

>> THANK YOU VERY MUCH AND THANK YOU BOTH FOR YOUR ARGUMENTS. THE NEXT CASE ON THE COURT'S AGENDA IS MICHAEL PENZER VERSUS TRANSPORTATION INSURANCE COMPANY.

>> CHIEF JUSTICE, I'M MARC WITES FROM WITES & KAPETAN AND I'M JOINED BY STEWART DAVIS... [INAUDIBLE] AND IT'S AN HONOR TO APPEAR ON BEHALF OF THE APPELLATE, MICHAEL PENZER, THE ISSUE PRESENTED TO THIS COURT ON A CERTIFIED QUESTION, FROM THE 11th CIRCUIT COURT OF APPEALS, ALTHOUGH NOT HAVING BEEN DIRECTLY ADDRESSED BY A COURT IN FLORIDA, IS BY NO MEANS A NOVEL ISSUE.

11 COURTS INCLUDING FEDERAL CIRCUIT COURTS OF APPEALS, STATE SUPREME COURTS, INTERMEDIARY STATE APPELLATE COURTS AND FEDERAL DISTRICT COURTS FROM THROUGHOUT THE COUNTRY HAVE EXAMINED IDENTICAL PROVISIONS FROM INSURANCE POLICIES PROVIDING COVERAGE FOR ADVERTISING OFFENSES, BASED ON IDENTICAL CLAIMS FOR VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT, FOR SENDING AN UNSOLICITED FACSIMILE ADVERTISEMENT AND HAVE FOUND IN ESSENCE ANSWERING THE 11TH CIRCUIT CERTIFIED QUESTION IN

THE AFFIRMATIVE, COVERAGE SHOULD BE AFFORDED AND WE ASK THE COURT TODAY TO REACH THE SAME CONCLUSION.

>> WITH REGARD TO THIS PROVISION BEING AN ISO STANDARD, CLAUSE, AND THE COMMERCIALIZED APPROACH AS BEING VERY VAST AND BROAD, IS THAT SOMETHING THAT IS PART OF THIS RECORD, IS IT PROPERLY BEFORE US, IS THAT A PROPER ARGUMENT?

WHERE DOES THAT FIT INTO THE CASE?

>> I'M NOT SURE IF I UNDERSTAND YOUR HONOR'S QUESTION --

>> IS THE FORM, SOMEPLACE WITHIN OUR RECORD, HAS BEEN ARGUED THAT THIS IS AN ISO FORM, THIS IS LANGUAGE DRAFTED, IS THAT PART OF THE ARGUMENT.

>> WELL, YES, TO ANSWER THE QUESTION, YES, IT IS PART OF THE RECORD, THE INSURANCE POLICY IS PART OF THE RECORD.

>> NO, THE -- THE ASPECT THAT THIS IS AN ISO FORM POLICY.

>> YES, I BELIEVE SO.

>> OKAY.

>> IT IS PART OF THE UNDERLYING RECORD.

>> IT IS AND SO THEN THAT IS A PROPER ARGUMENT FOR US TO CONSIDER WITH REGARD TO HOW ISO PROJECTED THE CLAUSE AND WHAT IT IS SUPPOSED TO DO IN THIS BROAD

EFFECT.

>> I THINK THAT THE MANNER FROM WHICH THIS COURT AS WELL AS WHEN THE 11TH CIRCUIT LOOKED AT HOW GEORGIA COURTS WOULD LOOK AT THE ISSUE IN THE HOOTERS VERSUS AMERICAN GLOBAL CASE IS NOT HOW AN ISO WOULD PUT IT FORWARD. NOT HOW AND INSURANCE COMPANY WOULD PUT IT FORWARD.

IT IS HOW WOULD THE ORDINARY --

>> I TAKE IT YOU DON'T WANT TO ANSWER MY QUESTION -- ISO FORM, AND WHETHER WE SHOULD EVEN CONSIDER THAT.

>> I DO BELIEVE IT IS AN ISO FORM, I DO BELIEVE IT IS SOMETHING TO CONSIDER.

BUT I RESPECTFULLY DISAGREE THAT IT IS THE POINT OF VIEW FROM WHICH THE COURT SHOULD ANALYZE THE PROVISION AT ISSUE TO DETERMINE WHETHER OR NOT COVERAGE SHOULD BE AFFORDED.

THAT IS MY RESPECTFUL DISAGREEMENT WITH YOUR HONOR.

I THINK FLORIDA LAW AND -- ON THIS ISSUE IS VERY CLEAR.

WE INTERPRET INSURANCE POLICIES AS WOULD THE ORDINARY PERSON ON THE STREET.

AND WHEN THERE IS AN AMBIGUITY, IT IS CONSTRUED IN FAVOR OF COVERAGE.

IN ORDER FOR TRANSPORTATION --

>> BUT YOU MUST AGREE THAT THIS

ENTIRE CLAUSE, WHEN YOU LOOK AT IT, NOT ONLY THIS ONE SENTENCE, BUT YOU LOOK AT THE ENTIRE POLICY PROVISION, A, B, C, DOWN THROUGH THE LIST, THAT THIS IS DESIGNED TO COVER SITUATIONS UNDER FLORIDA LAW FOR EXAMPLE, WHERE INDIVIDUALS HAVE TAKEN MATERIAL THAT MAY BE PERSONAL TO ME AND USED IT IN ADVERTISING OR IN SOME WAY VIOLATED MY PRIVACY, ISN'T THAT A FAIR READING IF YOU CONSIDERED EACH ONE OF THOSE ELEMENTS AND WHERE THE SENTENCE APPEARS IN THAT OVERALL COVERAGE APPROACH.

>> A RESPECTFULLY DISAGREE.

>> YOU CAN NOT SEE THAT.

>> MY ANSWER IS TWOFOLD.

ONE I WOULD LIKE TO EXPLAIN WHY A DISAGREE AND TWO, I WOULD LIKE TO EXPLAIN WHY, EVEN IF THAT IS A REASONABLE READING, IT IS ONE OF SEVERAL REASONABLE READINGS RENDERING THE CLAUSE AMBIGUOUS AND LET ME GO BACK TO THE FIRST POINTED IF I MAY.

WHEN YOU LOOK AT THESE FOUR PROVISIONS, WITHIN THE SECTION OF THE INSURANCE POLICY AT ISSUE, THERE ARE FOUR INDEPENDENT OFFENSES FOR WHICH COVERAGE MAY BE TRIGGERED UNDER THE POLICY.

NOT ONE OF THESE FOUR ARE DEPENDENT UPON THE OTHER.

NOT ONE, IS MODIFIED ON THE OTHER AND THAT IS A KEY DISTINCTION BETWEEN THE POSITION OF THE APPELLANT AND THE POSITION TAKEN BY TRANSPORTATION INSURANCE AND IF YOU LOOK AT PROVISION IMMEDIATELY ABOVE PROVISION B, TRANSPORTATION CHOSE TO WRITE THE FOLLOWING LANGUAGE, ORAL OR WRITTEN PUBLICATION OF MATERIAL THAT SLANDERS OR LIBELS, A PERSON OR ORGANIZATION OR DISPARAGES A PERSON'S OR ORGANIZATION'S PRODUCTS OR SERVICES AND ARE PURPOSEFULLY CHOOSING TO DEFINE THE CONTENT WHICH WOULD TRIGGER COVERAGE UNDER THAT SECTION OF THE POLICY.

WHEN YOU GO TO THE NEXT SUBDIVISION, THE ONE AT ISSUE HERE WHICH IS IN NO WAY DEPENDENT ON THE FIRST, THEY LEFT OUT ALL OF THOSE DESCRIPTIVE WORDS.

AND INTERESTINGLY ENOUGH, THE TELEPHONE CONSUMER PROTECTION ACT HAD BEEN PASSED 13 YEARS BEFORE -- MAYBE 12 YEARS, 1991, VERSUS THE 2003 POLICY, THE ONE ISSUED HERE, THEY COULD HAVE CHOSEN TO EXCLUDE COVERAGE FOR THIS CLAIM BUT THEY DID NOT.

NOW, MOVING ONTO SUB SECTION B IT READS, ORAL OR WRITTEN PUBLICATION OF MATERIAL THAT

VIOLATES A PERSON'S WRITE OF  
PRIVACY, NO LANGUAGE WITHIN THAT  
PROVISION, ADDRESSES THE  
CONTENT.

AND WHEN YOU GO TO C AND D,  
THESE ARE AGAIN CONDUCT-BASED  
OFFENSES.

THAT ARE NOT RELATED TO THE  
CONTENT OF THE MATERIAL.

>> MAY I -- ALL OF IT IS UNDER  
THE DEFINITION OF WHAT AN  
ADVERTISING INJURY IS.

>> YES, JUDGE.

>> WELL, I -- THIS -- EXPLAIN,  
THEN, BECAUSE, A, IS A LIABLE OR  
SLANDER.

AND HOW IS THAT AN ADVERTISING  
ISSUE.

>> IT COULD BE AN ADVERTISEMENT,  
THE CONTENT OF WHICH --

>> DOES IT HAVE, TO IN OTHER  
WORDS, WE FINISHED WITH ALL OF  
THESE... [INAUDIBLE] WOULD THAT  
HAVE BEEN ONE, OR DO THEY HAVE  
TO COME FROM AN ADVERTISEMENT?

>> I THINK IT HAS TO ARISE FROM  
AN ADVERTISEMENT.

>> SO, FIRST OF ALL, SO THIS IS  
-- SO IN ANSWER TO WHAT JUSTICE  
LEWIS IS ASKING, YOU HAVE TO  
LOOK AT THE WHOLE -- THE WHOLE  
CONTEXT HERE, BECAUSE THIS ISN'T  
JUST COVERING LIABLE AND  
SLANDER.

YOU KNOW, SOMEBODY -- BY MEANS  
OTHER THAN ADVERTISING, CORRECT.

>> YOU HAVE TO CONSIDER IT'S AN ADVERTISEMENT AND THERE IS NO DISPUTE THE MATERIAL AT ISSUE IS AN ADVERTISEMENT.

IT WAS --

>> BUT, STILL, I'M TRYING TO UNDERSTAND HOW BROAD OR NARROW THIS IS.

IT IS... STRIKES ME THAT THAT IS ALSO IMPORTANT TO HOW WE LOOK AT WHETHER IT IS -- C REFERS TO A CONTENT-BASED INJURY, OR IF IT IS BROADER.

NOW, ON THAT -- ON B, THE QUESTION I HAVE IS THAT IF -- ARE YOU SAYING THAT B BOTH COVERS SOMETHING THAT JUST IS UNWANTED BY THE PERSON, UNSOLICITED ADVERTISEMENT OF ANY SORT, OR... LIKE IF I GET SOMETHING IN THE MAIL AND I DIDN'T WANT IT?

IS THAT -- WOULD THAT BE A VIOLATION, AND IS THERE A CAUSE OF ACTION FOR THAT INTERESTING QUESTION, THAT WAS ASKED BY THE DISTRICT COURT AND THIS PANEL OF THE 11th CIRCUIT AND ONE, ARGUABLY, THERE MAY VERY WELL BE COVERAGE FOR SUCH A CLAIM.

>> BUT HERE --

>> WELL, IS THERE SUCH A CLAIM THAT EVEN EXISTS?

>> WELL, WHETHER OR NOT A PERSON COULD BRING, FOR EXAMPLE, A CLAIM FOR INVASION OF PRIVACY

BASED ON THE RECEIPT OF SOMETHING IN THEIR MAILBOX MIGHT BE A QUESTION FOR ANOTHER DAY AND MIGHT ARGUABLY BE A VALID CLAIM FOR INVASION OF PRIVACY AND BE COVERED UNDER THIS POLICY.

BUT FIRST OF ALL, THE ISSUE BEFORE THE COURT IS NOT WHETHER AN INVASION OF PRIVACY CLAIM IS COVERED UNDER THIS POLICY, IT'S BASED ON A CLAIM WHICH CONGRESS HAS EXPLICITLY SAID IN ITS HISTORY INDICATES A PRIVACY INTEREST.

NEXT, TO ADDRESS YOUR QUESTION ABOUT WHETHER OR NOT AS A HYPOTHETICAL -- AND I BELIEVE THAT WAS THE COURT'S QUESTION -- THE RECEIPT OR SENDING OF AN UNSOLICITED MAIL PIECE MIGHT ALSO GIVE RISE TO A CLAIM.

I THINK THERE IS A MATERIAL DIFFERENCE, AND IT'S THAT MATERIAL DIFFERENCE THAT NOT ONLY LED CONGRESS TO PASS THE TPCA, BUT IT'S INTERESTING TO NOTE THAT THE FLORIDA LEGISLATURE PASSED AN IDENTICAL PROVISION THAT GAVE THE POWER NOT ONLY, WELL, IT GAVE THE POWER TO THE ATTORNEY GENERAL WHICH ISN'T PROVIDED IN THE TPCA TO BRING THE VERY SAME CLAIM PRESUMABLY TO PROTECT THE VERY SAME CLAIM, BUT WHY IS IT



DIFFERENT?

>> WELL, LET ME ASK YOU --

[INAUDIBLE]

>> I THINK THAT THE RIGHT OF PRIVACY ARISES FROM SEVERAL BASES.

FIRST, I THINK THE RIGHT OF PRIVACY IS CERTAINLY PART OF FLORIDA'S COMMON LAW WHICH INCLUDES A RIGHT TO BE FREE FROM INTRUSION OR SECLUSION.

AND THIS COURT, JUDGE QUINCE AND JUDGE PARIENTE IN THEIR CONCURRENCE IN THE GINSBERG PROVISION MADE CLEAR THAT THE PREVIOUS CATEGORIES OF INVASION OF PRIVACY CLAIMS THAT HAD BEEN DELINEATED IN THE AGENCY HEALTH CARE CASE WERE BY NO MEANS INTENDED TO, AND I'M QUOTING, DEFINITELY LIMIT THE POTENTIAL DECISIONS THAT MIGHT GIVE RISE TO A CAUSE OF ACTION.

>> IT'S NOT YOUR POSITION THAT THE FEDERAL STATUTE SHOULD RELY ON CONGRESS?

>> IT IS THE FEDERAL STATUTE WE RELY UPON, YES, BUT I THINK THAT IN READING THE POLICY AT ISSUE THE COURT HAS TO DETERMINE NOT WHETHER OR NOT THE CLAIMANT HAS ISSUED A -- IT'S WHETHER OR NOT THERE IS A VALID CAUSE OF ACTION, OR WHETHER OR NOT AN ORDINARY PERSON ON THE STREET WOULD READ THIS POLICY AND THIS

LANGUAGE TO DETERMINE THAT IT IS AN INVASION OF PRIVACY.

>> THE VALID CAUSE OF ACTION THAT YOU'RE TALKING ABOUT IS THE FEDERAL CAUSE OF ACTION.

>> YES, JUDGE.

>> AND WOULD THAT COVER -- I KNOW THIS WAS AN UNSOLICITED FAX ABOUT TELEPHONE SERVICE, CORRECT?

>> YES, JUDGE.

>> DOES IT COVER AN E-MAIL?

>> NO.

THE TELEPHONE CONSUMER PROTECTION ACT DOES NOT COVER UNSOLICITED E-MAILS.

THIS CASE IS ABOUT UNSOLICITED FAX ADVERTISEMENTS.

IF I COULD, I WANT TO FINISH ANSWERING JUSTICE PARIENTE'S QUESTION, AND THAT IS INSIDE SOMEBODY'S HOME THERE IS A REASONABLE EXPECTATION OF PRIVACY.

UNLIKE SOMETHING THAT GOES TO A MAILBOX, AN UNSOLICITED FAX AD OCCUPIES SOMEBODY'S PHONE LINE, IT MAKES NOISE IN THEIR HOME, IT USES THEIR INK, IT USES THEIR MACHINE, AND IT PUTS SOMETHING INTO THEIR DWELLING THAT WASN'T THERE BEFORE WHERE A PERSON HAS A REASONABLE EXPECTATION OF PRIVACY.

AND IT'S OUR POSITION AND THE POSITION OF THE 11 COURTS THAT

HAVE DIRECTLY ADDRESSED THIS  
ISSUE THAT THAT IS WHY A  
ORDINARY PERSON ON THE STREET --  
>> YOU REALLY THINK, THOUGH,  
THAT IF BUT FOR THE TELEPHONE  
CONSUMER PROTECTION ACT THAT  
THERE WOULD BE A FREE-STANDING  
COMMON LAW CAUSE OF ACTION FOR  
SOMEBODY SENDING A FAX THAT THEY  
DIDN'T -- AN ADVERTISING FAX  
INTO THEIR HOUSE?

>> I DO BELIEVE, AND I THINK  
THAT THE DISTINCTION IS THAT THE  
TELEPHONE CONSUMER PROTECTION  
ACT PROVIDES A STATUTORY REMEDY  
FOR A PERSON TO BRING THIS CLAIM  
WITHOUT HAVING TO PROVE ACTUAL  
DAMAGES.

AND PERHAPS THE DIFFERENCE MIGHT  
BE THAT IN BRINGING A CLAIM  
UNDER THE COMMON LAW SOMEBODY  
WOULD HAVE TO PROVE ACTUAL  
DAMAGES.

CONGRESS IN DETERMINING THAT  
THESE UNSOLICITED  
ADVERTISEMENTS, WHETHER THEY  
CAME BY PHONE CALLS OR BY FAX,  
HAS VIOLATED A PERSON'S RIGHT TO  
PRIVACY ENABLED CONSUMERS JUST  
LIKE THE FLORIDA LEGISLATURE  
ENABLED THE ATTORNEY GENERAL TO  
BRING A CLAIM WITHOUT HAVING TO  
ESTABLISH ACTUAL DAMAGES, TO  
HAVE THE INCENTIVE OF A  
STATUTORY REMEDY TO ADVANCE  
THEIR REMEDY BECAUSE OF THEIR

INVASION TO PRIVACY.

>> WHAT IS YOUR, WHAT'S YOUR RESPONSE TO THE ARGUMENT THAT THAT VIOLATES A PERSON'S RIGHT OF PRIVACY, IT MODIFIES MATERIAL?

>> I THINK THAT --

>> ONE OF THE -- WHICH IS FROM A GRAMMATICAL POINT OF VIEW, IS THAT CORRECT?

MATERIAL THAT VIOLATES A PERSON'S RIGHT TO PRIVACY?

>> WE THINK THAT IT IS EQUALLY PLAUSIBLE TO READ THAT PROVISION OF THE POLICY TO MODIFY THE TERM "PUBLICATION OF MATERIAL."

AND I THINK YOU HAVE TO GO TO A TECHNICAL LEGAL READING, PERHAPS THROUGH A TORT LENS, TO READ THE POLICY THAT WAY.

AND NUMEROUS COURTS HAVE --

>> IF YOU DO THAT, AREN'T YOU SUGGESTING YOU'RE TAKING THE WORDS OF THE MATERIAL OUT OF CONTEXT?

WHAT'S YOUR RESPONSE TO THAT?

>> I DON'T BELIEVE THAT BECAUSE I THINK THE CLAUSE AT THE END MODIFIES THE PUBLICATION OF MATERIAL, AND I THINK THAT THE MATERIAL HERE IS THE ADVERTISEMENT.

AND COURTS HAVE RULED, WE'VE CITED THEM IN OUR BRIEFS, YOU CAN'T CONSTRUCT USING A RULE OF STATUTORY INTERPRETATION READ

SOMETHING TO EVISCERATE THE  
PURPOSE, AND --

>> SO IT MODIFIES NOT JUST THE  
WORD "PUBLICATION," BUT  
"PUBLICATION OF MATERIAL," THE  
PHRASE TOGETHER?

IS THAT WHAT YOU'RE SAYING?

>> THAT'S WHAT I'M SAYING, BUT  
I'M SAYING SOMETHING ELSE IN  
ADDITION WHICH IS EVEN IF THE  
COURT COULD READ IT THE WAY YOU  
ARE SUGGESTING, JUSTICE, IT  
COULD ALSO BE READ THE WAY WE  
ARE SUGGESTING WHICH MEANS AT  
WORST THERE IS AN AMBIGUITY  
HERE, WHICH RENDERS AN  
AMBIGUITY.

IT HAS TO BE CONSTRUED AGAINST  
THE INSURANCE COMPANY THAT CHOSE  
NOT TO DEFINE IT IN THE WAY THEY  
WISH TO DEFINE IT NOW IN  
HINDSIGHT AND FIND FOR COVERAGE  
AND ANSWER THE 11TH CIRCUIT'S  
QUESTION IN THE AFFIRMATIVE.

THANK YOU.

>> OKAY.

>> MAY IT PLEASE THE COURT,  
RAOUL CANTERO FOR TRANSPORTATION  
INSURANCE COMPANY.

I'D LIKE TO HOLD UP THE ANSWER,  
IT'S ATTACHED TO THE COMPLAINT  
AND TO THE ANSWER, AND IT'S JUST  
A SIMPLE ADVERTISEMENT FOR FREE  
PHONE AND ACCESSORIES FOR  
NEXTEL, SIGN UP ON --

>> BUT THAT'S NOT REALLY THE

ISSUE THAT'S BEFORE US TODAY, IS IT?

WHETHER IT'S OFFENSIVE, NOT OFFENSIVE, ALL REALLY WHAT WE NEED TO DO IS TO ANALYZE THIS POLICY AND THAT PROVISION IN THE POLICY HOWEVER WE DO IT TO DETERMINE -- YOU MAY WIN DOWN THE ROAD OR WHATEVER ON WHETHER THERE IS A CAUSE OF ACTION OR IS NOT, BUT ISN'T THAT REALLY WHAT WE'RE SUPPOSED TO DO TODAY, AND ISN'T THAT REALLY THE ONLY ISSUE WE HAVE?

>> CERTAINLY.

>> OKAY.

>> WE HAVE TO LOOK AT THE ALLEGATIONS IN THE COMPLAINT.

>> RIGHT.

WHETHER SOMETHING IS OFFENSIVE OR NOT IS NOT SOMETHING WE DECIDE.

>> ABSOLUTELY.

>> OKAY.

AND THE OTHER PART ABOUT THIS, NOW, I DIDN'T KNOW ABOUT THE TELEPHONE CONSUMER PROTECTION ACT --

>> I DIDN'T EITHER, AND APPARENTLY EITHER DID SOUTHEAST WIRELESS.

[LAUGHTER]

>> AND OF ALL THE KINDS OF THINGS THAT SOMEBODY THAT DOES ADVERTISING WOULD WANT TO HAVE ADVERTISING, WOULDN'T IT BE THAT

AN INNOCUOUS AD GOING IN THIS MEDIUM BEING SENT BY FAX IS GOING TO GIVE RISE TO DAMAGES? AND FOR A STANDARD INSURANCE POLICY THAT'S ESPECIALLY COVERING SOMEBODY WHO DOES ADVERTISING OR MIGHT BE IN THE ADVERTISING BUSINESS NOT TO HAVE COVERAGE FOR THAT CLAIM IS, SEEMS TO BE, WOULD HAVE TO BE A VERY SPECIFIC OVERSIGHT NOT TO WANT TO HAVE COVERAGE FOR IT. SO IN OTHER WORDS, I AGREE THAT LOOKS INNOCUOUS.

I CAN'T BELIEVE THAT CONGRESS HAS GIVEN ALL THESE DAMAGES OR WHATEVER.

BUT IT SOUNDS LIKE THE KIND OF THING YOU WOULD WANT TO HAVE COVERAGE FOR.

AND THE QUESTION IS DOES IT PROVIDE THAT HOOK, AND IS THAT WHAT THE INSURANCE COMPANIES INTENDED?

>> CORRECT, YOUR HONOR.

AND I THINK THAT'S WHAT WE HAVE TO LOOK AT, TO LOOK AT THE PLAIN LANGUAGE OF THE POLICY.

I THINK AS JUSTICE LEWIS IS POINTING OUT AND OUR ARGUMENT IS IF YOU LOOK AT THE PHRASE IN THE CONTEXT IN WHICH IT STANDS, THE PHRASE AS A WHOLE IN ADDITION TO LOOKING AT IT IN THE CONTEXT OF THE PROVISIONS SURROUNDING IT YOU CAN ONLY REACH ONE

CONCLUSION, AND THAT IS THAT  
IT'S DESIGNED TO PROTECT AGAINST  
SECRECY-BASED INVASIONS OF THE  
RIGHT TO PRIVACY.

>> [INAUDIBLE]

THE LANGUAGE ITSELF WHERE IT  
SAYS "WRITTEN PUBLICATION,"  
PUBLICATION WOULD MEAN  
DISSEMINATION, SO A WRITTEN  
DISSEMINATION OF FACTS -- THAT'S  
A MATERIAL -- THAT VIOLATES A  
PERSON'S RIGHT OF PRIVACY.

YOU SAY THAT COMES AT LEAST FROM  
A FEDERAL STATUTE.

SO A PLAIN READING, WHY WOULDN'T  
IF YOU HAVE A WRITTEN  
DISSEMINATION OF THE FACTS THAT  
VIOLATES THE FEDERAL STATUTE,  
WHY ISN'T IT COVERED?

>> BECAUSE, YOUR HONOR, YOU HAVE  
TO LOOK AT THE DEFINITION OF  
RIGHT OF PRIVACY UNDER FLORIDA  
COMMON LAW AND WHAT THAT RIGHT  
OF PRIVACY ENTAILS.

>> IF I LOOK AT "RIGHT OF  
PRIVACY," PLAIN MEANING, IT  
WOULD SEEM TO ME TO BE ANY RIGHT  
GIVEN TO SOMEONE BE IT BY  
FEDERAL OR STATE LAW, COMMON  
LAW, CONSTITUTIONAL, STATUTORY,  
ANY KIND OF LEGAL RIGHT THAT  
THEY MAY HAVE, WOULD YOU  
DISAGREE WITH THAT?

>> YES, YOUR HONOR.

WE DON'T LOOK AT IT THAT WAY.  
UNDER GINSBERG THIS COURSE



LOOKED UNDER WHETHER COMMON LAW  
PROTECTS THAT PARTICULAR RIGHT.  
THE POLICY PROTECTS AGAINST  
OFFENSES.

THIS IS A LIABILITY INSURANCE  
POLICY THAT PROTECTS AGAINST  
CERTAIN OFFENSES.

THOSE OFFENSES INCLUDE, FOR  
EXAMPLE, LIBEL, SLANDER,  
MATERIAL THAT VIOLATES A  
PERSON'S RIGHT TO PRIVACY.

THOSE CAN ONLY BE INTERPRETED  
ACCORDING TO THE COMMON LAW.  
THEY CAN ONLY BE DEFINED.

YOU CAN'T LOOK AT "LIBEL" AND  
SAY WHAT IS THE PLAIN MEANING  
DEFINITION OF LIBEL.

WE NEED TO LOOK AT THE COMMON  
LAW DEFINITIONS BECAUSE IF  
THERE'S NO RIGHT, THERE'S NO  
VIOLATION UNDER THE COMMON LAW,  
THEN THE POLICY DOESN'T COVER  
IT.

>> NOW, THAT WAS THE SEXUAL  
HARASSMENT --

>> YES, YOUR HONOR.

>> -- KIND OF CASE THAT WE WERE  
DEALING WITH THERE.

>> CORRECT.

>> DOES THAT MAKE A DIFFERENCE  
IN WHAT WE LOOK AT AS TO HOW WE  
INTERPRET THIS?

>> THE ANALYSIS DOESN'T MAKE A  
DIFFERENCE, AND YOU DISAGREED  
WITH WHAT THE COURT DID.

IF THE COMMON LAW DID NOT

PROTECT THAT PARTICULAR INVASION OF PRIVACY AND THE MAJORITY SAID THE COMMON LAW DOESN'T, INVASION OF PRIVACY DOESN'T INCLUDE SEXUAL HARASSMENT --

>> WHICH I WOULD AGREE WITH AS --

>> YOU AGREED WITH THAT PART.

>> YEAH, YEAH.

>> BUT THE COURT SAID WE THEN STOP THERE BECAUSE IF THE COMMON LAW DOESN'T PROTECT IT, THEN IT'S NOT COVERED UNDER THE POLICY.

AND THIS COURT SAID, AND SIX JUSTICES AGREED WITH THAT, THAT IT RENDERS THE OTHER QUESTION MOOT BECAUSE BY DEFINITION THERE'S NO COVERAGE, AND I THINK THAT'S WHY YOU NEED TO LOOK -- WHEN YOU LOOK AT RIGHT OF PRIVACY WHAT IS PROTECTED UNDER FLORIDA LAW UNDER THAT RIGHT OF PRIVACY?

AND NOT EVEN THE PLAINTIFFS CLAIM THAT THE RIGHT OF PRIVACY UNDER THE FLORIDA COMMON LAW PROTECTS THIS KIND OF CONDUCT.

>> [INAUDIBLE]

FEDERAL STATUTE, WE'RE AT THE LIMITATIONS OF FLORIDA COMMON LAW.

WHY WOULDN'T YOU READ THAT PROVISION TO SAY THIS RIGHT OF PROPERTY COME FROM ANY LEGAL RIGHT THAT YOU MAY HAVE?

>> BECAUSE THE RIGHT OF PRIVACY IS A COMMON LAW RIGHT OF PRIVACY, AND THE POLICY'S INTERPRETED UNDER FLORIDA LAW.

>> BUT HOW ABOUT IF THERE'S A FLORIDA STATUTE, WHICH THERE IS? IT'S JUST IT DOESN'T PROVIDE THE CITIZENS THE CAUSE OF ACTION, I TAKE IT.

BUT WOULD THIS NOT COME INTO PLAY FOR THE CLAIMS BY THE ATTORNEY GENERAL IF THERE ARE ANY CIVIL CLAIMS?

>> NO, YOUR HONOR.

>> AND WHY NOT?

>> BECAUSE THE FLORIDA COMMON LAW RIGHT OF PRIVACY DOESN'T PROTECT AGAINST THOSE KINDS OF THINGS.

>> BUT AGAIN, ARE YOU SURE THAT'S WHAT GINSBERG REALLY STANDS FOR THAT?

GINSBERG WAS REALLY ANALYZING WHETHER THAT SEXUAL HARASSMENT WAS PART OF THE TRADITIONAL FLORIDA COMMON LAW PRIVACY RIGHTS.

>> YES.

>> ISN'T THAT THE MAIN THRUST OF THAT?

>> BUT IT'S ALSO WHEN YOU LOOK AT DEFINITIONS IN A POLICY, YOU LOOK AT THE DEFINITIONS UNDER THE COMMON LAW DEFINITIONS BECAUSE THOSE ARE LEGAL TERMS. WHEN YOU'RE DEFINING OFFENSES

UNDER THE POLICY, THEY'RE BY  
DEFINITION LEGAL TERMS.

THIS POLICY PROTECTS AGAINST  
VIOLATIONS OF A RIGHT TO  
PRIVACY, NOT VIOLATIONS OF  
PRIVACY.

>> WHAT IF CONGRESS HAD  
EXPRESSLY PROVIDED IN THIS  
STATUTE THAT'S AT ISSUE HERE  
THAT IT IS A VIOLATION OF THE  
CITIZEN'S RIGHT TO PRIVACY TO  
SEND THESE BACK?

WOULD THAT MAKE THE ANALYSIS  
DIFFERENT?

>> NO, YOUR HONOR.

BUT I AM NOT SAYING THAT THIS  
POLICY DOESN'T COVER ANY  
STATUTORY OFFENSES, LET ME BE  
CLEAR ABOUT THAT.

IF THERE WAS A FEDERAL STATUTE  
THAT PROHIBITED PUTTING IN A FAX  
ADVERTISEMENT SOMEBODY'S PICTURE  
WITHOUT THAT PERSON'S  
PERMISSION, IF YOU LOOK AT THE  
FACTS OF THAT COMPLAINT, IT  
WOULD STATE A CAUSE OF ACTION  
FOR INVASION OF PRIVACY UNDER  
FLORIDA LAW.

REGARDLESS OF WHETHER THE  
COMPLAINT ALLEGES VIOLATION OF  
RIGHT OF PRIVACY UNDER FLORIDA  
LAW EVEN IF IT ONLY ALLEGES A  
VIOLATION OF THAT FEDERAL  
STATUTE, IT WOULD BE COVERED  
BECAUSE IT WOULD CONSTITUTE A  
VIOLATION OF PRIVACY UNDER

FLORIDA LAW.

>> CAN I ASK SORT OF A RELATED QUESTION?

BUT IF YOU START WITH THE COVERAGES IN THIS CASE, IT APPLIES TO BODILY INJURY, IT APPLIES TO PERSONAL INJURY, AND IT APPLIES TO ADVERTISING INJURY.

AND IT SAYS ADVERTISING INJURY CAUSED BY AN OFFENSE COMMITTED IN THE COURSE OF ADVERTISING YOUR GOODS, PRODUCTS OR SERVICES.

NOW, IF SOMEBODY WAS LOOKING JUST AT THAT AND DIDN'T SAY, WELL, DO I NEED A DEFINITION TO UNDERSTAND WHAT ADVERTISING INJURY IS, THAT WOULD SEEM TO ME TO BE A VERY BROAD STATEMENT OF COVERAGE WHICH IS THAT IT'S AN OFFENSE IN THE COURSE OF ADVERTISING YOUR GOODS, PRODUCTS OR SERVICES.

SO IF I GET SUED FOR SOMETHING THAT IS IN THE COURSE OF ADVERTISING MY GOODS, SERVICES OR PRODUCTS, I'M GOING TO BE COVERED IF I'M IN THE -- AND THEN YOU HAVE TO GO TO SOME OTHER PLACE AND SAY IF I'M IN THE BUSINESS OF ADVERTISING. SO IS THAT AND HAS THAT BEEN IN TERMS OF TRYING TO LOOK AT THE POLICY AS A WHOLE IF THEY'RE GOING TO RESTRICT WHAT IS MEANT

BY OFFENSES THAT ARE IN THE COURSE OF ADVERTISING YOUR GOODS, PRODUCTS OR SERVICES WHERE YOU CAN BE SUED, DOESN'T THAT SPEAK TO HAVING A BROADER THAN DEFINITION OF WHAT THE ADVERTISING INJURY IS?

I MEAN, IN OTHER WORDS, WE DON'T NEED -- PERSONAL INJURY, WE ALL KNOW WHAT THAT IS.

BUT THAT IT IS COVERING OFFENSES COMMITTED IN THE COURSE OF ADVERTISING.

>> YOUR HONOR, I THINK IT DOESN'T COVER ALL OFFENSES BECAUSE THEN YOU HAVE TO LOOK AT SUBSECTIONS A, B, C, AND D WHICH DEFINES THE TYPE OF OFFENSES THAT ARE COVERED.

>> WELL, WHAT WOULD NOT BE, OF THOSE A, B, C, D, WHAT WOULD NOT BE COVERED BY ADVERTISING INJURY?

>> SENDING AN UNSOLICITED FAX TRANSMISSION.

[LAUGHTER]

>> OTHER THAN THAT.

>> I THINK THERE ARE SEVERAL THINGS THAT AREN'T COVERED. YOU REALLY HAVE TO LOOK AT WHAT IS COVERED.

>> BUT I'D LIKE TO THINK ABOUT WHAT IT IS, YOU KNOW, YOU SAID THESE ARE ALL SECRECY-BASED TYPES OF CLAIMS AND INFRINGEMENT OF A COPYRIGHT, I MEAN,

THAT'S -- AND THAT'S CERTAINLY  
BOTH FEDERAL AND, YOU KNOW,  
FEDERAL LAW.

MISAPPROPRIATION OF ADVERTISING  
IDEAS OR STYLE OF DOING BUSINESS  
IS NOT A SECRECY-BASED --

>> WELL, THEY'RE ALL  
CONTENT-BASED, YOUR HONOR.

IT'S ALL BASED ON WHAT IS  
ACTUALLY CONTAINED IN THE  
ADVERTISEMENT.

AS JUSTICE LEWIS POINTED OUT,  
WHAT IS IN THIS ADVERTISEMENT IS  
IRRELEVANT.

THERE'S NOTHING IN THE CONTENT  
OF THE ADVERTISEMENT --

>> WELL, TO THE EXTENT --

>> EXCEPT THAT IT'S ADVERTISING.

>> THE CONTENT IS RELEVANT TO  
THAT EXTENT.

AS A PERSONAL NOTE --

>> BUT THERE'S NOTHING IN THERE  
THAT WOULD VIOLATE SOMEONE'S  
RIGHT TO PRIVACY --

>> BUT IT IS RELEVANT, BUT  
CONGRESS IN ENACTING THE TCPA  
FOUND IT TO BE AN OFFENSE  
BECAUSE IT WAS INFRINGING ON A  
PERSON'S RIGHT OF PRIVACY.

>> I DON'T THINK THAT'S WHAT  
CONGRESS SAID, YOUR HONOR, AND,  
IN FACT, MOST OF --

>> WELL, WEREN'T THEY WORRIED  
THAT WE WERE JUST GOING TO USE  
UP OUR INK ON OUR FAX MACHINES?

>> THAT WAS PART OF IT, AND THE

SECOND WAS THAT IT WOULD  
INFRINGE COMMERCE BECAUSE BY  
SENDING FAX ADVERTISEMENTS THAT  
ARE UNSOLICITED, YOU'RE  
PREVENTING THOSE BUSINESSES FROM  
SENDING THEIR OWN FAXES, NUMBER  
ONE, AND RECEIVING FAXES FROM  
PEOPLE.

REMEMBER, THESE ARE BUSINESSES.  
THE RIGHT OF PRIVACY DOESN'T  
PROTECT A BUSINESS.

SO CONGRESS COULD NOT HAVE  
INTENDED FOR THIS TO BE  
PROTECTING ANY BUSINESS' RIGHT  
OF PRIVACY.

IT WAS SUPPOSED TO PROMOTE  
COMMERCE.

>> BUT IS IT LIMITED IN THAT  
WAY?

I MEAN, WHEN YOU READ IT, IT  
DOESN'T SEEM TO JUST LIMIT IT TO  
COMMERCE.

>> NO, BUT IT DOESN'T LIMIT IT  
TO PRIVACY.

IT DOESN'T TALK ABOUT PRIVACY.  
IT JUST TALKS ABOUT --

>> BUT IT SEEMS TO BE OPEN TO  
ALL INDIVIDUALS AS WELL AS  
COMPANIES.

>> YES.

>> OKAY.

AND THAT, AND THAT WE DO HAVE,  
IT SEEMS TO ME, SOME CASE LAW  
THAT SAYS THAT PRIVACY REALLY IS  
NOT ONLY SECRECY, BUT SECLUSION.  
AND SO HOW DO WE GET AROUND THE



FACT THAT THIS KIND OF  
UNSOLICITED FAX REALLY DOES  
INTERFERE WITH SOMEONE'S RIGHT  
OF SECLUSION?

>> BECAUSE, YOUR HONOR, IN THOSE  
CASES THAT SAY IT INTERFERES,  
THEY LOOK TO THEIR OWN SPACE  
COMMON LAW.

IN FACT, IN THE HOOTERS DECISION  
FROM THE 11TH CIRCUIT WHICH WAS  
BASED ON GEORGIA LAW, THEY  
SPECIFICALLY SAID THAT THE  
GEORGIA COMMON LAW RIGHT TO  
PRIVACY COVERS THIS KIND OF  
CONDUCT.

AND SO THAT'S WHY WE GO BACK TO  
GINSBERG, AND YOU HAVE TO  
DETERMINE WHETHER THE FLORIDA  
COMMON LAW RIGHT OF PRIVACY  
WOULD PROTECT AGAINST THIS KIND  
OF CONDUCT.

>> AND THAT'S WHY THE QUESTION  
THAT A FORMER JUSTICE USED TO  
ASK TO LITIGANTS AND ADVOCATES  
WAS, WHERE'S THE WEIGHT OF THE  
AUTHORITY IN THIS COUNTRY ON  
WHETHER THIS PARTICULAR  
PROVISION COVERS VIOLATIONS OF  
THE TPCA?

>> YOUR HONOR, IT DEPENDS ON HOW  
YOU LOOK AT IT.

I THINK IT'S PRETTY EVEN IF YOU  
UNDERSTAND, AS I SUGGEST, THAT  
THE PHRASE "MAKING KNOWN" IN THE  
CONTEXT OF THIS PHRASE MEANS THE  
SAME THING AS "PUBLICATION OF."

THERE ARE CASES THAT GO THE  
OTHER WAY, NO QUESTION --  
>> I MEAN, AREN'T OTHERS AFTER  
THE 7TH CIRCUIT, I THINK IT WAS  
JUDGE EASTERBROOK, AFTER THAT --

>> THERE'S H MORTGAGE FUNDING  
FROM THE SOUTHERN DISTRICT OF  
INDIANA WHICH WAS AFTER THE  
ILLINOIS SUPREME COURT'S VALLEY  
FORGE CASE THAT REJECTED THE  
REASONING OF VALLEY FORGE FOR  
INDIANA LAW.

>> I GUESS AND ALTHOUGH WE DON'T  
NECESSARILY LOOK TO ALWAYS THE  
WEIGHT OF THE AUTHORITY, THE  
FACT THAT SO MANY COURTS HAVE  
INTERPRETED THIS AS AT LEAST  
BEING AMBIGUOUS IN ORDER TO  
INCLUDE THE VIOLATION OF A  
PERSON'S RIGHT TO BE LEFT ALONE  
AS WELL AS THE CONTENT, DO YOU  
AT LEAST AGREE THERE -- AND  
MAYBE YOU CAN'T.

I MEAN, IS THERE, YOU DON'T,  
THAT THERE'S AN AMBIGUITY?

>> NO, I DON'T AGREE WITH THAT,  
YOUR HONOR --

>> BECAUSE YOU AGREE, THOUGH,  
THAT IF WE FIND AN AMBIGUITY,  
THEN ALL OF THE DIFFERENT RULES  
OF INSURANCE CONTRACT  
CONSTRUCTION --

>> YES, YES.

>> -- APPLY?

>> CORRECT.

BUT IF YOU RECALL IN THIS CASE

DECISION, IN THIS COURT'S  
DECISION IN TORRANCE HOLDINGS  
THERE WAS A VARIETY OF, THERE  
WAS A SPLIT IN THE COUNTRY ABOUT  
WHETHER THE TERM "ARISING UNDER"  
IN A POLICY WAS AMBIGUOUS.

SOME COURTS HAD SAYS IT WAS  
AMBIGUOUS, OTHER COURTS SAID IT  
WAS NOT.

DESPITE THAT SPLIT THIS COURT  
LOOKED AT IT ON ITS OWN AND SAID  
AS A MATTER OF FLORIDA LAW WE  
HOLD IT AS NOT AMBIGUOUS.

IT MAY FACTOR INTO IT, BUT  
THAT'S NOT DISPOSITIVE OF  
WHETHER THIS COURT BELIEVES  
THERE'S AN AMBIGUITY.

>> ISN'T, THEN, IN THIS STATE --  
AND I REALIZE THE RIGHT TO THE  
CONSTITUTION IS THE RIGHT TO BE  
LEFT ALONE BY THE GOVERNMENT --  
BUT DON'T WE HAVE A HISTORY IN  
THIS STATE OF REALLY PROTECTING  
THAT RIGHT TO BE LEFT ALONE?

>> YES, YOUR HONOR.

BUT IF THE COURT WERE TO READ  
THAT RIGHT SO EXPANSIVELY, IT  
WOULD HAVE DECIDED GINSBERG MUCH  
DIFFERENTLY THAN DECIDED.

AS A MATTER OF COMMON LAW, IT  
LOOKS TO WHAT THE COMMON LAW  
PROTECTS, NOT WHAT THE  
CONSTITUTION PROTECTS.

AND THERE'S SOME OTHER  
DISTINGUISHING FEATURES I'D LIKE  
TO POINT OUT, YOUR HONOR, AND

THAT IS THAT THE VAST MAJORITY  
OF THOSE CASES -- IN FACT THE  
VAST MAJORITY OF ALL CASES ON  
THIS ISSUE -- WERE DUTY TO  
DEFEND CASES.

AND IF YOU READ THOSE CONTRARY  
CASES, THEY SPECIFICALLY POINT  
OUT THAT UNDER THE LAW OF THOSE  
PARTICULAR STATES -- AND THIS  
INCLUDES VALLEY FORGE, FOR  
EXAMPLE -- THEY SAY THAT WHERE  
THERE IS EVEN POTENTIALLY  
COVERAGE WITHIN THE POLICY, THEN  
THERE'S A DUTY TO DEFEND.

OTHER COURTS SAY WHERE THE  
ALLEGATIONS COULD ARGUABLY BE  
COVERED UNDER THE POLICY, THEN  
THERE'S A DUTY TO DEFEND.

AND SOME OF THOSE COURTS  
SPECIFICALLY REFUSED TO CONSIDER  
THE INDEMNIFICATION ISSUE  
BECAUSE THEY WERE ONLY  
CONSIDERING AT THAT POINT THE  
DUTY TO DEFEND, AND --

>> I UNDERSTAND.

LET ME MOVE YOU -- WE'RE RUNNING  
OUT OF TIME.

>> YES, YOUR HONOR.

>> TWO QUESTIONS.

>> CERTAINLY.

>> YOU'RE FAMILIAR WITH THE  
ANTECEDENT RULE.

>> YES, YOUR HONOR.

I'M A FAN.

>> IS THAT A RULE OF  
CONSTRUCTION THAT APPLIES ONLY

IF THERE'S AMBIGUITY, OR IS THAT  
A GRAMMATICAL RULE THAT APPLIES  
IN A PLAIN MEANING ANALYSIS?

>> IT'S A GRAMMATICAL RULE, YOUR  
HONOR.

BECAUSE IN ORDER TO DETERMINE AN  
AMBIGUITY, YOU REALLY HAVE TO  
LOOK AT CERTAIN RULES OF HOW YOU  
READ A PROVISION.

AND THIS COURT IN OTHER CASES  
HAS USED THOSE RULES OF  
CONSTRUCTION TO DETERMINE  
WHETHER THERE'S AN AMBIGUITY.

>> BUT HERE -- GO AHEAD, YOU  
NEED A COUPLE MORE QUESTIONS.

>> ONE MORE QUESTION.

>> SURE.

>> IN EXCLUSIONS THAT'S NOT  
CERTIFIED BY THE 11TH CIRCUIT,  
THAT'S NOT BEFORE US?

>> CORRECT.

>> OKAY?

>> CORRECT.

>> AS YOU -- LET'S GRAMMATICALLY  
LOOK AT THE SENTENCE.

CERTAINLY THE VERB THERE IS  
"PUBLICATION," ISN'T IT?

>> YES, YOUR HONOR.

>> AND IT'S THE PREPOSITIONAL  
PHRASE THAT --

>> YES.

>> AND THE "ORAL OR WRITTEN,"  
THOSE ARE ADVERBS THAT MODIFY  
THE PUBLICATION.

SO I'M HAVING A DIFFICULT TIME  
THAT IT'S NOT "PUBLICATION" THAT

VIOLATES RATHER THAN "MATERIAL"  
BECAUSE THE MATERIAL COULD BE  
ANYWHERE.

IT COULD BE IN YOUR HAND, IT  
COULD BE ALL KINDS OF PLACES,  
BUT "PUBLICATION" IS REALLY WHAT  
YOU'RE TALKING ABOUT, THE ACT OF  
PUBLISHING.

>> BECAUSE MATERIAL IN THE  
CONTEXT OF THE SENTENCE  
"MATERIAL" MEANS INFORMATION  
CONTENT.

>> WELL, IT DOESN'T.

I DON'T DISAGREE WITH THAT, IT  
MUST BE SOMETHING.

BUT IT IS THE PUBLICATION THAT  
VIOLATES.

>> BUT SO FAR, AND I SO FAR  
AGREE WITH YOU, BUT NOW WE HAVE  
TO LOOK AT THE REST OF THE  
SENTENCE.

>> THAT'S WHAT I'M DOING.

>> THAT VIOLATES A PERSON'S  
RIGHT TO PRIVACY.

>> I THINK IT'S THE PUBLICATION  
THAT VIOLATES, IT'S NOT  
NECESSARILY THE MATERIAL.

IT'S YOUR ACT OF INVASION  
BECAUSE, AS YOU SAID, THE  
CONTENT MAKES NO DIFFERENCE.

IT'S THE ACT OF INVADING, AND  
THAT IS THE PUBLICATION, IS IT  
NOT?

>> YES, BUT I SUBMIT IT'S THE  
RIGHT TO PRIVACY THEN MODIFIES  
MATERIAL.

THAT VIOLATES A PERSON'S RIGHT TO PRIVACY, SO IT'S THE MATERIAL, NOT THE PUBLICATION, THAT HAS TO --

>> BUT IF YOU READ PUBLICATION VIOLATES, THEN CERTAINLY IT'S COVERING THAT.

>> IF YOU READ OUT THE MATERIAL --

>> WELL, NO, NO, YOU DON'T READ IT OUT, BUT YOU SAY IT'S PUBLICATION THAT VIOLATES BECAUSE OF MATERIAL BEING A PREPOSITIONAL PHRASE THERE, THEN THERE WOULD BE A QUESTION. I, I UNDERSTAND YOUR ARGUMENT. I MEAN, IF I LOOK AT THIS AS AN OVERVIEW NOT THINKING ABOUT THIS FEDERAL STATUTE, I MEAN, IT'S PRETTY CLEAR TO ME THIS IS, I MEAN, ALL THESE PERTAIN TO THE SAME THING.

>> YEAH.

>> YET I'M STRUGGLING WITH, YOU KNOW, SOMEBODY -- THERE'S LIKE SEVEN OR EIGHT OTHER COURTS AND OTHER PEOPLE, INTELLIGENT, LOGICAL FOLKS SAY, NO, THAT COULD READ DIFFERENTLY.

>> WELL, YOUR HONOR --

>> BECAUSE THAT CREATES AN AMBIGUITY THAT MAYBE NEEDS CONSTRUCTION.

>> FIRST OF ALL, SOME OF THOSE, MOST OF THOSE CASES ARE DUTY-TO-DEFEND CASES WHERE THEY

PUT ON A DIFFERENT LENS.

SECONDLY, A LOT OF THOSE COURTS  
HAVE SAID THESE WOULD BE, THIS  
WOULD BE COVERED UNDER THE LAW  
OF VIOLATION OF PRIVACY IN OUR  
STATE.

THIS WOULD COVER IT.

LIKE HOOTERS SAID, GEORGIA LAW  
WOULD COVER THIS KIND OF CONDUCT  
AS A VIOLATION OF THE RIGHT TO  
PRIVACY.

>> BUT ISN'T THE REAL QUESTION  
HERE IS WHAT A REASONABLE  
POLICYHOLDER WOULD UNDERSTAND OR  
MIGHT REASONABLY UNDERSTAND FROM  
THE LANGUAGE IN THE POLICY?

>> NOT, NOT IN DEFINING THE  
OFFENSES UNDER THE POLICY.

OTHERWISE GINSBERG WOULD HAVE  
SKIPPED THE FIRST QUESTION WHICH  
WAS WHETHER THERE'S A CAUSE OF  
ACTION AND GONE DIRECTLY TO THE  
SECOND QUESTION WHICH IS IS IT  
COVERED UNDER THE POLICY?

INSTEAD, GINSBERG SAID SINCE  
THERE'S NO CAUSE OF ACTION, IT'S  
NOT COVERED.

AND BEFORE I SIT DOWN, I WANT TO  
ANSWER YOUR FIRST QUESTION,  
JUSTICE LEWIS, WHICH IS WHETHER  
THE ISO POLICY ISSUE WAS IN THE  
RECORD.

IT IS NOT IN THE RECORD.

IT WAS RAISED FOR THE FIRST TIME  
BY UNITED POLICYHOLDER, AND I  
DON'T BELIEVE IT'S APPROPRIATE



FOR THIS COURT TO CONSIDER THAT ARGUMENT.

THANK YOU VERY MUCH FOR YOUR TIME.

>> REBUTTAL?

>> YES.

CHIEF JUSTICE.

I'D LIKE TO BEGIN BY ADDRESSING JUDGE PARIENTE'S QUESTION WHICH IS WHERE IS THE WEIGHT OF THE AUTHORITY?

WITH RESPECT TO MR. CANTERO, IT'S NOT EVEN CLOSE TO BEING EVEN, IT'S NOT CLOSE TO BEING A SPLIT.

THE OVERWHELMING AUTHORITY ON THIS EXACT LANGUAGE AND THIS EXACT CLAIM UNDER THE TELEPHONE CONSUMER PROTECTION ACT IS FOR A FINDING OF COVERAGE.

>> BUT DO YOU AGREE THAT THERE IS A DIFFERENCE BETWEEN A DUTY-TO-DEFEND CASE AND A COVERAGE CASE AS FAR AS WHAT IS LOOKED AT IN TERMS OF DECIDING DUTY TO DEFEND VERSUS A, WHETHER THERE'S ACTUALLY COVERAGE, AND IS MR. CANTERO CORRECT THAT THERE ARE MANY CASES THAT ARE DEALING WITH DUTY TO DEFEND?

>> FIRST, YES, ABSOLUTELY.

UNDER FLORIDA LAW THE DUTY TO DEFEND IS BROADER THAN THE DUTY TO INDEMNIFY OR TO PROVIDE COVERAGE.

BUT, NO, I DISAGREE WITH

MR. CANTERO WHO WANTS TO READ THESE CASES AND SAY THEY'RE ALL DUTY-TO-DEFEND CASES WHICH IS NOT THE CASE.

AND, IN FACT, WHEN YOU LOOK AT THE CASES UPON WHICH MR. CANTERO AND TRANSPORTATION INSURANCE COMPANY WANT TO RELY, THEY'RE ALL TALKING ABOUT, ONE, DIFFERENT LANGUAGE.

MAKING KNOWN WHICH THE 11TH CIRCUIT IN THE HOOTERS CASE CONNOTATES ON A SECRECY ISSUE NOT PRESENT IN THIS LANGUAGE. SECOND, THE CASES THAT HAVE FOUND NO COVERAGE HAVE ALL DISTINGUISHED -- THEY HAVE NOT ALL, THAT'S AN OVERSTATEMENT. MANY OF THEM HAVE DISTINGUISHED THE HOOTERS CASE WHICH SINCE IT WAS ISSUED WHICH CAME AFTER THE --

>> WELL, ABOUT THE HOOTER CASE, MR. CANTERO CONTENDS THAT THE HOOTER CASE WAS DECIDED THE WAY IT WAS DECIDED BECAUSE THE GEORGIA, OSTENSIBLY THE GEORGIA COMMON LAW ON A RIGHT TO PRIVACY WOULD COVER THIS KIND OF SITUATION, AND HE CONTRASTS THAT AS SAYING THAT THE FLORIDA RIGHT OF COMMON LAW RIGHT OF PRIVACY WOULD NOT.

AND WHAT IS YOUR RESPONSE TO THAT?

>> SEVERALFOLD, YOUR HONOR.

FIRST, I DON'T BELIEVE

MR. CANTERO WAS ABLE TO PROVIDE AN ANSWER BECAUSE THERE IS NONE. THE CONFINES OF FLORIDA'S LAW AND INVASION OF PRIVACY ARE SO LIMITED SO AS NOT TO INCLUDE THIS.

SECOND, THE 11TH CIRCUIT IN THE PENZER CASE THAT BROUGHT THE CERTIFIED QUESTION HERE IN REJECTING AND NOTING THE INFIRMITIES OF ALMOST THE ENTIRETY OF THE FEDERAL DISTRICT COURT OF OPINION THAT ULTIMATELY BROUGHT US TO THIS COURT SAID THAT FLORIDA AND GEORGIA LAWS AS IT RELATES TO THE INTERPRETATION OF INSURANCE POLICIES ARE SIMILAR.

AND WHAT TRANSPORTATION INSURANCE COMPANY IS ESSENTIALLY ARGUING IS NOT JUST SHOULD THIS COURT IGNORE THE FEDERAL STATUTE WHICH THEY SEEM TO WANT TO RENAME NOW AS A BUSINESS PROTECTION STATUTE, IT'S A CONSUMER PROTECTION STATUTE. IGNORE THAT, FIND THAT FLORIDA LAW IS SO DIFFERENT FROM THE COMMON LAW OF EVERY STATE UNDER WHICH THESE CLAIMS HAVE BEEN BROUGHT, THE LAWS THAT THEY'VE BEEN BROUGHT THAT NO REASONABLE PERSON COULD FIND THAT THE COVERAGE THAT THE POLICY HERE AND THE LANGUAGE HERE TRIGGERS

BOTH A DUTY TO DEFEND AND A DUTY TO PROVIDE INDEMNIFICATION AND COVERAGE.

>> CAN YOU TELL ME IF THEY HAD WANTED TO, IN YOUR VIEW, LIMIT IT TO CONTENT-BASED MATERIAL THAT VIOLATES THE RIGHT OF PRIVACY, HOW WOULD THIS SENTENCE BE CONSTRUCTED?

>> WELL, I THINK THERE'S -- I HAVE TWO ANSWERS FOR THAT QUESTION, JUDGE.

THE FIRST, WE ACTUALLY HAVE PUT BOTH IN OUR INITIAL AND OUR REPLY BRIEF.

THEY COULD HAVE DEFINED IT AND THEY ARE NOW SEEKING TO DEFINE IT AS "ORAL OR WRITTEN MATERIAL THE CONTENT OF WHICH VIOLATES A PERSON'S RIGHT OF PRIVACY."

THEY DIDN'T DO IT.

THEY CHOSE NOT TO DO IT.

SECOND, WE KNOW THAT TRANSPORTATION KNOWS HOW TO DEFINE TERMS IN AN INSURANCE POLICY AND TO DEFINE ADVERTISING INJURIES BASED ON THE CONTENT.

HOW DO WE KNOW THAT?

WE SIMPLY LOOK AT SUBDIVISION A OF THIS POLICY WHERE THEY WROTE "ORAL OR WRITTEN PUBLICATION OF MATERIAL TRACKING THE SAME LANGUAGE AS B THAT SLANDERS OR LIBELS A PERSONAL ORGANIZATION OR DISPARAGES A PERSON'S OR ORGANIZATION'S GOODS, PRODUCTS

OR SERVICES."

THAT IS WHY THERE IS A, A, IT'S  
CLEAR THEY COULD HAVE WRITTEN IT  
THAT WAY.

>> WHAT IF THEY HAD IN THAT SAME  
A AND PUT "OR VIOLATES A  
PERSON'S RIGHT OF PRIVACY,"  
WOULD YOU AGREE THEN IF THEY  
HADN'T PUT B IN, THAT THIS WOULD  
ONLY -- IN OTHER WORDS, LEFT OUT  
B AND JUST SAID "OR VIOLATES A  
PERSON'S RIGHT OF PRIVACY,"  
WOULD YOU AGREE THEN IT WOULD BE  
LIMITED TO CONTENT-BASED?

>> LIKELY I WOULD BECAUSE THERE  
WOULDN'T BE A SOLELY  
CONDUCT-BASED PROVISION UNDER  
WHICH COVERAGE WOULD BE AFFORDED  
UNDER THIS POLICY.

>> IT SEEMS TO ME IF I THINK  
ABOUT IT THAT THAT WOULD BE --  
SINCE THEY'RE USING DISPARAGING  
AS WELL AS LIBEL AND SLANDER,  
THAT WOULD BE THE EASIER WAY TO  
ADD IT IN OR VIOLATE THE RIGHT  
TO PRIVACY INSTEAD OF SIMPLY  
GOING TO CONTENT-BASED OR A, NOT  
NEED BE.

>> IN RETROSPECT, I'M SURE THEY  
WISH THEY HAD DONE THAT, BUT  
THEY DIDN'T.

>> OR MAYBE THEY WANT TO COVER.  
WE DON'T KNOW.

[LAUGHTER]

>> I THINK IT'S ALSO IMPORTANT  
TO TOUCH ON ONE OTHER POINT

THAT'S BEEN DISCUSSED AT THE HEART OF SOME OF THE QUESTIONS ASKED BY SEVERAL OF YOU TODAY. IT GOES TO THIS ISSUE OF, WELL, SHOULD WE BE LOOKING AT RULES OF STATUTORY CONSTRUCTION OR HOW THE ORDINARY PERSON ON THE STREET WOULD READ THIS POLICY? CERTAINLY FLORIDA LAW SAYS WE LOOK AT HOW THE ORDINARY PERSON ON THE STREET WOULD READ THE POLICY, BUT WE CAN ALSO LOOK AT THE DOCTRINE OF THE LAST ANTECEDENT WHICH THEY WANT TO RELY ON TO SAY IT DEFINES ONLY MATERIAL AND NOT PUBLICATION. WE CITE A CASE FROM THE FIRST DCA ON PAGE 7 OF OUR FIRST REPLY BRIEF THAT I THINK IS VERY INSTRUCTIVE IN TALKING ABOUT WHEN THE DOCTRINE DOES NOT APPLY, AND WITH MY 10 SECONDS LEFT I'LL READ IT, OR MAYBE I'M 10 SECONDS OVER.

"WHEN SEVERAL WORDS ARE FOLLOWED BY A CLAUSE WHICH IS APPLICABLE AS MUCH TO THE FIRST AND OTHER WORDS AS TO THE LAST, THE NATURAL CONSTRUCTION OF THE LANGUAGE DEMANDS THAT THE CLAUSE BE READ AS APPLICABLE THE ALL." THAT IS HOW THE ORDINARY PERSON WOULD READ THIS POLICY, THAT IS WHY ALL OF THE COURTS WITH THE EXCEPTION OF THE DISTRICT COURT BELOW HAVE FOUND THAT COVERAGE

SHOULD BE AFFORDED HERE, AND WE  
RESPECTFULLY REQUEST THAT THIS  
COURT ANSWER THE CERTIFIED  
QUESTION FROM THE 11TH CIRCUIT  
COURT OF APPEALS IN THE  
AFFIRMATIVE.

THANK YOU.

>> THANK YOU BOTH FOR YOUR  
ARGUMENTS.

THE COURT WILL TAKE ITS MORNING  
RECESS FOR 10 MINUTES.

>> PLEASE RISE.