

ORIGINAL

In the

Supreme Court of the United States

UNDERWRITERS NATIONAL ASSURANCE)
COMPANY,)
)
Petitioner,)
v.) NO. 80-1496
)
NORTH CAROLINA LIFE AND ACCIDENT)
AND HEALTH INSURANCE GUARANTY)
ASSOCIATION ET AL.)

Washington, D. C.

November 9, 1981

Pages 1 thru 60

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNDERWRITERS NATIONAL ASSURANCE :

4 COMPANY, :

5 Petitioner, :

6 v. : No. 80-1496

7 NORTH CAROLINA LIFE AND ACCIDENT :

8 AND HEALTH INSURANCE GUARANTY :

9 ASSOCIATION ET AL. :

10 - - - - - :

11 Washington, D. C.

12 Monday, November 9, 1981

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States at
15 10:05 o'clock a.m.

16 APPEARANCES:

17 THEODORE R. BOEHM, ESQ., Indianapolis, Indiana;
18 on behalf of the Petitioner.

19 WILLIAM S. PATTERSON, ESQ., Raleigh, North
20 Carolina; on behalf of the Respondents.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Number 80-1496, Underwriters National Assurance Company against the North Carolina Life and Accident Association.

I think we will wait just a moment, counsel, for our friends to go and sign the register.

(Pause.)

CHIEF JUSTICE BURGER: You may proceed whenever you are ready.

ORAL ARGUMENT OF THEODORE R. BOEHM, ESQ.,
ON BEHALF OF THE PETITIONER

MR. BOEHM: Mr. Chief Justice, and may it please the Court, this case raises the question whether the Indiana judgments relating to the rehabilitation of UNAC, as the insurance company involved in this case is colloquially called, are entitled to full faith and credit in North Carolina as a result of the procedures that were implemented.

There are two judgments of the Indiana Court that UNAC submits are entitled to full faith and credit, and preclude relitigation of the issues that the Respondents seek to raise.

The history of this proceeding started in 1974, when the Indiana Department of Insurance, pursuant to a

1 statutory mandate to take over the operations of a failing
2 insurance company organized under Indiana law, did just
3 that. As a result, pursuant to the Indiana statute, the
4 Indiana Insurance Commissioner, as rehabilitator, became in
5 possession of the business and assets of UNAC. That is the
6 statutory language.

7 Subsequent to that time, a notice was sent out by
8 the Court. The first notice that went out in 1975 was a
9 Rule 23(B)(3) notice with which this Court is fully
10 familiar, because Indiana trial procedure is exactly the
11 same as federal trial procedure in this respect, and just
12 about exactly at the same time that the Indiana Commissioner
13 took over UNAC, UNAC was sued in two class actions, one in
14 state court in Illinois and one in federal court in
15 Virginia.

16 The state court in Illinois case was removed to
17 federal court in Illinois, and each case was then stayed
18 pursuant initially to an injunction issued by the Indiana
19 court and then ultimately by agreement. The class
20 plaintiffs in those two lawsuits then intervened in the
21 Indiana proceeding, and those class plaintiffs were
22 ultimately certified as class plaintiffs on behalf of all
23 policyholders.

24 The claims they were asserting were essentially
25 that UNAC had defrauded the policyholders into entering into

1 the policyholder relationship. So, the first thing that
2 went out was a Rule 23(B)(3) notice with respect to those
3 claims. It also explicitly told the policyholders that
4 whether or not you opt out of the class pursuant to Rule
5 23(B)(3), you may ultimately be bound by a plan of
6 rehabilitation in your capacity as a policyholder. We don't
7 know at this time whether there will be a plan of
8 rehabilitation, but if there is one, you are in court in
9 Indiana in your policyholder capacity, irrespective of
10 whether you want these plaintiffs to represent you in
11 prosecuting these fraud claims. So, there are two
12 jurisdictional hooks, if you will, operating on this
13 situation.

14 No North Carolina policyholder opted out. As a
15 result, all of the North Carolina policyholders were in
16 court in Indiana, both as class plaintiffs and as
17 policyholders.

18 QUESTION: If one had opted out, would we have a
19 different situation?

20 MR. BOEHM: Well, we would have a different
21 situation with respect to one issue, but not as to the
22 fundamental issue that UNAC relies on, which is that qua
23 policyholders, the policyholders are bound by the plan of
24 rehabilitation, which is entitled to full faith and credit
25 in all states once entered as a judicial decree.

1 There is a second, if you will, fall-back position
2 that UNAC has that they are also bound as non-opting out
3 plaintiffs by a settlement of their class claims as well,
4 but that raises another whole complex of issues as to the
5 nature of a multi-state Rule 23(B)(3) claim, and how the
6 plaintiffs relate to the state of jurisdiction.

7 There are cases that hold, and they are cited in
8 our brief -- the Kansas Supreme Court Shutts case is the
9 leading one, that holds that a plaintiff who is a member of
10 a class is in court and can be bound even though he is not a
11 resident of the state and has no other jurisdictional
12 connection with the state, but that issue is only reached in
13 this case if you should hold, which we submit would be
14 incorrect, that UNAC's plan of rehabilitation cannot bind
15 the policyholders as such.

16 QUESTION: Mr. Boehm, in one of the two Indiana
17 actions, some of the North Carolina parties' action
18 intervened, did they not?

19 MR. BOEHM: Yes, sir. At that point in my
20 narrative, that happened. The North Carolina Guaranty
21 Association intervened at the point after the class was
22 certified, and after the time for opting out had expired,
23 but before any plan of rehabilitation had been implemented.

24 The North Carolina Guaranty Association, as you
25 know, is here in its capacity as assignee of the

1 policyholders' claims by operation of the North Carolina
2 statutory framework, which makes them liable to make good on
3 the policyholders but also gives them whatever rights it
4 gives the company.

5 QUESTION: Mr. Boehm, is that the group that has
6 an appeal pending in the Indiana courts?

7 MR. BOEHM: Yes.

8 QUESTION: From which of the judgments, the
9 rehabilitation --

10 MR. BOEHM: The second.

11 QUESTION: The second?

12 MR. BOEHM: The second.

13 QUESTION: And that is the basic one, is it?

14 MR. BOEHM: That is really the supplemental.

15 QUESTION: Supplemental.

16 MR. BOEHM: Yes, sir.

17 QUESTION: What is the status of that appeal now?

18 MR. BOEHM: It is pending. Oral argument was held
19 a few months ago, and the court took it under submission and
20 indicated that it would stay proceedings pending a
21 resolution of this Court's proceeding.

22 QUESTION: Until this Court decides.

23 MR. BOEHM: They are waiting for you, is what it
24 boils down to.

25 QUESTION: But there was never any appeal from the

1 1976 --

2 MR. BOEHM: That is correct, and that is the key
3 point, or a key point. That 1976 judgment that implemented
4 the plan of rehabilitation is binding, and the time for
5 appeal has run, and it is entitled to full faith and credit.

6 Now, when the North Carolina Guaranty Association,
7 subsequent to the plan's implementation, and subsequent to
8 its becoming a binding final judgment, instituted a lawsuit
9 in North Carolina. At that point, UNAC went back into court
10 under the continuing jurisdiction provisions of the
11 rehabilitation decree and said essentially, court, what do
12 we do? We have been sued in North Carolina, we think we
13 shouldn't be continuing to honor the service agreement that
14 we've got with the Guaranty Association, if they are
15 claiming they are entitled to something beyond what they get
16 under the rehabilitation plan.

17 The Indiana court then held another hearing at
18 which the North Carolina Guaranty Association appeared and
19 argued and was heard and presented its arguments.
20 Essentially, the issue presented by that hearing was, is the
21 first judgment conclusive, and the Indiana court said, yes,
22 I decided this once before, and I am deciding it again, and
23 I had jurisdiction then and I have it now, and that is the
24 end of the matter.

25 Now, that is what is on appeal, that second order.

1 QUESTION: Mr. Boehm, did that occur after the
2 proceeding in North Carolina?

3 MR. BOEHM: It occurred before any judgment was
4 entered in North Carolina. It was after the complaint was
5 filed and before any judgment or summary judgment motion was
6 entered.

7 QUESTION: So which takes precedence --

8 MR. BOEHM: The Indiana court.

9 QUESTION: -- on the litigation of the
10 jurisdictional question?

11 MR. BOEHM: The Indiana court clearly under
12 settled rules of res judicata. The first judgment wins, I
13 think, under settled rules of both Indiana and federal
14 procedure.

15 QUESTION: Is it your position that the question
16 of subject matter jurisdiction was fully litigated in the
17 Indiana court?

18 MR. BOEHM: Yes, although I am frank to say,
19 Justice O'Connor, I don't know what subject matter
20 jurisdiction means in this context. Subject matter
21 jurisdiction in the federal context means, is there a
22 federal question, is there diversity. In the state context,
23 we had a court here of general jurisdiction in Indiana, and
24 it had jurisdiction to adjudicate any dispute, any dispute
25 that is cognizable by an Indiana court, and this is one of

1 them. The only question is, did it have personal
2 jurisdiction, we submit, over the parties, and it clearly
3 did as to the North Carolina Guaranty Association.

4 QUESTION: Mr. Boehm, does the Indiana statutory
5 scheme provide for judicial review of the administrative
6 proceedings leading to rehabilitation?

7 MR. BOEHM: Oh, yes. Indeed, it is a judicial
8 decree, Your Honor. All the --

9 QUESTION: Yes. The ultimate rehabilitation
10 decree is a judicial decree.

11 MR. BOEHM: Yes, sir, it is a judgment of a court
12 of general jurisdiction. Indeed, all the administrative
13 proceeding is, it is not an administrative proceeding at
14 all. The administrator is a party to the proceeding, and he
15 proposes a plan of rehabilitation. You then send out a
16 notice to everybody in the world who might be affected by
17 it, which included, by the way, the state insurance
18 commissioners of all 50 states as well as policyholders,
19 creditors, agents, all manner of people.

20 You then hold a hearing at which everybody --

21 QUESTION: Including the custodian of this North
22 Carolina fund?

23 MR. BOEHM: Well, it is argued that the
24 Commissioner of Insurance is the custodian. Now, apparently
25 under Indiana -- under North Carolina law the deposit is

1 made with the Insurance Commissioner, who then registers it
2 in the name of the treasurer, but it is the Insurance
3 Commissioner who receives the deposit and to whom UNAC gave
4 it. Now, if he turned around and holds it in street name,
5 if you will, that is his business, is our view. It is the
6 Insurance Commissioner who is the arm of the state of North
7 Carolina that is involved here, and he was given notice.

8 QUESTION: Is this not in effect a streamlined
9 statutory receivership, much like an old-fashioned
10 receivership?

11 MR. BOEHM: Yes, sir, that is exactly what it is,
12 I think, in common sense terms.

13 QUESTION: It merely is tailored to fit the
14 particular industry here.

15 MR. BOEHM: That is right, and the reason, of
16 course, that you have a statutory proceeding is that the
17 bankruptcy laws don't apply to insurance. Otherwise, you
18 really wouldn't need this -- this relatively unusual state
19 law creature.

20 QUESTION: Did the Insurance Commissioner of North
21 Carolina take any part in the Indiana case?

22 MR. BOEHM: No.

23 QUESTION: You said he did receive notice.

24 MR. BOEHM: Yes.

25 QUESTION: And I think you said the treasurer of

1 North Carolina, in whose name the bonds were registered,
2 took no part either.

3 MR. BOEHM: That's correct.

4 QUESTION: And both of those officers are parties
5 to this case.

6 MR. BOEHM: That's correct. They are parties
7 defendant, by the way. The plaintiffs sued them along with
8 UNAC for whatever interest they may have. They then filed a
9 cross claim that in effect asked for no relief. It is our
10 view that they are nominal parties at best.

11 QUESTION: Well, Mr. Boehm, I gather, of course,
12 the Indiana court took the position that this fund, whatever
13 you want to call it, the deposit was before it.

14 MR. BOEHM: Not exactly, sir.

15 QUESTION: Right.

16 QUESTION: Justice Brennan, what was before it was
17 the beneficial interest of UNAC in the fund. In other
18 words, this -- the Indiana courts did not adjudicate the
19 trust, if you want to use the parlance of the North Carolina
20 parties, was invalid. It adjudicated, to use the trust
21 analogy, that the beneficiaries had assigned their interest
22 to UNAC in exchange for ongoing insurance.

23 QUESTION: And is that the holding of the Indiana
24 rehabilitation court?

25 MR. BOEHM: I think that is a fair

1 characterization of it in those terms.

2 QUESTION: How did it say the deposit or the
3 interest in the deposit got before it?

4 MR. BOEHM: It said that all parties before it are
5 before -- the policyholders are before it, and that whatever
6 claims they have against any asset of UNAC, which includes
7 UNAC's beneficial interest in the trust, are hereby
8 compromised and dismissed.

9 QUESTION: Was that resisted? Was that issue
10 contested in the Indiana court?

11 MR. BOEHM: No.

12 QUESTION: Of course, as you said, the North
13 Carolina authorities never appeared.

14 MR. BOEHM: Well, the policyholders appeared and
15 the North Carolina Guaranty Association appeared, and the
16 Commissioner --

17 QUESTION: But neither resisted the --

18 MR. BOEHM: That's correct.

19 QUESTION: -- the insistence that the equitable
20 interest belonged --

21 MR. BOEHM: There was no argument about that
22 deposit or any deposit in any other state. The only issue
23 about deposits that caused problems were those outside the
24 United States, where there was a real question, and the plan
25 explicitly dealt with the problem that we don't have a full

1 faith and credit clause that binds --

2 QUESTION: Well, didn't the policyholders appear
3 only through the association? I mean, no policyholders were
4 there in person.

5 MR. BOEHM: Oh, roughly 40 policyholders were
6 there in person.

7 QUESTION: Through their attorneys?

8 MR. BOEHM: But none of them were North Carolina
9 -- yes.

10 QUESTION: Well, but no North Carolina
11 policyholder was there --

12 MR. BOEHM: That's correct.

13 QUESTION: -- except to the extent that they had
14 assigned their claims by operation of law to the association.

15 MR. BOEHM: Well, they were there in the
16 metaphysical sense, Justice White.

17 QUESTION: Well, only through the association.

18 MR. BOEHM: No, they were there -- if nobody had
19 ever intervened in this proceeding, the policyholders --

20 QUESTION: I know, that is your fall-back position.

21 MR. BOEHM: No, no, that is not our fall-back
22 position, if I may respectfully --

23 QUESTION: Well, you say you were there only
24 because they were parties to a class action.

25 MR. BOEHM: No, that's the fall-back position.

1 They are also there because they are policyholders of the
2 company, and if no policyholder had intervened, we still
3 could have had a valid rehabilitation, simply by sending
4 them notice.

5 QUESTION: Well, you ought to be glad you don't
6 have to argue that.

7 MR. BOEHM: Well --

8 QUESTION: Because you certainly can argue that
9 they were there through the association.

10 MR. BOEHM: Oh, yes, we have that position, which
11 is a good position and a winning position. But if that had
12 not happened --

13 QUESTION: You only need to win on one, don't you?

14 MR. BOEHM: Sure. We've got three, really.

15 QUESTION: Does that position depend on North
16 Carolina law?

17 MR. BOEHM: No. No, it depends on Indiana law.

18 QUESTION: Indiana decides as to who has
19 possession of that money in North Carolina?

20 MR. BOEHM: No, sir. Indiana decides --

21 QUESTION: Well, that is what I am talking about.

22 MR. BOEHM: Indiana does not decide that it had
23 that pot, nor did Indiana decide that if the North Carolina
24 policyholder had wished to assert a claim against that pot
25 in North Carolina it couldn't have done so. They could have

1 done so. A North Carolina claim either in North Carolina --

2 QUESTION: I just don't see how Indiana courts got
3 jurisdiction over the money in North Carolina.

4 MR. BOEHM: They didn't. They got jurisdiction
5 over the claim of UNAC to that --

6 QUESTION: Well, how can they get -- is that a
7 North Carolina claim?

8 MR. BOEHM: Well, it's in Indiana, where UNAC is,
9 just like all of the assets are. In fact --

10 QUESTION: Is that determined by North Carolina
11 law?

12 MR. BOEHM: No, it is determined by Indiana law.

13 QUESTION: Well, how can Indiana law apply to
14 North Carolina?

15 MR. BOEHM: It doesn't, except in the sense that --

16 QUESTION: Isn't that what you are trying to do?

17 MR. BOEHM: Well, no. All we are saying is that
18 every policy --

19 QUESTION: Well, suppose when this case is over
20 and you win, and North Carolina says, come and get it.

21 MR. BOEHM: We are -- it is on deposit in North
22 Carolina. If we default --

23 QUESTION: How could you get it?

24 MR. BOEHM: We can't. I mean, it is on deposit
25 pursuant to this arrangement --

1 QUESTION: Well, what am I talking about then if
2 the money is not involved?

3 MR. BOEHM: Well, the money continues to remain in
4 North Carolina in --

5 QUESTION: Is the money what is involved in this
6 case?

7 MR. BOEHM: Well, I guess it is fair to say we are
8 all here because --

9 QUESTION: If not, where do we get jurisdiction?

10 MR. BOEHM: I beg your pardon, sir?

11 QUESTION: If not, where do we get jurisdiction?

12 MR. BOEHM: Where does this Court get
13 jurisdiction? Or where does Indiana court? I am not sure I
14 understand the question, sir.

15 QUESTION: If money is not what is involved, how
16 does this Court get jurisdiction?

17 MR. BOEHM: Well, the dispute to the rights to the
18 money are involved. What North Carolina is saying is that
19 it can liquidate that sum and pay it over to the Guaranty
20 Association.

21 QUESTION: And you say it isn't in dispute as to
22 money and money.

23 MR. BOEHM: Yes, and we are saying they can't do
24 that --

25 QUESTION: Okay. All right.

1 MR. BOEHM: -- because the Indiana court
2 adjudicated all that and it is res judicata.

3 QUESTION: May I ask, Mr. Boehm, I gather -- or is
4 it your position that because you had those -- or Indiana
5 courts, rather, had the Guaranty Association before it, it
6 had that jurisdiction. Even if it had no jurisdiction over
7 the fund itself, nevertheless the Indiana court may enforce
8 its order requiring that the fund be part of the assets. Is
9 that it?

10 MR. BOEHM: Yes, sir. That is a position. That
11 is actually another fall-back position. The basic position
12 is that a rehabilitation works even if nobody appears in
13 Indiana court, that all you need to do to adjust the rights
14 of the Indiana policyholders and all policyholders in the
15 United States is send them a notice and say, here is our
16 plan of reorganization, just like a bankruptcy court does,
17 and to the extent that you are a policyholder of this
18 company, unless you appear and object, your rights are going
19 to be adjusted by this plan, and if you can't do that, you
20 can't rehabilitate an insurance company.

21 QUESTION: Do you think you have some old
22 receivership cases that said that the receivership court
23 could adjudicate the claims to assets outside the state if
24 no one who has -- who had any claim to those assets appeared
25 in the receivership court? That is what you are essentially

1 saying.

2 MR. BOEHM: Well, I --

3 QUESTION: That this rehabilitation proceeding
4 could adjudicate claims to property in North Carolina even
5 though the people who also had claims to that property never
6 appeared in the receivership proceeding? That seems to be
7 your basic position.

8 MR. BOEHM: I am not sure.

9 QUESTION: And yet -- I don't know. Must you win
10 on this ground?

11 MR. BOEHM: No. No, we can win on the ground that
12 Justice Brennan articulated, and that --

13 QUESTION: Well, then you can win on the ground
14 that the policyholders are there through the association.

15 MR. BOEHM: Sure. That only works for North
16 Carolina.

17 QUESTION: And that they -- and that they had a
18 chance to litigate everything they wanted to.

19 MR. BOEHM: That's correct.

20 QUESTION: On behalf of the shareholder.

21 MR. BOEHM: That's correct. That would determine
22 this case as to the North Carolina policyholders.

23 QUESTION: But even if the policyholders weren't
24 there, doesn't the full faith and credit clause, assuming
25 that there was jurisdiction in the Indiana courts, require

1 North Carolina to recognize the Indiana decree?

2 MR. BOEHM: Absolutely.

3 QUESTION: Well, yes, that is if it is bound by
4 the jurisdictional holding, but who is bound by a
5 jurisdictional determination if he hasn't had a chance to
6 litigate it?

7 MR. BOEHM: Well, Your Honor --

8 QUESTION: And who litigated it in Indiana?

9 MR. BOEHM: The North Carolina Guaranty
10 Association did, the second time.

11 QUESTION: Right.

12 MR. BOEHM: The first time --

13 QUESTION: There is it, and there are the
14 shareholders, the policyholders, and they are there
15 litigating jurisdiction, or at least they had a chance to.

16 MR. BOEHM: I don't disagree for a moment that
17 that is dispositive of this case, but there is another, more
18 fundamental point.

19 QUESTION: If the question of jurisdiction had
20 never come up in the Indiana court and the policyholders
21 weren't there, they had never had a chance to litigate it
22 except from way back in North Carolina, just the recitation
23 of having jurisdiction would be --

24 MR. BOEHM: No, but the policyholders --

25 QUESTION: Would it, or not?

1 MR. BOEHM: Well --

2 QUESTION: It has to be litigated.

3 MR. BOEHM: -- I don't accept the premise that the
4 policyholders weren't there. The policyholders --

5 QUESTION: No, I said assume they weren't there
6 through the Association.

7 MR. BOEHM: All right. I am saying they were
8 there --

9 QUESTION: I know that. I want you to assume that
10 they were not there.

11 MR. BOEHM: No, but I am saying, they were there
12 other than through the Association. They were there at
13 least to the extent of their claims against UNAC. There is
14 an in rem jurisdiction --

15 QUESTION: But not with respect to their claims
16 against property in North Carolina.

17 MR. BOEHM: Well, they assigned those claims.
18 That was what the deal was. They took on --

19 QUESTION: Well, I don't think you can have it
20 both ways. Either they were there through the Association
21 or they weren't.

22 MR. BOEHM: Well, they were there through the
23 Association; they were also there in their capacity as class
24 plaintiffs and in their capacity as policyholders. In other
25 words, they were there in three capacities, in our

1 submission.

2 QUESTION: Well, you certainly have a simple claim
3 at the front end of your --

4 MR. BOEHM: Oh, I agree.

5 QUESTION: It may be right or wrong, but I don't
6 know why we have to try to settle all of your problems that
7 you have all around the United States.

8 QUESTION: What would be the situation if this
9 were in a bankruptcy framework, traditional bankruptcy?

10 MR. BOEHM: There would be no question that a
11 nationwide notice to all creditors everywhere would bind
12 everyone, I think. That would be, of course, as a matter of
13 federal law. Now, I am not a bankruptcy expert, but I am
14 quite confident that is correct, that a reorganization under
15 the bankruptcy laws works nationwide.

16 QUESTION: Mr. Boehm, let's assume for the moment
17 that there was a creditor in North Carolina, your insurance
18 company, and that that creditor had, let's say had a
19 mortgage on North Carolina property or he had a North
20 Carolina judgment that gave him a lien on North Carolina
21 property. Is it your position that the Indiana court,
22 without the presence of either the rece or the creditor
23 could have wiped it out or adjusted it, taken the property
24 away and given him a general claim?

25 QUESTION: Just by sending him notice and say,

1 show up or else?

2 MR. BOEHM: I think ultimately that would be our
3 position, yes, that that is what it means to say that the
4 Indiana statute has -- that the Indiana commissioner assumes
5 title to whatever beneficial interest the company has.

6 QUESTION: Do you think an old-fashioned receiver
7 could do that?

8 MR. BOEHM: No, I think that the Indiana statute
9 gives the insurance rehabilitator, because of the unique
10 nature of insurance, that power. In that sense, the
11 receivership analogy breaks down, I think.

12 QUESTION: Yes. That is where it -- the Indiana
13 law can take away the rights of the North Carolina
14 policyholders.

15 MR. BOEHM: Well, that is just the --

16 QUESTION: You see, that is my problem.

17 MR. BOEHM: That is the deal the policyholder
18 makes when he contracts with an Indiana insurance company.

19 QUESTION: He shouldn't buy insurance in an out of
20 state company if he doesn't want to take that risk. Is that
21 your position?

22 MR. BOEHM: That is exactly what it amounts to.
23 And indeed, consider what the situation is if that is not
24 the law, if we can't bind all creditors everywhere. How do
25 you rehabilitate an insurance company.

1 QUESTION: Yes, but why does your company want to
2 sell in North Carolina if it doesn't accept the North
3 Carolina law requiring it to make deposits?

4 MR. BOEHM: Oh, it does. It does. And if a North
5 Carolina policyholder had said, I don't want my rights under
6 the rehabilitation plan, I want my rights under the deposit,
7 he gets them, plain and simple. The problem is, that didn't
8 happen in regard to --

9 QUESTION: How did he say that?

10 MR. BOEHM: We sent him an elaborate plan, 40
11 pages long, that says in six places --

12 QUESTION: And you take his assent from silence?

13 MR. BOEHM: Well, that's correct.

14 QUESTION: Yes.

15 MR. BOEHM: That's correct.

16 QUESTION: That's like in default, if you don't
17 answer a complaint in a lawsuit, you --

18 MR. BOEHM: Yes.

19 QUESTION: -- you assent to whatever default
20 judgment may be entered, do you not.

21 MR. BOEHM: That's right, and you assent to that
22 proceeding by entering into a contract with the Indiana
23 company.

24 QUESTION: That isn't so in an ordinary contract
25 suit, if the defendant happens to be out of state.

1 MR. BOEHM: Of course it is not, but you don't
2 have a statute that says, in the event your insurance
3 company becomes insolvent, the Insurance Commissioner in his
4 state of domicile is going to take him over and may adjust
5 your rights vis-a-vis him.

6 QUESTION: Mr. Boehm, do you make anything of
7 McCarren-Ferguson in respect of the authority of the Indiana
8 Insurance Commissioner?

9 MR. BOEHM: The only point we make of
10 McCarren-Ferguson is that it evidences a Congressional
11 policy to support state regulatory schemes, and to that
12 extent it supports the notion that the Indiana Commissioner
13 can do exactly --

14 QUESTION: That still doesn't eliminate the full
15 faith and credit federal constitutional question we have
16 here.

17 MR. BOEHM: It does not, I don't believe, although
18 it could be viewed as a Congressional policy in part
19 implementing the delegation of Congress to legislate under
20 full faith and credit to support these state schemes, and
21 indeed, what the Indiana Commissioner did here is what every
22 rehabilitator does in every multi-state rehabilitation, and
23 there is no alternative. If they cannot adjust all these
24 things, where are we? How do --

25 QUESTION: There is no federal tribunal.

1 MR. BOEHM: There is no federal tribunal, and
2 there is only one state that seeks to do this. This is
3 completely unlike the Delaware Stott sequestration
4 situation, where the jurisdiction that is asserted is
5 different from the claim that is being adjusted.

6 Here, the only jurisdiction that is being asserted
7 is over the very claim that is in dispute.

8 QUESTION: Mr. Boehm, could you help me with a
9 simple factual question here? Would you tell me what
10 happens to the \$100,000 bond in North Carolina if you win
11 and what happens if you lose?

12 MR. BOEHM: If we win --

13 QUESTION: In terms of what happens to
14 policyholders and to your opponent.

15 MR. BOEHM: If we win, it stays there.

16 QUESTION: I understand the bond stays there, but
17 what happens to -- how much difference does it make in terms
18 of dollars to policyholders? What is happening to the
19 policyholders? There are only about a dozen of them, I
20 think.

21 MR. BOEHM: The policyholders have no interest in
22 this litigation. The policyholders have assigned their
23 claims to the North Carolina Guaranty Association.

24 QUESTION: All right, so that if your opponent is
25 -- it is the Guaranty Association that gets the benefit of

1 your defeat, if at all.

2 MR. BOEHM: Yes.

3 QUESTION: Now, just exactly what does it get?

4 Does that help it pay premiums, or help it pay claims?

5 MR. BOEHM: It just gets the money, and it puts it
6 in its general asset, and it is that much richer, so that it
7 can -- I mean, it is going to pay the claims whether or not
8 it gets the money from us. It is solvent. It is an
9 association of insurers with over 600 members, all the big
10 insurance companies that do business in North Carolina.

11 QUESTION: And it does business in states other
12 than North Carolina?

13 MR. BOEHM: No.

14 QUESTION: It does not?

15 MR. BOEHM: There is a separate one created under
16 the statute of every state that has one. The oddity here
17 is, the Guaranty Associations are a relatively recent
18 national phenomenon.

19 QUESTION: But am I correct in believing that the
20 policy -- the 17 or 18 policyholders in North Carolina have
21 no interest in the outcome of this litigation?

22 MR. BOEHM: They have absolutely none. They have
23 assigned whatever claim they have against UNAC or any of its
24 assets to the Guaranty Association, and in exchange --

25 QUESTION: And what additional burden has the

1 Indiana rehabilitation proceeding put on the Guaranty
2 Association? What obligation do they have that they did not
3 otherwise have?

4 MR. BOEHM: They have to make up the difference
5 between what the policyholders will get under the
6 restructured policy and what they had under the original
7 policy as written. In other words, essentially what caused
8 the rehabilitation to take place was, the company was
9 writing Cadillac policies at Volkswagen prices. The
10 Guaranty Association has to now deliver that Cadillac, and
11 gets the Volkswagen income, if that is --

12 QUESTION: They are basically a reinsurer.

13 MR. BOEHM: It puts them in that posture, yes.

14 QUESTION: Mr. Boehm, before the Guaranty Fund was
15 created, the policyholders would have had a very serious
16 interest in the outcome of this case, wouldn't they?

17 MR. BOEHM: Yes. Well, assuming they -- yes, and
18 they could have then elected to assert a claim against the
19 deposit. Now, there is one point that needs to be made.
20 They have no practical need -- I mean, this is a little
21 deposit. It is a \$100,000 face bond. It may be \$50,000.
22 One judgment that the Indiana Commissioner had to make was,
23 does it make any sense at all to have little
24 mini-liquidations going around all over the nation over
25 essentially immaterial amounts of money? The legal

1 profession would be the only beneficiary of that doctrine.
2 No policyholder would end up better over a squabble over how
3 to handle that \$50,000. I mean, that is the practicality of
4 this thing. And only because we've got a solvent entity
5 that can pursue this claim do we find ourselves in Court
6 here today, that has an interest that it seeks to assert.

7 May I save the rest of my time?

8 QUESTION: Mr. Boehm, is the position on the North
9 Carolina officials in this litigation different from anyone
10 else?

11 MR. BOEHM: Well, I think -- yes. They have no
12 interest, first. Second, they were given the same notice
13 anybody else has, and by the way, the North Carolina Uniform
14 Insurance Liquidation Act expressly gives the Commissioner
15 the election to seek to foreclose the deposit in that state
16 if it wants to, if he determines -- if he determines that it
17 makes economic sense to do so. He didn't do that. The plan
18 went through, became a binding judgment, and now, after the
19 fact, the Guaranty Association, having litigated this twice,
20 wants to relitigate.

21 QUESTION: Well, Mr. Boehm, the treasurer did not
22 receive notice. Is that correct?

23 MR. BOEHM: Yes, he -- of the second provision,
24 but not the first.

25 QUESTION: And in any event --

1 MR. BOEHM: But he is the custodian.

2 QUESTION: -- it is your position that his
3 interest is not such that he requires notice?

4 MR. BOEHM: That's right.

5 QUESTION: That is, the state --

6 MR. BOEHM: The state of North Carolina's arm that
7 is in charge of this situation is the Insurance
8 Commissioner, not the treasurer. He is just a registered
9 holder. He has no interest in the thing other than doing
10 what the Commissioner tells him to do.

11 May I save the rest of my time for rebuttal?

12 CHIEF JUSTICE BURGER: Mr. Patterson?

13 ORAL ARGUMENT OF WILLIAM S. PATTERSON, ESQ.,

14 ON BEHALF OF THE RESPONDENTS

15 MR. PATTERSON: Mr. Chief Justice, and may it
16 please the Court, as a condition to its doing business in
17 North Carolina, UNAC agreed to transfer title to securities
18 to a trust located in North Carolina, and subject to North
19 Carolina trustees. UNAC agreed that the sole purpose of
20 this trustee, of this trust would be for the protection of
21 North Carolina policyholders in the event that UNAC should
22 default on any of its obligations, whether by reason of
23 insolvency or otherwise.

24 UNAC subsequently became insolvent. The final
25 order of rehabilitation in the Indiana court allowed UNAC to

1 substantially diminish its policy obligations owed to
2 policyholders in return for UNAC being allowed to continue
3 to do business.

4 During the entire pendency of the rehabilitation
5 proceeding, there was not one single notice to the
6 policyholders of the existence of this deposit or their
7 special statutory rights in the deposit. UNAC -- or the
8 rehabilitation proceeding in Indiana was conducted as if the
9 deposit did not exist. No one, least of all the
10 policyholders, had any idea that UNAC was -- or that the
11 rehabilitation proceeding was attempting to assert
12 jurisdiction over this deposit.

13 QUESTION: Mr. Patterson, your client knew about
14 it, didn't it?

15 MR. PATTERSON: Our client was aware of the
16 deposit, Justice Stevens, but it had absolutely no reason to
17 believe that UNAC was attempting to assert jurisdiction over
18 it. This was --

19 QUESTION: Didn't they schedule it as an asset in
20 their balance sheet, whatever it was?

21 MR. PATTERSON: The deposit was scheduled, and I
22 think this is discussed at some length in the briefs,
23 because of this discrepancy, the deposit was listed in the
24 balance sheet of the convention blanks that UNAC filed with
25 the North Carolina Department of Insurance and with the

1 other Departments of Insurance. However, the deposit in
2 that convention blank was listed as a general asset of the
3 insolvent insurer, which is patently incorrect. I don't
4 think UNAC would object to that description of the listing
5 as being -- as being just as incorrect as it could possibly
6 be.

7 If one were to look at this convention blank, the
8 only assumption that he could draw is that this was a
9 general asset of the insolvent insurer, which is just not
10 the truth. It was a -- not only was it not a general asset,
11 it was an asset to which UNAC did not even hold title. It
12 had been transferred to a trust. The terms of the trust are
13 the terms of the Uniform Insurance Liquidation Act in North
14 Carolina. They quite explicitly say that in the event that
15 there is a default, the deposit will be used for the benefit
16 of the North Carolina policyholders.

17 QUESTION: Mr. Patterson, is it your position that
18 the proposed final plan for rehabilitation and the first
19 final judgment did not in any way indicate to the North
20 Carolina Guaranty Association that UNAC was assuming and the
21 Indiana court was assuming that it had control in effect
22 over that deposit?

23 MR. PATTERSON: That is correct, Justice O'Connor,
24 and it is consistent with -- with the many cases at the
25 state court level that have been decided with regard to

1 deposits. Indeed, there are two cases in North Carolina,
2 one a federal court case interpreting North Carolina law,
3 and the second a very recent North Carolina Supreme Court
4 case that specifically says that these deposits are a trust,
5 and they are not an asset of the insolvent insurer, and they
6 are not subject to the jurisdiction of the domiciliary
7 insolvency proceeding.

8 So, consistent with North Carolina law, the
9 Guaranty Association certainly had no basis on which to
10 conclude that UNAC was going to assert jurisdiction in this
11 deposit.

12 QUESTION: But North Carolina can't determine for
13 itself, can it, whether or not Indiana has jurisdiction over
14 a particular rece or a particular set of facts, or a
15 particular case? That remains for the Fourteenth Amendment
16 and the International Shoe and that type of case?

17 MR. PATTERSON: That's correct, Justice
18 Rehnquist. It can't determine for itself, but I think under
19 *Durfee v. Duke*, it is certainly entitled to determine
20 whether jurisdiction was fully and fairly considered in the
21 proceeding in the other state, which is exactly what
22 happened in the subsequent North Carolina proceeding. The
23 court looked at the Indiana proceeding. There was
24 absolutely no mention of the deposit. There was no notice
25 to the policyholders of either the deposit or the statutory

1 rights in it.

2 The court looked to the entire record and saw
3 absolutely no mention of this deposit within the insolvency
4 proceeding. Indeed, the closest mention of any -- of the
5 interplay of an insolvency proceeding with this sort of
6 deposit occurs in the brief that UNAC's current counsel
7 submitted to the rehabilitation court in support of
8 rehabilitation.

9 In that brief, counsel quotes from Couch on
10 Insurance, a very well recognized treatise that acknowledges
11 -- a passage that acknowledges that a rehabilitation
12 proceeding does not have priority over -- or does not have
13 control over assets in another jurisdiction when there are
14 special statutes in that jurisdiction pertaining to this
15 asset.

16 QUESTION: But isn't at least the second Indiana
17 judgment, remaining unreversed as it is, an official act or
18 entry subject to the full faith and credit clause even
19 though it may not be final in Indiana?

20 MR. PATTERSON: Well, Justice Rehnquist, that
21 proposition is a little bit hard to swallow if you look at
22 it from the North Carolina side. North Carolina first
23 challenges the jurisdiction of Indiana to determine the
24 right of the proceeding. The Guaranty Association initiated
25 a proceeding in North Carolina saying that the Indiana

1 proceeding lacked jurisdiction over the deposit. All
2 right. Under, I think, the cases that this Court has handed
3 down dealing with collateral attack, it is fairly obvious
4 that a court can come up with the wrong conclusion as to
5 jurisdiction, but if it appears that jurisdiction was fully
6 and fairly considered, it can't be attacked.

7 All right. Now, what we have here is a situation
8 where the Court didn't come up with any conclusion, didn't
9 fully and fairly consider jurisdiction as to the deposit at
10 all in its first proceeding. Then, when it is about -- when
11 a proceeding is filed in another state, starting a
12 collateral attack as to jurisdiction, and one, I think, that
13 UNAC could truly lose, UNAC initiates another proceeding in
14 Indiana and says, all right, we missed -- we neglected to
15 fully and fairly consider jurisdiction in the original
16 proceeding, but we will fully and fairly consider it now,
17 and that will relate back to the rehabilitation proceeding.
18 In other words, the --

19 QUESTION: Isn't the assumption that a judicial
20 decree of any state or federal court presumptively had
21 jurisdiction, and it is up to the person attacking it to
22 show that it did not have jurisdiction?

23 MR. PATTERSON: That is correct, and I think that
24 is exactly what happened in North Carolina when the
25 rehabilitation proceeding was collaterally attacked in North

1 Carolina. It was very clear that the Indiana proceedings
2 seemed to have swept this asset in by mistake, as much as
3 anything. It was just totally unaware of the nature of the
4 asset, of the fact that it was subject to statutes in North
5 Carolina.

6 What UNAC seems to be arguing is almost -- could
7 best be termed jurisdiction by mistake rather than
8 jurisdiction by necessity or anything else. We just think
9 jurisdiction would not lie in this situation, and the North
10 Carolina court is free to conclude that, after looking at
11 the record and determining whether jurisdiction had been
12 fully and fairly considered.

13 QUESTION: Well, I gather, Mr. Patterson, that is
14 that the nature of this trust was such that that deposit
15 could never be an asset of UNAC in the rehabilitation
16 proceeding unless what?

17 MR. PATTERSON: Justice Brennan, I don't think it
18 could be an asset in the proceeding in any event. I think
19 North Carolina --

20 QUESTION: It is just not property of UNAC at all?

21 MR. PATTERSON: No. UNAC had --

22 QUESTION: Well, is that really fair? Supposing
23 all the policyholders -- there are only 17 policyholders in
24 North Carolina? Supposing they all accepted a liquidation
25 of their claims. They had a choice of either to keep the

1 policies in effect at a different basis or liquidate. Isn't
2 that right?

3 MR. PATTERSON: That's right.

4 QUESTION: Supposing they liquidated, and the
5 total cost of liquidation were less than the face value of
6 this bond. Is it not true that the remainder of the bond
7 would have reverted to the general assets of the company?

8 MR. PATTERSON: Ultimately, but I think we have a
9 situation there where all of the --

10 QUESTION: Assume they cease doing business.

11 MR. PATTERSON: Right. They are at best a
12 contingent beneficiary of this trust. To the extent that
13 they honor their policy obligations, then their contingent
14 interest in the trust would be activated, and title would
15 revert to the Indiana company.

16 QUESTION: Well, don't you agree that the
17 Association was the assignee of the policyholders' interests?

18 MR. PATTERSON: Yes --

19 QUESTION: Under North Carolina law?

20 MR. PATTERSON: Yes, Justice Rehnquist.

21 QUESTION: And don't you agree that the
22 Association did appear in the Indiana proceeding?

23 MR. PATTERSON: There is no doubt about that.

24 QUESTION: And didn't the plan that it either
25 agreed to or was subject to there, didn't it define the

1 extent of its interests?

2 MR. PATTERSON: Of the Guaranty Association's
3 interest?

4 QUESTION: Yes.

5 MR. PATTERSON: Yes, it --

6 QUESTION: And didn't the Guaranty Association
7 accept that?

8 MR. PATTERSON: Yes.

9 QUESTION: And that was the extent of it?

10 MR. PATTERSON: That's correct.

11 QUESTION: So any policyholder's interest in this
12 fund, the Association had.

13 MR. PATTERSON: That's correct.

14 QUESTION: And they accepted something else in
15 exchange for it.

16 MR. PATTERSON: The policyholders accepted
17 something else?

18 QUESTION: No, the policyholders are out, aren't
19 they?

20 MR. PATTERSON: Yes. Well, the policyholders have
21 been made whole by the Guaranty Association.

22 QUESTION: Exactly, so we can just forget about
23 them. Their only interest, if they have any, is in the
24 association.

25 MR. PATTERSON: That's correct.

1 QUESTION: And the Association accepted a plan
2 which defined fully the extent of its interests.

3 MR. PATTERSON: Yes, but if you will look at the
4 definition of the Guaranty Association's interest in that
5 plan, the definition of the Guaranty Association's interest
6 is that it has the -- it has the same rights that the
7 policyholders that it made whole would have. So, by virtue
8 of subrogation, it stands on --

9 QUESTION: Well, I know, but they -- suppose it
10 had been just as express as it could possibly be in the plan
11 that not only -- they would put a footnote, and you also,
12 Mr. Association, release any claim you have to the fund in
13 North Carolina. Suppose the plan had just said that, in
14 just plain black and white, and they accepted it. Do you
15 think the association would be permitted under those
16 circumstances nevertheless to say, we still own the fund in
17 North Carolina?

18 MR. PATTERSON: I think it would be inequitable to
19 do so, but probably --

20 QUESTION: I am talking about the law. And in
21 those circumstances, in those circumstances it is claimed
22 that the judgment of the Indiana Court is entitled to full
23 faith and credit, because the Association certainly had a
24 chance to say, we have a claim to this fund, but they didn't
25 say that.

1 MR. PATTERSON: I think the first --

2 QUESTION: They gave up any claim they had. They
3 accepted the plan in full satisfaction of any claim they
4 had, didn't they?

5 MR. PATTERSON: Well, the first issue that would
6 have to be answered is whether the Indiana court had any
7 right to adjudicate rights at all in this deposit.

8 QUESTION: Well, I think that gets back to what
9 you answered me earlier, doesn't it, Mr. Patterson, that
10 this fund simply never can be and never was under any
11 circumstances part of the assets of UNAC.

12 MR. PATTERSON: It is not an asset of UNAC --

13 QUESTION: It never was, I think, is your position.

14 MR. PATTERSON: The Guaranty Association's
15 position is that no matter what the Indiana rehabilitation
16 proceedings said about this asset, it simply lacked
17 jurisdiction to deal with the asset.

18 QUESTION: Even though the people who own the
19 claims to the fund, who were the beneficiaries of the fund,
20 the policyholders, had given their interest to the
21 Association, you say the Association was powerless to
22 surrender its interest in the fund in Indiana litigation?
23 That sounds strange.

24 MR. PATTERSON: I don't think the Indiana court
25 had any jurisdiction to require it to do anything with the

1 deposit. The deposit was clearly a North Carolina asset.

2 QUESTION: What if the Association had employed a
3 driver to drive an automobile to St. Louis to attend an
4 insurance convention, and drove through Indiana, and was
5 involved in an accident, and Indiana sought to exert long
6 arm jurisdiction over the Association. Would you say that
7 the assets of the fund were not available to satisfy any
8 judgment if a long arm jurisdiction were proffered?

9 MR. PATTERSON: Any judgment against Indiana?

10 QUESTION: Any judgment against the North Carolina
11 Association.

12 MR. PATTERSON: I am afraid I don't understand the
13 question, Justice Rehnquist.

14 QUESTION: Well, you are saying somehow that this
15 fund can never be reached, no matter what the North Carolina
16 Association does, and I am suggesting to you that if the
17 North Carolina Association engages in perhaps ventures that
18 it may not be empowered to do under state law, if those
19 ventures have an effect in another state, and the other
20 state can get jurisdiction over the Association by a long
21 arm statute, the fund may be an asset which can be used to
22 satisfy a judgment rendered in those proceedings.

23 MR. PATTERSON: Against the Guaranty Association?

24 QUESTION: Yes.

25 MR. PATTERSON: Would this be based on an

1 assumption that the Guaranty Association had become a --
2 been assigned some sort of beneficial interest in the trust?

3 QUESTION: Well, perhaps I am laboring under a
4 misapprehension. Just what is this trust?

5 MR. PATTERSON: Well, the trust is for the sole
6 benefit and protection of North Carolina policyholders. The
7 Guaranty Association has absolutely no right to this trust
8 until there has been a default by some insurance company,
9 UNAC here. At that point, the Guaranty Association would
10 pay the policyholders of UNAC the amount of the fault, and
11 could then move against the deposit, which is where the
12 policyholders would have gone absent the Guaranty
13 Association.

14 The North Carolina statutory scheme is such that
15 the policyholders really have two sources to make them
16 whole. First, they have the Guaranty Association, which is
17 statutorily required to step in. If the Guaranty
18 Association weren't there, they would still have this
19 deposit that the policyholders could have gone to. The
20 statutory scheme intermeshes, and what happens is, if the
21 Guaranty Association pays the policyholders off then and
22 only then does the Guaranty Association become subrogated to
23 the policyholders' rights in such a way that it can move
24 against the deposit.

25 QUESTION: Would you say that in effect North

1 Carolina is a law unto itself regardless of the full faith
2 and credit clause with respect to this particular matter?

3 MR. PATTERSON: I think again the full faith --
4 the application of the full faith and credit clause has to
5 do -- gets back to jurisdiction. If the Indiana court
6 lacked jurisdiction to adjudicate rights in the deposit,
7 which North Carolina says it does, then yes, the full faith
8 and credit clause is not applicable.

9 I think the initial question, though, should be,
10 how did Indiana get around applying the full faith and
11 credit clause as to the North Carolina statute, which
12 specified the policyholder rights in this deposit?

13 QUESTION: Well, if the North Carolina -- if the
14 Indiana court did purport to do that, and did it wrongly,
15 wasn't the North Carolina Association's remedy by appeal
16 through the Indiana courts rather than collateral attack?

17 MR. PATTERSON: I think it would have been had
18 Indiana or had the rehabilitator given anyone even the
19 slightest hint that it purported to be dealing with this
20 deposit. Until -- It was over a year after the
21 rehabilitation proceeding closed that UNAC first contended
22 that rights in the deposit were cut off by this
23 rehabilitation proceeding.

24 QUESTION: Mr. Patterson --

25 QUESTION: What is the issue --

1 QUESTION: Excuse me. Go ahead.

2 QUESTION: What is the issue before the Indiana
3 Supreme Court on the Guaranty Association's appeal?

4 MR. PATTERSON: The issues there are basically the
5 same as they are here. The question is, did --

6 QUESTION: They are arguing you had absolutely no
7 jurisdiction over this particular deposit, just as you are
8 arguing here.

9 MR. PATTERSON: That's correct.

10 QUESTION: Mr. Patterson, let me ask you a
11 question about how the fund may be used. As I understand
12 it, the rehabilitation proceeding has modified the rights of
13 the policyholders so that, to take an example, a claim for a
14 \$1,000 injury before the rehabilitation proceeding might now
15 only be worth \$700. All right.

16 Now, if such a claim is made arising out of an
17 incident that occurs after the plan had been approved, would
18 it be your view that the policyholder just has the \$700
19 entitlement, in my hypothetical example? And doesn't that
20 in turn mean that the likelihood that the fund may be
21 exhausted has changed because the obligations that it might
22 have to satisfy have been reduced?

23 So, inevitably, has not the possibility that that
24 fund will be used in certain ways have been changed by what
25 happened in Indiana?

1 MR. PATTERSON: I think it could be in some
2 insolvency -- there could be a rehabilitation proceeding
3 that would reduce rights in that way.

4 QUESTION: Well, they did -- in this case, I
5 thought everyone agreed that the rights of the North
6 Carolina policyholders are less than they were before, which
7 in turn means that their right to recover from the fund is
8 different. In the event that -- say your client is
9 bankrupt. Now they would get from the state the \$100,000 on
10 deposit in North Carolina, they would only get \$700 instead
11 of \$1,000.

12 MR. PATTERSON: That's correct.

13 QUESTION: So that isn't it inevitably true --

14 QUESTION: But they get that from the Association.

15 MR. PATTERSON: But at the same time, the
16 Association has a continuing obligation to make the
17 policyholders whole.

18 QUESTION: And as long as the Association can do
19 it, there will be no need to resort to the bond.

20 MR. PATTERSON: Well, that's correct, but the
21 Association --

22 QUESTION: So the bond is only important to the
23 policyholders in the event that the reinsurer is also
24 insolvent.

25 MR. PATTERSON: Well, the Guaranty Association is

1 not a reinsurer, and I don't think it should be analogized
2 to one. The Guaranty Association is a statutory
3 organization --

4 QUESTION: Well, only in the event that it can't
5 perform its statutory duty, then.

6 MR. PATTERSON: Yes.

7 QUESTION: Then you would need to resort to the
8 bond, and you would have a lesser claim against the bond
9 because the policyholders there have received -- have a
10 different bargain than they had before the Indiana
11 proceeding went forward.

12 You don't challenge the power of the Indiana court
13 to modify the kind of claim the policyholder can make
14 against that bond.

15 MR. PATTERSON: No. I think it is well settled
16 that a rehabilitation proceeding in one jurisdiction can
17 alter contractual policy rights and rights against the
18 general assets of an insurer, and in such a way that it will
19 affect policyholders in other jurisdictions. That is well
20 settled. But what is not at all settled is how deposits fit
21 into this scheme. Deposits have been -- and there is a
22 great deal of state law, and there is a very interesting
23 quote from this Court as to the status of deposits, and as
24 to the fact that it is a special asset, and not subject to
25 reach by anyone but the persons for whose benefit the

1 deposit was made.

2 This Court, in Blake v. McClung, at 172 257, and
3 this is quoted, I believe, at Page 59 -- Page 29 --

4 QUESTION: That was decided while Poll and
5 Virginia was still law?

6 MR. PATTERSON: Pardon?

7 QUESTION: Decided while Poll and Virginia was
8 still law?

9 MR. PATTERSON: Yes, I suppose it would have
10 been. It would have been 1898, I believe. I think the
11 theory behind this has certainly been carried through into
12 certainly more recent decisions.

13 This Court stated, "Insurance funds set apart in
14 advance for the benefit of hung policyholders of a foreign
15 insurance company doing business in the state on a trust
16 fund of a specific kind to be administered for the exclusive
17 benefit of certain persons, policyholders in other states
18 know that those particular funds are segregated from the
19 mass of property owned by the company, and that they cannot
20 look to them to the prejudice of those for whose special
21 benefit they were deposited."

22 That is exactly the theory and status that North
23 Carolina has afforded to these deposits, that it is a trust
24 fund, that it is no longer owned by the insolvent. North
25 Carolina has gathered jurisdiction into itself to deal with

1 this deposit. It is part of a statutory scheme. Their
2 interest -- the state interest, of course, is to regulate
3 foreign insurers and protect North Carolina policyholders
4 who are doing business against foreign insurers.

5 QUESTION: Mr. Patterson, is it your position that
6 the Indiana court could not at any time litigate the
7 question of the subject matter jurisdiction insofar as the
8 deposit is concerned?

9 MR. PATTERSON: That's correct, Justice O'Connor.

10 QUESTION: The Indiana court in your view could
11 not even deal with the question in its courts of
12 jurisdiction. Is that your position?

13 MR. PATTERSON: That's correct, Justice O'Connor,
14 since it wasn't an asset of the insolvent insurer, it wasn't
15 an asset before the rehabilitation court.

16 QUESTION: Even though you would concede that the
17 Indiana court had general jurisdiction over the
18 rehabilitation proceeding and over all of the policyholders
19 for whose benefit the North Carolina fund was held?

20 MR. PATTERSON: That's correct. A lot has been
21 said here about the general jurisdictional proposition that
22 a rehabilitation court in one state can adjudicate rights of
23 individuals residing in another state even though those
24 individuals are not necessarily before the court. I don't
25 think the parties disagree with that at all.

1 QUESTION: Would you agree that the Indiana court
2 in the second proceeding did at least attempt to litigate
3 this very question?

4 MR. PATTERSON: I think it attempted to litigate
5 it. I think it fell short of the mark.

6 QUESTION: And did that judgment become entered
7 before the North Carolina judgment was entered?

8 MR. PATTERSON: It did become entered before -- it
9 was entered before the North Carolina judgment. The
10 question again would be, can the Indiana rehabilitation
11 court go back and redo its prior mistake and relate that
12 back to the insolvency proceeding. Secondly, in attempting
13 to do so, did it fully and fairly consider jurisdiction the
14 second time? We think not. I think if --

15 QUESTION: But you are saying even if it tried to,
16 it couldn't ever.

17 MR. PATTERSON: That's correct.

18 QUESTION: Is that right?

19 MR. PATTERSON: That's correct.

20 QUESTION: How can a rehabilitation proceeding in
21 these complicated insurance matters ever do the job if the
22 court asserting jurisdiction can't deal with these questions
23 of the deposits?

24 MR. PATTERSON: Well, we -- I think the
25 appropriate move here would have been to have initiated --

1 if UNAC wanted to attempt to adjudicate these rights prior
2 to its final order of rehabilitation, then an ancillary
3 proceeding in North Carolina would have been appropriate.
4 This would not have been a burden on UNAC, who did business
5 in, I believe, 40 some states.

6 QUESTION: All right, and there were other states
7 with similar special fund deposits. Correct?

8 MR. PATTERSON: Only four, Justice O'Connor.

9 QUESTION: And they did not make similar claims
10 such as North Carolin?

11 MR. PATTERSON: Again, they are, were then and
12 probably are to this day completely unaware that UNAC has
13 asserted that its order cut off rights in this -- in the
14 deposit made in their state.

15 I think in addition to the question of subject
16 matter jurisdiction, for lack of a better term, there are
17 certainly other jurisdictional claims here. The notice
18 issue, I think, is quite significant. Could the Indiana
19 rehabilitation proceeding assert jurisdiction over the --
20 this would be in a situation in which it might otherwise
21 have jurisdiction, would it have had jurisdiction because of
22 its -- would it have lost jurisdiction or failed to assert
23 jurisdiction because of its failure to give any notice of
24 the existence of these deposits to the policyholders --

25 QUESTION: Well, Mr. Patterson, you refer to

1 subject matter jurisdiction of a trial court of general
2 jurisdiction of a state. Don't they have subject matter
3 jurisdiction of all matters that are brought before them,
4 unless excluded by the law of the state in which they sit?

5 MR. PATTERSON: Well, Indiana law, I think, is
6 fairly clear that to adjudicate rights in the trust, it must
7 have either the trust assets or the trustee before it. Here
8 it had neither.

9 QUESTION: Well, supposing that the Indiana court
10 made a wrong decision. It still is entitled to full faith
11 and credit unless it had no jurisdiction.

12 MR. PATTERSON: Well, assuming it fully and fairly
13 considered jurisdiction, I think that is correct. The issue
14 here would be -- in a collateral procedure, I think the
15 relevant inquiry is, was jurisdiction fully and fairly
16 considered, not whether the Indiana court actually had
17 jurisdiction. Conceivably, Indiana could have fully and
18 fairly considered jurisdiction and incorrectly asserted it,
19 and North Carolina would have been foreclosed, but that is
20 not what happened here. There was no consideration of
21 jurisdiction at all.

22 QUESTION: Mr. Patterson, may I ask you another
23 factual question? Who got the interest on this bond, the
24 \$100,000?

25 MR. PATTERSON: The interest on the bond is

1 currently being accumulated by the trustee.

2 QUESTION: What happened between 1973 and the
3 beginning of the rehabilitation?

4 MR. PATTERSON: At that point, the interest was
5 being collected and paid over to UNAC. However, it was --
6 UNAC or the Department of Insurance had the right to stop
7 these payments at any time, and did so.

8 QUESTION: Right. And then after the
9 rehabilitation proceeding started, what happened to the
10 interest then? Was it accumulated right away, or was it
11 continued to be paid for a period?

12 MR. PATTERSON: It was -- I think it started being
13 accumulated -- well, within a few years --

14 QUESTION: Within a few years?

15 MR. PATTERSON: I think it was actually within a
16 few years by virtue of oversight. It was just --

17 QUESTION: Well, what happened during the
18 oversight period? Where did it go then? Did it go to the
19 rehabilitation trustee?

20 MR. PATTERSON: Yes.

21 QUESTION: Mr. Patterson, did the Guaranty
22 Association file a claim in the proceeding in Indiana, and
23 if so, what did it claim? Did it file a claim as a
24 contingent creditor?

25 MR. PATTERSON: It didn't file a claim per se.

1 What happened is, the original draft of the plan of
2 rehabilitation contemplated certain future recoveries by the
3 rehabilitation court. I think UNAC had several outstanding
4 suits at that time, so there was a possibility of future
5 recovery. The rehabilitation proceeding did not -- said
6 that any of these future recoveries would go to the
7 policyholder regardless of whether the Guaranty Association
8 had taken their place. The Guaranty Association came in and
9 said, if we are going to make the policyholder whole, then
10 any of these future benefits should flow back to the
11 Guaranty Association. That was its only claim in the -- in
12 the rehabilitation proceeding.

13 QUESTION: May I ask one other question about the
14 interest? What is your position as to the proper
15 disposition of that interest today?

16 MR. PATTERSON: Well, I think if the -- the
17 trustee would certainly be empowered to accumulate it for
18 the benefit of the policyholders. This would be
19 particularly --

20 QUESTION: Not what he is empowered to do. What
21 is your position as to what he should do?

22 MR. PATTERSON: I think he should continue to
23 accumulate the interest.

24 QUESTION: He should accumulate the interest
25 indefinitely, even if there are no claims on the fund.

1 MR. PATTERSON: If there were no claims, I don't
2 think there is that much justification for doing it, but --

3 QUESTION: But then who should get it, in your
4 view?

5 MR. PATTERSON: Justice Stevens, if past practice
6 of the department were followed, the interest would begin to
7 be paid again to UNAC.

8 QUESTION: To the insurance company.

9 MR. PATTERSON: In addition to being an income --
10 or a contingent beneficiary, I suppose it would be fair to
11 also characterize UNAC as a contingent income beneficiary as
12 well as a contingent remainderment in the trust.

13 Thank you.

14 CHIEF JUSTICE BURGER: Mr. Boehm, do you have
15 anything further?

16 ORAL ARGUMENT OF THEODORE R. BOEHM, ESQ.,

17 ON BEHALF OF THE PETITIONER - REBUTTAL

18 MR. BOEHM: We don't accept the trust analogy. It
19 is a pledge. The asset is UNAC's, always is, always was,
20 still is. It is pledged to secure against the default, and
21 in the event of default, and only then can the North
22 Carolina Commissioner arrest the interest payments and do
23 the other things that he is purporting to do here. There is
24 no default. UNAC and the policyholders reached an agreement
25 whereby UNAC would offer ongoing insurance and the

1 policyholders accepted it.

2 QUESTION: Can't North Carolina tell you to
3 redeposit the \$100,000 tomorrow?

4 MR. BOEHM: Oh, we agree. It is there. It is in
5 the deposit, and we can't withdraw it unless we stop writing
6 the insurance on North Carolina insureds, but it is there to
7 secure a future default should we go in the tank again.

8 QUESTION: I don't see what -- it seems to me it
9 is going to be there no matter who wins. That is what
10 puzzles me.

11 MR. BOEHM: Well, they are seeking to liquidate.
12 The remedy they request is that it be paid over to the
13 Guaranty Association.

14 QUESTION: And then you would have to make another
15 deposit, if you wanted to write insurance in North Carolina.

16 MR. BOEHM: That is correct, I suppose.

17 QUESTION: Yes.

18 MR. BOEHM: Although the basic --

19 QUESTION: That is what is really at stake, isn't
20 it?

21 MR. BOEHM: Yes. Yes. I suppose that is
22 correct. We haven't anticipated that point, but the logic
23 of what you say seems correct, and we would have to make
24 another deposit, although I expect we would as a practical
25 matter stop writing insurance in that state.

1 QUESTION: Well, there was a time when some
2 insurance companies declined to do business in certain
3 states, notably Texas, for reasons of that kind. Is that
4 not so?

5 MR. BOEHM: Oh, yes, and that is, again, the basic
6 point of this case from our point of view is that this is an
7 insurance case, and it is a regulated industry that has a
8 state statutory framework that tells the state Commissioner
9 in the state of domicile to do what the Indiana Commissioner
10 did here, and purports to make it stick nationwide.

11 QUESTION: Mr. Boehm, I just didn't really have a
12 clear enough grasp of the facts here. Is the reason they
13 claim they are entitled to the \$100,000 because there has
14 been that much in defaults subsequent to this plan?

15 MR. BOEHM: No, there is no claim that UNAC is in
16 default of any post-rehabilitation obligation. UNAC is
17 honoring its policies as restructured today.

18 QUESTION: And so they are claiming it on account
19 of default pre-rehabilitation --

20 MR. BOEHM: Yes, yes.

21 QUESTION: -- defaults, but I thought the
22 policyholders had accepted the new plan, so I don't
23 understand what -- what are the defaults on which they want
24 this --

25 MR. BOEHM: Your confusion is the same as ours,

1 Your Honor. We think it is as simple as day that the
2 policyholders accepted the restructured policy, we are not
3 in default, and the money is there in its pledged state, if
4 you would, to secure future defaults.

5 QUESTION: Mr. Boehm, I thought the funds were to
6 be used to pay the increased premium charges that arose out
7 of the rehabilitation.

8 MR. BOEHM: That is going to be paid regardless of
9 the disposition of this case. As a matter of the North
10 Carolina Guaranty Association's statutory obligation to the
11 policyholders, it has to make up the additional benefits to
12 the policyholders in -- UNAC -- as between UNAC and the
13 policyholders, the policies are written down. Now, it is
14 hard to explain this in a few words, because there is
15 disability income insurance, and what in effect they did is
16 change them from non-cancellable, which means you can't
17 raise the premium, to guaranteed renewable, which means we
18 keep insuring these people. We can't terminate them.

19 QUESTION: And the premiums have gone up.

20 MR. BOEHM: The premiums have gone up, and --

21 QUESTION: And isn't the North Carolina Guaranty
22 Association hoping to reach the deposit to repay itself --

23 MR. BOEHM: Yes.

24 QUESTION: -- for the increased cost of the
25 premiums?

1 MR. BOEHM: Yes. Yes, it --

2 QUESTION: Isn't that what we are talking about?

3 MR. BOEHM: Yes, as I understand it --

4 QUESTION: That is part of the --

5 QUESTION: -- and the benefits have gone down.

6 There are two changes, basically. And so it is a rather

7 complicated actuarial proposition.

8 QUESTION: Mr. Boehm, don't other states have laws

9 similar to North Carolina's --

10 MR. BOEHM: Yes.

11 QUESTION: -- concerning these deposits?

12 MR. BOEHM: Yes.

13 QUESTION: Are they identical in fact?

14 MR. BOEHM: I can't represent that, but I

15 believe --

16 QUESTION: Do most states have laws that are

17 similar?

18 MR. BOEHM: Oh, I think so. It is a question of

19 administrative discretion whether they require a deposit

20 before they will admit a company, but I think most states

21 have a procedure for getting a deposit from a company that

22 they regard as suspect. And in many cases you end up with

23 the situation we have here, where the amount of the deposit

24 is really miniscule, not enough to warrant the very

25 proceeding that your question focuses on.

1 Consider what would have happened if every
2 policyholder were perfectly delighted with the plan of
3 rehabilitation and nobody wanted to litigate or anything.
4 Nonetheless, the Respondent's view would force a
5 mini-liquidation or rehabilitation in eight states where
6 there was nobody who was upset about it, because there would
7 be no way to make the thing a binding adjudication in one
8 form even though nobody was upset about anything.

9 QUESTION: Has the North Carolina court yet held
10 that if you lose in this proceeding, that your opponent is
11 entitled to use the bond to reimburse itself for the
12 increased premium?

13 MR. BOEHM: Yes, I think that is what the trial
14 court held.

15 QUESTION: Yes, and you think the appellate court
16 approved of that?

17 MR. BOEHM: I think so. I find the appellate
18 court opinion a little opaque.

19 QUESTION: Well, frankly, I didn't get that out of
20 the appellate court opinion. That is one reason --

21 MR. BOEHM: Well, I may be prejudiced -- I mean,
22 my view of the appellate court opinion may be colored by
23 what went on in the trial court that I am aware of. That is
24 what the trial court ordered, and --

25 QUESTION: Well, was that order affirmed by the

1 appellate court?

2 MR. BOEHM: I think so. The word "affirmed" ends
3 up at the end of the opinion.

4 QUESTION: Well, that is usually what it means,
5 then, doesn't it?

6 MR. BOEHM: I am trying to parse the logic of that
7 opinion.

8 QUESTION: We often say around here it is
9 judgments we receive, not opinions.

10 MR. BOEHM: Yes, sir.

11 CHIEF JUSTICE BURGER: Thank you, gentlemen. The
12 case is submitted.

13 (Whereupon, at 11:10 o'clock a.m., the case in the
14 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

UNDERWRITERS NATIONAL AUURANCE COMPANY vs. NORTH CAROLINA LIFE AND ACCIDENT AND HEALTH INSURANCE GUARANTY ASSOCIATION, et al. 80-1496

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY Sharon Agnes Connelly

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