

>> SUPREME COURT OF FLORIDA  
IS NOW IN SESSION.  
PLEASE BE SEATED.

>> THANK YOU.

NEXT CASE IS DEPARTMENT OF  
TRANSPORTATION-- I'LL LET YOU  
TELL ME.

[LAUGHTER]

>> GOOD MORNING.

MAY IT PLEASE THE COURT, I'LL  
RESERVE FOUR MINUTES FOR  
REBUTTAL.

WITH ME IS MR. CURINGTOP, THE  
AGENCY'S GENERAL COUNSEL AT THE  
TIME THE CASE WAS BRIEFED  
THIS SUMMER.

THIS CASE PRESENTS TWO QUESTIONS  
CERTIFIED BY THE SECOND DISTRICT  
COURT OF APPEALS HAVING GREAT  
PUBLIC IMPORTANCE.

THE FIRST QUESTION IS WHETHER  
THE DEPARTMENT IS BOUND BY THE  
INDEMNITY CLAUSE OR WHEN THE  
CLAUSE IS PART OF A CROSSING  
AGREEMENT IN WHICH THE  
DEPARTMENT RECEIVED IRREVOCABLE  
LICENSE TO USE CSX'S LAND AS  
RIGHT-OF-WAY--

>> LET ME ASK YOU A QUESTION ON  
THE GREAT PUBLIC IMPORTANCE.  
YOU AND YOUR PREDECESSOR IN THE  
BRIEFS SAY THAT REALLY THERE ARE  
ONLY A COUPLE OF AGREEMENTS AT  
RAILROAD CROSSINGS THAT HAVE  
INDEMNITY AGREEMENTS AS  
PART OF IT.

I MEAN, YOU'RE MAKING A BIG  
POINT OF THAT.  
IS THAT CORRECT?

>> THERE ARE-- THERE WAS AN  
AFFIDAVIT TENDERED TO THE SECOND  
DISTRICT COURT OF APPEAL BELOW  
THAT STATED FIVE OF 233 CROSSING  
AGREEMENTS BETWEEN--

>> SO WHY SHOULDN'T WE JUST LET  
IT, IF THAT HAS SUCH A MINIMAL,  
I MEAN, IT'S NOT ALL THE  
CROSSING AGREEMENTS LIKE JUDGE  
ALBRITTON THOUGHT, WHY SHOULD  
THAT BE SOMETHING-- AND I'M

JUST ASKING BECAUSE YOU'VE MADE SUCH A GREAT POINT OF BRINGING OUT THAT THIS ISN'T GOING TO HAVE A CATASTROPHIC EFFECT ON EITHER WAY, BASICALLY. IT WOULD SEEM TO ME.

>> WELL, I THINK THAT THE POSITION REMAINS THAT ANY INDEMNITY CLAUSE RUNNING IN FAVOR OF A RAILROAD COULD HAVE A CATASTROPHIC EFFECT ON THE STATE TREASURY.

RAILROAD ACCIDENTS, AS I'M SURE YOU WILL BE TOLD, CAN GET TO BE PRETTY EXPENSIVE.

>> WELL, MAYBE YOU NOW GO AHEAD PROSPECTIVELY AND RENEGOTIATE THE CONTRACTS.

I MEAN, IT'S-- THEY WERE NEGOTIATED IN 1930.

I MEAN, THERE'S NO, YOU KNOW, THERE'S NO-- ANYWAY, JUST GO AHEAD WITH YOUR ARGUMENT.

I WAS JUST THINKING ABOUT THE PUBLIC POLICY HERE, AND MAYBE YOU'LL WANT TO ADDRESS THE STATE OF FLORIDA ENTERING INTO AGREEMENT IN THE 1930s TO PROVIDE FOR INDEMNITY AND FINALLY WHEN THERE'S AN ACCIDENT, WE'RE NOT BOUND BY THAT INDEMNITY CONTRACT.

I'M NOT SURE I UNDERSTAND HOW THAT POLICY COULD BE, YOU KNOW, APPROPRIATE FOR THIS COURT TO--

>> BECAUSE THE PUBLIC POLICY OF THIS COURT HAS AND HAS BEEN THAT THE STATE WILL NOT BE ESTOPPED FROM REPUDIATING A CONTRACT THAT IS REPUG IN AND ABOUT TO PUBLIC POLICY.

>> AND IT'S REPUGNANT TO PUBLIC POLICY BECAUSE IT HAS AN INDEMNITY CLAUSE.

>> IT IS AN INDEMNITY CLAUSE THAT'S NOT AUTHORIZED BY THE LEGISLATURE.

THE D., LIKE ALL STATE AGENCIES, IS A CREATURE OF STATUTE. WE HAVE ONLY THOSE POWERS--

>> I GUESS ONE OF THE QUESTIONS I HAVE FUNDAMENTALLY AT THE BEGINNING OF THIS IS WE KNOW THAT THE STATE OR ITS AGENCIES CAN ENTER INTO A CONTRACT, CORRECT?

>> OF COURSE.

>> OKAY.

AND SO YOU'RE TAKING ISSUE WITH THE INDEMNITY PORTION OF THE CONTRACT.

>> THAT'S CORRECT.

>> AND SO WHERE IS IT SPECIFICALLY THAT SAYS THAT THE STATE CANNOT ENTER INTO AN INDEMNITY PORTION OF THE CONTRACT?

>> WELL--

>> IS THERE ANY CASE LAW, OR IS IT BASICALLY JUST BECAUSE THE STATUTE DOESN'T SAY YOU CAN PROVIDE FOR INDEMNITY?

>> WELL, THERE IS SOME CASE LAW, YES, WE CITED IN OUR BRIEF--

>> OKAY.

WHICH CASE IS THAT?

>> THE CASE OUT OF THE FIFTH CIRCUIT CITED IN OUR REPLY BRIEF.

JUDGE WALLACE BELOW, THAT'S-- IN HIS DISSENT HELD OR WOULD HOLD THAT--

>> BUT NOW THE-- WHEN WAS THE FRUITVILLE CASE?

THAT WAS IN 1958?

>> YES, MA'AM.

THAT WAS THE CASE THAT YOU CITED IN YOUR DISSENT TO THE AMERICAN--

>> RIGHT.

AND THAT, AND I READ THROUGH THAT CASE AGAIN, AND THE TERM "PUBLIC POLICY" AND ALL THAT IS THROWN AROUND QUITE A BIT, BUT THERE'S NEVER ANY TRUE REFERENCE TO WHY IT'S AGAINST PUBLIC POLICY.

>> I DON'T WANT TO REPEAT MYSELF BUT, AGAIN, THIS COURT HAS IN THE PAST REFUSED TO ESTOP THE

STATE FROM REPUDIATING CONTRACTS  
THAT ARE OAT VERY RUSS.

>> WELL, HERE'S THE PROBLEM.  
THE DEPARTMENT OF TRANSPORTATION  
WANTED TO GET A RIGHT-OF-WAY SO  
THAT THEY CAN BUILD A ROAD  
ACROSSED ARE TRACKS.

>> YES.

>> OKAY.

AND THEY'RE GOING TO MAINTAIN  
THAT ROAD.

THAT WAS THE AGREEMENT.

>> WE DID AGREE TO MAINTAIN  
THIS ROAD, YES.

>> OKAY.

NOW, THE RAILROAD, THEY DON'T  
HAVE AN INTEREST IN HAVING A  
ROAD OR A HIGHWAY.

I MEAN, THAT'S ALWAYS GOING TO  
CREATE A POTENTIAL PROBLEM FOR A  
RAILROAD, YOU KNOW, BOTH FROM A  
MAINTENANCE AS WELL AS A SAFETY  
POINT OF VIEW.

SO WHY IS IT THAT IF THE  
RESPONSE-- IF THE STATE WANTS  
IT, THAT FOR THE TOTAL-- IN  
THIS CASE, THERE SEEMS TO BE NO  
QUESTION THIS WAS NOT RAILROAD  
NEGLIGENCE, THIS ACCIDENT-- AND  
WE CAN SAY HOW IT HAPPENED, BUT  
IF IT'S GOING TO BE LIABILITY,  
IT'S GOING TO BE BECAUSE OF THE  
DEPARTMENT OF TRANSPORTATION'S  
NEGLIGENCE IN FAILING TO  
MAINTAIN THE RAILROAD CROSSING.  
SO WHY ISN'T IT REASONABLE THAT  
BEFORE AN ENTITY IS GOING TO  
ALLOW THE STATE TO HAVE A  
RIGHT-OF-WAY, I MEAN, HAVE  
THEIR-- ENTER INTO THIS  
AGREEMENT, YOU WOULDN'T WANT TO  
HAVE INDEMNITY FOR THE ACTS OF  
NEGLIGENCE OF THE DEPARTMENT OF  
TRANSPORTATION?

I MEAN, THAT SEEMS LIKE A  
REASONABLE, YOU KNOW, AGAIN,  
IT'S HARD TO BE SYMPATHETIC  
EITHER WAY HERE AS FAR AS THE  
PARTIES ARE CONCERNED.  
BUT IN TERMS OF LOOKING AT THIS,

I DON'T UNDERSTAND HOW THAT  
COULD BE REPUGNANT TO PUBLIC  
POLICY IF THE STATE WANTS TO  
BUILD ROADS.

THEY'RE NOT JUST GOING TO GET IT  
WITHOUT SOME AGREEMENT FOR THEIR  
NEGLIGENCE THAT THEY HAVE TO BE  
RESPONSIBLE FOR THE CONSEQUENCES  
OF THEIR OWN NEGLIGENCE.

>> OKAY.

A COUPLE OF RESPONSES.

FIRST OF ALL, AS YOU POINTED  
OUT, JUSTICE PARIENTE, THEY  
ACTUALLY HAVE AGREED TO HAVE  
CROSSING AGREEMENTS WITHOUT  
INDEMNITY CLAUSES RUNNING IN  
FAVOR OF CSX.

228 OF THEM, TO BE EXACT.

>> BUT HOW-- AGREEMENTS THAT  
WHAT, I'M SORRY?

I DIDN'T HEAR THE LAST OF THAT.

>> JUSTICE PARIENTE'S POINT, AS  
I UNDERSTAND IT-- AND CORRECT  
ME IF I'M MISTAKEN-- IS THAT  
CSX WOULD NATURALLY WANT TO HAVE  
INDEMNITY CLAUSES RUNNING IN ITS  
FAVOR BEFORE IT AGREES TO THE  
RIGHT-OF-WAY.

AS WE DISCUSSED IN THE VERY  
BEGINNING OF THIS ARGUMENT,  
THERE ARE, THERE'S AN AFFIDAVIT  
THAT WAS FILED WITH THE SECOND  
DCA BELOW THAT SAYS 228 OF THE  
233 AGREEMENTS BETWEEN CSX AND  
THE DEPARTMENT HAVE NO  
INDEMNITY CLAUSE.

>> WE DON'T KNOW WHAT ELSE IS IN  
THAT AGREEMENT--

>> WHAT OTHER CONSIDERATION IS  
IN THEM?

>> WELL, THEY'RE NOT OF RECORD.  
THE AGREEMENTS THEMSELVES  
AREN'T OF RECORD.

THIS AGREEMENT WE GO INTO THE  
BRIEF AT SOME LENGTH ABOUT WHAT  
OTHER CONSIDERATIONS, AND  
JUSTICE WALLACE-- PARDON ME,  
JUDGE WALLACE BELOW ALSO  
DISCUSSED THE OTHER  
CONSIDERATIONS THAT ARE WITHIN

THE CROSSING AGREEMENT.  
SECONDLY, THE ISSUE ON APPEAL  
ISN'T WHETHER CSX MIGHT WANT TO  
HAVE AN INDEMNITY CLAUSE.  
I'M SURE THAT THEY WOULD.  
THE ISSUE IS WHETHER THE  
DEPARTMENT AGREE TO INDEMNIFY  
ABSENT STATUTORY AUTHORITY.  
>> AND I GUESS WHAT I'M  
WONDERING, AGAIN, IT GOES BACK  
TO THE PAN-AMERICAN, EVERYTHING,  
THAT IF YOU HAVE THE  
AUTHORITY-- YOU'RE THE  
DEPARTMENT OF TRANSPORTATION,  
AND THE ISSUE OF ROAD  
MAINTENANCE IS PART AND PARCEL  
OF WHAT GOES ON.  
SO WHY IS THAT NOT PART OF THEIR  
ABILITY TO ENTER INTO  
AGREEMENTS, AND IF WHOEVER THE  
PARTY IS WANTS INDEMNITY FOR THE  
ACTS OF THE DEPARTMENT OF  
TRANSPORTATION, WHY ISN'T THAT  
PART OF THEIR AUTHORITY TO ENTER  
INTO THESE CONTRACTS  
TO BEGIN WITH?  
WHY DOES IT HAVE TO BE THAT THE  
LEGISLATURE HAS TO AUTHORIZE THE  
INDEMNITY PART AS OPPOSED TO THE  
DEPARTMENT OF TRANSPORTATION  
HAVING THAT AS A BASIC PART OF  
ITS CONTRACTUAL AUTHORITY?  
AND WE'RE GOING HERE TO THE  
PAN-AM CASE AND ITS PROGENY.  
>> RIGHT.  
WELL, PAN-AM HAS HELD THAT STATE  
IS GOING TO BE LIABLE FOR ITS  
CONTRACTS.  
THERE WERE TWO IMPORTANT  
LIMITATIONS ON THAT HOLDING.  
THAT THE CONTRACTS HAVE TO BE  
WRITTEN, AND THE CONTRACTS MUST  
HAVE SPECIFIC STATUTORY  
AUTHORITY.  
AND THIS COURT MADE VERY CLEAR  
THAT THE REQUIREMENT THAT THE  
CONTRACTS MUST BE WRITTEN HAS  
TEETH.  
>> WELL, DOES THE-- THE  
DEPARTMENT OF TRANSPORTATION

DOESN'T HAVE AUTHORITY TO ENTER INTO CONTRACTS?

>> ARE YOU INTERPRETING THE, THAT PHRASE, "THE AUTHORITY," TO MEAN FOR EVERY SENTENCE IN THE CONTRACT?

AS OPPOSED TO THE GENERAL AUTHORITY FOR THE SUBJECT MATTER?

THAT'S THE WAY YOU'RE INTERPRETING THAT.

>> WELL, I THINK THAT SARASOTA FRUITVILLE SPEAKS TO--

>> LET'S GO BACK TO THE CASE YOU WERE DISCUSSING.

YOU'RE DISCUSSING PAN-AM, AND PAN-AM HAS TO BE INVOLVED IN THE RESOLUTION OF THIS CASE.

>> YES, I AGREE.

>> YOU'RE INTERPRETING THAT ONE PHRASE ABOUT HAVING AUTHORITY TO MEAN THAT IT MUST HAVE AUTHORITY FOR EVERY SENTENCE IN THE CONTRACT SPECIFICALLY, NOT JUST GENERAL AUTHORITY TO ENTER INTO THAT CONTRACT.

THAT'S YOUR ARGUMENT, HAS TO BE.

>> MY ARGUMENT IS A LITTLE DIFFERENT FROM THAT.

>> LET'S HEAR IT.

YEAH.

>> MY ARGUMENT IS, AND WE DEVELOP IT IN THE REPLY BRIEF BECAUSE THEY SAY IN THEIR ANSWER BRIEF, THEY ARGUED THAT, WELL, THE DEPARTMENT'S ARGUING THAT WE HAVE TO-- THAT THE LEGISLATURE HAS TO ACTUALLY AUTHORIZE EVERY LINE OF THE CONTRACT.

>> HAVE IF YOU WANT TO HAVE A CLAUSE IN THERE THAT'S GOING TO COST THEM MONEY.

>> AND-- I WAS GETTING TO THAT WITH THE SARASOTA FRUITVILLE CASE.

SARASOTA SAID, WELL, OF COURSE THE DEPARTMENT PAY MONEY, CAN PAY OTHER CONSIDERATION FOR A RIGHT-OF-WAY, BUT IT CANNOT, IT CANNOT USE A LEGAL CONSIDERATION

FOR THE RIGHT-OF-WAY.  
AND SARASOTA FRUITVILLE FOUND  
THAT THE INDEMNITY CLAUSE WAS  
ILLEGAL, WAS REPUGNANT TO PUBLIC  
POLICY BECAUSE THERE WAS NO  
STATUTORY AUTHORITY--

>> AGAIN, YOU'RE GOING  
IN CIRCLES.

IT COMES DOWN TO THAT EVERY  
SENTENCE IN THE CONTRACT HAS  
TO BE APPROVED.

>> MY ANSWER IS THAT I DON'T  
THINK THAT THE LEGISLATURE HAS  
TO SAY THE DEPARTMENT IS  
AUTHORIZED TO ENTER INTO THIS  
KIND OF CONTRACT AND IS  
AUTHORIZED TO PAY MONEY FOR IT.  
I DON'T THINK THAT THAT SECOND  
PART IS NECESSARY.

GENERALLY ACCEPTED  
CONSIDERATION, I DON'T THINK THE  
LEGISLATURE HAS TO GO THAT FAR.  
BUT THE LEGISLATURE DOES HAVE TO  
AUTHORIZE THE DEPARTMENT, IF IT  
CHOOSES TO.

FOR THE DEPARTMENT TO AGREE TO  
INDEMNIFY, THE LEGISLATURE MUST  
SPECIFICALLY--

>> SO YOU'RE CARVING OUT OF  
PAN-AM THAT THE APPROVAL IS FOR  
INDEMNIFICATION SENTENCE OR  
PARAGRAPH.

AND IT'S NOTHING ELSE.

I MEAN, THAT HAS TO BE WHAT  
YOU'RE SAYING.

>> WELL, ANYTHING--

>> THAT'S THE ONLY TYPE OF  
CLAUSE THAT MUST BE SEPARATELY  
APPROVED.

>> NO.

ANY KIND OF CONSIDERATION THAT  
WOULD BE CONTRARY TO PUBLIC  
POLICY OTHERWISE.

ILLEGAL CONSIDERATION.

>> THAT'S WHAT WE'RE HERE TO  
LISTEN.

WHICH ONES?

>> WELL, ACCORDING TO CSX THAT  
IF WE AGREE TO A CONTRACT, IF  
THE LEGISLATURE AUTHORIZES A



CONTRACT, THEN ANYTHING WE MIGHT  
AGREE TO IN THAT CONTRACT NO  
MATTER HOW OUTLANDISH IT MIGHT  
BE, WE'RE BOUND BY.  
THAT CAN'T BE RIGHT.

>> ALL RIGHT.

>> IF THE DEPARTMENT WERE TO  
AGREE TO--

>> WELL, THE FLIP OF THAT CAN'T  
BE RIGHT EITHER, IS THAT YOU'RE  
BOUND GENERALLY TO THE CONTRACT  
BUT NOT TO EVERY INDIVIDUAL  
SENTENCE IN THE CONTRACT.

SO, I MEAN, THE FLIP OF THAT--  
CAN IT GOES AROUND YOUR  
ARGUMENT.

MY QUESTION IS, AND I NEED TO  
GET AN ANSWER TO THIS BECAUSE I  
THINK THIS IS CRITICAL TO IT, IS  
THAT WHAT KIND OF CLAUSES AND  
HOW DO WE ALERT THE PUBLIC TO  
THE KIND OF CLAUSES THAT CANNOT  
BE IN THE CONTRACT UNDER THE  
PAN-AM AUTHORITY UNLESS WE WANT  
TO JUST DO AWAY WITH PAN-AM  
WHICH I DOUBT IS A VERY GOOD  
POLICY TO BEGIN WITH.

>> AND WE'RE NOT ADVOCATING--

>> I UNDERSTAND.

SO WHAT KIND OF CLAUSES?  
DOES AN INDEMNIFICATION  
PRIVILEGE HOLD HARMLESS THE ONLY  
ONE?

>> I DIDN'T ENDEAVOR TO CATALOG  
EVERY SINGLE CLAUSE THAT MIGHT  
BE.

AS A GENERAL RULE, I COULD  
SUGGEST TO THE COURT THAT  
CLAUSES THAT PURPORT TO WAIVE  
SOVEREIGN IMMUNITY--

>> WELL, THAT'S THE  
INDEMNIFICATION CLAUSE.

>> BUT IT DOESN'T HAVE TO BE  
JUST AN INDEMNITY CLAUSE.  
THAT'S CERTAINLY AN EXAMPLE.  
BUT IF YOU WERE TO SIMPLY SAY  
THE DEPARTMENT HEREBY WAIVES  
SOVEREIGN IMMUNITY, IT DOESN'T  
HAVE TO BE IN THE FORM OF  
INDEMNITY.

>> SEE, THAT JUST GOES CONTRARY TO PAN-AM BECAUSE PAN-AM SAYS IF IT'S CONTRACT, SOVEREIGN IMMUNITY-- THE STATUTE'S NOT PART OF THE ANALYSIS, DOESN'T IT.

>> WELL, IF THE DEPARTMENT WERE TO SAY WE WAIVE SOVEREIGN IMMUNITY IN TORT, IF THE DEPARTMENT WERE TO SAY THAT WE ARE, WE ARE ACQUIRING THIS RIGHT-OF-WAY AND IN EXCHANGE AGREE TO DO SOMETHING ILLEGAL, IF WE AGREE TO SUBVERT THE PUBLIC, THE PUBLIC RECORDS LAWS, IF WE AGREE TO SUBVERT THE CRIMINAL LAWS--

>> SEE IF WE CAN GET TO IT IN A DIFFERENT WAY.

COULD THE PLAINTIFFS IN THE UNDERLYING SUIT WHO WAS INJURED AND THE ONE WHO, THE STATE OF THE PERSON WHO DIED--

>> THE SCHWEFRINGHAUSS, YES, MA'AM.

>> OKAY.

COULD THEY HAVE SUED THE DEPARTMENT OF TRANSPORTATION DIRECTLY?

THEY SUED THE RAILROAD, RIGHT?

>> YES, THEY DID.

>> THEN THE RAILROAD BROUGHT IN AS A THIRD PARTY DEFENDANT CAN, I GUESS, THE D.O.T..

>> YES, UNDER LAW AND CONTRACTUAL INDEMNITY.

>> SO THEY COULD HAVE SUED THE DEPARTMENT OF TRANSPORTATION DIRECTORY FOR THEIR NEGLIGENCE IN MAINTAINING THE ROAD THAT CROSSED THE RAILROAD TRACK, CORRECT?

>> YES.

AND SO TO THAT, TO THE EXTENT THEN THAT THEY ENTERED INTO AN AGREEMENT WITH THE RAILROAD SAYING THAT WE WILL INDEMNIFY YOU FOR THOSE KINDS OF SITUATIONS, WOULD THAT BE AGAINST PUBLIC POLICY?

>> IF THE LEGISLATURE--  
>> FOR THOSE KIND OF SITUATIONS  
WHERE THE DEPARTMENT COULD HAVE  
BEEN SUED DIRECTLY FOR ITS  
NEGLIGENCE?  
>> WELL, FIRST OF ALL, AND YOU  
POINTED THIS OUT IN THE AMERICAN  
HOME DISSENT, JUSTICE QUINCE.  
IF WE WERE SUED BY THE  
SCHWEFRINGHAUSS, WE WOULD BE  
SUBJECT TO THE 76828 CAP.  
>> I KNOW-- BEYOND THE CAP, I'M  
JUST TALKING ABOUT YOU COULD  
HAVE BEEN SUED DIRECTLY FOR THE  
NEGLIGENCE IN MAINTAINING  
THAT ROAD.  
AND SO TO THE EXTENT THAT THE  
AGREEMENT WITH THE RAILROAD IS  
THAT, YOU KNOW, IF YOU GET SUED  
FOR IT AND WE END UP HAVING TO  
PAY MONEY, YOU HAVE TO INDEMNIFY  
US, WHY WOULD THAT BE AGAINST  
PUBLIC POLICY?  
>> UP TO THE CAP?  
OR GENERALLY?  
WITHOUT LIMITATION, I'D SAY,  
YES, IT IS AGAINST PUBLIC POLICY  
BECAUSE THE LEGISLATURE HAS SAID  
THAT IF A-- THE LEGISLATURE HAS  
SAID--  
>> SO ARE YOU THEN TAKING ISSUE  
WITH THE AMOUNT THAT'S ABOVE THE  
CAP, OR ARE YOU TAKING ISSUE IN  
GENERAL WITH THE FACT THAT THIS  
WAS AN INDEMNITY CLAUSE?  
BECAUSE IT SOUNDS TO ME NOW LIKE  
YOU ARE SAYING ONLY TO THE  
EXTENT THAT IT EXCEEDS THE CAP  
IS IT A PROBLEM.  
>> WELL, I'VE RAISED ALTERNATIVE  
ARGUMENTS IN THE BRIEF.  
MY FIRST ARGUMENT IS THAT THE IP  
DEM ANITY CLAUSE IS VOID AND  
UNENFORCEABLE.  
BUT IF THIS COURT DECIDES THAT  
THE INDEMNITY CLAUSE IS VALID  
AND ENFORCEABLE, MY ALTERNATIVE  
ARGUMENT IS THAT THE 76828 CAP  
APPLIES--  
>> DOES THAT INCLUDE ATTORNEYS'

FEES?

>> WELL, THE SETTLEMENT BELOW--  
[INAUDIBLE]

>> NO.

THE CAP IS WHAT THE CAP IS.

>> I'M SAYING, DOES THAT INCLUDE  
ATTORNEYS' FEES?

BECAUSE AS I UNDERSTAND IT, A  
PART OF WHAT WAS ORDERED IN THIS  
ACTION WAS FOR THE ACTUAL AMOUNT  
THAT WAS PAID TO THE ORIGINAL  
PLAINTIFF AND FOR ATTORNEYS'  
FEES.

>> RIGHT.

THE BREAKDOWN WAS \$125,000 THAT  
CSX PAID TO SETTLE WITH THE  
SCHWEFRINGHAUSS AND \$377,000  
IN COSTS--

>> WELL, THERE'S A POLICY RIGHT  
THERE.

WHY WOULDN'T THE D.O.T. WHEN  
THEY KNOW THAT CSX IS BEING SUED  
AND THEY'RE BROUGHT IN AS A  
THIRD PARTY ACTIVELY DEFEND THE  
CASE SO THAT CSX DOESN'T HAVE TO  
SPEND \$325,000 THAT NOW WE'RE  
GOING TO, THE TAXPAYER'S GOING  
TO HAVE TO BEAR FOR THAT?  
SO IT SEEMS TO ME THAT THAT WAS,  
THIS COULD HAVE BEEN AMEAL YOUR  
AUTOED AT THE VERY LEAST IF  
D.O.T. HAD COME IN AND DEFENDED  
CSX AS THEY WOULD HAVE BEEN  
REQUIRED TO DO UNDER THE  
AGREEMENT.

I MEAN, THAT'S ANOTHER ISSUE  
THERE THAT MAYBE YOU'RE ALMOST  
OUT OF TIME, BUT THAT'S SORT OF  
A CRAZY SITUATION THAT THERE'S  
SO MUCH IN ATTORNEYS' FEES  
BECAUSE THE D.O.T. DIDN'T TAKE  
ITS RESPONDENT TO DE-- ITS  
RESPONSIBILITY TO DEFEND THE  
NEGLIGENCE CASE.

>> I AM INTO MY REBUTTAL TIME.  
I'M NOT SURE THAT THERE WAS A  
QUESTION THERE--

>> YEAH.

THE QUESTION IS THAT THE, THE  
ATTORNEYS' FEES IS THE LARGER

AMOUNT, AND THAT TO-- THAT OCCURRED BECAUSE D.O.T. DIDN'T DEFEND THIS LAWSUIT.

>> RIGHT.

I ACCEPT THE FACT THAT THE DEPARTMENT DIDN'T DEFEND--

>> THAT'S NOT--

[INAUDIBLE]

>> I'M SORRY?

>> IT'S NOT A TORT CLAIM.

HER POINT IS YOU CAN CONTRACTUALLY AGREED TO DEFEND, AND YOU DIDN'T DO IT.

SO WHY, WHY IS THAT A TORT CLAIM EVEN UNDER OUR SOVEREIGN IMMUNITY STATUTE?

>> WELL, AND WE DEVELOPED THIS ARGUMENT IN OUR BRIEFS AS WELL, THAT THIS IS A-- WHILE IT MAY BE A CONTRACT CLAIM IN FORM, TORT CLAIM IN SUBSTANCE BECAUSE THE UNDERLYING--

>> IT'S NOT PART OF A TORT CLAIM.

IS THERE ANY SPACE WHERE YOU AGREED-- THE ONLY FEES THAT YOU WOULD HAVE TO PAY WOULD BE WHAT THEY PAID THEIR LAWYERS IN DEFENDING AN ACTION THAT YOU SHOULD HAVE DEFENDED, RIGHT? ISN'T THAT WHAT ATTORNEYS' FEES ARE?

>> YES.

>> OKAY, SO THAT--

>> THIS COURT HAS HELD THAT INDEMNITY CLAIMS--

>> THAT'S NOT A TORT, THAT'S A CONTRACT.

I AGREE TO DO SOMETHING CONTRACTUALLY.

I DON'T DO IT, THEY'RE SUING YOU FOR BREACH OF CONTRACT.

WHY IS THAT NOT?

I THINK THAT'S THE POINT SHE'S MAKING, AND YOU JUST DON'T WANT TO ANSWER THE QUESTION.

>> WHY ISN'T-- IT'S A TORT CLAIM BECAUSE THE UNDERLYING ACTION IS BECAUSE WE INNOCENTLY MAINTAINED-- NEGLIGENTLY

MAINTAINED--

>> OKAY.

THAT'S YOUR BEST ANSWER TO THAT ONE.

>> YES.

>> IT'S A TORT CLAIM, OTHERWISE CONTRACTUAL CLAIM IS CONVERTED ALSO INTO A TORT CLAIM.

>> YES.

THE ENTIRE--

>> YOU'RE OUT OF TIME.

I'LL GIVE YOU TWO MINUTES FOR REBUTTAL.

>> THANK YOU, JUSTICE.

>> THANK YOU, MR. CHIEF JUSTICE, AND MAY IT PLEASE THE COURT, THE DEPARTMENT OF TRANSPORTATION MAKES A NUMBER OF IMPORTANT CONCESSIONS.

IT CONCEDES THAT UNDER THIS COURT'S DECISION IN PAN-AM A STATUTE THAT AUTHORIZES AN AGENCY TO ENTER INTO A CONTRACT WAIVES THE AGENCY'S SOVEREIGN IMMUNITY FROM AN ACTION ALLEGING A BREACH OF THE CONTRACT.

>> HERE'S THE PROBLEM THOUGH. AGAIN, I KNOW WE HAD A LOT OF WHAT SEEMED TO BE FRIENDLY QUESTIONS FOR YOU.

MY, I GUESS THE PROBLEM IS, THAT YOU'VE GOT-- AND MAYBE IT'S NOT CSX'S PROBLEM, BUT YOU'VE GOT A STATE AGENCY THAT IF THEY HAD BEEN SUED DIRECTLY, WOULD BE LIMITED IN TORT.

SO SOMEHOW BY AVOIDING SUING THE DEPARTMENT OF TRANSPORTATION AND SUING CSX, AN INJURED PERSON GETS THIS, QUOTE, BONUS THAT IS NOT ENVISIONED BY SOVEREIGN IMMUNITY WHICH IS REALLY UNLIMITED TORT DAMAGES FOR WHAT WOULD IN, I GUESS, 95% OF THE OTHER CROSSING AGREEMENTS WOULD, YOU KNOW, WOULD BE CSX'S RESPONSIBILITY.

SO HOW DOES THAT WORK?

IN OTHER WORDS, HOW CAN A STATE

AGENCY WITHOUT EXPLICIT  
AUTHORITY CHANGE, ESSENTIALLY  
MAKE THE CAP FOR TORT DAMAGES,  
YOU KNOW, OBLIATED AND MAKE IT  
UNLIMITED?

>> RIGHT.

I THINK THE BASIC ANSWER TO THAT  
QUESTION IS THAT AN CONTRACTUAL  
INDEMNITY DOES NOT SOUND IN  
TORT.

IT'S A CONTRACTUAL REMEDY.  
THAT WAS, IN ESSENCE, THE  
HOLDING OF THIS COURT IN THE  
AMERICAN HOME CASE.

>> BUT EVERYTHING IN AMERICAN  
HOME-- AND I, YOU KNOW, AGAIN,  
THE CONCURRENCE ALSO, WE'RE NOT  
DECIDING THIS ISSUE FOR STATE  
AGENCIES, BECAUSE STATE  
AGENCIES, THE ISSUE WITH  
MUNICIPALITIES THAT HAD PLENARY  
AUTHORITY AND NO CAPS IS  
COMPLETELY DIFFERENT THAN THE  
STATE.

SO FROM A POLICY POINT OF VIEW,  
WHAT-- JUST LET'S TALK ABOUT  
WHERE IS THAT I DON'T THINK  
AMERICAN HOME REALLY ANSWERS THE  
QUESTION BECAUSE WE WENT SO OUT  
OF OUR WAY TO SAY MUNICIPALITIES  
ARE DIFFERENT THAN THE STATE.

>> I MEAN, I DO THINK AMERICAN  
HOME ANSWERS IT, AND I DON'T  
THINK THE COURT RELIED ON ANY  
DISTINCTION BETWEEN  
MUNICIPALITIES AND STATES, AND I  
HOPE I GET A CHANCE TO SAY A  
LITTLE BIT MORE ABOUT THAT.  
BUT AS TO THE POLICY QUESTION, I  
THINK THE BASIC ANSWER IS THIS:  
THERE IS A FUNDAMENTAL  
DISTINCTION BETWEEN WITH TORTS  
AND CONTRACTS.

CONTRACTS ARE A MATTER OF  
VOLUNTARINESS AND CONSENT,  
TORTS AREN'T.

TO BE PERFECTLY CLEAR ABOUT  
WHAT'S GOING ON HERE-- AND I  
THINK THIS IS A CRITICAL POINT  
AND I HOPE IT WILL GUIDE THE

COURT IN ITS ANALYSIS AND DECISION IN THIS CASE-- WE'RE NOT SAYING THAT THERE IS SOME OBLIGATION IMPOSED BY LAW FOR STATE AGENCIES TO INDEMNIFY CONTRACTING PARTIES.

ALL WE'RE SAYING IS THAT IF A STATE AGENCY DECIDES TO ENTER INTO AN INDEMNITY AGREEMENT AND IF THE CONTRACT OF WHICH THE INDEMNITY AGREEMENT IS A PART IS AUTHORIZED BY STATUTE AND IF THERE'S NO STATUTE THAT PROHIBITS INDEMNITY AGREEMENTS, IT'S BOUND BY IT IN THE SAME WAY THAT IT'S BOUND BY ANY OTHER CONTRACTUAL PROVISION.

>> WHY IS IT THAT THE LEGISLATURE, I MEAN, WHAT DO WE TAKE FROM THE IDEA OR FROM THE FACT THAT THE LEGISLATURE HAS SPECIFICALLY AUTHORIZED INDEMNITY AGREEMENTS IN CERTAIN SITUATIONS BUT NOT THIS? WHAT DOES THAT SAY IN CONNECTION WITH BOTH WHAT THEY'VE SAID ABOUT SOVEREIGN IMMUNITY UNDER 768 AND THE FACT THAT THEY'VE AUTHORIZED INDEMNITY AGREEMENTS WHERE THEY INTEND TO AUTHORIZE THEM?

>> RIGHT.

AND WE SAY TWO DIFFERENT THINGS ABOUT THAT.

AND THE FIRST THING WE SAY IS THAT THE ISSUE IN THIS CASE ISN'T WHETHER AN AN INDEMNITY WAS SPECIFICALLY AUTHORIZED. EVERYBODY AGREES IT WASN'T. THE ISSUE IN THIS CASE IS WHETHER IT HAS TO BE SPECIFICALLY AUTHORIZED. THAT'S ULTIMATELY A QUESTION FOR THIS COURT, A QUESTION ULTIMATELY OF CONSTITUTIONAL LAW, NOT A MATTER OF LEGISLATIVE INTELLIGENT, NOT A MATTER OF STATUTORY INTERPRETATION. SO OUR FIRST ANSWER IS WHATEVER THE LEGISLATURE'S VIEW MIGHT BE



ON THAT, IT'S ULTIMATELY  
IRRELEVANT TO THE QUESTION HERE  
WHICH IS WHETHER THERE IS THIS  
REQUIREMENT IN THE FIRST PLACE.  
THE SECOND PART OF OUR ANSWER IS  
EVEN IF YOU DISAGREE--

>> WHERE IS THE CONSTITUTIONAL  
DIMENSION THAT YOU'RE  
MENTIONING?

>> WELL, IT'S ULTIMATELY A  
QUESTION OF SOVEREIGN IMMUNITY,  
I THINK, WHICH IS A  
CONSTITUTIONALLY-BASED OR--

>> ISN'T IT A QUESTION ABOUT  
WHETHER--

[INAUDIBLE]

WAIVER OF SOVEREIGN IMMUNITY BY  
THE LEGISLATURE.

DOESN'T THAT ENTER INTO IT?  
BECAUSE THE UNDERPINNING OF  
THE-- GET THE NAME MIXED UP,  
BUT THE CASE WHERE WE DECIDED  
THAT THE STATE WOULD BE LIABLE  
ON CONTRACT.

THE UNDERPINNING OF THAT IS THAT  
BY AUTHORIZING AN AGENCY TO  
CONTRACT, THERE MUST BE, THE  
LEGISLATURE MUST HAVE INTENDED  
TO WAIVE SOVEREIGN IMMUNITY TO  
THE EXTENT THAT IT'S NECESSARY  
TO, OTHERWISE YOU WOULDN'T HAVE  
AN ENFORCEABLE CONTRACT.

>> THAT'S RIGHT.

>> SO IT IS A QUESTION ABOUT THE  
LEGISLATIVE INTENT TO IMPLICITLY  
WAIVE SOVEREIGN IMMUNITY.

>> RIGHT.

BUT I GUESS JUST TO BE AS CLEAR  
ABOUT THIS AS I CAN, THERE'S NO  
DISPUTE IN THIS CASE THAT THERE  
IS A STATUTE THAT AUTHORIZES THE  
CROSSING AGREEMENT.

AND I THINK JUSTICE LEWIS PUT  
HIS FINGER ON IT.

ULTIMATELY, THE QUESTION IN THIS  
CASE IS, IS THERE SOMETHING  
DIFFERENT ABOUT INDEMNITY  
CAUSES.

BECAUSE THE AGENCY SEEMS TO  
CONCEDE THAT ANY PROVISION OF AN

AUTHORIZED CONTRACT IS ENFORCEABLE UNDER PAN-AM EXCEPT FOR IBIDEM IN I THINK CLAUSES-- INDEMNITY CLAUSES.

>> WELL, BECAUSE THE INDEMNITY IS ARISING OUT OF A TORT CLAIM WHERE THE LEGISLATURE HAS BEEN VERY SPECIFIC ABOUT LIMITING ITS LIABILITY.

I MEAN, HERE WE HAVE ONLY \$125,000 SETTLEMENT, AND GOD KNOWS HOW CSX'S ATTORNEYS RACKED UP ALMOST \$400,000 IN ATTORNEYS' FEES TO DEFEND A CLEAR LIABILITY CASE, BUT THAT'S NOT BEFORE US. BUT IT COULD HAVE BEEN A DISASTER, AND THERE WAS \$10 MILLION IN WHAT HAPPENED. SO THERE IS A VERY SERIOUS QUESTION.

I MEAN, HERE IT DOESN'T SEEM LIKE IT'S MUCH, BUT THERE IS FOR THE STATE IN TORTS WHERE THEY GO SO OUT OF THEIR WAY TO LIMIT THEIR LIABILITY, IT SEEMS THAT IT'S DIFFERENT FROM OTHER, YOU KNOW, JUST SAYING IN PAN-AM THERE'S WAIVER OF CONTRACTUAL LIABILITY.

BUT JUST TO SAY, WELL, IT'S INDEMNIFICATION COMES OUT OF CONTRACT, THEREFORE, YOU DON'T CONSIDER THE TORT LIABILITY, SEEMS MY DEVELOP YOU CAN.

>> RIGHT.

IF THE PRINCIPLE FOR DISTINGUISHING INDEMNITY CLAUSES IS THAT, YOU KNOW, ULTIMATELY A STATE AGENCY COULD BE REQUIRED TO PAY A LOT OF MONEY--

>> IN TORT.

TORT LIABILITY.

NOT A LOT OF MONEY, OKAY? BECAUSE THEY COULD SUE AND BREACH AN AGREEMENT AND HAVE TO PAY IN CONTRACT.

>> RIGHT.

>> BUT WHERE THE IP DEM ANITY ARISES OUT OF TORT, DOES THAT-- ARE THERE OTHER STATUTORY, DOES

768.28 AND THE LIMITATIONS AT THE VERY LEAST COME INTO EFFECT WHICH IS THE SECOND CERTIFIED QUESTION?

>> RIGHT.

NO.

I MEAN, OUR POSITION IS THAT THEY ABSOLUTELY DON'T AND THAT THIS COURT HAS ALREADY DECIDED THAT THEY DON'T.

>> COULDN'T THIS BE ANSWERED FOR THIS CASE, I MEAN, THE 125,000 IS RESULTED TO 100,000, AND BECAUSE THE ATTORNEYS' FEES SOUNDS TRULY AN INDEMNITY, NOT IN TORT THAT YOU GET YOUR FULL, YOU KNOW, THEY DON'T DEFEND, YOUR GET YOUR FULL CONTRACTUAL INDEMNIFICATION ON ATTORNEYS' FEES.

JUST THIS CASE.

>> NO, I DON'T THINK SO.

I MEAN, THAT WAS THE ISSUE IN AMERICAN HOME.

ONE OF THE ISSUES WAS IS A CONTRACTUAL INDEMNITY IN A CROSSING AGREEMENT SUBJECT TO LIABILITY UNDER 768.28 WHICH SETS THE CAP ON TORT DAMAGES AGAINST THE STATE.

>> FOR THE STATE, BUT WITH THE STATE AND ITS SUBDIVISIONS. AGAIN, WITH THE VERY HISTORICAL BACKDROP THAT JUSTICE CANTERO TALKS ABOUT, THAT THE DIFFERENCES IN THIS STATE HAVING MUNICIPALITIES, AGAIN, HAVING UNLIMITED LIABILITY AND THE STATE HAVING NO EXPOSURE.

>> RIGHT.

I CONCEDE THERE ARE IMPORTANT DISTINCTIONS BETWEEN MUNICIPALITIES AND STATES. WHAT I DON'T SEE IS THAT DISTINCTION MADE ANY DIFFERENCE TO THE OUTCOME OF AMERICAN HOME. WHAT THE COURT SAID IN AMERICAN HOME WAS THAT SECTION 768.28 ONLY APPLIES TO ACTIONS TO RECOVER DAMAGES AND TORT.

THE COURT ITALICIZED THAT LANGUAGE.

IT THEN SAID AT ISSUE HERE IS BASED ON A CONTRACT, ITALICIZED CONTRACT.

THEN SAID, THUS, WE CONCLUDE THAT THE STATUTORY PROVISION GOVERNING TORT ACTIONS IS NOT APPLICABLE HERE.

SO IT SEEMS TO US THAT THE RELEVANT DISTINCTION IN AMERICAN HOME WAS NOT BETWEEN STATES AND KNEW MISPALTIES, IT WAS BETWEEN CONTRACTUAL INDEMNIFICATION AND TORTS, PRECISELY WHAT YOU HAVE HERE.

AND AS I SAY-- LET ME JUST ADD BEFORE I FORGET IN THE CONTRACT POINT DECISION, THERE IS A FOOTNOTE WHICH MAKES THE SAME SORT OF GENERAL POLICY POINT. I'M TRYING TO MAKE HERE TODAY WHICH IS THAT TORT JUDGMENTS AND BREACH OF CONTRACT JUDGMENTS AND THE METHODS OF PAYMENT ARE IN NO WAY COMPARABLE.

THE POINT WE HAVE REPEATEDLY MADE IS THE STATE CAN DETERMINE WHAT LIMITS THE PLACE ON VALID AND BINDING CONTRACTS AT THE TIME IT ENTERS INTO THE CONTRACT.

TO THE CONTRARY, THE AMOUNT OF TORT JUDGMENTS OR FOR THAT MATTER THE AMOUNT OF JUDGMENTS ARISING OUT OF THE EXERCISE OF ITS POLICE POWER MAY BE DIFFICULT TO ASSESS AND ARE UNPREDICTABLE.

SO TO US, THIS IS THE FUNDAMENTAL DISTINCTION.

THERE'S A REASON WHY THE LEGISLATURE HAS CAPPED TORT RECOVERIES, BECAUSE A STATE AGENCY CAN'T CONTROL, YOU KNOW, ITS EMPLOYEES GETTING INTO CAR ACCIDENTS.

BUT A STATE AGENCY ASSUREDLY CAN CONTROL WHETHER IT WANTS TO AGREE TO AN INDEMNITY AGREEMENT.

LOTS OF INDIVIDUALS IN LIFE,  
LOTS OF COMPANIES AND LOTS OF  
GOVERNMENT ACTORS MAKE  
DECISIONS, FINANCIAL, IMPORTANT  
FINANCIAL DECISIONS EVERY DAY  
DEPENDING UPON HOW RISK-TOLERANT  
OR RISK-AVERSE THEY WANT TO BE.  
>> HOW ABOUT, I MEAN, AMERICAN  
HOME AND THE MAJORITY OPINION IS  
ACTUALLY A THREE-PERSON OPINION,  
AND THERE'S A PRETTY STRONG  
CONCURRENCE SAYING WHY IT'S  
DIFFERENT.

BUT COULD YOU ADDRESS THE ISSUE  
OF WHY THIS WOULDN'T AT LEAST  
ALTERNATIVELY BE AN ESTOPPAL ON  
THE DEPARTMENT OF  
TRANSPORTATION?

BECAUSE ONE IS, YES, THEY HAVE  
AUTHORITY TO ENTER INTO  
INDEMNIFICATION NO MATTER HOW  
UNLIMITED THE TORT LIABILITY  
WOULD BE.

THE OTHER IS, LOOK, THEY DID IT  
IN 1936.

CSX HAD A RIGHT TO RELY ON THAT  
INDEMNIFICATION--  
INDEMNIFICATION CONTRACT, AND I  
DON'T KNOW WHAT THEY DID IN THE  
OTHER ONES, BUT THEY HAD A RIGHT  
TO RELY, AND FINALLY WHEN IT'S  
TIME TO PAY UP, THEY GO, OH, NO,  
NOT US.

IS IT WHY DO YOU NOT RELY ON AN  
ESTOPPAL?

>> WE DO RELY ON IT AS A  
FALLBACK ARGUMENT.

THE WE THINK THE EASIEST WAY TO  
DECIDE THE CASE IS PAN-AM  
CONTROL, WE DO THINK THAT, YOU  
KNOW, 'S STOPPAL IS AN EQUITABLE  
DOCTRINE, AND THE EQUITIES, WE  
THINK, HEAVILY FAVOR US HERE.  
THIS WAS A CONTRACT THAT WAS  
ENTERED INTO THREE-QUARTERS OF A  
CENTURY AGO.

THE PREDECESSOR TO THE D. OF  
TRANSPORTATION WANTED TO BUILD A  
ROAD ACROSS THE TRACKS OF CSX'S  
PREDECESSOR, AND CSX'S

PREDECESSOR AGREED, AND THE ONLY THING IT GOT IN EXCHANGE WAS TO INDEMNIFY THERE WAS EVER A NEED FOR IT.

FDOT AND ITS PREDECESSOR TOOK ADVANTAGE OF THIS CONTRACT FOR THREE-QUARTERS OF A CENTURY AND PAID NOTHING FOR IT.

IT WAS RENT-FREE.

>> NOW, OF COURSE, THEY SAY THAT'S NOT TRUE.

THEY TAKE WHAT JUDGE WALLACE SAID IS THAT, NO, THERE WAS OTHER CONSIDERATION.

THEY WERE MAINTAINING THIS CROSSING, AND THAT WAS TO CSX'S ADVANTAGE.

PLUS THEY SAY EVEN THOUGH JUDGE BRITTON SAID THIS WOULD EFFECT ALL THESE CROSSINGS ACROSS THE STATE, THAT THERE WERE ONLY A LIMITED NUMBER THAT HAVE INDEMNIFICATION AGREEMENTS.

>> RIGHT.

IN TERMS OF WITH RESPECT TO WHETHER THIS WAS THE SOLE CONSIDERATION OR JUST PART OF IT, AS FAR AS OUR PRIMARY ARGUMENT IS CONCERNED WHICH IS A LEGAL ARGUMENT AND NOT AN EQUITABLE ARGUMENT, I DON'T THINK IT MATTERS.

WHAT THIS COURT SAID IN AMERICAN HOME WAS SO LONG AS AN INDEMNITY PROVISION IS PART AND PARCEL OF A CROSSING AGREEMENT, THAT IS OTHERWISE AUTHORIZED ENFORCEABLE, THE INDEMNITY PROVISION IS ENFORCEABLE.

AS FAR AS THE EQUITABLE ARGUMENT IS CONCERNED, I REALLY DON'T THINK THERE WAS ANY OTHER CONSIDERATION, AT LEAST NOT IN ANY KIND OF COMMON SENSE WAY.

THE THINGS TO WHICH THE DEPARTMENT POINTS AS EXAMPLES OF OTHER CONSIDERATION ARE NOT ANY THINGS THAT REALLY BENEFITED CSX.

THEY WERE THINGS THAT THE ROAD

D. TOOK IT UPON ITSELF TO DO IN CONNECTION WITH OPERATING THIS ROAD.

IF YOU WERE TO SAY TO ME CAN I BUILD A ROAD THROUGH YOUR BACKYARD AND I'M GOING TO BUILD IT AND MAINTAIN IT, I THINK MOST PEOPLE WOULD NOT THINK THAT THEY WERE REALLY GETTING ANYTHING OUT OF THAT UNLESS THEY WERE PAID SOMETHING FOR IT.

AND THE ONLY PAYMENT HERE IS THE AGREEMENT TO INDEMNIFY.

>> WELL, LET ME ASK YOU THIS, UNDER PAN-AM, ALTHOUGH THE COURT SAID IN PAN-AM THAT WHEN THE STATE IS AUTHORIZED TO ENTER, BASICALLY ENTER INTO A CONTRACT, THEN THEY ABOUND, SOVEREIGN IMMUNITY WILL NOT PROTECT THEM FROM A BREACH OF THAT CONTRACT, CORRECT?

>> RIGHT.

>> BUT PAN-AM ITSELF IS NOT ABOUT AN INDEMNITY SITUATION, IS IT?

ISN'T THAT-- IT WAS A BREACH OF A CONTRACT FOR EARLY TERMINATION OR SOMETHING TO THAT EFFECT?

>> I THINK SO.

>> BUT IT DIDN'T INVOLVE INDEMNITY.

>> NO.

>> OKAY.

BUT TO THE EXTENT THAT AN INDEMNITY CLAUSE WOULD POTENTIALLY EVEN UNDER A TORT SITUATION BE, THE STATE WOULD BE LIABLE FOR MORE THAN THE STATUTORY CAP.

TO THAT EXTENT, WOULDN'T AN INDEMNITY CLAUSE REALLY BE A GOOD PUBLIC POLICY?

>> I DON'T, I MEAN, I JUST THINK TO REACH THAT CONCLUSION YOU HAVE TO DISAGREE, AND I THINK MAYBE YOU DO, BECAUSE, JUSTICE QUINCE, YOU WERE IN DISSENT IN AMERICAN HOME WITH THE IDEA THAT THERE IS A DISTINCTION BETWEEN

CONTRACTUAL INDEMNITY ANY THE CITY  
AND TORT.

AND I THINK AMERICAN HOME  
FUNDAMENTALLY--

>> BUT WHEN YOU LOOK AT THIS  
CASE, FUNDAMENTALLY THIS WAS,  
STARTED OUT AS A TORT ACTION BY  
THE ORIGINAL PLAINTIFFS BECAUSE  
THERE WAS AN STENT AT THAT  
CROSSING-- AN ACCIDENT AT THAT  
CROSSING, CORRECT?

>> RIGHT.

>> AND SO THE RAILROAD, CSX PAID  
THOSE PLAINTIFFS BASED ON THEIR  
TORT ACTION, CORRECT?

>> RIGHT.

>> AND SO TO THE EXTENT THAT THE  
\$125,000 WAS PAID BASED ON A  
TORT ACTION, CORRECT?

>> NO, I'M NOT, I'M NOT GOING TO  
CONCEDE--

>> I MEAN--

>> THIS IS--

>> BUT WHAT DID, WHY DID CSX PAY  
THE PLAINTIFFS THE \$125,000?

>> WELL, THERE WAS INDISPUTABLY  
A TORT ACTION BROUGHT BY  
MS. SCHWEFRINGHAUS AND HER  
ESTATE, SORRY, HER HUSBAND'S  
ESTATE.

THAT WAS A TORT ACTION, NO  
QUESTION ABOUT THAT.

BUT THERE WAS A THIRD PARTY--

>> AND THE INDEMNIFICATION.

>> SO WHAT WE HAVE IN THIS CASE  
IS A CONTRACT ACTION AND A TORT  
ACTION, AND UNDER AMERICAN HOME  
AND UNDER WHAT WE THINK ARE  
BASIC PRINCIPLES THAT TELL YOU  
WHAT THE DISTINCTION IS  
BETWEEN--

>> SO BECAUSE THE  
INDEMNIFICATION PROVISION IN THE  
CONTRACT DOESN'T PUT ANY  
LIMITATIONS, THAT THE STATE  
WOULD BE LIABLE FOR ANY AMOUNT  
OF MONEY THAT CSX WOULD HAVE  
PAID TO THE ORIGINAL PLAINTIFFS.

>> YES, IT WOULD, AND THE-- SO  
LONG AS THE CONTRACT IS



AUTHORIZED AND THERE'S NO  
DISPUTE THAT IT IS, AND AND SO  
LONG AS THE LEGISLATURE HAS NOT  
PLACED ANY LIMITS ON INDEMNITY.  
AND TO BE CLEAR, IT HAS DONE  
THAT SINCE THIS CONTRACT WAS  
ENTERED INTO IN MANY DIFFERENT  
CONTRACTS.

AND IT IS PERFECTLY CAPABLE OF  
DOING THAT.

IF THE LEGISLATURE THINKS  
INDEMNITY IS A BAD IDEA, IT CAN  
LIMIT IT, IT CAN PROHIBIT IT.  
IF AN AGENCY THINKS INDEMNITY IS  
A BAD IDEA EITHER IN A SPECIFIC  
CONTRACT OR IN A CATEGORY OF  
CONTRACTS OR GENERALLY, IT CAN  
DEDECLINE TO ENTER INTO  
CONTRACTS WITH IP DEM ANITY  
PROVISIONS.

BUT OUR POSITION IS AND WE THINK  
THE LAW OF THIS COURT COMPELS  
THIS CONCLUSION, IF THE  
LEGISLATURE HAS NOT PROHIBITED  
OR LIMITED INDEMNITY AND IF THE  
AGENCY DECIDES THAT IT IS IN THE  
INTERESTS OF THE AGENCY TO HAVE  
AN INDEMNITY PROVISION AND  
ENTERS INTO A CONTRACT WITH ONE,  
IT IS ENFORCEABLE.

AND JUST TO BE CLEAR--

>> LET ME ASK YOU A QUESTION  
ABOUT THE RELATIONSHIP BETWEEN  
PAN-AM AND AMERICAN HOME.  
IS AMERICAN HOME AN APPLICATION  
OF PAN-AM?  
IN YOUR VIEW?

>> I THINK IT IS.

I THINK IT IS, YES.

>> OKAY.

I THOUGHT YOU'D BEEN ARGUING  
THAT.

BUT WHAT ABOUT WHAT THE MAJORITY  
SAYS IN AMERICAN HOME WHERE WE  
SAY WE CONCLUDE THAT PAN-AM  
TOBACCO DOES NOT CONTROL THE  
AGREEMENT BECAUSE THAT CASE  
ADDRESSED THE CONTRACTUAL  
LIABILITIES OF THE STATE WHILE  
MUNICIPALITIES HAS HISTORICALLY

POSSESSED LIABILITIES FOR THEIR CONTRACTS.

THERE ARE SOME THINGS IN THIS OPINION THAT ARE CONFUSING TO ME, BUT THAT SEEMS TO BE-- THEY'RE SEPARATING THESE TWO THINGS BASED ON THE STATUS OF THIS AS A MUNICIPAL CONTRACT, NOT A STATE CONTRACT.

>> IT'S A FAIR QUESTION AND LET ME TRY TO ANSWER IT AS BEST I CAN.

AMERICAN HOME HAS A LOT OF MOVING PARTS, TO BE SURE.

THERE ARE A LOT OF--

>> THAT'S A CHARITABLE WAY TO PUT IT.

>> THERE ARE A LOT OF CERTIFIED QUESTIONS, THERE ARE SEPARATE OPINIONS.

I THINK AS RELEVANT HERE, THERE ARE TWO PARTS OF THE OPINION. ONE OF THEM RELATES TO THE SECOND ISSUE HERE WHICH IS WHETHER THE 768.28'S CAP ON TORT LIABILITY APPLIES TO A CONTRACTUAL INDEMNITY.

OUR POSITION IS THAT AMERICAN HOME SQUARELY ANSWERS THAT IN OUR FAVOR FOR THE REASONS I DESCRIBED TO JUSTICE PARIENTE AND AGAINST THE DEPARTMENT'S FAVOR.

NOW, AS FAR AS THE PAN-AMISH SHOE IS CONCERNED THAT YOU ASKED ABOUT, THAT HAS TO DO WITH AMERICAN HOME'S RESOLUTION OF THE ISSUE THAT WE THINK CORRESPONDS TO THE FIRST ISSUE IN THIS CASE WHICH IS WHETHER AN INDEMNITY PROVISION REQUIRES SEPARATE AUTHORIZATION.

AND WHAT THE COURT SAID THERE, IT DID SAY PAN-AM DOES NOT APPLY IN THIS SITUATION BECAUSE WE'RE DEALING WITH A MUNICIPALITY AND NOT A STATE.

BUT WHAT IT ALSO SAID AND WHAT WE THINK IS CRITICALLY IMPORTANT TO THIS CASE IS THAT IF YOU HAVE

AN AUTHORIZED CONTRACT AND AN INDEMNITY PROVISION WITHIN THAT AUTHORIZED CONTRACT, THE INDEMNITY PROVISION IS ENFORCEABLE IF IT'S PART AND PARCEL OF THAT AGREEMENT. NOW, TO BE SURE, THE REASON THAT THE CROSSING AGREEMENT IN AMERICAN HOME WAS AUTHORIZED WAS BECAUSE IT WAS A MUNICIPALITY THAT WAS ENTERING INTO IT. AND WHAT THE COURT SAID IS THAT MUNICIPALITIES, UNLIKE STATES, HAVE, ESSENTIALLY, PLENARY AUTHORITY OR AT LEAST PRESUMPTIVE AUTHORITY TO LEGISLATE. EVEN IF THEY DIDN'T, THERE HAPPENS TO BE A STATUTE THAT AUTHORIZES THE CROSSING AGREEMENT. BUT THE IMPORTANT POINT IS THAT THE COURT SAID ONCE A CROSSING AGREEMENT IS AUTHORIZED, IF THERE'S AN INDEMNITY PROVISION WITHIN IT, THAT INDEMNITY PROVISION IS ENFORCEABLE. AND THERE'S NO DISPUTE HERE THAT THE CROSSING AGREEMENT IS AUTHORIZED. SO WE THINK IT IS IN THAT SENSE THAT THAT PART OF THE AMERICAN HOME DECISION COMPELS OR AT LEAST STRONGLY SUPPORTS THE OUTCOME THAT WE'RE ADVOCATING HERE.

>> THANK YOU, COUNSEL. YOU'VE GOT TWO MINUTES FOR REBUTTAL.

>> THANK YOU, JUSTICE. AMERICAN HOME THIS COURT HELD THAT A MUNICIPAL AGENCY, LIKE A UTILITY AUTHORITY, HAS THE INHERENT AUTHORITY TO ENTER AN INDEMNIFICATION AGREEMENT. THE STATE HAS NO INHERENT AUTHORITY. STATE ONLY HAS THE POWERS GRANTED TO IT BY THE LEGISLATURE.

>> HOW ABOUT THIS CASE?  
IF THE INDEMNIFICATION AGREEMENT  
RATHER THAN SAYING A BROADLY  
WORDED ONE, BUT AGREED THAT PART  
OF THE CONSIDERATION WOULD BE  
INDEMNIFICATION TO COVER ANY  
COSTS THAT ARE BROUGHT UPON  
LANDOWNER FOR SOME REASON?  
>> THE QUESTION IS RATHER THAN  
INDEMNITY FOR A TORT?  
>> FOR A TORT ACTION, BUT IT  
WOULD SAY SOMETHING TO THE  
EFFECT OF ANY COSTS OR  
DAMAGES--  
>> WOULD THE COSTS AND DAMAGES  
RELATE OR ARISE OUT OF A TORT  
ACTION?  
IN THAT CASE I'D SAY NO--  
>> IF IT RELATES AT ALL--  
>> IF IT RELATES OUT OF A TORT  
ACTION, MY ANSWER WOULD BE AND  
HAS BEEN THAT 768.28--  
>> AGAIN, YOU'RE COMING BACK  
BEING CONSISTENT WITH YOUR  
POSITION THAT YOU CAN'T SEPARATE  
THE ATTORNEYS' FEES FROM THE  
UNDERLYING ACTION.  
>> NO, I DON'T THINK SO.  
BECAUSE IT ARISES OUT OF THE  
TORT CLAIM.  
>> SO YOU COULDN'T EVEN  
INDEMNIFY FOR ATTORNEYS' FEES  
EVEN IF YOU SAID YOU'RE NOT  
INDEMNIFYING FOR TORT?  
THAT'S WHAT YOU'RE SAYING.  
>> WELL, I'M SAYING THAT--  
YOU'RE SAYING COULD WE INDEMNIFY  
FOR A CONTRACT CLAIM?  
>> WELL, FOR ATTORNEYS' FEES.  
AND WHAT YOUR POINT IS THAT YOU  
CANNOT SEPARATE THE TWO.  
>> THAT'S CORRECT.  
THAT IS MY POINT.  
>> WHAT HAPPENS IN A CASE WHERE  
THERE'S AN OFFER OF JUDGMENT?  
I DON'T KNOW THE LAW ON THIS.  
DOES THE, IF THE-- IS THE  
SOVEREIGN IMMUNITY LAW THAT  
COSTS ARE ADDITION TO THE CAP,  
COSTS--

>> I BELIEVE THAT THE CAP IS ALL INCLUSIVE.

>> YOU THINK IT INCLUDES BOTH COSTS AND ATTORNEYS' FEES?

>> YES, MA'AM.

>> OKAY.

>> I'M OUT OF TIME, BUT I'M HAPPY TO ANSWER QUESTIONS OTHERWISE.

I APPRECIATE YOUR TIME.

I'D URGE THE COURT TO ANSWER THE FIRST CERTIFIED QUESTION IN THE NEGATIVE, ALTERNATIVELY, THE SECOND CERTIFIES QUESTION IN THE AFFIRMATIVE.

THANK YOU.

>> THANK YOU, COUNSEL, FOR YOUR ARGUMENT, AND WE'RE IN RECESS UNTIL TOMORROW, 9:00.