER. WHAT I WOULD CITE TO THE COURT IS THE FLORIDA VERSUS UNIQUE SUNDRIES CASE, OUT OF THE SECOND DISTRICT COURT OF APPEAL, WHERE THEY SAID THAT IT WAS NOT THE PUBLIC POLICY OF FLORIDA NOT TO ALLOW A CLIENT TO CONSULT WITH AN ATTORNEY OR ACCOUNTANT WITHOUT FEAR OF THE RESULTING COMMUNICATIONS BECOMING PUBLIC, SO IN ORDER TO PROTECT THE PERSONAL NATURE OF THIS RELATIONSHIP, THE COURTS IN THIS STATE, INCLUDING THIS COURT, HAVE UNIFORMLY HELD THAT THE PUBLIC POLICIES OUTWEIGH THE PARTICULAR RIGHT OF A CLIENT TO SELL A CLAIM AGAINST A LAWYER.

AREN'T WE DEALING HERE WITH EQUITABLE SUBJUGATION PRINCIPLES, ALSO? IN OTHER WORDS WHEN SOMEONE PAYS THE ACTUAL DEBT THAT THE CLIENT THERE FOR OTHERWISE WOULD HAVE PURSUED THAT, THEY STAND IN THEIR SHOES, AND THAT POLICY IS DIFFERENT THAN JUST SAYING I AM GOING TO ASSIGN MY PERSONAL TORTS OR MY ACTIONS AGAINST ATTORNEYS, JUST BECAUSE I WANT TO SELL THEM TO SOMEBODY ELSE. DON'T YOU SEE A DIFFERENT, WHEN IT IS THE -- A DIFFERENCE, WHEN IT IS THE INSURANCE COMPANY PAYING THE LOSS, THAT IT IS NOT ONLY THE CONTRACT THAT GUIDES THE SUBROGATION BUT YOU, ALSO, HAVE EQUITABLE PRINCIPLES AND THAT, ALONE, SHOULD ALLOW NATIONAL UNION TO PURSUE THESE RIGHTS?

THAT SAME ARC UNIT DID NOT CONVINCE THE FOURTH DISTRICT COURT OF APPEAL, IN THE SALTER VERSUS NATIONAL UNION CASE, PARTICULARLY IN OTHER STATES, NOTABLY CALIFORNIA, THAT THE TRANSFER OF A CLAIM, IT BE BY ASSIGNMENT OR SUBJUGATION, IS NO DIFFERENT N FACT I CAUTION THE COURT THAT, IN PRIVATE SITUATIONS, WHICH I, ALSO, MIGHT ADD THAT DESPITE THE FACT THAT THERE HAS BEEN AN ARGUMENT THAT THE PUBLIC ATTRIBUTES OF AN INDEPENDENT AUDITOR MILITATE AGAINST THE VERY RULE THAT WE WOULD URGE. VERY SELDOM ARE YOU GOING TO FIND A TRANSFER BY ASSIGNMENT OR FOR THAT MATTER SUBJUGATION BETWEEN AN INSUROR AND AN INSURANCE COMPANY. IT IS PURELY A PRIVATE DISPUTE AND IN THAT CASE YOU RUN AN ECONOMIC COERCION, WHEN THE CARRIER DEMANDS THE RIGHT TO PAY FOR A CLIENT, AND THE CLIENT, WHO PAID THE INSURANCE, DEMANDS TO BE PAID ON THE CLAIM AND NOW IS IN A SITUATION WHERE HE CAN'T GET THAT MONEY, UNLESS HE GIVES THE INSUROR A RIGHT TO SUE HIS LAWYER OR ACCOUNTANT, AND THE COURT, IN THOSE NATIONAL PUBLIC POLICY REASONS, THE SALTER CASE, SAID, NO, YOU CANNOT TRANSFER BY ASSIGNMENT OR SUBJUGATION. I AM GOING TO -- SUBROGATION. I AM GOING SAVE THE REST OF MY TIME FOR REBUTTAL. THANK YOU.

MR. CROWDER?

I AM HERE WITH JAMES F CROWDER AND I AM JAMES YAGLE. WE REPRESENT NATIONAL UNION. IT WAS BOTH AN ASSIGN' AND AN EQUITABLE AND TRANSFERABLE ASSIGN' IN THIS CASE FORM THE COVENANT WAS THAT THEY WOULD SPECIFICALLY ASSIGN THEIR CLAIMS TO NATIONAL UNION. WHAT IS, ALSO, IMPORTANT ABOUT THAT COVENANT IS THAT IT ADDRESSED THE ACCOUNTANT-CLIENT PRIVILEGE. JUSTICE PARIENTE, ONE OF THE QUESTIONS THAT YOU ASKED OPPOSING COUNSEL IS WHETHER OR NOT THEY WERE HANGING THEIR HAT ON THE PRIVILEGE. THE ANSWER, UNQUESTIONABLY, IS YES. HISTORICALLY THE COURTS IN THIS COUNTRY HAVE REFUSED TO ALLOW LEGAL ASSIGNMENT OF MALPRACTICE CASES IS FOR THREE REASONS. THE FIRST IS THE RELATIONSHIP BETWEEN ATTORNEY AND CLIENT AND THE UNDIVIDEDED DUTY BETWEEN AN ATTORNEY AND CLIENT AND THE THIRD IS CONFIDENTIAL OATH OF RELATIONSHIP BETWEEN ATTORNEY AND CLIENT AND THE NEXT ONE IS THE COURT LIMITS ON SUBSTITUTION, I WOULD PRESENT THAT THAT, ALSO, RELATES TO A FIDUCIARY RELATIONSHIP. WHEN THE COUNSEL ARGYAUD TO ALL OF THE CASES, YOU NEVER HEARD THE WORD FIDUCIARY RELATIONSHIP OR UNDIVIDED LOYALTY. THAT SUGGESTED THAT THIS COURT, IN THE THIRD DISTRICT, IN APPROPRIATELY CONSTRUE PRIOR LAW AND SAID PUBLIC ACCOUNTANTS OWE A DUTY TOY THIRD PARTIES. THAT IS NOT WHAT --

THE LEGISLATURE DIDN'T DRAW THAT DISTINCTION, THOUGH, IN MAKING THE ACCOUNTANT-CLIENT PRIVILEGE THE SAME AS THE ATTORNEY-CLIENT PRIVILEGE.

JUSTICE WELLS, THE PRIVILEGES ON THEIR FACE ARE THE SAME, BUT HISTORICALLY WHAT COURTS, IN REFUSING TO ALLOW IN THE ASSIGNMENT OF LEGAL MALPRACTICE CASES, HAVE NOT FOCUSED ON THE CONFIDENTIAL COMMUNICATIONS. THEY HAVE FOCUSED ON THE DUTIES THAT THE PRIVILEGE SERVES, AND SPEAKING OF THAT ISSUE, IF YOU LOOK AT THE CASE OF FIRST COMMUNITY BANK AND TRUST VERSUS KELLY --

WOULD THERE BE A DIFFERENCE IN THE SITUATION, IN WHICH WE WERE DEALING WITH A PUBLIC OFFERING, AND THE LAWYER SIGNED THE PAPERS TO GET THE FILING BEFORE THE SEC, AS DID THE AUDITOR, AND THERE WAS ASSIGNMENT OF THAT CLAIM WOULD IT MAKE SENSE THAT YOU COULD HAVE A SUBREGATION CLAIM AGAINST THE AUDITOR?

I THINK THE PUBLIC AUDITOR HAS A DUTY TOY DISCLOSE ILLEGAL ACTS TO THE SEC.

WHAT IS THE LAWYER'S RESPONSIBILITY?

THE LAWYER HAS A DUTY OF UNDIVIDEDED LOYALTY TO HIS CLIENT.

AND SO THE LAWYER DOESN'T HAVE ANY OBLIGATION IN SIGNING THOSE PAPERS, TO THE PUBLIC?

IT HAS AN OBLIGATION, JUSTICE, BUT HE DOESN'T HAVE AN OBLIGATION TO DISCLOSE CONFIDENTIAL COMMUNICATIONS IT TO THE SEC, IF HE LEARNS OF ACTS THAT HIS CLIENT HAS DONE. THE INDEPENDENT AUDITOR, BY SEC STANDARDS, MUST DISCLOSE CERTAIN ILLEGAL ACTS. NOW, GRANTED THERE IS A PROCESS. THEY MUST DISCLOSE THEM TO THE BOARD OF DIRECTORS FIRST, ET CETERA, BUT THAT GOES DIRECTLY TO THE ISSUE. HISTORIC DLI -- HISTORICALLY WHAT THE COURTS HAVE FOCUSED ON IS THIS FIDUCIARY RELATIONSHIP.

IN PICADILLY, AS AN OFFICER OF THE COURT, THE ATTORNEY HAS CERTAIN DUTIES THAT --S THAT MIGHT, THAT COULD CONCEIVABLY CONFLICT WITH THE INTEREST OF HIS CLIENT, AS AN OFFICER OF THE COURT, THE KNOWLEDGE OF A CRIME ABOUT TO BE COMMITTED, FOR INSTANCE. SO OTHER THAN THAT FACET, THAT THE OFFICER, THAT THE LAWYER IS A OFFICER OF THE COURT, THE CONFIDENTIALITY AND SO FORTH, AREN'T THEY THE SAME AS TO THE LAWYER AND THE ACCOUNTANT?

NOT AT ALL.

DOESN'T THE ACCOUNTANT OWE CONFIDENTIALITY, OTHER THAN IN LIMITED SITUATIONS?

NO, YOUR HONOR. THE COURT EXPLAINED IN FIRST COMMUNITY BANK --

HE CAN GO AROUND AND TALK ABOUT HIS CLIENTS?

JUSTICE, HE CAN'T TALK ABOUT HIS CLIENTS, AND CAN'T TALK ABOUT THE INFORMATION, BUT THE QUESTION IS WHAT DUTY DOES THE PRIVILEGE SERVE? THE DUTY OF THE INDEPENDENT AUDITOR IS ONLY INTRINSIC VALUES TO THE CLIENT, ITSELF. MOST STATES DO NOT HAVE AN ACCOUNTANT-CLIENT PRIVILEGE. IT DOESN'T INCLUDE THE INDEPENDENT AUDITOR FROM PERFORMING SERVICES. THE LAWYER, ON THE OTHER HAND, HAS DUTIES SEPARATE AND APART FROM THE DUTY OF CONFIDENTIALITY, AND THAT IS EXACTLY WHAT THE INDIANA COURT OF APPEALS SAID, AND WHY THEY SAID NO. THIS SAME EXACT ARGUNIT WAS MADE TO THAT COURT, AND THEY SAID, NO, THE PRIVILEGES ON THEIR FACE ARE THE SAME BUT THEY ARE FUNDAMENTALLY DIFFERENT, BECAUSE THE LAWYER HAS A DUTY TO BE A ZEALOUS ADVOCATE OF HIS CLIENT, AND THEREFORE THE DUTY OF HIS CONFIDENTIALITY SERVES THE ATTORNEY-

CLIENT RELATIONSHIP. IT JUST DOESN'T SERVE THE CLIENT'S OWN INTEREST. THEREFORE IF THE CLIENT WANTS TO WAIVE THAT ACCOUNTANT-CLIENT PRIVILEGE BY ASSIGNMENT, LIKE IT DID IN THIS CASE, IT CAN DO SO.

WOULD THE SAME ARGUNIT APPLY TO AN IN-HOUSE AUDITOR, AS OPPOSED TO AN INDEPENDENT AUDITOR?

I DON'T KNOW THAT I THINK THE IN-HOUSE AUDITOR, BY VIRTUE OF THE FLORIDA STATUTE, WOULD EVEN HAVE A PRIVILEGE. THE PRIVILEGE SPECIFICALLY APPLIES TO CERTIFIED PUBLIC ACCOUNTANTS AND PUBLIC ACCOUNTANTS PERFORMING, AND SOMETHING I WOULD LIKE TO POINT OUT TO JUSTICE PARIENTE, PERFORMING ACCOUNTANT SERVICES. THERE IS A QUESTION, NOW, ABOUT HOW MUCH THE BROAD SERVICES SUPPLIED BY ACCOUNTING FIRMS, HOW MUCH OF THOSE SERVICES WOULD COME UNDER THE PRIVILEGE IN THE FIRST PLACE.

JUST WAIT UNTIL WE GET MULTIDISCIPLINARY REGULATION.

JUSTICE PARIENTE THAT, IS AN INTERESTING POINT THAT I WOULD LIKE TO ADDRESS, BECAUSE IN THE BRIEFS WHAT KPMG IS ASKING THE COURT TO DO TODAY IS TO SAY THAT LAWYERS ARE THE SAME AS ACCOUNTANTS AND WE EVEN HAVE ETHICAL RESPONSIBILITIES, AND YET WHEN THE AI CPA TOOK OBJECTION TO THE IMPOSITION OF THE LEGAL RULES OF ETHICS TO MDP'S STATING THAT IT WOULD CREATE CONFLICTS OF INTEREST WHERE NONE EXISTED BEFORE, AND YET KPMG COMES TO THIS COURT TODAY AND SAYS WE ARE REALLY THE SAME. WE ARE NOT THE SAME. LAWYERS ARE ADVOCATES. THEY ARE AN EXTENSION OF THE COURT. THEY HAVE A DUTY TO BE A ZEALOUS ADVOCATE TO THEIR CLIENT. THEY HAVE A DUTY OF UNDIVIDEDED LOYALTY. CPA'S DO NOT HAVE. THAT YOU DID NOT SEE KPMG SAY TO THIS COURT THAT WE OWE A FIDUCIARY DUTY, JUST LIKE LAWYERS SAY. THEY WON'T SAY THAT.

ARE YOU SAYING THAT ALL ACCOUNTING MALPRACTICE CAUSES OF ACTION ARE ASSIGNABLE OR ONLY THOSE THAT ARISE OUT OF INDEPENDENT AUDITS. IN OTHER WORDS THIS QUESTION OF THE -- THIS TASK-BASED ANALYSIS, WHICH I THINK COULD LEAD TO THE SLIPPERY SLOPE THAT YOUR OPPONENT SUGGESTS, IS THAT A CONCERN, OR ARE YOU ASKING US TO GO MUCH BROADER AND JUST SAY IF IT'S AN ACCOUNTANT AND NO MATTER IF IT IS TAX ADVICE, INDEPENDENT AWED AT THIS TIME -- AUDIT, IT IS ASSIGNABLE.

JUDGE, I DON'T KNOW HOW SLIPPERY OF A SLOPE I THINK THAT IS. THE QUESTION IS WE ARE ASKING THE COURT TO ADDRESS THE FACTS OF THIS CASE. THE FACTS OF THIS CASE ARE THAT THEY HAVE ASSIGNED A CLAIM AGAINST THEIR INDEPENDENT AUDITOR. WE ARE NOT GOING TO ASK THIS COURT TO RULE SO ON WHAT IS GOING TO HAPHE IF IT IS A TAX CLAIM. IS THE STATE OF FLORIDA GOING TO ACCEPT ASSIGNMENTS FOR TAXPAYERS TO GO AGAINST THEIR ACCOUNTANTS FOR IMPROPERLY PREPARING THEIR RETURNS? IT IS A HARD TO ENVISION SCENARIO, BUT WE ARE ASKING THIS COURT TO LOOK AT THE LAWS THAT EXIST. IT IS IMPORTANT TO KNOW THAT YOU WOULD BE THE FIRST COURT IN THE COUNTRY TO RULE THIS. EVERY OTHER COURT WHO HAS GOTTEN REMOTELY NEAR THIS ISSUE HAS SAID, NO, WE SEE NO OBJECTION, AND MANY COURTS HAVE RELIED ON THE DECISION IN DANTZLER, DUNBAR EXPORT COMPANY. I WOULD LIKE TO GO BACK TO THE ISSUE OF UNDIVIDEDED LOYALTY AND THE BREACH OF THE FIDUCIARY RELATIONSHIP. ONE OF THE THINGS THAT THE COURTS HAVE POINTED OUT, IN THE LEGAL CONTEXT, AND SAID THAT IF A LAWYER KNOWS THAT IF HIS ADVERSARY CAN BUY UP A CLAIM AGAINST HIM, IT MAY CHILL HIS DUTY TO BE A ZEALOUS ADVOCATE AND THEREFORE HE MAY NOT BE A ZEALOUS ADVOCATE. HE MAY COME AFTER HIS CLIENT OR WORK A DEAL WITH HIS CLIENT AND THEREFORE TAKE ASSIGNMENT, SO THEREFORE THE LAWYER IS IN A POSITION WITH THE CLIENT TO SAY, YES, I ADVISE YOU TO SETTLE THIS CASE AND GIVE ME A LEGAL MALPRACTICE CLAIM AGAINST ME, SO IT FOCUSES ON THE CHILLING EFFECT THAT IT WOULD HAVE. THE ASPCA FOCUSED ON THAT SAME EFFECT IN A CHILLING ANNOUNCEMENT, WHERE IT SAID INSERT POSITIONS AN INSUROR HAS SUBDWAINGS TO COME

AFTER THE -- A SUBJUGATION TO COME AFTER THE CPA FIRM. THAT IS NOT NORMALLY IMPAIRED. SO WE HAVE A DIRECT CONTRADICTION. ALL OF THE POLICIES THAT ARE BEFORE THIS COURT AND WHAT HAS ALWAYS PRECLUDE LEGAL MALPRACTICE CLAIMS FROM BEING ASSIGNED HAVE DEALT WITH THE CHILLING EFFECT OF THE LAWYER CLIENT RELATIONSHIP AND THE SPCA HAS SAID THERE IS NO CHILLING EFFECT. ONLY IN ALLEGATION WHERE THERE MAY BE FRAUD OR MISMANAGEMENT. I WOULD LIKE TO, THE CASE OF THE UNITED STATES VERSUS ARTHUR YOUNG AND COMPANY, BECAUSE THE COURT FOCUSED ON THAT CASE, ON THE PUBLIC RESPONSIBILITIES OF THE CPA, AND IT SAID THAT ULTIMATELY THE CPA OWES ITS FIDELITY TO THE PUBLIC TRUST. AND WHAT WAS, ALSO, INTERESTING ABOUT ARTHUR YOUNG AND COMPANY WAS IT, AGAIN, DEALT WITH THE CHILLING EFFECT AND THE PRIVILEGE ASPECT. THE CHILLING EFFECT, WHERE THE CONCERNS WERE THAT A CLIENT WOULD NOT TELL HIS LAWYER OR GIVE HIM FULL AND FRANK DISCLOSURE, THERE BY LIMITING THE ABILITY OF THE LAWYER TO GIVE FRANK LEGAL ADVICE. IN THE UNITED STATES VERSUS ARTHUR YOUNG AND COMPANY CASE, THE CIRCUIT COURT, ALSO, INDICATED THAT WE HAVE CONCERNS THAT PEOPLE MAY NOT BE FULL AND FORTHRIGHT WITH THEIR INDEPENDENT AUDITOR. THE ARTHUR YOUNG SUPREME COURT SAID, HOWEVER, NO, THERE IS A COUNTERVAILING SITUATION, WHICH IS IF THE -- A COUNTERVEILING SITUATION, WHICH IS IF THE CLIENT DOESN'T TELL THE CPA, ALL OF THE INFORMATION THAT IS NECESSARY, THEN THE INDEPENDENT AUDITOR WILL GIVE A QUALIFIED OPINION, AND BY NO MEANS DOES A PUBLIC COMPANY WANT A QUALIFIED PIN I DON'T REMEMBER OR IN A CASE OF A PRIVATE COMPANY THAT IS GOING TO GIVE A LOAN, BECAUSE IT IS GOING TO BE RED FLAGGED THAT THE COMPANY HAS A PROBLEM, AND SO THERE IS A COUNTERVEILING SITUATION THAT WON'T CAUSE ANY CHILLING EFFECT, IF WE ALLOW OR REFUSE TO RECOGNIZE THIS PRIVILEGE OF WHAT THEY WERE DOING AT THE FEDERAL LEVEL, AND THAT SAME SITUATION OCCURS HERE. BANK ATLANTIC IS A PUBLIC COMPANY, AND SO THERE IS NO COUNTERVEILING CHILLING EFFECT, BECAUSE BANK ATLANTIC HAVE TO BE FULL AND FRANK WITH ITS INDEPENDENT AUDITORS. OERS OTHERWISE IT WOULD RECEIVE A COUNTERPIN I DON'T REMEMBER OR A CLAIM OF OPINION WHICH WOULD DEVASTATE IT, AND SO THE PUBLIC POLICIES THAT THE COURT DECIDED IS THE REASON THAT THE COURT WOULD NOT DECIDE A LEGAL MALPRACTICE CLAIM ARE NOT HERE TODAY. KPMG IS SIMPLY SAYING TO THIS COURT IN FORGIONI YOU TALKED ABOUT THREE DIFFERENT THINGS. YOU TALKED ABOUT RELATIONSHIP. WE HAVE A DUTY. THEY DON'T HAVE A FIDUCIARY DUTY I OR AN UNDIVIDEDED DUTY OF LOYALTY. IN FORGIONE WE HAVE A CONFIDENTIALITY OF RELATIONSHIP. WE DON'T HAVE A RELATIONSHIP. WE HAVE A PREVIOUS LIGE. WE CAN'T GO OUT AND SUBSTITUTE OURSELVES. AND THE CONSTITUTIONALITY FACES WANK AND WANK, AND YOU ARE LOOKING AT THE ASSIGNMENT OF A LEGAL MALPRACTICE CLAIM AND WHAT THE COURT SAID IS THAT THE ATTORNEY CANNOT DELEGATE HIS RESPONSIBILITY TO ANOTHER, WITHOUT THE PERMISSION OF THE CLIENT. WHAT THE GOODLY COURT WAS ADDRESSING WAS THE PRINCIPLE AGENCY FIDUCIARY RELATIONSHIP THAT EXISTS BETWEEN AN ATTORNEY AND CLIENT, SO WHAT KPMG WANTS TO YOU DO, TODAY, IS TO SAY WE HAVE GOT A PRIVILEGE. WE HAVE GOT ONE OF THE THREE, REALLY. SO WE ARE JUST LIKE LAWYERS, AND THEREFORE THE SAME POLICIES DON'T APPLY. BUT THE SIMPLE ANSWER IS THAT WHEN YOU GO DEEPER INTO THE ANALYSIS, THE FACT OF THE MATTER IS THAT THE POLICIES THAT HAVE BEEN HISTORIC DLI -- HISTORICALLY CITED BY THE COURTS JUST AREN'T HERE ON ANALYSIS TODAY. THE CLOSEST CASE IN THIS COUNTRY ON POINT IS FIRST COMMUNITY BANK AND TRUST VERSUS KELLY, HARDESTTY AND SMITH. THEY WERE PRESENTED WITH THE SAME SCENARIO IN ATLANTA, AND THE COURT DISSECTED THE ACTUAL POLICY CONSIDERATIONS AND SAID THEY ARE JUST NOT PRESENT IN THIS SCENARIO. OTHER COURTS HAVE NOTED PICADILLY VERSUS DRACO, IN LEGAL MALPRACTICE CLAIMS IS NOTED THAT ASSIGNABILITY IS NOW A RULE OF LAW AND THAT THE EXCEPTION IS LEGAL MALPRACTICE CLAIMS, BECAUSE OF THE CLOSE, PERSONAL AND HIGHLY CONFIDENTIAL RELATIONSHIP. KPMG HAS ARGUED TO THIS COURT, AS WELL, THAT THIS CASE PRESENTS A CLASSIC SCENARIO. THE FACT OF THE MATTER IS THIS CASE DOESN'T PRESENT A CLASSIC SCENE RARE YO OF WHY THERE SHOULDN'T -- SCENARIO OF WHY THERE SHOULDN'T AND ASSIGNMENT. THE BANK BARGAINED FOR ITS RIGHTS TO BE PAID. IT GAVE AWAY CERTAIN RIGHTS N ITS GIVING AWAY THOSE RIGHTS, IN THE SETTLEMENT AGREEMENT, IT SPECIFICALLY ADDRESSED THE PRIVILEGE. IT KNEW THE RISKS ASSOCIATED WITH

LOSING THE PRIVILEGE OR THAT THERE COULD BE A LOSS OF PRIVILEGE. SO THIS ISN'T A SITUATION WHERE THERE HAS BEEN SOME INVOLUNTARY LOSS OF RIGHT AND A CLIENT HAS SUDDENLY BEEN SHOCKED BY GOING OH, CONFIDENTIAL COMMUNICATIONS I HAVE WITH MY LAW YOU ARE ARE BEING -- WITH MY LAWYER ARE BEING DISCLOSED NOW AND I DIDN'T KNOW IT.

WASN'T THIS CASE ABOUT, AND I REALIZE WE ARE HERE ON A BROADER ISSUE, BUT WASN'T THE CASE ABOUT CERTAIN CAUSES OF ACTION, AGAINST CERTAIN ENTITIES, BANK ATLANTIC BY THIS AGREEMENT, AGREED TO BRING, AND SPECIFICALLY THIS WAS NOT IN THERE. IS THAT RAISED BELOW? HOW DO WE --

THE FACT OF THE MATTER, YOUR HONOR, IS THERE IS NOTHING IN THE RECORD THAT INDICATES THAT BANK ATLANTIC SAID WE DON'T WANT YOU GUYS TO BRING A CAUSE OF ACTION ON OUR PART, AND WE SPECIFICALLY PUT IT IN OUR BRIEF, WITHOUT RECORD CITATIONS. WHAT YOU SEE, WHEN YOU LOOK IN THE RECORD OF THIS CASE, THE COVENANT NOT TO EXECUTE, IS THE COUGHNENT NOT TO CLAIM. YOU DON'T SEE A STRONG UNION BETWEEN THE BANK ATLANTIC, A STRONG, SOPHISTICATED ENTITY AND NATIONAL UNION, ANOTHER STRONG, SOPHISTICATED ENTITY. SO THIS IS NOT A CLASSIC SCENARIO IN THIS CASE. YOUR HONORS, I WOULD LIKE TO SUM UP AND SILVERLY SAY TO THIS COURT THAT, WHAT THE COURTS -- AND SIMPLY SAY TO THIS COURT THAT WHAT THE COURTS ARE REFUSING TO LOOK AT, IN THE ASSIGNMENT OF A LEGAL MALPRACTICE CLAIM, HAS BEEN A CLOSE, HIGHLY PERSONAL, CONFIDENTIAL RELATIONSHIP BETWEEN AN ATTORNEY AND CLIENT AND THE UNDIVIDEDED LOYALTY. THE CONFIDENTIALITY IS NECESSARY INORDER FOR THE ATTORNEY TO FULFILL HIS DUTY TOY THE CLIENT. THE CPA'S CONFIDENTIALITY IS CREATED BY STATUTE. THE ATTORNEY-CLIENT PRIVILEGE IS THE OLDEST PRIVILEGE KNOWN TO COMMON LAW. THE CPA PRIVILEGE IS CREATED BY STATUTE, NOT RECOGNIZED IN FEDERAL LAW, RECOGNIZED ONLY IN LIMITED CAPACITY, FINALLY, BY STATUTE AT FEDERAL LAW IN TAX CASES, IN WHICH THE COURTS HAVE SAID IN CIVIL TAX MATTERS WE WILL, NOW, RECOGNIZE SOME DEGREE OF PRIVILEGE. KPMG HAS NOT SAID TO THIS COURT. THEY HAVE NOT UNDERTAKEN THE RESPONSIBILITIES OF AN ATTORNEY. THEY ARE NOT A PARTICIPANT IN THE ADVERSARIAL SYSTEM OF JUSTICE. THEY HAVE NOT DEMONSTRATED THAT THE PLIF LEDGE IS NECESSARY FOR THEM TO FULFILL THEIR DUTIES AND HOW THEIR RELATIONSHIP WILL ULTIMATELY BE CHILLED OR THEIR ABILITY TO CARRY OUT THEIR FUNCTION WILL BE CHILLED. THE SIMPLE FACT OF THE MATTER IS THAT THE RELATIONSHIP BETWEEN ATTORNEY AND CLIENT AND INDEPENDENT AUDITOR AND CPA IS FUNDAMENTALLY DIFFERENT, AND THE POLICY CONSIDERATIONS THAT PRECLUDE THE ASSIGNMENT OF LEGAL MALPRACTICE CLAIMS ARE JUST NOT PRESENT IN THE CONTEXT OF THE INDEPENDENT AUDITOR CPA. THANK YOU, YOUR HONORS.

THANK YOU, COUNSEL. REBUTTAL?

THANK YOU. YOUR HONOR.

COUNSEL, CAN YOU ASK YOU ONE QUESTION. IS OPPOSING COUNSEL CORRECT, WHEN HE SAYS THAT SHOULD WE REAL, AS YOU SUGGEST, THAT WE WOULD BE THE ONLY COURT IN THE NATION TO DO SO, AND IF THAT IS TRUE, THEN WHY DO YOU THINK THAT IS TRUE?

YOUR HONOR, WE DID NOT PRESENT TO YOU A RULING BY AN APPELLATE COURT OF ANOTHER STATE TO THE EFFECT THAT WE ARE URGING HERE TODAY. BUT THERE IS A REASON FOR IT. THERE ARE, AND IT IS THE REASON WHY YOU SHOULD RULE IN FAVOR OF KPMG IN THIS CASE. FLORIDA IS ONE OF THE FEW STATES IN THE UNITED STATES THAT DOES, IN FACT, HAVE AN ACCOUNTANT-CLIENT PRIVILEGE. THE OTHER STATES HAVE NOT GONE UP TO THIS LEVEL, AND ON ALL FOURS IN THIS CASE, THE INDIANA CASE, THE COMMUNITY BANK CASE, BUT YOU HAVE TO READ THAT CASE AND UNDERSTAND THE BASIS FOR THE COURT'S RULING, AND I WOULD LIKE TO DISCUSS IT WITH YOU, BECAUSE IT HIGHLIGHTS THE DIFFERENCES BETWEEN INDI AND A LAW AND FLORIDA -- BETWEEN INDIANA LAW AND FLORIDA LAW. IN THE CASE OF FEDERAL BANK

VERSUS KELLY CASE, DIRECTORS WHO HAD SERVED ON THE BOARD OF THE BANK HAD AGREED TO BUY CERTAIN NONPERFORMING LOANS FROM THE BANK. THE CRITICAL FACTORS THAT LED TO THE COURT'S CONCLUSION WERE THE FOLLOWING. THE TRANSFERESE WERE NEVER IN AN ADVERSE POSITION TO THE BANK. NATIONAL UNION GOT SUED BY THE BANK AND COUNTERCLAIMED. THE TRANSFREEZE DIDN'T JUST TAKE THE MALPRACTICE CASE. THEY TOOK ASSETS WHICH PUT THEM IN THE SHOES OF THE TRANSFER OR. NATURALLY YOU DIDN'T BUY ANY ASSETS FROM ANYBODY. IT DIDN'T GET TRANSFERRED ANY ASSETS. THE ASSET BEING CLAIMED WAS NOT THE ASSET TRANSFERRED. IN THIS CASE THE ASSET IS BEING TRANSFERRED. FINALLY THAT THE TRANSFER CONSTITUTE ADD WAIVER OF THE PRIVILEGE AS TO THE ASSET SOLD AND THE TRUSTEES, BECAUSE THEY HAD A RIGHT TO UNDERTAKE DUE DILIGENCE REGARDING THE QUALITY OF THOSE ASSETS THEY COULD TAKE, SO THE ANSWER TO YOUR QUESTION IS, UNS YE, AND THE -- IS YES, AND THE INDIANA COURT DID NOT FIND THAT, DESPITE THE PRIVILEGE IN THAT STATE, PEOPLE ARE FREE TO ASSIGN AND TRANSFER. THEY SAY ONLY IN CONNECTION WITH THE SALE AFTER ASSET.

YOUR PRIMARILY -- YOUR PRIMARY RELIANCE, THEN, IS ON THE UNION SNEAKNESS OF FLORIDA -- UNIQUENESS OF FLORIDA'S PRIVILEGE S THAT WHAT YOU ARE SAY SOMETHING.

LET'S TAKE A MOMENT AND TALK ABOUT T LET'S START, AGAIN, WITH CHIEF JUSTICE HARDING'S OPINION IN FORGIONE. THE LACHCK THE INSURANCE AGENT DID NOT DEAL IN THE SAME RELATIONSHIP WITH HIS CLIENT AS LAWYER, WERE THERE WERE SUBSTANTIAL DIFFERENCES. CAN WE SAY THAT THERE ARE SUBSTANTIAL SIMILARITIES BETWEEN ACCOUNTANTS AND LAWYERS IN FLORIDA?

CERTAINLY WE CAN SAY FOR YEARS WE HAVE UNIFORMLY FOUND THAT. IN PETE MARK VERSUS LANE, A ACCOUNTING TAX CASE BEFORE THIS COURT IN 1990, THE COURT HELD WE FIND THAT THE BASIC PRINCIPLES FOR ALL PROFESSIONAL MALPRACTICE ACTIONS SHOULD BE THE SAME, ABS CLEAR, LEGISLATIVE INTENT TO DISTINGUISH -- ABSENT CLEAR, LEGISLATIVE INTENT TO DISTINGUISH CERTAIN CASES IN THAT APPLICATION OF THE LIMITATIONS PERIOD MUCH THE THIRD DISTRICT, IN COOPERS AND LYBRAND, AND YOU WILL NOTE NO MENTION OF THE LINES OF CASES AND NO MENTION OF THE FACT THAT IS THERE A SUBSTANCE REACTION UNDER 473 FLORIDA STATUTES, WHICH IS CLEAR AND CONFIDENTIAL COMMUNICATIONS PROTECTED WITH AN ACCOUNTANT AND A CLIENT. THAT GIVES RISE TO A CAUSE OF ACTION BY THE CLIENT AGAINST HIS AUDITOR FOR VIOLATING THE PRIVILEGE AND RELEASING CONFIDENTIAL COMMUNICATION.

A FIDUCIARY RELATIONSHIP?

INSTITUTIONALLY KPMG HAS TAKEN THE POSITION, YOUR HONOR, THAT THERE IS NONE. HOWEVER, IF YOU READ THE COOPERS AND LYBRAND THIRD DISTRICT CASE, THERE ARE INSTANCES IN THIS CASE WHERE THE COURTS HAVE FOUND THEIR IS A FIDUCIARY RELATIONSHIP.

DO YOU AGREE THAT THAT EITHER IS THE LAW OR SHOULD BE THE LAW, THAT THERE IS A FIDUCIARY RELATIONSHIP AND THAT THE DUTIES AND OBLIGATION THAT IS FLOW FROM THAT FLOW WITH REFERENCE TO --

I DO NOT BELIEVE THAT THERE IS A FIDUCIARY RELATIONSHIP, NOT WITHIN THE TERM. NOTWITHSTANDING THE DANTZLER COURT DID SAY THAT THERE IS A ACCOUNTANT TRUST WITH HIS CLIENT, BUT UNDERSTAND I DID NOT READ THE OPINION IN FORGIONE AS TO SAY THAT YOU ARE HANDING DOWN A BRIGHT-LINE TEST, THAT EVERY PROFESSION MUST MEET THESE STANDARDS, BECAUSE I CAN TELL THAT YOU THAT ANALYSIS WOULDN'T STAND UP IN A DOMESTIC COUNSELOR, VICTIM CLAIM THAT IT MIGHT BE ASSIGNED.

YOU NEED TO BRING YOUR REMARKS TO A CLOSE.

YES, SIR. THAT WOULD NEVER SURVIVE THE TEST THAT THE OTHER SIDE CAN TEST. THEY HAVE TO PROVE THEY ARE LIKE LAWYERS. THE QUESTION BEFORE THE COURT IS WHETHER OR NOT THIS IS A TRANSFER OF PERSONAL TORT. I URGE THE COURT TO BEAR IN MIND THAT THIS DECISION AFFECTS NOT JUST KPMG BUT, AS I SAID, EVERY ACCOUNTANT IN THE STATE OF FLORIDA RENDERING ACCOUNTING ADVICE TO A CLIENT, AND THAT THE CLIENT DOES NOT UNDERSTAND THESE TASK-BASED DIFFERENCES IN THE DIALOGUE THEY HAVE WITH THEIR ACCOUNTANT. YOU SHOULD ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE AND QUASH THE WIN PIN I DON'T KNOW OF THE THIRD DISTRICT COURT OF APPEAL AND THEREBY REINSTATE. THANK YOU, YOUR HONORS.

THANK, COUNSEL.