In the

ORIGINAL

Supreme Court of the United States

UNION LABOR LIFE INSURANCE COMPANY, Peititioner	)	
v.	)	No. 81-389
A. ALEXANDER PIRENO; and	)	
NEW YORK STATE CHIROPRACTIC ASSOCIATION, Petitioner	)	
v.	)	No. 81-390
A. ALEXANDER PIRENO	)	

Washington, D. C.

April 27, 1982

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Petitioner :

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Tuesday, April 27, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:09 a.m.

APPEARANCES:

T. RICHARD KENNEDY, ESQ., New York, N.Y., on behalf of the Petitioners.

SUSAN M. JENKINS, ESQ., Washington, D.C., on behalf of the Respondent.

B. BARRY GROSSMAN, ESQ., Washington, D.C., on behalf of the United States as amicus curiae.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Union Labor Life Insurance Company against Pireno and the consolidated case.

Mr. Kennedy, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF T. RICHARD KENNEDY, ESQ.,

ON BEHALF OF PETITIONERS

MR. KENNEDY: Mr. Chief Justice and may it please the Court:

These consolidated actions arise from a health insurance company's use of peer review in the State of New York. Specifically my client, Union Labor Life Insurance Company, referred certain claims for reimbursement for chiropractic treatment to a peer review committee of the Petitioner New York State Chiropractic Association.

The referrals were necessary because the company in its experience was not familiar with the type of treatment rendered or the medical necessity of that treatment. And since the policy specifically limits the coverage to treatment that is medically necessary and fees which are reasonable and customary within a particular community, it was necessary for my client to obtain professional advice from the peer review

committee of the chiropractic association.

Now, these terms of the policy which I mentioned are approved by the superintendent of insurance of the State of New York under extensive regulation of insurance in our state.

Peer review, chiropractic peer review, arose in the early 1970's at the time that New York State insurance law was amended to require health insurance companies to provide to policyholders reimbursement for chiropractic treatment as well as medical treatment. And therefore it became necessary for the companies to honor all claims for chiropractic treatment and to obtain the professional advice which I had mentioned.

Respondent Alexander Pireno, a licensed chiropractor in the State of New York, brought this action in 1976 under the Sherman Act, alleging conspiracy in restraint of trade in the peer review arrangement between the insurance company and the peer review committee of the state chiropractic association. After two years of extensive discovery in the case, it became obvious that the only activity of the peer review committee was advising the insurance company as to whether the treatment rendered was medically necessary or as to whether the fees charged were within the range of reasonable and customary charges in the particular

community; and that Union Labor Life Insurance Company was using that advice in determining the amount of reimbursement to be provided to its policyholders in connection with their claims for chiropractic treatment.

Therefore, it became obvious that the Pireno claim was simply that the company was using this advice to interpret its policy and he was disputing the company's interpretation of the policy insofar as the amount of benefits to be provided to the insured.

QUESTION: What language in the policy was being interpreted?

MR. KENNEDY: Justice White, there were specific terms in the policy that limited the extent of the coverage. One of the limitations was that the treatment had to be medically necessary, and another was that the extent of reimbursement would only be for usual and customary fees and charges and reasonable charges within the community.

QUESTION: And are those two things precisely what the peer review committee's attention would be addressed to, the question, were the services necessary; and secondly, were the charges usual and customary?

MR. KENNEDY: Those were the usual questions, Your Honor. There were additional questions. For

example, the company does not provide reimbursement if the treatment is beyond the scope of the chiropractor's license to practice.

Furthermore, if the treatment is the result of a job-related accident or injury there is no coverage. And sometimes it might be necessary for the company to obtain professional advice in respect to those matters.

QUESTION: But those -- would that aspect be the business of insurance?

MR. KENNEDY: Yes, Your Honor. As long as it's the interpretation of the policy and relates to the extent of the insuror's obligations to the insured, we say it is the business of insurance.

Now, we therefore moved for summary judgment in the district court and that motion was granted. The district court held that, since peer review served to determine the precise extent of the insurance company's obligations to the policyholders and since it determined, it helped to determine, the rights of the insured under the policy, that this was what this Court has held the core of the business of insurance. And this Court so held that in the National Securities case and in the Royal Drug case decided in 1979.

The court held also, the district court held also here, that this --

QUESTION: In your view, are they in effect appraisers in terms of the value of the services? Do they function as appraisers, in other words?

MR. KENNEDY: Mr. Chief Justice, I think there is an analogy there. The appraiser is an expert in a sense with respect to, say, automobile damage and the reasonable cost of getting that damage repaired. And so too are the chiropractors experts in the field of treatment.

And it would be unreasonable to expect the insurance company to have this medical expertise on its staff, and therefore it's necessary for them to go to these professionals to get this type of professional input.

QUESTION: Are arrangements like this common in the industry?

MR. KENNEDY: Yes, they are, Justice Brennan. I think that's indicated by the number of amici we have here.

QUESTION: Well, what -- are you relying on McCarran-Ferguson?

MR. KENNEDY: That's correct, Your Honor.

QUESTION: And McCarran-Ferguson says that no state law will be invalidated because?

MR. KENNEDY: Well, McCarran-Ferguson says

that the antitrust laws are will apply to the business of insurance -- will not apply to the business of insurance to the extent that that business is regulated by the state. And here's there's no question that the business is regulated by the state very extensively.

QUESTION: Well, is it regulated in this particular respect?

MR. KENNEDY: We claim it is, Justice White. The Respondent and the Attorney General say that since the state law and regulation doesn't mention peer review specifically that there is no specific regulation.

QUESTION: Well, does it regulate how the company will interpret necessary and usual and customary?

MR. KENNEDY: The New York State law requires the insurance commissioner to supervise the adjustment of losses such as these health insurance reimbursement claims, and the statute requires the insurance company to adopt standards providing for the reasonable and prompt resolution of these claims. And the insurance company is required under state law to make prompt investigation any time they have a question.

QUESTION: Do those procedures have to be submitted to the insurance commissioner for approval?

MR. KENNEDY: The insurance commissioner,

Justice Brennan, oversees the process. He approves the policy wording. He has adopted detailed regulations covering adjustment of losses and he has established a complaint bureau within the insurance department.

QUESTION: Are those regulations in any way -- can they be read to authorize this kind of peer review that your client adopted?

MR. KENNEDY: I think they may be read to require peer review.

QUESTION: They require it?

MR. KENNEDY: Because the -- not specifically, it doesn't mention peer review, of course. But it does require the insurance company to make a prompt investigation and a complete review and analysis of the claim, and if the company does not have the expertise on its staff to determine --

QUESTION: I take it if you did have the expertise on your staff and did this with your own staff employees, there'd be no question it would be business of insurance?

MR. KENNEDY: I think the Respondent and the Attorney General both concede that fact, that if the chiropractors were on the staff that there would be no problem, because this would be a determination wholly within the company and they would not be going outside

the company.

QUESTION: Well, your answer to Justice Brennan confuses me a little. You mean there'd be a different result of they had a psychiatrist and a chiropractor and a general practitioner of medicine on the staff, to whom these matters were referred? Then you'd have a different result?

MR. KENNEDY: Then I think it's conceded by Respondent and amici that in those circumstances the exemption provided by the McCarran-Ferguson Act would apply.

QUESTION: You think they concede that or that it'd be perfectly obvious there wouldn't be a violation of the antitrust laws?

MR. KENNEDY: Well --

QUESTION: Or both?

MR. KENNEDY: I don't want --

QUESTION: Well, could I ask you, the McCarran-Ferguson Act, Section 2, Section (a) of Section 2, says that the business of insurance shall be subject to the laws of the several states which relate to the regulation or taxation of such business. Then in (b) it says no Act of Congress is to be construed to invalidate, impair, or supersede any law.

Now, you're saying that there is a law in the

state that would be superseded if the antitrust laws were to apply?

MR. KENNEDY: We contend, Your Honor, that it's not necessary for us to show that the law of the state would be superseded. I think the legislative history here and a review of the debate in Congress will show quite clearly that what both the House and the Senate intended was that if an insurance -- if the state regulated the business of insurance the antitrust laws were not to apply, period.

QUESTION: You mean regulated insurance in any way?

MR. KENNEDY: As long as they regulate the particular activity involved. For example, where there's detailed regulation of claims adjustment, as there is in New York State, then the antitrust laws should not be imposed on top of that type of regulation.

QUESTION: Despite -- you don't even have to show that the application of the antitrust laws would impair the state law?

MR. KENNEDY: I think, Your Honor, you only have to show that there is regulation and supervision by the insurance superintendent.

QUESTION: Have we got cases here to that

effect in this Court?

MR. KENNEDY: I think in the -- well, not on the particular McCarran-Ferguson Act, I think, Your Honor. You do have it in other areas of implied exemption, which are quite different than an explicit exemption that was granted here by Congress.

QUESTION: Are the conclusions of the peer review group binding on the insuror or are they merely advisory?

MR. KENNEDY: They're not binding, Mr. Chief Justice. And I think the Department of Justice, after reviewing the record in this case, has conceded that in their brief, that these determinations are not binding. They are only advisory and all the peer review committee is doing is advising the company with respect to the limitations of the policy.

QUESTION: Mr. Kennedy, the New York law in this field basically does not require peer review, does it?

MR. KENNEDY: That's correct, Justice O'Connor, it does not require it.

QUESTION: And it really isn't, the peer review itself, is not supervised, is it, pursuant to state law?

MR. KENNEDY: Well, there is no precise

wording in the statute which says peer review.

QUESTION: It just -- the New York law prohibits unfair claims practices?

MR. KENNEDY: That's correct. And if a policyholder feels that he or she is not getting full reimbursement to which they are entitled under the policy, then they have the right to complain to the insurance department, and there's an elaborate procedure for this. There's a complaint bureau in the department.

That was not done here, apparently, by any of Pireno's patients. And furthermore, Pireno had a remedy in that he could have taken an assignment of any of his insured patients' claims against the company and made a claim to the insurance department under this process that I mentioned. He apparently failed to do that. He came forward with no evidence that he had tried that.

QUESTION: How do you distinguish the holding in the Royal Drug case, which really gave rather a restrictive definition of the business of insurance?

MR. KENNEDY: Well, Justice O'Connor, the Royal Drug case involved provider agreements and what those provider agreements intended was a price-fixing with respect to goods to be sold to policyholders under a separate arrangement, entirely separate arrangement

with the insurance company. Now, that's quite different than here, where the insurance company is only getting advice from the peer review committee and there is no fixing of fees. The chiropractor remains free to charge whatever the chiropractor wishes to charge to the policyholder.

Dr. Pireno can -- in fact, the record here discloses that Dr. Pireno claims no loss of income and no loss of patients as a result of peer review.

The chiropractor can deal with the patient, charge whatever he would like to charge, and deal on whatever terms he wishes. That's quite different than at Royal Drug, where the participating pharmacy had to charge a specific charge set out in the agreement. There's no contract here for the purchase of goods.

And even under a restrictive interpretation of McCarran-Ferguson we say this should be the business of insurance because it involves the spreading of risk. As the district court held here, this process determines to what extent the policyholder is going to have to bear the loss, the entire loss, or whether the insurance company is going to take a good part of that loss or the entire loss.

To the extent the insurance company takes the entire loss, then that risk and loss has to be spread

among all policyholders in the form of higher premiums. Furthermore, peer review helps the insurance company determine what are the reasonable and customary charges that it's going to encounter in this field of its business. A good part of underwriting is calculating not only the frequency, the number of times you're going to have a claim under the policy, but also calculating the likely magnitude of those losses. And unless the insurance company gathers information, as it's doing here through the peer review committee, as to what the likely fees to be encountered are, then it has no way of estimating the amount of premium and rates that it should charge and file with the insurance department.

QUESTION: Doesn't it get some information of that kind just by paying claims?

MR. KENNEDY: Yes, sir, yes, it does. As a matter of fact, the insurance company handles most of these claims without consulting a peer review committee. They are able to act on their own experience.

It's only when they encounter the difficult claim, the unusual treatment, the extensive amount of treatment that isn't normally experienced, that they go to the peer review committee. And I think that's conceded in the Department of Justice brief, where they

say it's very rarely used, the peer review process.

QUESTION: Mr. Kennedy, the Solicitor General's argument is even if you are in the business of insurance, even if this is business of insurance, you're still not regulated by New York law, the other requirement of the McCarran-Ferguson Act. I know you addressed this a little earlier, but would you mind just telling me what are the statutes you rely on that you are regulated in this respect?

MR. KENNEDY: Yes, Your Honor. That is briefed in both our main brief and our reply brief. There is a statute regulating extensively the claims adjustment process, and that's a law enacted not only in New York but most all states.

QUESTION: Now, how does that regulate this peer review procedure?

MR. KENNEDY: Well, that requires the insurance company, as I said before, to make a prompt investigation of a claim and to settle a claim expeditiously and fairly. And the insurance company therefore has to gather information and has to go to professionals where it does not have that information, and that's what it's doing here.

Again, if the insurance company fails in these obligations then it's subject to sanction by the

insurance department, even to the point of losing its license. And a policyholder that feels aggrieved in any particular lack of reimbursement can go to the insurance department complaint bureau set up for this and make a complaint against the company.

As I said before, the chiropractor also can go to the insurance department simply by taking an assignment of his insured patient's claim against the company.

QUESTION: What happens after someone goes to the complaint department? What does the -- or complaint bureau. What does the insurance department do about it?

MR. KENNEDY: Well, Justice Rehnquist, that is not in this record simply because Dr. Pireno's patients did not go to the insurance department and he didn't go himself. However, as a matter of fact what happens is the insurance department staff makes an investigation, an extensive investigation. They contact the company, they contact the doctor, the policyholder, and they get all the facts and they make a final determination.

Sometimes these things are done for a matter of several dollars by way of reimbursement.

QUESTION: Do they enter an order directing the company to pay?

MR. KENNEDY: Yes. It's not an order in the sense of an administrative order. It's just ordinarily a letter sent to the company saying that, you have not complied with the statute and the regulations in that you didn't fairly adjust this loss.

QUESTION: In New York have licenses been either cancelled or failed renewal because of the way claims were handled, as has happened in some states? I just wonder what New York's is, since New York is the pattern for so much of this legislation.

MR. KENNEDY: I would not be surprised if that were true, Mr. Chief Justice, but I don't know of personal knowledge. But I know there have been sanctions imposed upon companies for failure to adjust losses as required by the statute and by the superintendent's regulations.

QUESTION: Mr. Kennedy, is your position -- it seems to me one might draw a distinction between the agreement between the insurance company and the group of doctors to conduct a particular review on the one hand, and the agreement among the doctors on how they would do the job. Do you contend both of those agreements would be within the exemption?

MR. KENNEDY: We do, Justice Stevens, to a very limited extent in the second instance, the

agreement among the doctors. To the extent that the doctors have a procedure as to how they're going to review these claims and analyze them and maybe --

QUESTION: Say for example they agreed upon a schedule of these they would consider reasonable and anything above it would be considered unreasonable or not usual and customary, and they just always processed them according to that, and they periodically revised that.

MR. KENNEDY: Justice Stevens, the type of review the peer review committee is asked to undertake is really not susceptible to a fee schedule, because it's not the routine claims. If it were a routine claim the insurance company could deal with it through its own experience.

It's the unusual, based on the medical, particular medical condition of a patient or complications which arose in the course of the treatment. It's the unusual case which is not susceptible to a fee schedule.

But to the extent they adopted guidelines on fees that they might be asked to pass upon, so long as they use that only to advise the insurance company and they didn't tell the insurance company and the insurance company didn't agree that they were going to use those

fees, as long as the insurance company maintained its discretion to make the determination, then we say it is all part of the business of insurance.

QUESTION: Well, but -- in other words, every time the insurance company was involved it would be within the exemption. But I'm still not quite clear. What the doctors' activities -- I mean, a general allegation of conspiracy and so forth. Can the doctors come in and get advantage of the exemption? That's what I'm not quite clear on.

MR. KENNEDY: Well, if the doctors -- the reason, of course --

QUESTION: You know, a plaintiff tends to allege things in very dramatic, all-encompassing terms. And the doctors come in and just say, well, we're -- this was conducted pursuant to peer review procedures, we're therefore exempt. Would that be a good defense?

MR. KENNEDY: Well, to the extent that the doctors used the peer review process to accomplish something that --

QUESTION: Which the plaintiff is always going to allege, is what I'm suggesting.

MR. KENNEDY: Yes. In that case you would have a potential abuse which could result in the loss of te exemption. I think this happens in the exemption

cases all the time. It happened in the labor cases cited by the Justice Department, where the unions agreed with the employer to certain conditions which were designed to drive competitors of the employer out of business. And this Court held there, in the Huntington case, that that was -- that went beyond the purpose o the exemption provided to the unions, and that purpose was collective bargaining.

Here the purpose is to permit the states to regulate insurance, and to the extent that -- to regulate the business of insurance -- and to the extent that chiropractors may do something, for example attempt to operate as a cartel or attempt to disseminate their decisions with respect to peer review, to fix prices in the chiropractic profession, in that instance you go beyond the exemption and obviously it's going to be lost. And there may have to be hearings where you have that type of allegation.

That's why, Your Honor, we went through extensive discovery in this case. Instead of simply moving on the pleadings, we went through discovery to see if there were that type of evidence. There wasn't that type of evidence.

And if you look at the briefs of the Respondent and the amici on appeal, they talk about the

potential for abuse in this process. But they don't cite anything from the record to show that there's any evidence of that type of abuse. And on the facts of this case we say it's quite clear that there is the business of insurance.

QUESTION: Mr. Kennedy, exactly how is the peer committee appointed or chosen, the committee we're talking about in this case?

MR. KENNEDY: I believe, Justice Powell, that that is a matter of the chiropractors volunteered to serve on the committee. They're not compensated.

QUESTION: Don't you know how it is chosen?

MR. KENNEDY: Pardon me?

QUESTION: Don't you know how the Association goes about it?

MR. KENNEDY: Yes, Your Honor. That's in the record.

QUESTION: Yes, but I wondered if you could tell us briefly.

MR. KENNEDY: The members are -- they volunteer to serve on the committee and I believe they're appointed by the officers of the association.

QUESTION: They volunteer. They're not compensated, are they?

MR. KENNEDY: That's correct, Your Honor.

They're not.

QUESTION: Do they have any staff?

MR. KENNEDY: I don't believe so, other than the ordinary staff of the association.

QUESTION: And do they have specialists who are called in to sit on particular cases, or do you know?

MR. KENNEDY: No, they don't, Your Honor. But they have chiropractors from different communities in the state, from different schools of treatment. That's been the experience of my client in using them. So that they're prepared to answer a variety of different questions with respect to the treatment obtained.

QUESTION: But they're not experts, are they?

MR. KENNEDY: They're experts in --

QUESTION: They're peers; they're not experts.

MR. KENNEDY: Well, they're experts, Justice Marshall, in connection with chiropractic treatment, and they are -- there are different --

QUESTION: Moreso than all the other chiropractors?

MR. KENNEDY: Well, there are different schools of chiropractic treatment and different methods of treatment, and some are more experienced and skilled

in those schools than others.

QUESTION: But you keep emphasizing the peer, which means that they're the equals. So that's the opposite of expert.

MR. KENNEDY: Well, the Respondent emphasizes they're the peers, and I suppose they are to the extent that they're licensed chiropractors. But some have more expertise in certain areas than others.

QUESTION: Well, like the saying, they're all equals but some are more equal than the others.

MR. KENNEDY: As in any other field, I suppose that's true.

QUESTION: Lawyers, doctors, psychiatrists.

MR. KENNEDY: That's correct, Your Honor, yes.

Thank you.

CHIEF JUSTICE BURGER: Ms. Jenkins.

ORAL ARGUMENT OF SUSAN M. JENKINS, ESQ.

ON BEHALF OF RESPONDENT PIRENO

MS. JENKINS: Mr. Chief Justice and may it please the Court:

This case involves a claim for exemption from the antitrust laws under the McCarran-Ferguson Act not only by an insurance company, Union Labor Life, but also by a non-insurance entity, a group of health care

providers, the New York State Chiropractic Association. Both Union Labor Life and the Chiroprctic Association seek immunity for their conduct, claiming that it constitutes the business of insurance under Section 2(b) of the McCarran-Ferguson Act.

QUESTION: What would be your view of the matter if the people conducting the peer review were employed by the insurer?

MS. JENKINS: Our position on that, Mr. Chief Justice, would be that there would probably not be a violation, because it would all be in house and there would not be a conspiracy among chiropractors. As to the McCarran-Ferguson issue, we think that Royal Drug expresses three tests for the business federal insurance: One is whether or not risk-spreading or underwriting are involved; the second is whether or not the relationship between the insurer and insured is involved; and the third is whether or not parties outside of the insurance industry are involved.

Now, if it were an in-house chiropractor it would satisfy the third test, but not necessarily the first or second. But what we --

QUESTION: What do you see as the functional difference between the peer review chiropractor who is on the outside and one who is on the staff?

MS. JENKINS: Well, as to the merits of the case, Your Honor, as to whether or not it's a violation of the antitrust laws, there would be no conspiracy if it were an in-house employee of the insurance company. As far as the McCarran-Ferguson Act is concerned, I think there probably is not much of a functional difference whether it's in-house or not.

QUESTION: Well, wouldn't the in-house specialists be a little more inclined to follow the orders of his master?

MS. JENKINS: Well, the insurance company has access already to all their claims experience information. And as Mr. Kennedy agreed, that kind of information is already available to them to base their decisions on claims on. So it's already done in-house to a large extent.

The peer review committee may have interests adverse to the insurance company, but we don't think they do in this case.

We contend that it is important to recognize, as this Court emphasized in Royal Drug, that when exemptions from the antitrust laws are sought they must be narrowly construed, and a statutory exemption should be limited to the scope that was clearly intended by Congress and to the market in which Congress intended to

displace competition with regulation, here the insurance market.

The market in which the chiropractors compete is the chiropractic market and that is where the restraint has occurred in this case. The New York State insurance supervisor does not regulate chiropractors. Peer review is not regulated by New York State law. And the New York State insurance department would have no power over the kinds of restraints that are going on here.

QUESTION: Ms. Jenkins, what if instead of referring this matter to a peer review committee of chiropractors the company had referred it to retained counsel? Would you use the same argument, saying that lawyers are regulated by the New York courts and the state bar and therefore they're not within the exemption?

MS. JENKINS: No, Your Honor. I would say that the lawyers are not regulated by the New York insurance department and therefore they're not within the McCarran-Ferguson exemption.

QUESTION: Even though they were asked to construe a term of the policy?

MS. JENKINS: Well, I wouldn't -- that wouldn't necesssarily violate the antitrust laws, but it

certainly would not be the business of insurance. Otherwise, everyone that an insurance company goes to to seek any kind of services in connection with its business would be exempted from the antitrust laws and it would begin to affect many other markets besides the insurance market.

QUESTION: I would have thought that might have been within the definition in SEC versus National Securities. Do you think Royal Drug narrowed the definition in National Securities?

MS. JENKINS: I think Royal Drug emphasizes an additional test beyond the one in National Securities in that Royal Drug speaks about the underwriting and risk-spreading element of insurance, which Royal Drug says is an indispensable characteristic of insurance.

QUESTION: It didn't say that was the only thing that was going to --

MS. JENKINS: No. National Securities is part of another test, which is the relationship between the insurer and insured. In Royal Drug the merger involved the relationship between the insurance company and its stockholders, rather than policyholders.

We contend that the contract, the agreement to perform peer review between the New York State Chiropractic Association and the insurance company is

not a contract that concerns the policyholder. The policyholder is unconcerned in the same way it would be with the pharmacy agreements in the Royal Drug case.

The chiropractor in Dr. Pireno's position is much like a nonparticipating pharmacy in Royal Drug, and we believe that that interpretation of the relationship between -- the contract between the insurer and the insured is what governs in this situation.

QUESTION: From what you have said and what your friend has said, the Petitioner could solve all these problems by simply taking the same chiropractors who are now being used as peer review committees and write them a letter and say, we hereby appoint you on our staff, review staff, and we'll pay you $25 or $50 or whatever, or pay them nothing. That would apparently solve the problem, wouldn't it?

MS. JENKINS: Your Honor, no, I don't think it would, because to the extent --

QUESTION: Well then, that isn't consistent with what you responded earlier, that if they were in-house people there would be no problem.

MS. JENKINS: What I would like to add -- I beg your pardon, Your Honor. What I would like to add to that is, if they were in-house people and were no longer practicing chiropractors who were competitors of

each other and of the people whose claims they're reviewing. If they were totally in-house they would no longer be competitors in the chiropractic market who were setting fees for that market.

QUESTION: Well then, what if they took people from New Jersey and Connecticut, chiropractors from New Jersey and Connecticut? They aren't competitors, presumably.

MS. JENKINS: Well, they might be, to the extent that there's any interstate movement. But no, they're not directly competitors in the same extent, and there would probably not be the same type of antitrust violation of they had not been direct competitors of Dr. Pireno.

However, I still don't think that it would have been the business of insurance. The legislative history of the McCarran-Ferguson Act shows that what Congress was concerned about were the competition and the stringent regulation in the insurance market, and it wished to preserve state regulation of the insurance market. It was not concerned, Congress was not concerned, with competition in the markets in which insurors function as buyers. When an insurer is dealing with providers, it's basically there as a buyer of goods and services, just as the Blue Shield plan in Royal Drug

was a purchaser of services from the pharmacies.

So I believe that we must look to see whether the competition that's allegedly affected in the complaint is the competition that was intended to be displaced by regulation under the McCarran-Ferguson Act.

We think that there are -- contend that there are several points on which this case is governed by and is similar to Royal Drug. In the first place, it's an agreement with providers by the insurance company which the insurer enters into in order to contain its costs, just as the Blue Shield plan did in Royal Drug. It might be part of the business of insurance companies to that extent, like other arrangements for the purchase of goods and services, but it's not the business of insurance.

This arrangement does not underwrite or spread risks. The risks are spread by the policy itself which the insured purchases from the insurance company. But determinations later on about what the obligation of the insurance company is under that policy, or actually advice regarding that, do not underwrite or spread the risks.

This peer review arrangement does not concern the policyholder directly himself. It doesn't relate to

the contract between the insurer and the insured. And it involves parties outside of the insurance industry and outside of the contract between the provider and -- between the insurer and the insured.

We also would like to stress that there are a number of respects in which the provider agreements here are even less the business of insurance than they were in Royal Drug. In the first place, Royal Drug concerned a Blue Shield plan whose policies themselves promised and provided the services that were being offered, that is a service benefit contract, whereas here only indemnity contracts are involved, money benefits to reimburse the insured.

The provider contracts in Royal Drug at least contemplated that some kind of provider agreements would be entered into. In fact, they were expressly requested by the union management who were involved in the group contracts that Blue Shield offered that had pharmacy agreements, whereas here the agreement with New York State Chiropractic Association is neither necessary nor related to the insurer's efforts to satisfy its obligations to its policyholders, because there are other means whereby the insurer could get the same kind of advice and information.

Finally, in this case the complaint alleges a

conspiracy among the providers which arose outside of the insurance industry and sought to affect a non-insurance market, the market for chiropractic services. The providers agreed among themselves and then persuaded or were joined voluntarily by Union Labor Life. And we think this makes this case even less the business of insurance than Royal Drug.

With respect to the state regulation issue, I would like to point out that, first, it would not be necessary to reach this issue in order to affirm the Second Circuit, but it has been briefed by the parties and we believe that New York State does not regulate peer review practices of chiropractors at all, and it does not regulate this particular practice to the extent that is required for McCarran-Ferguson immunity.

Furthermore, the first section of -- the first part of Section 2(b) is particularly appropriate, because there is no law of New York State that would be impaired or invalidated or superseded if peer review is simply made subject to federal antitrust laws.

Furthermore, because the peer review committee --

QUESTION: Well, let's assume that -- there is a procedure in New York, isn't there, for state authorities to review an insurance company's claims

settlement?

MS. JENKINS: Yes, Your Honor, there is.

QUESTION: May a policyholder complain and have a hearing or something?

MS. JENKINS: A policyholder may complain to the insurance department about the claims settlement it has received.

QUESTION: Well, suppose -- and what does the official do then, or the official body do?

MS. JENKINS: Well, as Mr. Kennedy says, it contacts the parties, the insurance company and the doctor that provided the service. It does not contact the peer review committee. It has no jurisdiction over the peer review committee and would not be able to deal directly with --

QUESTION: That may be so, but what if the official believes the settlement was quite proper? What will he do? He'll just say, sorry, you'll get no relief?

MS. JENKINS: If the insurance department determines that the claim was fairly paid, I imagine that that's what --

QUESTION: What if it determines it was not fairly paid? What can it do about it? Cancel a license of the company to do business? They can't order --

MS. JENKINS: It can -- I am sure it could possibly cancel the license of the insurance company, or reprimand the insurance company. It could do nothing whatsoever to the chiropractors.

QUESTION: But it can't change the amount that the company is supposed to pay, can it?

MS. JENKINS: I think it could probably order a readjustment, but I'm not positive about that.

QUESTION: It may? It may?

MS. JENKINS: I'm sorry, I'm not sure whether they can or not.

QUESTION: Well, what if it approves it? What if it approves it? Don't you think that if the antitrust law came along and upset that claim that it would be impairing some state procedure for the settlement of claims?

MS. JENKINS: No, Your Honor, I don't believe it would, because it's not necessary under New York State law that this particular means be used.

QUESTION: It may not be necessary, but nevertheless if it's permissible under state law and they use it and the state review committee -- if there's a complaint and the state officials say, why, this claim was settled quite well, and then along comes the antitrust laws and --

MS. JENKINS: Well, it doesn't upset the insurer's internal determinations on claims settlement. It just -- and not only that. I mean, it's not necessarily -- just because an activity is exempt from the antitrust laws, is not exempt from the antitrust laws, it doesn't always mean that there's a violation. We contend there that there has been an abuse of the peer review process and it has been used to both fix fees and to dictate what the modes, the proper modes of practice are that will receive the so-called seal of approval of the chiropractors association.

QUESTION: What if an insurance commission received a great many complaints about a particular insurer who was deliberately delaying payment of claims, and then a study was made and it developed that the median time for disposing of claims was, let us say hypothetically, three months, but that this particular company took 12 months.

Would that be a subject over which the commission in New York would have jurisdiction to act?

MS. JENKINS: The commission would certainly have jurisdiction to act against the insurance company, yes. The insurance company, however, is not the only Defendant in this action, and the real focus of the complaint of Respondent was on the agreement between the

insurance company and the Chiropractic Association and the activities of the Chiropractic Association implementing that agreement.

QUESTION: But you didn't seek any redress from the New York authorities at all?

MS. JENKINS: Well, because Dr. Pireno does not --

QUESTION: Yes or no?

MS. JENKINS: No. Dr. Pireno does not accept assignments and so he would not be able to directly approach the insurance department.

QUESTION: Do you think if state law required this sort of a peer review group that it would be exempt from the antitrust laws?

MS. JENKINS: Well, if the state insurance law required insurance departments to have peer review committees?

QUESTION: Or that it required private insurers to have this precise kind of peer review group, peer review committee.

MS. JENKINS: Well, if it were required by state law --

QUESTION: Yes.

MS. JENKINS: -- then I would imagine that it would satisfy certainly the extent of state regulation

test of the McCarran-Ferguson Act. It still might not necessarily be the business of insurance. The business of insurance might still be regulated and not automatically satisfy the first test under the McCarran-Ferguson Act.

Like agreements with respect to a lease or office supplies or attorneys' services or investments, contracting with providers for peer review is the business of an insurance company, and the peer review conduct itself is not even that; it's part of the business of chiropractors. Neither of these, of this conduct, fits the definition of the business of insurance under Royal Drug and the other precedents of this Court.

The McCarran-Ferguson Act should be construed narrowly rather than extended to give immunity to parties, conduct, and markets which Congress never intended to exempt from the antitrust laws.

If the Court has any further questions?

CHIEF JUSTICE BURGER: Apparently none.

Mr. Grossman?

ORAL ARGUMENT OF B. BARRY GROSSMAN, ESQ.

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

MR. GROSSMAN: Mr. Chief Justice, may it please the Court:

The two courts below construed the complaint to allege a conspiracy which eliminated competition in the market for the services of chiropractors. In the Government's brief we indicated why we think this alleged competitive restraint is not the business of insurance.

It doesn't satisfy any of the functional or analytical criteria articulated in this Court's decisions. Moreover, as we indicated in our brief, the challenged restraint in the chiropractic market does not satisfy the criteria established in either the opinion of the majority or that of the dissent in Royal Drug, this Court's most recent decision on the subject.

Now, in view of the short time available I wont try to repeat that brief in necessarily abbreviated form. Instead, I'd like to address the critical words "business of insurance" from a historical perspective, for after all the various criteria articulated by the courts, whether it's spreading risk or relationship to the policy, are but means to an end, and that end is of course to ascertain whether Congress intended a restraint of the type alleged here, namely in a provider market, a non-insurance market, to be entitled to the exemption that it had provided for the business of insurance.

The McCarran-Ferguson Act of course was passed in response to this Court's decision in Southeastern Underwriters, and there is considerable evidence that Congress was attempting to undo some, but not all, of the changes that that decision was thought to have brought about. In Southeastern Underwriters the majority held that the Sherman Act encompassed alleged restraints among insurers in the writing of insurance policies.

All the members of the Court recognized that the interstate communications and transportation incidental to the writing of insurance policies were sufficient to fall within the commerce clause. But Chief Justice Stone in his dissent sought to distinguish between the local and the interstate aspects of insurance company activities, and he referred to the former as the business of insurance.

And in developing his limited notion of the business of insurance which should be left to state primacy, the Chief Justice addressed the issue raised in this case. And I just direct the Court's attention to pages 570 and 7 of volume 322, where you will see that the Chief Justice stated that if contracts of insurance are in fact made the instrument of restraint in the marketing of goods or services, they are not beyond the

reach of the Sherman Act. Contracts not in themselves in interstate commerce may nevertheless be used as the means of its restraint.

Similarly, Justice Jackson in his dissent expressed the view at page 587 that if competition in goods and services other than insurance were restrained by insurance company activities that conduct would be subject to the Sherman Act. Now, since the majority of the Court felt the Sherman Act applied to the actual writing of insurance policies, it can be assumed that they too deemed the federal law applicable to restraints in non-insurance markets effectuated through insurance company activities.

Thus it could be said that the entire Court in Southeastern Underwriters was of the view that conduct involving an insurance company would be subject to the Sherman Act if it restrained competition in non-insurance markets.

QUESTION: I don't think that was Justice Frankfurter's view, was it? Didn't he think that the Congress in 1890 had in mind the Paul decision and didn't intend it to reach --

MR. GROSSMAN: That was a view held by Justice Frankfurter, but he joined the dissent, Chief Justice Stone, which drew this distinction between insurance

restraints and insurance transactions which result in a restraint in a non-insurance market. He joined that dissent. I think it is a fair statement to say that he thereby adopted the reasoning. If not, then one member of the Court did not address that issue.

This unanimity or consensus I suggest is critical to ascertaining what Congress' intent was with respect to non-insurance restraints of the type alleged in this case, for it indicates the legal status quo ante to which the drafters of the McCarran Act looked. Now, we all realize that the legislative history reveals considerable disagreement as to how much of the exclusive power of insurance thought to reside in the states as a result of Paul v. Virginia should be returned to the states.

Now, it's clear that Congress gave back some of that power, but not all. But more important to the facts of this case is that there is nothing in the statutory language, the legislative reports, or the Congressional debates to indicate any Congressional intent to create a broader exemption from federal antitrust law for insurance-related activities than was thought to exist prior to Southeastern Underwriters; and that, since the Court's aversion to this distinction between insurance restraints and non-insurance

restraints can be presumed to have been known to the Congress, this silence is extremely important.

For there is absolutely no evidence in any of the sources that I have referred to that Congress desired to expand the antitrust primacy of the states to include non-insurance goods and services. On the contrary, they used the limited term "business of insurance" rather than some broader term, "business of insurers" or "conduct, transactions, restraints, related to insurance."

QUESTION: But would you agree that insurers engaged in the business of insurance engage in the various components which in and of themselves are not the business of insurance?

MR. GROSSMAN: I believe that --

QUESTION: And isn't the settlement -- isn't this method of settling their claims such a component?

MR. GROSSMAN: Well, if in fact this practice is not the business of insurance, as you may be suggesting, then it is not entitled to an exemption. I think what must be kept in mind in this --

QUESTION: Assume it is not in itself the business of insurance, but is it or is it not essential, an essential part of carrying on the business of insurance?

MR. GROSSMAN: The restraint alleged here -- and I think that's what we must focus on -- is not an essential element of the business of insurance.

QUESTION: You mean they're doing it the wrong way. They could do it some other way where it might be all right?

MR. GROSSMAN: What the allegation is is that they have used this arrangement, which if used legitimately might be viewed as at least related to claims adjustment, but they have abused it, because they've used it to eliminate chiropractic competition. Now, that is the gravamen of the offense, and if in fact the work was all done in-house you would have no allegation that there was a restraint outside the insurance market.

Now, whether in fact this complaint is true is a completely separate issue from the one before this Court. But we have to take it as -- at least accept the allegation for the purposes of this exemption question.

QUESTION: Mr. Grossman, how do you account for the fact that the commissioners of insurance, the association representing all of them in every state, have filed a brief in which they take precisely a different, an opposite view from that taken here today by the Solicitor General and the Department of Justice?

They disagree with you both on whether or not this is the business of insurance and also as to whether or not the states regulate it. And these are the people responsible for the regulation.

MR. GROSSMAN: I don't want to seem to avoid that question, but I would suggest that it is probably more relevant what the National Association of Insurance Commissioners thought prior to the passage of the Act, because as this Court's decisions indicated its comments were very instrumental in bringing that about. And if we look to those suggestions, the draft position of the National Association at that time, all of their --

QUESTION: You're talking about when the McCarran Act was passed?

MR. GROSSMAN: Yes. I'm talking about the intent of Congress at that time, which is what we are looking to. At that time the National Association of Insurance Commissioners urged that an exemption be limited to horizontal activities among insurance companies. If one looks to their recommendations, and they I think appear in the Royal Drug decision, they talked about agreements between providers to enter into joint programs of one type or another -- collection of cost data, the adoption of rates --

QUESTION: Well, all you're saying is that

they disagree today with what their predecessors said a good many years ago?

MR. GROSSMAN: Well, that is correct. They have now perhaps rethought --

QUESTION: Could it be possible that they know more about it today than they did then?

MR. GROSSMAN: It's certainly possible.

QUESTION: Were there peer committees functioning at that time?

MR. GROSSMAN: No. My understanding is that the first peer review relationship arose in around 1945, but they really did not become a frequently used practice until much later. And of course what is relevant is what the intention of Congress was in 1945, not what might be wise or better practice in 1982.

CHIEF JUSTICE BURGER: Your time has expired, counsel.

Do you have anything further?

REBUTTAL ARGUMENT OF T. RICHARD KENNEDY, ESQ.

ON BEHALF OF PETITIONERS

MR. KENNEDY: Yes, I do, Mr. Chief Justice.

With respect to the last point made by the Solicitor General, I'd like to remind the Court of what it said in SEC versus Variable Annuity, that insurance is an evolving institution and should not be frozen into

the concept that existed in 1945. And the NAIC, we contend what they're saying today is not different from what they said in 1945 if the complete legislative history is reviewed.

I'd like to point out further what Justice Brennan cited in his dissent in the Royal Drug case, that Congress considered a bill which would have limited the business of insurance only to agreements among -- agreements between insurance companies and related only to rate methods. That was Senate Bill 12, introduced in 1945.

Senator O'Mahoney, who advocated the position of the Justice Department at that time, said that he sought vigorously to get that bill approved in Committee and on the floor of the Senate. But it was not approved. Congress instead chose to enact a broad exemption from the federal antitrust laws and that exemption is for the business of insurance. And as this Court has held --

QUESTION: Mr. Kennedy, with respect to the basic argument the Solicitor General made, do you contend that the McCarran Act does create an exemption that was broader than the area that was exempt from the antitrust laws before the Southeastern Underwriters case was decided?

MR. KENNEDY: No, I don't, Your Honor.

QUESTION: How do you meet his argument based on the dissenting justices in Southeastern Underwriters?

MR. KENNEDY: Well, prior to Southeastern Underwriters everyone had assumed that the antitrust laws didn't even apply to the business of insurance.

QUESTION: No, but apparently his argument, as I understood it, is that the dissenters took the position that if the insurance companies restrained a non-insurance market, that then the antitrust laws would apply.

MR. KENNEDY: Well, Your Honor, almost everything the insurance companies do affects the non-insurance market. For example, if my client here made a unilateral determination that they were only going to allow $100 as a reasonable fee for a certain type of chiropractic treatment, certainly that would have the same restraining effect on chiropractors charging their policyholders as is alleged in this case.

And if a company does make the determination as to what that reasonable fee should be, but instead of making an arbitrary decision it goes out and seeks professional advice as it's required to do, to get expert input, by the New York insurance law --

QUESTION: Well, of course a unilateral determination by the company wouldn't raise an antitrust problem. But suppose all the insurance companies agreed on what fees they would -- what costs they would reimburse, and therefore had restrained competition in a non-insurance market. Do you think that would be covered?

MR. KENNEDY: Well, that's the issue just decided by the Court of Appeals in the District of Columbia, where the court held that an intra-industry horizontal agreement was part of the business of insurance and within *. And indeed, the Justice Department has taken that position in amicus briefs filed in the Proctor case, I believe, and in the Quality Auto Body case as well, that if it's an agreement solely among insurance companies it is part of the business of insurance.

Now, further I --

CHIEF JUSTICE BURGER: Your time has expired, counsel.

MR. KENNEDY: I'd like to thank the Court for its attention.

CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted.

(Whereupon, at 11:09 a.m., the case in the

above-entitled matter was submitted.)

* * *

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:

Union Labor Life Insurance Company, Petitioner V. A. Alexander Pireno; and New York State Chiropractic Association, Petitioner v. A. Alexander Pireno

No. 81-389 & 81-390

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

BY Irene Hammond