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IN THE SUPREME COURT OF THE UNITED STATES

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HOWARD DELIVERY SERVICE, INC., :
ET AL., :
Petitioners :
v. : No. 05-128
ZURICH AMERICAN INSURANCE CO. :

- - - - -X

Washington, D.C.
Tuesday, March 21, 2006

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:13 a.m.

APPEARANCES:

PAUL F. STRAIN, ESQ., Baltimore, Maryland; on behalf of
the Petitioners.
DONALD B. VERRILLI, JR., ESQ., Washington, D.C.; on
behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:13 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first today in 05-128, Howard Delivery Service v.
5 Zurich American Insurance Company.

6 Mr. Strain.

7 ORAL ARGUMENT OF PAUL F. STRAIN

8 ON BEHALF OF THE PETITIONERS

9 MR. STRAIN: Mr. Chief Justice, and may it
10 please the Court:

11 We are here about a bankruptcy priority, and
12 bankruptcy priorities must be clearly granted by
13 statute or they are not granted at all. That's the
14 first principle of bankruptcy law that this Court has
15 laid down, that equal priority, that equal distribution
16 is the first principle, and every priority is a
17 deviation from that first principle, and therefore,
18 they must be clearly set out in the statute. This
19 Court has been very clear over and over on those
20 bedrock principles.

21 Applying them here, Zurich must demonstrate
22 that its workers' comp insurance policy receivables are
23 clearly included within the statutory phrase of
24 507(a)(4), contributions to an employee benefit plan
25 arising from services rendered within 180 days. Judge

1 Niemeyer -- Judge Niemeyer followed those principles,
2 those bedrock principles of this Court. The two
3 concurring opinions below did not follow nor even
4 mention those principles, and that led them to err, we
5 -- we submit.

6 CHIEF JUSTICE ROBERTS: Can I get you to step
7 back just -- the presumption that you began with. What
8 -- what's your strongest authority for that? The first
9 thing you cite in your brief is a dissenting opinion of
10 two justices.

11 MR. STRAIN: The strongest authority for
12 that, Your Honor, is the opinion in Kothe, K-o-t-h-e, a
13 1930 opinion, followed by Nathanson, followed by
14 Embassy Restaurant, and it is the --

15 CHIEF JUSTICE ROBERTS: Nathanson is the --
16 you cite the dissenting opinion for this proposition?

17 MR. STRAIN: No. It is -- Nathanson -- the
18 -- the citation, the page citation, is to the majority
19 -- is to the majority opinion. The principle is laid
20 out in the majority opinion, Mr. Chief Justice. And
21 Nathanson majority opinion relied on Kothe, and
22 Nathanson majority opinion was followed in 1959 by this
23 Court in Embassy Restaurants, and followed in 1968 by
24 this Court in Joint Industries Board also dealing with
25 bankruptcy priorities. That is the bedrock principles

1 in the -- of the majority decisions of -- of this case
2 -- of this Court.

3 And what we have here, Your Honor and members
4 of the Court, is that a -- an insurance policy -- what
5 we're talking about here is an insurance policy, and
6 the statutory language refers to an employee benefit
7 plan. We don't even have a plan here. We have a
8 policy.

9 There's a citation in the Zurich brief at
10 page 20 to this Court's opinion in Pegram v. Herdrich,
11 which I think drives that point home. It is an
12 incomplete citation. The omitted language from the
13 Zurich brief is as follows. From page --

14 JUSTICE SCALIA: Where -- where is the
15 unomitted language? What -- what page of the brief are
16 you quoting from?

17 MR. STRAIN: It's on page 20, Your Honor, of
18 Zurich.

19 Citing to page 223 from this Court's opinion
20 in Pegram, the omitted language, which comes in the
21 middle of the quotation given at page 20, is as
22 follows. Thus, when employers contract with an HMO to
23 provide benefits to employees subject to ERISA, the
24 provisions of documents that set up the HMO are not, as
25 such, an ERISA plan.

1 Now, that is what our case is, an insurance
2 policy that incorporates a duty to pay benefits subject
3 to workers' comp laws of the different States. So even
4 under the citation in -- the full citation in Pegram,
5 it is seriously questionable whether this insurance
6 policy is a plan at all. The statute requires an
7 employee benefit plan. The -- this Court requires that
8 it be clear from the statute that this insurance policy
9 is itself a plan.

10 JUSTICE SCALIA: Now, ERISA -- ERISA makes it
11 very clear that -- that a plan to pay insurance for
12 employee benefits, whether it's disability or
13 retirement or whatever else, is an employee benefit
14 plan and -- and explicitly excludes workmen's comp
15 because otherwise it would fall within that definition
16 of an employee benefit plan.

17 MR. STRAIN: I believe that is -- is correct,
18 Justice Scalia.

19 JUSTICE SCALIA: I know that's a different
20 statute. I'm not saying that the -- that the
21 definitions of that statute have to apply here, but the
22 definitions of that statute at least demonstrate that
23 it is a permissible use of the -- of -- of the term
24 employee benefit plan.

25 MR. STRAIN: I disagree with you, Justice

1 Scalia --

2 JUSTICE SCALIA: All right. Tell me why.

3 MR. STRAIN: -- to this -- to this extent.

4 The definition of employee benefit plan under ERISA is
5 in two parts: a section (a), which is a -- which is a
6 listing; and a section (b), which is incorporation of
7 provisions of the Taft-Hartley law. And it's under the
8 section (b), the incorporation of provisions of the
9 Taft-Hartley law, that workers' compensation comes in.
10 And, of course it is then excluded by -- by ERISA.

11 But a -- the ERISA definition does not
12 demonstrate that a -- an insurance policy is a plan.
13 This Court has dealt with the issue under ERISA of
14 whether everything scheduled in ERISA is a plan or not.

15 In the Massachusetts v. Morash decision, this Court
16 determined whether a vacation -- unpaid vacation policy
17 was a plan under the definition of ERISA, and this
18 Court held that it was not. So it is clear from this
19 Court's precedent that whether or not something is
20 listed in ERISA, even if it applied -- in that case,
21 ERISA applied; in this case it does not -- even if it
22 applied, would not qualify as a plan.

23 JUSTICE GINSBURG: Would it -- would it if
24 the employer were self-insured? Can you be self-
25 insured for workers' comp?

1 MR. STRAIN: The employer can be self-insured
2 for workers' --

3 JUSTICE GINSBURG: Would that be a plan then?

4 MR. STRAIN: I think it would not, Your
5 Honor, because the self-insurance for workers' comp, as
6 I understand them, what they normally do is, just as
7 the Court referred to in that omitted section of the
8 Pegram opinion, is it simply is -- is an agreement that
9 it will provide the necessary wherewithal and bonding
10 to pay the benefits as specified, as they may change
11 from time to time in a State statute. There is none of
12 the other things, as I understand it, that the Court
13 dealt with in Pegram which would make it a plan that
14 are present in either a workers' compensation insurance
15 policy or a self-insurance program, as is permitted and
16 --

17 JUSTICE GINSBURG: So it would be an employee
18 benefit program, but not a plan.

19 MR. STRAIN: It would be, Your Honor, or in
20 the case of our case, an employee benefit policy.

21 And I would like to pick up on that, if I
22 may, because it is not --

23 JUSTICE SCALIA: Before you -- before you go
24 on, could you satisfy a curiosity of mine? Maybe Mr.
25 Verrilli should be the one I should ask this, but you

1 must have your -- your version of it. How do you
2 decide whether an insurance premium is for work that
3 was done within the last 180 days? How -- how do you
4 calculate it, whether that characteristic of the -- of
5 the statute is complied with?

6 MR. STRAIN: Your Honor, I don't know that
7 there is any good way to do that, and I think that's
8 one of the anomalies in trying to superimpose an
9 insurance policy under the rubric of an employee
10 benefit plan.

11 Now, premiums -- premiums, of course, there
12 is a -- there is a mechanism --

13 JUSTICE SCALIA: Oh, if it said premiums due
14 within the last 180 days, I could understand it --

15 MR. STRAIN: And there is a mechanism in the
16 policy to determine the payment of premiums.

17 JUSTICE SOUTER: But isn't -- doesn't the
18 mechanism take into account the number of employees who
19 are on the rolls at any given time?

20 MR. STRAIN: I believe it does, Your Honor.

21 JUSTICE SOUTER: Well, if that's the case,
22 then -- then doesn't the premium that you're supposed
23 to pay depend in -- in -- on the number of employees
24 within the last 180 days, which in turn depends on
25 their working in the last 180 days?

1 MR. STRAIN: It is not my understanding -- and I
2 may be mistaken because this policy was not placed in
3 the record by Zurich. It is not my understanding that
4 that is how the policy premium calculations are made,
5 Your Honor. Now --

6 JUSTICE SOUTER: Well, how -- maybe you just
7 don't know the answer.

8 MR. STRAIN: -- certainly, Justice Souter,
9 you may be right, but we've checked the proof of claim
10 filed by Zurich which started this off, and they did
11 not attach the workers' compensation insurance policy
12 to it. So it is not in the record, and I simply don't
13 know --

14 JUSTICE SOUTER: So that's -- that's really
15 not an issue for us.

16 MR. STRAIN: Well, I -- I will not say that
17 it's not an issue, Your Honor. It is -- it is an issue
18 --

19 JUSTICE SOUTER: Well, if you want to make it
20 an issue, you'd have to get the -- the predicate in the
21 record to do it, and -- and we just don't have that.

22 MR. STRAIN: Well --

23 JUSTICE SOUTER: We -- we couldn't resolve
24 that.

25 JUSTICE SCALIA: Or else establish that

1 there's no conceivable way that 180 days makes any
2 sense.

3 MR. STRAIN: And -- and I -- I think that, as
4 -- as I hope may blend the answers to both questions.
5 I think that --

6 JUSTICE SOUTER: Consider us together, yes.

7 JUSTICE SCALIA: We're together on this.

8 (Laughter.)

9 MR. STRAIN: I -- I think that is -- I think
10 that is where we -- where we are. We have a policy
11 that was not placed in the record by the applicant for
12 this priority. We have our general knowledge of what
13 workers' comp insurance policies are. We have a
14 statutory requirement which reads, a calculation with
15 180 days, which I suggest is an anomaly when we compare
16 it to the statutory language.

17 JUSTICE KENNEDY: Is there anything in the
18 statute which says how promptly the premiums have to be
19 paid as it -- to -- to make it analogous, say, to
20 withholding where you might have to pay every quarter
21 on -- by a certain day? Does -- does the statute
22 regulate when and how promptly the premiums must be
23 paid, or is that just all comprehended in the terms of
24 the policy agreement?

25 MR. STRAIN: Well -- well, certainly the

1 priority statute does not because the priority statute
2 doesn't --

3 JUSTICE KENNEDY: No. I meant the State
4 workmen's comp law.

5 MR. STRAIN: The State workers' -- workers'
6 comp law. Your Honor, I -- I don't know the answer. I
7 know that the State laws -- I know that the State laws
8 vary, and we have 10 different workers' comp laws that
9 allude to or mention workers' comp insurance policies
10 present just in this case. So it may be that those
11 statutes might provide some of the basis for an
12 explanation, but I simply don't know the answer to
13 that. I did want to --

14 JUSTICE BREYER: If you have an employer who
15 says, I promise to give \$200 a month per worker to a
16 fund, which money will go to pay their health costs
17 when they're sick, that's plainly covered.

18 MR. STRAIN: Yes, it is, Your Honor.

19 JUSTICE BREYER: And now suppose it's exactly
20 the same, but instead of his paying \$200 a month, he
21 pays \$200 to an insurance company in return for a
22 promise that they'll pay precisely the same amount to
23 the employee if he gets sick. In your view, that's not
24 covered.

25 MR. STRAIN: In our view -- in our view, Your

1 Honor -- I -- if -- if I may, I think that the
2 hypothetical you pose is not quite our case.

3 JUSTICE BREYER: Of course. It's not meant
4 to be.

5 MR. STRAIN: It -- it --

6 JUSTICE BREYER: I want to know how you are
7 going to answer my hypothetical.

8 (Laughter.)

9 MR. STRAIN: Your Honor, I -- I think the --
10 the focus of the answer should be on whether it is an
11 employee benefit or not.

12 JUSTICE BREYER: I'm not -- I'm asking you --

13 MR. STRAIN: Yes.

14 JUSTICE BREYER: -- to answer my hypothetical
15 please. If in fact -- you didn't want me to repeat it?

16 MR. STRAIN: No, no. No, I --

17 JUSTICE BREYER: Then what is the answer?

18 MR. STRAIN: -- I understand it, Your Honor.

19 JUSTICE BREYER: In your view, is my
20 hypothetical covered or not?

21 MR. STRAIN: I -- I think it is not, Your
22 Honor.

23 JUSTICE BREYER: It is not.

24 MR. STRAIN: I think --

25 JUSTICE BREYER: And therefore, if we accept

1 your interpretation, then all those employers who,
2 instead of contributing directly to health funds,
3 instead buy insurance policies to do the same thing,
4 will discover they do not have the advantage of the
5 fifth priority.

6 MR. STRAIN: All right. And now I see -- now
7 I see, Justice Breyer, I did misunderstand --
8 misunderstand the facts. Those facts clearly are
9 covered. They're -- they're covered under --

10 JUSTICE BREYER: Now, if they are covered --
11 if they are covered, as I thought, then what is the
12 difference whether the employer buys a policy whereby
13 the insurance companies pays for their health benefit
14 when they're sick or pays for their accident benefit
15 when they have an accident at work?

16 MR. STRAIN: Your Honor, I think the
17 difference are -- are several. Number one is what the
18 employer is doing here is insuring itself against a
19 claim that would otherwise be against the insurer.
20 That was not in your hypothetical, Your Honor. That
21 makes what we have here a policy for an employer
22 benefit. It is not an employee benefit.

23 Now, the -- the employer is the insured.

24 JUSTICE SCALIA: The -- the correlative
25 hypothetical would be a plan such as Justice Breyer

1 describes in which the employer has contracted to pay
2 his employees \$200 a month for when they're sick, and
3 that's a contractual obligation of his, and then he
4 buys insurance to cover that contractual obligation.

5 MR. STRAIN: And --

6 JUSTICE SCALIA: You say that would be this
7 case.

8 MR. STRAIN: That would be this case, Your
9 Honor.

10 JUSTICE SCALIA: And you say that wouldn't be
11 covered.

12 MR. STRAIN: And that would not be covered,
13 and that would not be covered in great part because it
14 is an employer benefit, employer choice, employer
15 benefit. And what we have in this case --

16 JUSTICE BREYER: Well, that's -- that's a
17 better way to put it. If -- if that's right, then what
18 you're saying, as I understand it, is in those cases
19 where an employer goes to an insurance company, they
20 give a contractual promise to pay the employee when he
21 gets sick in return for a premium by the employer --
22 and it's a health benefit or a vacation benefit, the
23 most typical thing -- you're saying all those -- all
24 those -- there's no fifth priority. They don't --
25 can't take advantage of that.

1 MR. STRAIN: No. Your Honor, what -- what
2 I'm saying is and what we have here, if what you're
3 describing, if I understand it correctly, is a normal
4 fringe benefit. That is, an employer agrees to take
5 out a -- to contribute to a pension fund for the
6 benefit of the employees. That is clearly covered.
7 That was the kind of thing dealt with in Embassy
8 Restaurant and the Joint Industries Board that (a) (4)
9 was intended to supplant or overrule.

10 JUSTICE GINSBURG: And why did --

11 CHIEF JUSTICE ROBERTS: And that's clearly
12 covered.

13 JUSTICE GINSBURG: -- why did you answer
14 Justice Scalia's question as you did? That is also an
15 employee benefit, that is, vacation, sickness.

16 MR. STRAIN: Your Honor, I answered that
17 because, as Justice Scalia changed the hypothetical, it
18 was not an employee benefit. It was the employer
19 insuring itself, buying an annuity or, like we have
20 here, insuring itself, so it -- so it could make the
21 payments.

22 What we have here, Your Honor, is a situation
23 where, as it is admitted in the record, the employees
24 don't benefit at all. As Zurich has admitted in this
25 record at page 17, the employees are in the same

1 position whether there is insurance or no insurance.
2 In fact, the irony here is that if Zurich prevails, not
3 only do the employees not benefit, they are harmed
4 because there are in the (a) (4) -- the (a) (4) priority
5 claimants are a total of 1.6 million, including the
6 400,000 of Zurich. All the others are health and
7 welfare funds such as Justice Breyer was -- was posing.
8 Zurich is not.

9 But what happens -- and there's not enough
10 money to pay everyone. What happens is if the Zurich
11 Insurance Company receivable gets an equal priority
12 with the health and welfare funds, then there is a
13 dilution of the money going for the employees' health
14 and welfare and pension, a 25 percent, in this case,
15 dilution of that money because the employer chose to
16 insure itself for its liability, potential liability,
17 to the employees. The employer benefited from that
18 insurance. In some States, it would be required to
19 have the insurance. In most States, it has the option
20 of having insurance or not.

21 JUSTICE ALITO: Would the same thing happen
22 under multi-employer plans? Would not the employees
23 typically receive the benefits even if their employer
24 did not make the contributions that it was required to
25 make?

1 MR. STRAIN: It would -- they would typically
2 -- in a multi-employer plan, as many of our priority
3 claimants are here, because the money is spread, the
4 employees still get some money. But if we consider the
5 greater whole, the money, the available res, the
6 available pot, to pay those -- pay those employees is
7 diminished. So --

8 JUSTICE GINSBURG: I thought there's also,
9 isn't there, the Pension Benefit -- even if there's no
10 money in the till for the plan, isn't there a
11 Government fund so that the worker would receive the
12 benefit in any event if -- I don't see the distinction
13 that you're making based on whether the worker would
14 get a benefit whether or not the employer made the
15 contribution.

16 MR. STRAIN: Well, Your Honor, there
17 certainly is -- there certainly are -- in most States
18 at least, there certainly are funds that step in if a
19 workers' comp insurer or an employer does not make --
20 is not available to pay an award to a workers' comp
21 injured -- a worker who was injured on the job.

22 On the other -- on the other hand, Your
23 Honor, whether such funds exist to step in and supplant
24 the payments not made to -- in the ordinary health and
25 welfare and pension context, I think not, Your Honor.

1 JUSTICE KENNEDY: Well, I recognize there are
2 different schemes. The only one I'm familiar with is
3 my former State. But did I understand from your answer
4 that in some or many of these States, the employer is
5 free not to have insurance? He can be self-funded?

6 MR. STRAIN: Yes. Yes, that's correct, Your
7 Honor, in -- in --

8 JUSTICE KENNEDY: And is there any
9 requirement that there be an actual fund in place or is
10 it just a general liability?

11 MR. STRAIN: Well, there is -- there is -- it
12 is a -- a traditional self-insurance with the overlay.

13 That is, there -- there must -- there must be a
14 showing of the wherewithal, but with the additional
15 overlay, in all or virtually every State which permits
16 this, of the requirement of a bond. And that's --

17 JUSTICE KENNEDY: A bond.

18 MR. STRAIN: -- which is an interesting point
19 because if Zurich prevails, we have the -- the camel's
20 nose is under the tent because in all the self-
21 insurance contexts, the bond issuer will have an
22 equivalent claim to Zurich. Under their broad
23 reasoning or broad interpretation of the statute that
24 should be considered narrowly -- under the broad
25 interpretation they want, that camel's nose would be

1 under the tent, and the bond issuer would have an
2 equivalent claim to Zurich on its policy.

3 To extend that a little further, what Zurich
4 did here -- was an insurance company -- it required
5 letters of credit of Howard Delivery, the debtor, to
6 issue its policies. It drew down those letters of
7 credit \$1.1 million. F&M Bank, the letter of credit
8 issuer, of course sought security from the debtor, but
9 not enough. As is commonly the situation once the
10 liquidation is finished, there wasn't enough security.

11 So F&M, which had facilitated Zurich's workers'
12 compensation insurance by its letters -- letters of
13 credit, would have an equivalent claim to Zurich as
14 well. So more and more of the camel is going under the
15 tent. This is a very broad interpretation with major
16 implications that they seek and it is completely
17 inappropriate under the bedrock principles of
18 approaches to priorities under bankruptcy law.

19 JUSTICE KENNEDY: Well, if there were letters
20 of credit, why is Zurich injured? Because the letters
21 of credit were not large enough to cover the premium
22 liability?

23 MR. STRAIN: They -- they were not, Your
24 Honor. They were not.

25 JUSTICE SOUTER: See, what I don't understand --

1 JUSTICE GINSBURG: Mr. Strain --

2 JUSTICE SOUTER: Mr. Strain, you -- you
3 mentioned --

4 JUSTICE GINSBURG: -- in -- in your brief,
5 you seem to put considerable stress on something that I
6 haven't heard you say one word about so far, and that
7 is that these -- workers' compensation is State-
8 mandated. They're not negotiated or even employer-
9 determined benefits. They are whatever the law
10 prescribes. And you haven't -- haven't mentioned that,
11 so I'm wondering where that fits into your picture.

12 MR. STRAIN: It -- I haven't mentioned it.
13 I'll take this opportunity to mention it, Justice
14 Ginsburg, because it is a very important point.

15 We know that in the statute -- (a)(4) we're
16 talking about -- section (a)(3) -- these are numberings
17 before 2005 amendment to the act. The language stayed
18 the same. The numbers were -- are different.

19 But there are two that work together. The
20 (a)(3) priority for wages for the employees and the --

21 JUSTICE SCALIA: Where does (a)(3) appear?
22 There -- there was that discussion in your brief, and
23 I'm darned if I could find (a)(3).

24 MR. STRAIN: Section (a)(3), Your Honor.
25 I'll refer you, if I may, to the brief of amicus at

1 page 11, and that's why I mentioned, Your Honor, that
2 there is a new numbering because the numbering in the
3 amicus brief is using the 2005 numbering in the revised
4 statute. And what is listed there as (a)(4) is the
5 wages priority, and at the next page, (a)(5) is the
6 priority that we're talking about as -- as (a)(4).

7 JUSTICE SCALIA: Well, it would have been
8 nice to have it in your brief --

9 MR. STRAIN: I agree.

10 JUSTICE SCALIA: -- and numbered -- numbered
11 3 instead of 4. That would have helped a lot.

12 MR. STRAIN: I -- I certainly recognize that,
13 Your Honor.

14 The -- the provision of (a)(3) and (a)(4) --
15 they work in tandem to protect the workers. They share
16 a cap. The more a worker benefits from a wage
17 priority, the less the worker benefits from the -- from
18 the employee benefit plan priority. And so they work
19 together; they work in tandem, which gives meaning to
20 (a)(4) under many of the canons of construction that --
21 that we're familiar with.

22 It would not work -- it's an anomaly that an
23 insurance company receivable would share the cap with
24 the wages priority. That is simply an anomaly. And
25 when we look to the legislative history, it is

1 absolutely clear, Your Honor, that the fact of the
2 judicial -- the statutory mandate for workers'
3 compensation insurance is very important because what
4 is spoken about, as Judge Niemeyer pointed out in his
5 dissent below -- what is spoken about in the
6 legislative history over and over again is a wage
7 substitute or a wage surrogate that employers do not
8 give -- will lower the wages but provide fringe
9 benefits. So the package remains the same. Now,
10 that's not a workers' compensation insurance policy,
11 but that is the wage surrogates that the Congress was
12 looking at.

13 JUSTICE SOUTER: Let -- let me, if I may, ask
14 you about other possible wage surrogates because what
15 you're saying now seems to me to mesh with the
16 argument, another legislative history argument, to the
17 effect that the -- the current provision was meant to
18 overrule two prior cases of this Court. And the -- the
19 question I have turns on the fact that the -- the
20 language is broader than what would merely have been
21 necessary to overrule those cases.

22 So my question is if the broader language
23 does not cover the premiums that we're concerned with
24 here, what other items dealing with -- with wage
25 substitutes would it pick up, would it include?

1 MR. STRAIN: Well, Your Honor, I -- I would
2 answer from -- in part from the legislative history of
3 some of the things discussed were joint apprentices and
4 training programs, by way of example, as new forms of
5 fringe benefits that some of the witnesses wished to
6 see to ensure would be covered. I think that sort of
7 thing could be covered under -- under this language as
8 well.

9 We know from the legislative history -- we
10 know from the legislative history that there was
11 absolutely no intention to incorporate the definition
12 of ERISA, and we know from this Court's teaching in the
13 decision in United States v. C&F Fabrication just 10
14 years ago that it is absolutely inappropriate to
15 incorporate into the bankruptcy statute an ERISA
16 definition where Congress does not provide. That's an
17 absolute square holding of this Court that exactly
18 should lead to rejection of the effort by Zurich to
19 incorporate -- to ask the Court to engraft onto this
20 statute a -- a definition from another statute.

21 If there are no questions at -- additional
22 questions at this time, I would like to reserve my
23 remaining time.

24 CHIEF JUSTICE ROBERTS: Thank you, Mr.
25 Strain.

1 Mr. Verrilli.

2 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.

3 ON BEHALF OF THE RESPONDENT

4 MR. VERRILLI: Thank you, Mr. Chief Justice,
5 and may it please the Court:

6 I think it's important to focus at the outset
7 on exactly what a workers' compensation plan provides.

8 A workers' compensation plan provides health insurance
9 that pays for the medical costs of a workplace
10 accident, disability insurance --

11 JUSTICE SCALIA: You're begging the question
12 by calling it a plan. I mean, that -- that's -- that's
13 one of the issues here. Why don't you tell us what
14 workmen compensation laws require?

15 MR. VERRILLI: Well, I'd be happy to go right
16 to the question of whether it's a plan, Justice Scalia,
17 because I think it's indisputably a plan under this --
18 under the dictionary definition, ordinary meaning of
19 plan, this Court's interpretation of it in Pegram,
20 under ERISA, under the Department of Labor's
21 interpretation of it, and under plain common sense. A
22 plan is an arrangement or program or scheme, as Pegram
23 said, to -- established by an employer or an employee
24 organization to secure the provision of benefits to an
25 employee through insurance or otherwise.

1 JUSTICE GINSBURG: Mr. Verrilli, there's no
2 employer or employee, for that matter, who's doing the
3 planning. The planning is all done by the Government
4 --

5 MR. VERRILLI: See, I -- I --

6 JUSTICE GINSBURG: -- because what's covered
7 is prescribed by law.

8 MR. VERRILLI: I think there is a plan for
9 this reason, Justice Ginsburg. The -- what the law
10 prescribes is that which the employer must provide to
11 the employees. But it's not a self-executing law.
12 The -- the employer has got to make arrangements to
13 ensure that the benefits are provided, and under the
14 laws of the vast majority of the States, the employer
15 has options for doing that. The employer can contract
16 with an insurance company to do it. The employer can
17 self-insure to do it. And by the way, Justice Kennedy,
18 there are quite stringent requirements for fiscal
19 solvency and there is a surety bond that needs to be
20 posted in order to -- in order to self-insure.

21 JUSTICE GINSBURG: But the it is not
22 negotiable. We think of a health plan, a retirement
23 plan. That doesn't have to be any set coverage. It's
24 negotiated or the employer, if it's not a collective
25 bargaining situation, determines what the benefits will

1 be. Here, the law determines what the benefits will
2 be.

3 MR. VERRILLI: I agree that that aspect of
4 the arrangement is not negotiated, but there is
5 nonetheless an arrangement that secures and guarantees
6 the provisions of the benefits, and that's the plan.
7 There are steps that the employer has to take to secure
8 the provision of the benefits, here through the
9 purchase of insurance, and that is the plan. The plan
10 is the arrangement to secure the provision of benefits.

11 Certainly they are --

12 CHIEF JUSTICE ROBERTS: So that if an
13 employer decides to -- because his employees have had a
14 good year, he's going to put in a new parking lot for
15 them -- he -- his plan is to have a contract with a
16 paving company to pave the parking lot. Are the
17 payments under that contract's contributions to an
18 employee benefit plan?

19 MR. VERRILLI: I don't think the answer to
20 that question is yes, Mr. Chief Justice. I think the
21 answer is no. I mean, I suppose you could say that
22 those are -- that's a benefit provided to employees,
23 but --

24 CHIEF JUSTICE ROBERTS: It seems like the
25 consequence of your theory though --

1 MR. VERRILLI: I don't think so. I think
2 there's a limiting principle here and I think the
3 limiting principle is to look to ERISA. ERISA has a
4 set of -- it defines what employee benefits are for
5 ERISA purposes, and it's not -- and it's not these
6 benefits and similar things. It's an exhaustive list
7 of benefits. The parking lot isn't on the list.
8 Similarly, a break room wouldn't be on the list. None
9 of those things are on the list, and therefore, I think
10 by reference to ERISA, one can relatively easily
11 exclude those --

12 CHIEF JUSTICE ROBERTS: But -- but providing
13 for workers' compensation through insurance, rather
14 than through self-insurance, is also not on the list.

15 MR. VERRILLI: Well, I think both of them are
16 on the list actually, Mr. Chief Justice, because both
17 of those are programs or arrangements to secure the
18 provision of benefits, and one is through insurance and
19 the other through self-insurance. So I think they're
20 plans in both instances.

21 JUSTICE SCALIA: What's your answer to the
22 180 days question I answered -- I asked? You know,
23 the provision provides contributions. It doesn't say
24 just contributions to an employee benefit plan. It
25 says contributions to an employee benefit plan arising

1 from services rendered, and then it goes on to say, but
2 -- but the services have to be within the last 180
3 days.

4 MR. VERRILLI: Right.

5 JUSTICE SCALIA: How do you square that with
6 -- with the purchase of block insurance like this?

7 MR. VERRILLI: Well, because the amounts that
8 Zurich is seeking in premiums are the amounts that were
9 due for providing coverage during the 180 days before
10 Howard ceased operations, and the reason that arises
11 from -- it seems to me there are two ways in which that
12 could arise from services rendered. It can arise from
13 services rendered to the employees in the following
14 sense. Howard has the obligation to provide those
15 benefits by virtue of the fact that the employees are
16 working for it during that period of time. That's what
17 Judge King said in his opinion in the Fourth Circuit,
18 and that seems to me exactly right. Alternatively --
19 alternatively, as other courts have suggested, the --
20 the services rendered --

21 JUSTICE SCALIA: But each of those insurance
22 premiums that's paid by the employer doesn't just cover
23 workers who've worked for the last 180 days. Each premium
24 is divided among all the workers who've been working
25 there for years. Some of the premiums are going to go

1 to -- to allow the insurance company to pay in the
2 future people who have been there for 20 years.

3 MR. VERRILLI: Well --

4 JUSTICE SCALIA: I mean, it just seems to me
5 it's a square peg in a round hole. I -- I don't see
6 how you make sense out of that 180 --

7 MR. VERRILLI: I appreciate that, Justice
8 Scalia, but I do think the -- the obligation on the
9 part of the employer to keep paying the premiums
10 during that period arises from the fact that the
11 employees are continuing to work during that period.
12 And what the -- and what the insurance company is
13 seeking to recover is merely the cost of providing the
14 insurance during that period of 180 days which arises
15 --

16 JUSTICE SOUTER: If -- if they don't pay the
17 premium with respect to the 180 days, if there's an
18 accident during the 180 days, the insurance doesn't
19 cover the accident.

20 MR. VERRILLI: That's an important point,
21 Justice Souter, and I would like to focus on that and I
22 -- I hope correct something that the Petitioners said.

23 With respect -- it all depends on when the
24 insurance policy cancels. If there's nonpayment of
25 premiums, then the insurance company has the right to

1 cancel the policy, and there has -- there's a notice
2 provision, 10 days in some jurisdictions, up to 30 days
3 in others. But they have a right to cancel the policy.

4 If an injury occurs before cancellation, that
5 injury is covered and it's covered for all time, even
6 if the policy subsequently cancels.

7 But the key thing here, I think, the critical
8 point is that without the priority, the -- the
9 insurance company is going to look at the situation and
10 say, we have very little prospect of recovering if this
11 company actually goes down the tubes and into
12 bankruptcy as a general unsecured creditor. Therefore,
13 we need to get out of this situation fast. And they --
14 at that point, they're going to cancel the policy.
15 There's going to be much more of a hair-trigger sense
16 of the need to cancel policies. When they cancel
17 policies, the immediate consequence, of course, is that
18 the -- that the employees are no longer covered.

19 And then, the -- it seems to me, the
20 secondary consequence, which is also quite important --

21 JUSTICE SCALIA: You really think that --
22 that they cut it that fine? They say, oh, yes, this
23 guy is going to go into bankruptcy. We're pretty sure
24 about that, but don't worry. We'll have priority.

25 MR. VERRILLI: It's absolutely --

1 JUSTICE SCALIA: I think as soon as they
2 smell bankruptcy, they're going to pull the plug
3 anyway.

4 MR. VERRILLI: That -- I -- I disagree with
5 that, Justice Scalia. I think in -- in the real common
6 practice here, the amount that they can recover and the
7 amount that they think they have a prospect of
8 recovering is a very important determinant in their
9 decision on whether to hang in and how long to hang in
10 until they get to the chapter 11 process where the
11 debtor can then husband its assets and can pay the
12 workers' compensation premiums as an administrative
13 claim. So I think it's a -- it's a significant
14 determinant.

15 Without the priority, there's going to be a
16 hair trigger, which means coverage is terminated
17 sooner, and it's going to mean for many employers that
18 they're going to have to go out of business because you
19 can't operate without --

20 JUSTICE BREYER: There -- there are two parts
21 in my mind to this. The question is what is the
22 difference between a workmen's -- worker compensation
23 and health benefits. I agree with you, so far
24 tentatively, that that difference can't lie in the
25 nature of the contract providing the benefit. Now, I

1 know they'll want to argue the contrary, but put that
2 to the side.

3 If it doesn't depend on that, it depends on
4 the difference between workers' compensation and health
5 benefits. And you want to say there isn't enough of a
6 difference there, though they argued the mandate makes
7 a difference. Of course, you could mandate health
8 benefits too, and I don't think that would matter.

9 But if you're right, what about a -- a long-
10 term contract for bottled water for the workers?

11 MR. VERRILLI: I think my answer would be the
12 same as to the Chief Justice that in some sense, I
13 suppose you could say it's an employee benefit; in some
14 sense, I suppose you could say that there's a contract
15 to provide it. But I think you can set the outer
16 bounds here by reference to the employee benefits that
17 ERISA defines as employee benefits.

18 But in any event --

19 JUSTICE BREYER: Well, actually -- this is --
20 to me anyway, this is an important point because at
21 some point you have to draw the line between the things
22 of a kind that workers might bargain for and things
23 not. Now, if that's where we're getting there, the
24 history of workers' compensation may cut the other way.

25 MR. VERRILLI: Well, I don't -- I don't think

1 so, Justice Breyer --

2 JUSTICE BREYER: Because? What's -- what's
3 the principle I'm going to use?

4 MR. VERRILLI: Well, first, if I can make a
5 prefatory point, that the bottled water example doesn't
6 distinguish the Petitioners' position from our
7 position. The Petitioners' position is that if it's a
8 -- if it's a negotiated-for, bargained-for benefit,
9 it's in. So I don't think that's a -- it provides a
10 limiting principle. And it seems to me, wherever the
11 line is --

12 CHIEF JUSTICE ROBERTS: Well, sure, if they
13 have a contract, as part of their -- part of their
14 contract, they get the bottled water, that's -- that's
15 easy to see why that's covered. But the -- the
16 question is when it's not. It's just something that
17 the employer does in the course of his business that
18 has -- that benefits both his business and his workers.

19 MR. VERRILLI: Right, but --

20 JUSTICE SCALIA: It has to be arising from
21 services rendered. I mean, it -- it really has to be
22 part of the contract with the employer --

23 MR. VERRILLI: Well, I -- I don't think
24 that's right. For example, in the -- in the case of
25 most voluntarily provided health insurance, the vast

1 majority of employees in this country -- it's not
2 bargained for. It's something an employer provides
3 unilaterally --

4 JUSTICE GINSBURG: But there's one feature of
5 this that is -- does make it different, at least one,
6 and that is this is a benefit to the employer in the
7 way that the others are not. The employer -- there's a
8 tradeoff in workers' compensation. It's not just I'm
9 going to pay benefits when the person is injured, but
10 I'm going to get off the hook for the tort liability
11 that I might otherwise have. And in the other cases of
12 the other benefits, there is no -- no such tradeoff.

13 MR. VERRILLI: Well, the fact that there may
14 be a benefit to the employer doesn't make it any less
15 of an employee benefit. The question is whether there
16 is a plan that provides employee benefits, and the
17 insurance coverage provided by workers' compensation
18 are clearly employee benefits. I also -- and -- and,
19 of course, the with -- with respect to that tradeoff,
20 that's -- that tradeoff is an employee benefit too,
21 Justice Ginsburg, because the -- the employee has no-
22 fault liability, gets paid promptly rather than have to
23 sue and wait years, doesn't lose his or her job as a
24 result of the injury or as a result of bringing the
25 lawsuit. So I don't think you can make the judgment

1 that it's not an employee benefit plan on the basis of
2 that fact. And of course, voluntarily provided
3 benefits also benefit the employer by making it a more
4 attractive place to work and -- and --

5 JUSTICE STEVENS: May I ask this question,
6 Mr. Verrilli?

7 MR. VERRILLI: -- better morale.

8 JUSTICE STEVENS: Can I -- can I ask you --
9 it goes back to the first point your opponent made.
10 What is the purpose of granting the priority? It seems
11 to me the purpose of the priority is to increase the
12 likelihood that the wage claims will be paid. And if
13 you -- if you win, it won't affect it one way or
14 another, as you acknowledge in your brief. But it
15 seems to me the priority should serve the purpose of
16 increasing the likelihood that the benefits would
17 actually flow to the employee benefit plan.

18 MR. VERRILLI: I think there are four things
19 I'd like to say in response to that, Justice Stevens.

20 First, there isn't a textual hook for -- for
21 that being a determinant, and it -- and it --

22 JUSTICE STEVENS: Well, it talks about
23 contributions to an employee benefit plan which one
24 would not normally think of as paying insurance
25 premiums.

1 MR. VERRILLI: And the second thing -- well,
2 I think to the contrary, Justice Stevens. I think in
3 the overwhelming majority of instances, the
4 contributions employers make to employee benefit plans
5 is the payment of insurance premiums to secure the
6 benefits. Collectively bargained benefits provided by
7 union trusts are a small minority of the benefits that
8 are provided to workers in this country.

9 But -- but going back to the specific
10 question, of course, as Justice Alito's question
11 earlier suggested, in a multi-employer pension plan
12 situation, the plan is obligated by law to provide all
13 vested pension benefits whether or not the employee's
14 employer has defaulted on its payments into the fund.
15 So it's in exactly the same position as the insurance
16 company is with respect to that set of benefits, and
17 therefore, the argument doesn't draw a distinction
18 between the two.

19 JUSTICE SCALIA: Mr. Verrilli, what -- what
20 is your response to Mr. Strain's assertion that if you
21 get a priority, so should the secondary insurer, that
22 is, the -- the bank that gave letters of credit?
23 They're just insuring -- that -- that's part of the
24 plan too. They couldn't have gotten the insurance from
25 you unless they got the letters of -- of credit from

1 the bank, which is a kind of secondary insurance.

2 And also in the case of self-insurance, which
3 is something of a plan -- I -- I guess you'd call it a
4 plan -- what about the -- the person who puts up the
5 bond? That person is a kind of insurer, just as you
6 are. Do all of these people now -- now get bumped up
7 to the head of the line?

8 MR. VERRILLI: The answer is no. The statute
9 expressly covers this. The last provision of section
10 507 says no subrogation, and those would be subrogation
11 situations. So the statute just expressly covers it.
12 They aren't -- they don't get bumped up in the line,
13 period. I don't think there's any dispute about that.

14 If I could, though, return to a -- a point
15 that --

16 JUSTICE SCALIA: Where -- where does that
17 appear?

18 MR. VERRILLI: I'm sorry. I can't direct you
19 to where it is --

20 JUSTICE SCALIA: Yes, because it's not in the
21 briefs --

22 MR. VERRILLI: I'm sorry, Justice Scalia.

23 JUSTICE SCALIA: -- just -- just as the
24 contract isn't before us.

25 MR. VERRILLI: It should be in the briefs.

1 It's not, but that is what the last section of section 507
2 says, that those who are subrogated to the rights of
3 someone with a priority don't get the priority. So
4 that's just taken care of by the statute.

5 JUSTICE STEVENS: But if the payment of the
6 premiums doesn't increase the likelihood that the
7 employees will get the benefits, why should you get
8 priority?

9 MR. VERRILLI: It does increase the
10 likelihood, and it goes back to the example I was -- I
11 was discussing with Justice Souter earlier. And -- and
12 what -- it will not affect employees who are injured
13 before cancellation, but it will accelerate
14 cancellation. And as a result of accelerating
15 cancellation, employers who are injured after
16 cancellation will not get the benefits. And so it will
17 --

18 JUSTICE KENNEDY: What -- what about the --
19 the example we discussed, payment of a bond premium if
20 you're self-insured?

21 MR. VERRILLI: No. I think that -- I think,
22 again, that last section of 507 takes care of that.

23 JUSTICE SCALIA: How do we know what you've
24 just told us? Is that in the record? You're just
25 assuring us what the content of the insurance contract

1 is. Right? But we don't have the insurance contract.

2 MR. VERRILLI: The insurance contract is not
3 in the record. That's right, but the --

4 JUSTICE SCALIA: So we -- we have your
5 assurance that that's what happens here.

6 MR. VERRILLI: As a systematic matter -- it
7 seems to me as a systematic matter, this is what
8 insurance companies will do. I don't think that's
9 dependent actually, Justice Scalia, on -- on the
10 particular terms of this contract. I'm saying as a
11 systematic matter insurance companies --

12 JUSTICE SCALIA: Well, it has to be that way?
13 I could write a contract differently.

14 MR. VERRILLI: Well -- well, sure, but the
15 contracts comply with State law. State law sets notice
16 periods for cancellation, 10 days minimum, up to 30
17 days. We've cited those in our briefs. And so in most
18 States and in many States here, within as few as 10
19 days after nonpayment, you can cancel.

20 JUSTICE SCALIA: That's a --

21 JUSTICE GINSBURG: Mr. Verrilli, before --

22 JUSTICE KENNEDY: But I was -- can -- can I
23 -- I still don't quite understand the answer to the
24 bond premium question.

25 MR. VERRILLI: Well, that -- there would be

1 no priority there because that would be -- that would
2 be a subrogated claim, and the last section of section
3 of -- the last provision of section 507 says if you're
4 subrogated to a --

5 JUSTICE KENNEDY: No. No, it wouldn't be
6 subrogated. The bond premium -- the bonding company
7 says we're entitled to priority.

8 MR. VERRILLI: Well, I don't think --

9 JUSTICE KENNEDY: And it files the claim
10 directly with the bankruptcy.

11 MR. VERRILLI: -- I don't think that would be
12 a claim for contribution to the plan, Your Honor, in
13 the same sense that we're talking about here. The --
14 if I -- if I could --

15 CHIEF JUSTICE ROBERTS: You couldn't have the
16 plan without the bond, just as here you wouldn't have a
17 plan without the insurance policy. It's just a
18 different way of paying for the same thing.

19 MR. VERRILLI: Well, I'm -- I think there's
20 an order of -- there's another order of degree of
21 removal, and it would make it a harder question, I
22 suppose, as to whether there would be a -- whether
23 there would be a claim for priority in that context.

24 But I think, if I could, Mr. Chief Justice,
25 I'd like to return to the question of narrow

1 construction where we started the argument.

2 JUSTICE GINSBURG: May I detract you just for
3 a moment? On -- on a question of the statutory
4 history, correct me if I'm wrong, but originally, 1934,
5 the kind of claim that you have would be a seventh
6 priority claim. And then in '38, Congress said no
7 priority at all covering workers' compensation. And
8 then when Congress restored a priority, it ratcheted it
9 up to four or five, depending upon which version of the
10 statute we use. Is there any explanation why, when
11 Congress originally assigned first a very low priority
12 and then no priority, suddenly it gets up to be on a
13 par with the fringe benefits?

14 MR. VERRILLI: Yes. I think there are two
15 significant points there, Justice Ginsburg, in terms of
16 the history. First, in 1934 what Congress said was
17 that workers' compensation could be a provable claim.
18 It then said it's -- it gets the -- the seventh
19 priority, but the seventh priority was not a priority
20 specific to workers' compensation. It was a priority
21 that's -- it was a provision that said you get a
22 priority if State law provides the priority. In 1938,
23 what Congress did was wipe out that provision for all
24 State law granted priorities, not for workers' comp in
25 specific. So it doesn't seem to me it was a specific

1 judgment about workers' comp and its place in the
2 priority system.

3 And, of course, you didn't have the well-
4 developed system of employee benefit plans in the
5 1930's that you have now. And what Congress did, when
6 it enacted this provision in 1978, following closely
7 after ERISA, was to use language which is identical to
8 ERISA in providing a priority for employee benefit
9 plans which, as ERISA on its face, I think, makes
10 clear, would encompass workers' compensation plans.

11 CHIEF JUSTICE ROBERTS: Mr. Verrilli, your --
12 your friend's argument about the interrelation between
13 (a) (3) and (a) (4) seems like a compelling one. What is
14 your answer to that?

15 MR. VERRILLI: I think the complete
16 explanation for the relationship between (a) (3) and
17 (a) (4) was that Congress was trying to expand the scope
18 of the priority here without doing damage either to the
19 wage priority above it, which -- and -- and there would
20 have been damage to the wage priority above it if wages
21 were simply redefined to include the broader set of
22 employee benefits -- or to the priorities below.
23 Congress just took the aggregate amount. It seems to
24 me just an elegant solution that protects the wage
25 priority above, creates a new priority, and doesn't

1 disadvantage any of the -- any of the priority-holders
2 below. And I really do think that's the complete
3 explanation for the relationship between the two. You
4 really can't infer anything more than that.

5 But if I could just address the so-called
6 rule of narrow construction. Certainly there is a
7 sentence or two in Nathanson and Embassy Restaurant,
8 but those were such clear cases of statutory
9 construction that -- that the rule of narrow
10 construction, I submit, played no role there.

11 In many, many more cases in which this Court
12 has interpreted the priority provisions of the act and
13 the code, the Court has not mentioned this idea that
14 there's a rule of narrow construction or that the
15 principle of equality of distribution to creditors
16 should trump everything else. We've cited four in our
17 brief: Lewis, Shropshire, Ricketts, and SBA v.
18 McClellan, which by the way, expressly cut back on
19 Nathanson.

20 But there are many more cases. There's a
21 whole line of tax priority cases culminating in the
22 Reorganized CF&I Fabricators decision in which the
23 courts adjudicated the question of -- of the scope of
24 the tax priority. Most of the time, they find
25 priority. Occasionally they find no priority. But in

1 none of those cases is this so-called rule of
2 construction ever mentioned or the supposed primacy of
3 the rule of equality of -- of the principle of equality
4 of distribution ever mentioned.

5 CHIEF JUSTICE ROBERTS: Counsel, much of your
6 case hinges on the assumption that Congress
7 incorporated the ERISA definition into the bankruptcy
8 code. What -- what is your strongest evidence for
9 that?

10 MR. VERRILLI: Well, I think the fact that
11 the phrase is identical to the phrase that appears in
12 ERISA, employee benefit plan, is significant. ERISA
13 was one of the most substantial legislative
14 accomplishments of that decade of the 1970s. And so I
15 think the mere fact that the exact same language
16 appears in both places, importantly, however, with --
17 without the limiting qualification in section 507(a)(4)
18 that exists in ERISA itself with respect to workers'
19 compensation plans.

20 I also think that if the Court does look at
21 the legislative history, what -- what one learns from
22 the legislative history is that when the bill was
23 originally introduced to -- to create this priority, it
24 created a priority for -- proposed to create a priority
25 for pensions, insurance, and similar employee benefit

1 plans. The union representatives came in to Congress
2 and said that's too narrow. We need something
3 significantly broader to ensure that the full range of
4 employee benefits is protected and granted this
5 priority. What the union representatives all urged
6 Congress to do was to adopt the ERISA definition
7 wholesale.

8 Now, we don't have anything in the -- in the
9 House or Senate report saying that's what we did. In
10 other words, we intended to adopted ERISA wholesale,
11 but we do know that is what, in fact, they did. They
12 used exactly the language from ERISA and they moved it
13 into the priority in section 507.

14 JUSTICE STEVENS: To follow up on the earlier
15 question of the Chief Justice, by whom do you
16 understand the services have to be rendered within the
17 meaning of the act?

18 MR. VERRILLI: Well, I think that the -- I
19 think that the statute could be read --

20 JUSTICE STEVENS: Does it refer to the -- the
21 bankrupt's employees or your employees?

22 MR. VERRILLI: It could be the -- it could be
23 either, it seems to me, Justice Stevens.

24 JUSTICE STEVENS: You think it could be
25 either.

1 MR. VERRILLI: And I -- but I don't think it
2 matters in this case because you get to the same answer
3 either way. If it's the services rendered of the
4 employees, the -- the claim is for contributions to --
5 for the cost of providing insurance to those employees
6 during the 180 days. If it's the services rendered at
7 Zurich it's the provision of services during the 180 days --

8 JUSTICE SCALIA: But it's not just to those.
9 It's to a lot of other people. I mean, that's --

10 MR. VERRILLI: But it -- but it arises from.
11 The -- had -- I think it arises from in this sense,
12 Justice Scalia. Had Howard shut down on a certain day
13 and didn't have employees anymore, it wouldn't have any
14 continuing obligation to or need to pay workers'
15 compensation premiums because there would be no workers
16 to cover. And so it arises from --

17 JUSTICE SCALIA: Well, except the workers who
18 had already been injured in the past --

19 MR. VERRILLI: Right, but you don't need --

20 JUSTICE SCALIA: -- and -- and whom you
21 continue to pay. Right?

22 MR. VERRILLI: But -- yes. But not -- but --
23 but we -- let's see. I think that maybe this will
24 clear up the confusion. We continue to pay for them
25 even after the policy is over --

1 JUSTICE SCALIA: Right.

2 MR. VERRILLI: -- and -- but -- and so --

3 JUSTICE SCALIA: And I assume that each of
4 your premiums takes into account the fact that you're
5 not only going to be paying for people, you know, who
6 were injured between the last premium and now, but that
7 you're also going to be paying for people who were
8 injured a long time ago.

9 MR. VERRILLI: Well, depending on the kind of
10 policy, that may be true to some extent. Sometimes
11 policies are loss-sensitive policies in which the
12 amounts owed are calculated very carefully with respect
13 to the amounts actually of loss incurred during the
14 period. That is, in fact, the case here. If you have
15 an understanding of insurance, you can infer that from
16 the charts that are included in the joint appendix,
17 although I acknowledge it's very difficult to do so.

18 So I do think -- I do think on any common
19 sense understanding of the -- of the phrase, arising
20 from, which is a capacious phrase, it really does arise
21 from.

22 But in terms of -- I think, Justice Stevens,
23 with respect to your question, to get to the same
24 answer, in terms of calculating the amount of the
25 claim, whichever one you pick here, there's actually a

1 division of authority in the lower courts. There's a
2 Fourth Circuit opinion by Judge Luttig, saying it's
3 services rendered by the insurance company. Other
4 courts say services rendered by the employees. Since it
5 doesn't make a difference in this case, I would
6 respectfully suggest probably it ought not to be
7 decided in this case because you get to the same place
8 either way.

9 I do -- I do think that it's important also
10 -- I'm sorry. Excuse me. If I may just go back to the
11 narrow construction rule.

12 The -- the point of this idea of primacy of
13 equality of distribution. Equality of distribution is
14 an important policy under the bankruptcy code, but it's
15 only one important policy under the bankruptcy code.
16 Rehabilitation of the debtor is an important policy
17 under the code. The maximizing the value of the estate
18 is an important policy under the code, and specific
19 code provisions advance other specific policies as
20 well. So in any given case, as here, all of those co-
21 policies aren't going to align and point in the same
22 direction. Sometimes they're going to be at cross
23 purposes.

24 And what -- what the Court said in Union
25 Bank, in I think a closely analogous context

1 interpreting the ordinary course exemption from -- from
2 the preference rule, was that we don't put a thumb on
3 the scale either way here. We don't assume that one of
4 these policies is more important than the other. What
5 we assume is that Congress struck the balance between
6 the potentially competing policies, that the balance is
7 reflected in the text of the statute that Congress
8 enacted, and that we should interpret the text as it's
9 written without -- without a presumption in either
10 direction. I really think Union Bank is highly
11 instructive on that, and it's just -- it's just right
12 and plain common sense. And that's why I think in the
13 vast majority of cases, there is no rule of narrow
14 construction.

15 JUSTICE GINSBURG: What is -- what is
16 unemployment compensation? Those two I think of as
17 those are law-mandated coverage that every employer
18 must have: workers' comp and unemployment. So
19 what's unemployment, is that a plan too?

20 MR. VERRILLI: No, because the employer
21 doesn't have the obligation to provide unemployment
22 compensation. That's a State-run system in which the
23 State has the obligation to provide the benefit, and
24 the State does in fact provide the benefit. It's
25 usually funded through a tax. The key difference is

1 this is an employer obligation to provide these
2 benefits, and I think that's why this is an employee
3 benefit plan. The employer is obligated to provide it
4 to employees by virtue of the fact that the employees
5 are working for the employer. Not true about
6 unemployment compensation.

7 In conclusion, if I could just focus on the
8 -- the point that it really is the case that enforcing
9 this priority, as it is written, will advance the
10 purposes for which Congress included it in the code.
11 It will protect the interests of workers, millions of
12 whom have no employee benefit plan other than workers'
13 compensation, because it will increase the prospects
14 that that money is there to pay workers' compensation
15 claims.

16 It will also advance the code's purpose of
17 better rehabilitation because it will give insurance
18 companies a reason not to pull the hair trigger, to
19 hang in there with these companies, and to allow them
20 to have a chance to rehabilitate rather than forcing them
21 into liquidation by canceling coverage which the law
22 allows.

23 Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you, Mr.

25 Verrilli.

1 Mr. Strain, you have 4 minutes remaining.

2 REBUTTAL ARGUMENT OF PAUL F. STRAIN

3 ON BEHALF OF THE PETITIONERS

4 MR. STRAIN: Thank you, Mr. Chief Justice.

5 This Court 10 years ago in United States v.
6 Reorganized CF&I provided that -- I suggest, that the
7 engrafting of the ERISA definition into this bankruptcy
8 statute was improper. Almost word for word what we're
9 asking the Court to find about this engrafting of the
10 ERISA definition into the bankruptcy statute is dealt with
11 in plain language in this Supreme Court decision. It is
12 simply improper to do that, and yet, that is the answer
13 given by Zurich to the many probing hypotheticals about
14 parking lots and bottled water and the rest.

15 JUSTICE BREYER: Well, they're doing that to
16 get a standard.

17 MR. STRAIN: I'm sorry, Your Honor?

18 JUSTICE BREYER: And I'd like to know what
19 your -- they're trying to use that as a basis for
20 separating the bottled water from the workmen's comp
21 from the health benefit. And they're saying here's an
22 example of where Congress put the workers' comp on the
23 same side as the health benefit. Now, that's their
24 approach.

25 What's your approach to the standard? What

1 rule or system would you use from deciding which
2 insured-for or paid-for benefits count as the plan and
3 which ones don't?

4 MR. STRAIN: What we look to, Justice Breyer,
5 first of all, is whether it is a true wage substitute
6 rather than a policy to take care of a non-negotiable
7 statutory requirement that's --

8 JUSTICE BREYER: So if, in fact -- if, in
9 fact, the State legislature mandates certain health
10 benefits, then the plan that provides those benefits
11 would no longer qualify.

12 MR. STRAIN: That would be one significant
13 factor to consider, Your Honor. There are certainly
14 others, but that would be one significant factor to
15 consider. That is true.

16 And I -- I suggest to the Court that when we
17 look to the legislative history, as the questions were
18 asked about the legislative history, it is devoid of
19 any reference to the commission that recommended the
20 law, the House report or the Senate report, or even one
21 stray Congressman suggesting that workers' comp
22 insurance policies should get a priority. Not one.
23 The industry didn't even put up a representative to
24 make that suggestion at a hearing. It is devoid of any
25 support for putting this nose under the tent in the way

1 they suggest, and it truly is a broadening. It is not
2 subrogation. The bondholder would not have a
3 subrogated claim. F&M Bank would not have a subrogated
4 claim. They would have a claim, a direct claim, just
5 as Zurich does here.

6 And I think that the issue we come back to --
7 and I'm glad my brothers ended with that as well because
8 that's where we began. The issue is what is the
9 Court's proper approach to this attempt to enlarge the
10 priority under subsection (a)(4). It is not correct
11 that this Court departs from the idea that priorities
12 are a deviation from the bedrock principle of equality
13 of -- equality of distribution. That remains good law,
14 cited by this Court a number of times.

15 The cases they purportedly cite to the
16 contrary were plain language cases, were Embassy
17 Restaurant and Joint Industries Board. This Court
18 didn't even feel necessary to cite that principle
19 because of the -- because of the plain language. Where
20 is the plain language establishing clearly, as this
21 Court requires, that this is a plan? Where is the
22 plain language establishing clearly that this is an
23 employee benefit? The insurance policy. That's what
24 we're talking about. Not the workers' compensation
25 statute. The insurance policy may benefit the

1 employer. The statute may benefit the employee. But
2 we are talking about contributions to an employee
3 benefit plan. Zurich's insurance policy is neither.

4 Unless there are further questions, Mr. Chief
5 Justice, that concludes my argument.

6 CHIEF JUSTICE ROBERTS: Thank you, Mr.
7 Strain.

8 MR. STRAIN: Thank you.

9 CHIEF JUSTICE ROBERTS: The case is
10 submitted.

11 (Whereupon, at 11:11 a.m., the case in the
12 above-entitled matter was submitted.)

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