

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

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WASHINGTON, D.C. 20543

THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

DKT/CASE NO. 83-1748

TITLE ALLIS-CHALMERS CORPORATION, Petitioner v.  
RODERICK S. LUECK

PLACE Washington, D. C.

DATE January 16, 1985

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ALLIS-CHALMERS CORPORATION, :  
4 Petitioner :  
5 v. : No. 83-1748  
6 RODERICK S. LUECK :  
7 - - - - -x

8 Washington, D.C.

9 Wednesday, January 16, 1985

10 The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States  
12 at 1:57 p.m.

13 APPEARANCES:

14 THEOPHIL C. KAMMHOLZ, ESQ., Chicago, Illinois; on behalf  
of the Petitioner.

15 GERALD S. BOISITS, ESQ., Milwaukee, Wisconsin; on behalf  
16 of the Respondent.

17 - - -

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

2                   CHIEF JUSTICE BURGER: Mr. Kammholz, you may  
3 proceed whenever you're ready.

4                   ORAL ARGUMENT OF THEOPHIL C. KAMMHOLZ, ESQ.,

5                   ON BEHALF OF THE PETITIONER

6                   MR. KAMMHOLZ: Mr. Chief Justice and members  
7 of the Court:

8                   At issue in this case is the extent to which a  
9 state, by application of state law, may regulate the  
10 legal obligations of parties to a collective bargaining  
11 agreement and adjudicate the legal consequences of the  
12 breach of such agreement.

13                   A majority of the Wisconsin supreme court held  
14 that Section 301 of the Labor Management Relations Act  
15 of 1947 did not preempt a state court suit brought by a  
16 union employee against his employer, alleging tortious  
17 bad faith in the administrative handling of a disability  
18 claim, even though the employee's right to benefits  
19 derived entirely from a collective bargaining agreement,  
20 and the employee did not resort to the contractual  
21 grievance procedure which included arbitration at the  
22 terminal level.

23                   The facts are simple and undisputed.  
24 Allis-Chalmers and the UAW union for many years have  
25 been parties to collective bargaining agreements. The



1 current agreement at issue here incorporates a group  
2 health and disability plan funded by Allis-Chalmers and  
3 administered by Aetna Insurance Company. Disability  
4 benefits are provided for non-occupational illness and  
5 injury to all UAW represented employees, including Lueck.

6 The agreement between the UAW and  
7 Allis-Chalmers also contains a provision for resolution  
8 of disputes, as I have noted earlier. It's a typical  
9 union contract dispute resolution procedure, grievance  
10 procedure, culminating in arbitration at the final level.

11 Lueck suffered a nonwork-related disability.  
12 Payments were initiated under the plan. Lueck  
13 ultimately received all that was due him under the plan,  
14 but there was some delay in payment with respect to some  
15 of the obligation under the plan.

16 Lueck did not go to his union. He did not go  
17 to the grievance procedure. What he did do was to go to  
18 the circuit court for Milwaukee County, Wisconsin and  
19 file a lawsuit against Allis-Chalmers alleging  
20 contemptuous, deliberate, repeated conduct on the part  
21 of the company in failing to pay -- make payments  
22 promptly. He further alleged that as a result of the  
23 defendant's bad faith, he incurred emotional distress,  
24 pain and suffering, physical impairment, all to his  
25 damages to the extent of \$10,000 compensatory and

1       \$300,000 punitive.

2               With respect to the circuit court suit,  
3       Allis-Chalmers and Aetna raised two defenses. First,  
4       that the suit was preempted by Section 301 of the Labor  
5       Management Relations Act; and secondly, that Lueck had  
6       not resorted to the contractual grievance procedure.

7               QUESTION: Mr. Kammholz --

8               MR. KAMMHOLZ: Yes, Justice --

9               QUESTION: -- on a side point, may I inquire  
10       whether the disability plan involved here is governed by  
11       ERISA?

12              MR. KAMMHOLZ: The record does not show this.  
13       It may well be. The reason I say the record does not  
14       show it, the case went up on summary judgment. And I  
15       was about to come to that motion for summary judgment on  
16       the failure to exhaust the grievance procedure and on  
17       account of preemption under 301.

18              The circuit court granted motion for summary  
19       judgment on behalf of both defendants Allis-Chalmers and  
20       Aetna. An appeal was taken to the Wisconsin court of  
21       appeals. It affirmed the lower court decision. And  
22       further appealed to the Wisconsin supreme court with  
23       respect to certiorari, to wit we're here today.

24              A majority of that court in January of last  
25       year, relying on what it said were long-established

1 principles of state insurance law, held that any  
2 violation of the labor agreement was irrelevant to the  
3 issue of bad faith handling of the disability claim.  
4 Further, the court said there was no 301 presumption  
5 "even though the insurance contract is part of a labor  
6 agreement otherwise governed by federal law." By  
7 implication, the court further held that there was no  
8 need to resort to the grievance procedure because it did  
9 not comment on the grievance procedure.

10 The single dissent in the Wisconsin supreme  
11 court concluded that any duty allegedly violated by  
12 Allis-Chalmers was specifically created by the labor  
13 contract and would not exist absent the labor contract.  
14 Consequently, the dissent concluded, it must fail within  
15 -- on account of the ambit of Section 301 which governs  
16 labor agreements.

17 The dissent further noted that there should  
18 have been an exhaustion of remedies under the grievance  
19 procedure which did not occur. Finally, the dissent  
20 concluded that the mere existence of a state tort of bad  
21 faith is insufficient to override uniformity in  
22 application of federal labor law, and to do as the  
23 majority holds fragments federal labor law.

24 I have gone into some detail here on what  
25 happened in the court below because I think that puts

1 into sharp focus precisely the issues before you here  
2 this afternoon.

3 We respectfully submit that this is a 301  
4 case, pure and simple -- a labor agreement, grievance  
5 procedure, arbitration at the terminal level, no attempt  
6 to grieve. Since the enactment of LMRA in 1947 and  
7 beginning with the first significant decision in that  
8 area in 1957, the Lincoln Mills case, and continuing  
9 through the Steelworkers trilogy in 1950, Boys Market in  
10 1957, I believe, the law has consistently held that it's  
11 federal law that must be fashioned by the courts,  
12 federal law and not state law. And yet, the result of  
13 the supreme court decision of Wisconsin here would  
14 fragment that federal law and permit encroachment on the  
15 exclusivity that is created under LMRA and under the  
16 decided cases.

17 With respect to the preemption aspect, we  
18 suggest also that the law is crystal clear. In Lucas  
19 Flower in 1962 the Court first articulated the concept  
20 of preemption of state law. This has been applied  
21 consistently and without exception over the years. The  
22 erosion that would result from acceptance of the  
23 Wisconsin doctrine would be -- would have very serious  
24 implications on the federal labor scene. In that  
25 respect I think it is appropriate for me to note the



1 cogent amicus brief filed by the AFL-CIO and a similar  
2 brief by the United States Chamber of Commerce. These  
3 briefs state in some detail their view as to what would  
4 result if state action could be accorded the kind of  
5 finality that would apply under the Wisconsin decision.

6 The issue is simple: does Wisconsin as a  
7 state have the right to impose insurance principles in  
8 the context of a collective bargaining agreement  
9 governed by federal law with arbitration in the  
10 grievance procedure also included in that contract, and  
11 which --

12 QUESTION: Well, Mr. Kammholz, I gather the  
13 Court, in Linn at least, recognized that there might be  
14 state law action, notwithstanding a breach of -- that  
15 was a libel action, wasn't it?

16 MR. KAMMHOLZ: Linn was a libel action. Your  
17 Honor, Linn was not a contract 301 case. Linn was a  
18 Section 7 and 8 NLRA breach.

19 QUESTION: Well, when you say preemption, I  
20 gather what you mean is that it's a breach of contract.  
21 The action must be under 301 whether that action is  
22 brought in the state court or the federal court.

23 MR. KAMMHOLZ: Yes, sir.

24 QUESTION: And it's not really preemption.  
25 It's state law -- rather, federal law, and only federal

1 law applies if it's an action for breach of the  
2 collective bargaining.

3 MR. KAMMHOLZ: Yes. And it applies whether  
4 the action is brought in state court or whether it's  
5 brought in federal court. The Wisconsin Supreme Court --

6 QUESTION: Well, it then was not a breach of  
7 collective bargaining?

8 MR. KAMMHOLZ: It was not.

9 QUESTION: Didn't we have another? I thought  
10 we had some other that -- well, I've forgotten.

11 MR. KAMMHOLZ: There are other cases involving  
12 egregious conduct, none in the context of a collective  
13 bargaining agreement; all in the context of does the  
14 National Labor Relations Act preempt; what is the reach  
15 of the NLRA.

16 QUESTION: Well, would it have been all right,  
17 in your view, if the supreme court of Wisconsin had  
18 adjudicated this case but applied the principles of  
19 federal labor law that you say are derived from the  
20 Lincoln Mills cases?

21 MR. KAMMHOLZ: Yes. The Wisconsin supreme  
22 court should have said, very simply, this case is  
23 preempted, period.

24 QUESTION: Well, but I -- my question was was  
25 it all right for the supreme court of Wisconsin to have

1 adjudicated this case so long as it applied principles  
2 of federal law derived from the Lincoln Mills trilogy?

3 MR. KAMMHOLZ: Yes. In the Dowd case in this  
4 Court the law was articulated along these lines, that  
5 yes, the state court may adjudicate, but a state court  
6 must apply federal law.

7 QUESTION: Well, I gather, Mr. Kammholz, what  
8 you would have hoped the Wisconsin court would say is  
9 we'll treat this as a 301 suit brought in state court;  
10 we'll stay it while we send you to, under Boys Market,  
11 to exhaust your administrative remedies and end up in  
12 arbitration. That's what you wanted, wasn't it?

13 MR. KAMMHOLZ: Yes. The Wisconsin court did  
14 confuse the preemption doctrine under 301 with the  
15 preemption doctrine under NLRA, Sections 7 and 8.

16 We assert that the 70 -- that the 301 doctrine  
17 is the only doctrine applicable here; that Section 7 and  
18 8 doesn't come into play because we're dealing with a  
19 collective bargaining agreement, a grievance procedure  
20 and arbitration.

21 QUESTION: Is it clear, Mr. Kammholz, that if  
22 this particular respondent had a claim for -- under this  
23 plan that he would have had to submit it to arbitration  
24 under the collective bargaining agreement?

25 MR. KAMMHOLZ: Absolutely, no question about

1       that.

2               Unless the Court has further questions, at  
3       this time I should like to reserve for --

4               QUESTION: I have one question.

5               MR. KAMMHOLZ: Yes.

6               QUESTION: But again, it's not directly  
7       related to the facts of this case obviously. But  
8       assuming for purposes of the question that your position  
9       is correct and that this is a 301 case, if it's also  
10      governed by ERISA are there any conflicts between the  
11      remedies available to someone in the circumstances of  
12      the plaintiff below by virtue of the fact that it might  
13      also be an ERISA plan?

14              MR. KAMMHOLZ: The record is barren, of  
15      course, with respect to ERISA.

16              QUESTION: Both being federal laws --

17              MR. KAMMHOLZ: Both federal laws.

18              QUESTION: -- but with different remedial  
19      approaches. And yet, one can't help but be struck how  
20      the facts of this case and the one that was just argued  
21      are identical.

22              MR. KAMMHOLZ: That's why we're here in  
23      tandem, I assume.

24              Yes. I -- with respect to your question, I  
25      believe that there may well be another discrete route



1 for preemption. We now have two and possibly -- and  
2 three, I suppose -- 301, NLRA, and ERISA. So a  
3 parallel, yes. I do not think that this could conflict  
4 with --

5 QUESTION: At any rate, it's federal, not  
6 state.

7 MR. KAMMHOLZ: In any event it's federal, yes.

8 CHIEF JUSTICE BURGER: Very well.

9 MR. KAMMHOLZ: Thank you.

10 CHIEF JUSTICE BURGER: Mr. Boisits.

11 ORAL ARGUMENT OF GERALD S. BOISITS, ESQ.,

12 ON BEHALF OF THE RESPONDENT

13 MR. BOISITS: Mr. Chief Justice, members of  
14 the Court:

15 Before proceeding into my response to Mr.  
16 Kammholz's argument, I'd like to clarify a few of the  
17 facts that I believe are part of the record.

18 First of all, while Mr. Kammholz does admit to  
19 the fact that these disability benefits on behalf of Mr.  
20 Lueck were eventually received, the record should show  
21 that Mr. Lueck received these benefits only after  
22 Allis-Chalmers and Aetna Insurance Company were served  
23 with his cause of action.

24 QUESTION: Did the claim -- did his claim  
25 arise out of the union contract?

1 MR. BOISITS: Excuse me, Your Honor.

2 QUESTION: Did his claim arise under the union  
3 contract?

4 MR. BOISITS: Your Honor, yes and no, all  
5 right. First of all, as far as the union contract is  
6 concerned, we've got a contract that on one hand  
7 provides for the normal things that a labor contract  
8 provides for -- labor, conditions of employment, wages,  
9 that type of thing. Then we have a peripheral thing  
10 where the insurance or the employer has, in addition,  
11 provided some health benefits and --

12 QUESTION: Did that derive from an agreement  
13 between the company and the union?

14 MR. BOISITS: It did come from the agreement.  
15 It's specifically mentioned in the union contract. It  
16 was something that was negotiated. I can't argue with  
17 that.

18 The problem I have in looking at the case is  
19 primarily the situation where they've accepted the  
20 obligations to insure Mr. Lueck under a disability  
21 policy, and they've therefore basically put on the hat  
22 of an insurance company and are now attempting by virtue  
23 of Section 301 to avoid some of the obligations that the  
24 state recognizes as mandatory as far as someone that's  
25 acting as an insurance company.

1                   And in that situation, Mr. Lueck is really  
2 caught between a rock and a hard place basically,  
3 because he can go through the union procedures, and  
4 what's basically provided under those union procedures  
5 is that he's going to collect whatever disability  
6 benefits he's entitled to if they were denied, and  
7 perhaps maybe some interest that he lost -- that's not  
8 clear by the contract -- and that's it. The insuring  
9 employer can therefore basically be entitled to a free  
10 play with his insurance benefits.

11                   QUESTION: Well, that's what happens under  
12 collective bargaining agreements all the time where you  
13 have to go through the grievance procedure, and you have  
14 to be -- you have to settle for whatever you get out of  
15 the grievance or the abitrator.

16                   MR. BOISITS: True. But a state --

17                   QUESTION: And even -- even if the employer  
18 keeps the wages that you are -- withholds, wrongfully  
19 withholds wages that you would like to use to feed your  
20 family.

21                   MR. BOISITS: Yes, but basically as far as an  
22 -- when the employer acts as an insurer, there are other  
23 obligations that the state feels that are very  
24 important. And in this case we are proceeding against  
25 -- against the employer --

1 QUESTION: Would you say that this agreement,  
2 then, this agreement that was provided for arbitration  
3 of disputes about this very plan, is contrary to public  
4 policy? Is that what you're saying?

5 MR. BOISITS: I'm saying that it --

6 QUESTION: It's just unenforceable, that  
7 provision of the contract.

8 MR. BOISITS: That I'm saying -- no, I'm not,  
9 Your Honor. Basically --

10 QUESTION: Well, if it's enforceable, why  
11 can't you insist that he go to arbitration?

12 MR. BOISITS: He can go to arbitration to get  
13 his contract benefits, the benefits that are arising out  
14 of the breach of the contract, the employment contract.  
15 They provide for him to get a means of redress. He can  
16 get his --

17 QUESTION: Yes, but most arbitration  
18 provisions say that the arbitrator -- the arbitrator's  
19 decision will be final and binding, and that's all you  
20 get.

21 MR. BOISITS: As far as disability benefits  
22 are concerned, but the state interest, the interest that  
23 the Wisconsin -- that the State of Wisconsin, as well as  
24 the Wisconsin majority, indicated was look at, we cannot  
25 allow an employer to hide under a Section 301 case, or



1 what's claimed to be a Section 301 case. They can horse  
2 Mr. Lueck around forever. They can delay his payments.  
3 He can go through -- he can go through the arbitration  
4 process. They can pay his disability. Then later on  
5 they can deny him payments again. They can send him to  
6 four or five different doctors, all of whom affirm his  
7 disability, and still deny it and then go through the  
8 arbitration, and so forth and so on without any --  
9 without any -- with impunity.

10 QUESTION: If we join you and make this  
11 exception as to insurance policies, can you tell me  
12 anything that the state can't also do and wreck the  
13 whole contract?

14 MR. BOISITS: And wreck the entire employment  
15 contract by allowing --

16 QUESTION: Yeah, yeah.

17 MR. BOISITS: Your Honor, I can't --

18 QUESTION: Well, can you name something that  
19 they couldn't do? Couldn't the state say it's against  
20 our policy to pay a minimum wage?

21 MR. BOISITS: Yes, but now we're getting into

22 --

23 QUESTION: Would that apply?

24 MR. BOISITS: Yes. The state could not say  
25 that.

1 QUESTION: Why not?

2 MR. BOISITS: Basically because now that's

3 dealing -- that's stepping right into a situation of the

4 conditions of employment and wages, something that

5 Section 301 --

6 QUESTION: Something that's bound by the

7 contract.

8 MR. BOISITS: Something that's related to the

9 contract, yes.

10 QUESTION: Just like the policy.

11 MR. BOISITS: Well, the policy -- what I'm

12 saying, though, is that --

13 QUESTION: Is -- does the contract in any way

14 say that this benefit under the policy is different from

15 the rest of the contract?

16 MR. BOISITS: I'm sorry. I don't understand

17 the question.

18 QUESTION: You say this is a separate part of

19 the contract.

20 MR. BOISITS: Yes, it is.

21 QUESTION: Does it say that it is separated

22 from the contract so that it does not apply to

23 arbitration?

24 MR. BOISITS: No, it doesn't.

25 QUESTION: Well, then how can you say so?

1 QUESTION: It's just the contrary.

2 MR. BOISITS: It says the contrary. But  
3 again, where does -- we're talking about a state  
4 interest here in making sure --

5 QUESTION: Well, how can the state do it?

6 MR. BOISITS: Why can the state do it?

7 QUESTION: How?

8 MR. BOISITS: The state can step in and allow  
9 Mr. Lueck compensatory damages and punitive damages just  
10 like was discussed in the previous case. They cannot  
11 rule as to the eligibility as far as disability benefits  
12 are concerned. That's something that the parties to the  
13 labor agreement anticipated, and that's something that  
14 they've agreed to go through arbitration process on.  
15 But they have not -- there is nothing in that contract  
16 to indicate what -- if there are any procedures in  
17 respect to how the employer, who is an insurer -- I  
18 think the key thing here as far as the Court should  
19 consider is that the -- that the employer now has  
20 stepped out of the shoes of an employer and has taken on  
21 the guise of an insurance company; and as a result, they  
22 become amenable to some of the equitable principles.

23 QUESTION: Well, I gather, though, Mr.  
24 Boisits, what you're saying is even though the  
25 collective bargaining agreement says for issues of this

1 kind you must go through the grievance procedure, you  
2 must accept arbitration, it doesn't really mean  
3 anything, because if the state wants to intervene and  
4 say well, we've got a different policy in particular  
5 respects, and if that policy is violated, then that's in  
6 addition to whatever remedy you have under the  
7 collective bargaining.

8 That is what you're saying?

9 MR. BOISITS: No, I'm not. Because I'm  
10 saying, what I'm saying is that the Wisconsin supreme  
11 court decision is accommodating to the Section 301  
12 arguments. Congress as -- as --

13 QUESTION: I know, but it's -- it's adding  
14 something. I thought you just suggested to Justice  
15 White that there isn't any question in terms at least  
16 that the arbitration and grievance procedure applied to  
17 this claim; isn't that right?

18 MR. BOISITS: It applies to a claim for  
19 disability benefits. It does not apply to a claim for  
20 bad faith, the bad faith tort that Wisconsin has  
21 promulgated. It only applies to the collection of his  
22 disability benefits. If they deny him his benefits, he  
23 can go through an arbitration process, if they  
24 wrongfully, recklessly, contemptuously deny his benefits.

25 QUESTION: Well, isn't that one of the -- so



1 the employee says to the -- says to the employer or to  
2 the insurance company or whoever he's talking to, you  
3 haven't paid me my benefits, and furthermore, you have  
4 not done it -- you've done it in bad faith. And the  
5 employer says well, let's arbitrate; this is a dispute  
6 about the payment of these benefits. And you say you  
7 divide that up into two things. One is you go arbitrate  
8 for your benefits, and you sue in the state court for  
9 bad faith.

10 MR. BOISITS: That's what I'm saying.

11 QUESTION: Well, that's --

12 QUESTION: Well, if the union became convinced  
13 that Allis-Chalmers was horsing some of its members  
14 around, as you put it, on these disability payments,  
15 couldn't the union decide that we don't want to submit  
16 that kind of thing to arbitration and simply withdraw  
17 that from the arbitration contract, and that then you'd  
18 really be in a lot better position, I would think.

19 MR. BOISITS: You're talking a renegotiation  
20 of the contract then.

21 QUESTION: I realize --

22 MR. BOISITS: There's no -- there's no  
23 provisions in there for that now. Where is the -- where  
24 is the employer amenable to the situation that Mr. Lueck  
25 faced, if they're treating him in bad faith as alleged?

1       Where is he amenable to it? He can do that with every  
2       employer until the union steps forward and says let's  
3       negotiate. Hey, you're -- you know, you're horsing the  
4       people around.

5                QUESTION: But he's bound by the union's  
6       contract on his behalf to arbitrate this particular kind  
7       of dispute, as I understand it.

8                MR. BOISITS: Just the disability, not --  
9       Wisconsin looked at this as a separate tort action, just  
10      like it looked -- this Court has looked at as emotional  
11      distress, intentional causing emotional distress,  
12      malicious libel -- those type of cases. This Court has  
13      looked at those things and has designed a policy to show  
14      that yes, you can go into court -- if the action is of a  
15      particularly contemptuous nature, you can go into court  
16      and sue on that. There won't be any infringement on  
17      it. It was said in Farmer. It was said in other cases,  
18      which admittedly do deal with the Garman exceptions or  
19      the Garman preemption doctrine and the related cases.  
20      However, I think that it's important to note that the  
21      first criteria under the Garman ruling is basically,  
22      one, number one, that the court has got to see whether  
23      or not there's any conflict with Section 301, with the  
24      Labor Management Relations Act. That's the first  
25      criteria that's stated in the Garman case.

1 QUESTION: Is this obligation on the benefits  
2 a debt? Is it a debt relationship?

3 MR. BOISITS: As far as the disability  
4 benefits are concerned? I would consider that a debt, a  
5 debt under the contract.

6 QUESTION: Well, then, is every person who  
7 doesn't pay his bills on time committing a tort?

8 MR. BOISITS: No, he isn't.

9 QUESTION: Well, you've just said that their  
10 failure to pay was a tort.

11 MR. BOISITS: There's got to be a particularly  
12 abusive manner in failing to do it, other ulterior  
13 motives.

14 QUESTION: Well, let's say that you write  
15 Brooks Brothers and say that go fly a kite, we're not  
16 going to pay you the bill, and don't waste your postage  
17 sending me any more bills. Is that a tort?

18 (Laughter.)

19 MR. BOISITS: It's a breach of contract.  
20 There's no -- there's no malice. There's no  
21 particularly abusive manner where Brooks Brothers has  
22 been harmed by it. They're not going to be harmed by  
23 it. You know, the cost of your suit is not going to be  
24 there.

25 Pardon?

1 QUESTION: They haven't got their money.

2 MR. BOISITS: They haven't gotten their money,  
3 but they have not been harmed by the action that you've  
4 done except they haven't gotten their money.

5 QUESTION: How's Brooks Brothers any different  
6 from your client?

7 MR. BOISITS: Yes, they are.

8 QUESTION: How?

9 MR. BOISITS: We're talking -- we're talking  
10 an employer, a giant industry. We're talking an  
11 employer-insurer who is -- who is out to horse somebody  
12 around, to keep them horsing around, and he's  
13 continually being denied the benefits. Where can Mr.  
14 Lueck turn? The state is the only place he can go. The  
15 union, as indicated here, both the union and the United  
16 States Chamber of Commerce are amicus here. There's  
17 nowhere to turn except to the state, the state that's  
18 promulgated state --

19 QUESTION: How can you say the union was  
20 disinterested in this case? Did he apply to the union?

21 MR. BOISITS: Mr. Lueck received his benefits  
22 before there was any right --

23 QUESTION: Well, what did the union refuse to  
24 do?

25 MR. BOISITS: Well, the union didn't refuse to



1 do anything in this case.

2 QUESTION: So you can't complain against the  
3 union.

4 MR. BOISITS: But what I'm saying is is that --

5 QUESTION: You can't, can you?

6 MR. BOISITS: No, I can't.

7 QUESTION: Well, why try to do it now?

8 MR. BOISITS: Justice, I'm not trying. I'm  
9 just saying, though, that the way the forces are on this  
10 course that there's danger on -- as far as contracts are  
11 concerned, that individuals cannot have any redress if  
12 someone on a labor contract horses them around, unless  
13 that contract is renegotiated and re-evaluated by the  
14 parties. And what if it isn't? Both parties have  
15 interest not to have a bad faith claim brought against  
16 them. They don't want to have to deal with that.

17 QUESTION: What if the union -- do you think  
18 the union's reason is that it might be a defendant in  
19 such a claim?

20 MR. BOISITS: I think that's why they're  
21 there. I don't think they're looking at this as an  
22 infringement. This is a -- this is a type of case where  
23 -- that they can become amenable to this type of  
24 action. It's a separate, distinct tort that the court  
25 has looked at, and they've treated it basically --

1 QUESTION: Well, may I ask you on that point,  
2 this contract, as I remember it, there's some  
3 supplementary correspondence about insurance-related  
4 matters, that they had some kind of a special  
5 arbitration procedure. If they had said in those  
6 documents insurance-related matters shall include  
7 arbitration of claims that the company was slow in  
8 paying, for bad faith or otherwise, and that the  
9 arbitrator would have the authority to grant appropriate  
10 relief if that happens, would you then feel you had to  
11 go through that procedure?

12 MR. BOISITS: Yes. Because then the state  
13 interest has been recognized, the interest that the --  
14 the contract is now taking into account.

15 QUESTION: Well, then, may I ask why couldn't  
16 one argue that your first step in this problem, if it's  
17 a general problem, is to ask the union to negotiate such  
18 a provision, or to bring a proceeding and see whether  
19 they might not even interpret the existing documents to  
20 give that relief?

21 I suppose it's conceivable that if you took  
22 the claim to arbitration and said that insurance-related  
23 matters includes claims of this kind as well, and if you  
24 have very sympathetic facts, as presumably you do.

25 MR. BOISITS: Justice, it is conceivable, but

1 unfortunately, it wasn't done in this case, or  
2 fortunately.

3 QUESTION: Well, Mr. Boisits, I'm looking at  
4 the collective bargaining agreement at page 24 of the  
5 Joint Appendix, and there's a provision as to the  
6 jurisdictional authority of the impartial referee, and  
7 it says, "It's defined as, and limited to, a  
8 determination of any grievance which is a controversy  
9 between the parties, or between the company and employee  
10 covered by this agreement concerning compliance with any  
11 provisions of this agreement, and is submitted to him  
12 consistent with the provisions of this agreement."

13 Now, I don't know. That seems to me broad  
14 enough to cover the kind of grievance that is I haven't  
15 been paid my benefits in time.

16 MR. BOISITS: Your Honor, in addition to that  
17 there's the other letter that specifically just says  
18 that --

19 QUESTION: Well, I was looking at the  
20 conclusion of the agreement. I wasn't looking --

21 MR. BOISITS: Are we looking in the -- what's  
22 --

23 QUESTION: Joint Appendix, page 24.

24 MR. BOISITS: On page 24?

25 QUESTION: Twenty-four, yes. See that

1 paragraph, the first paragraph at the top of the page,  
2 240? It's a rather broad authority.

3 MR. BOISITS: Yes, Your Honor, but again, as  
4 far as this would -- this page is concerned and this  
5 paragraph is concerned, I would argue that this applies  
6 to anything dealing with wages and conditions of  
7 employment. If we have to -- I think the --

8 QUESTION: Well, doesn't -- doesn't the --  
9 under that provision would not the arbitrator decide  
10 whether a given grievance comes within his authority or  
11 not?

12 MR. BOISITS: As far as -- whether they decide  
13 -- whether -- well, I'd say --

14 QUESTION: Whether it's an arbitrable  
15 grievance. Wouldn't that be within his authority to  
16 decide?

17 MR. BOISITS: Well, I'd say as far as Mr.  
18 Lueck was concerned, if he looked at the thing and he  
19 determined that this is a wage-related or he felt it was  
20 a wage-related condition of employment situation, yes,  
21 he would go to the arbitrator. However, he could be  
22 misled because of the statements that are in the Joint  
23 Appendix on page 42 and 43.

24 When looking at this, it was my feeling and,  
25 of course, Mr. Lueck's as a result, that the statements



1 that the -- the -- are in that letter are supplementing  
2 the labor agreement. They're treating it as a separate  
3 thing. They're treating the insurance benefits as a  
4 separate thing, and there they're just referring to the  
5 discontinuance of weekly disability payments.

6 QUESTION: But the supreme court of Wisconsin  
7 didn't consider it at all, did they?

8 MR. BOISITS: Didn't consider what at all?

9 QUESTION: That provision. Did it?

10 MR. BOISITS: I was asked about it at an oral  
11 argument. They did not put that down as far as their  
12 decision was concerned.

13 QUESTION: It's not in their opinion at all,  
14 is it?

15 MR. BOISITS: No, it isn't. No, it isn't.  
16 What they're looking at is they're looking -- I believe  
17 that they're promulgating the state interest. They're  
18 saying Lueck has nowhere else to go for this; that our  
19 state -- we've designed statutes, we've designed case  
20 law that treats this bad faith treatment as a separate,  
21 distinguishable tort from the contract, and as a result,  
22 we are ruling that there is jurisdiction to proceed  
23 against the employer when he puts the hat on as an  
24 insurer.

25 QUESTION: Well, now, look at this letter at

1 page 43 that you refer to expressly says that "questions  
2 within the committee's scope shall be referred to it and  
3 shall not be processed in the first three steps of the  
4 grievance procedure, but may be presented for  
5 arbitration in the established manner once they've been  
6 discussed and have not been resolved.

7 MR. BOISITS: I look --

8 QUESTION: I don't see any independent. That  
9 seems to me to reach your -- that's your arbitration --

10 MR. BOISITS: But they're making the final  
11 decision as to whether or not we're going to refer it  
12 back to the labor agreement, Justice. And, in addition  
13 -- well, 42, page 42, that letter again shows that it  
14 only deals with disability benefits and nothing else.  
15 So, again, we would be consistent with what they're  
16 saying here, that we'd be going through the labor  
17 agreement in respect to discontinuance of weekly  
18 disability benefits, and that's it.

19 If I may make a suggestion to the Court, I  
20 think the Court, at least as far as the philosophy is  
21 concerned, has addressed this question in respect to the  
22 Garman preemption situation.

23 A short note: the Garman preemption arguments  
24 as presented by myself were originally brought up in the  
25 circuit court and determined by Justice Lamponi in the

1 circuit court on the two grounds: one, Section 301  
2 preemption; and number two, on the basis of Garman.  
3 That argument was brought all the way through the  
4 Wisconsin courts, and that's why the Wisconsin court  
5 relied heavily on the Garman argument, primarily because  
6 it was raised by opposing counsel and Allis-Chalmers.

7 I'd like to bring out just two points as far  
8 as the Garman preemptions considerations are. The Court  
9 did appear hard-pressed when they talked about, say,  
10 emotional distress in the Farmer decision. In other  
11 words, it appeared to me as reading the decision that  
12 the Court wanted to make perfectly clear that as far as  
13 the emotional distress situation is concerned, that that  
14 would have to be something completely separate out of  
15 this wage and conditions of employment argument. That  
16 the -- the -- we have to -- we have to look at the type  
17 of conduct that was promulgated by the tortfeasor. In  
18 other words, in that case it was my understanding that  
19 the emotional distress was a function of the  
20 particularly abusive manner in which the claimant was  
21 handled by the union officials, and that the matters  
22 dealing with the negotiation of the contract or the  
23 rates under the contract were completely separate.

24 And you can see, at least from my reading of  
25 it, it seems that this Court has attempted to

1 distinguish that. That's basically all that Mr. Lueck  
2 is doing. He's attempting to show that there was a  
3 particularly abusive manner in which he was treated  
4 that's separate and distinct from the labor contract,  
5 and that yes, he can go through the remedies that are  
6 afforded by the labor contract, and yes, he can go into  
7 state court and go after that separate tort and the  
8 remedies that are available there.

9 The dual functions are served. The Section  
10 301 is remaining intact, and the state interest in  
11 making sure that insurance companies don't horse an  
12 individual around are also remain intact. They can go  
13 hand in hand. They do not necessarily butt heads.

14 Another argument as far as the Garman  
15 philosophy is concerned is that the Section 301  
16 preemption argument is incorporated in the Garman  
17 exceptions. Number one, the number one criteria where  
18 it talks of whether or not the action is one of  
19 peripheral concern to the Labor Management Relations  
20 Act, that directly goes to Section 301 considerations,  
21 whether or not Section 301 applies.

22 The Wisconsin court saw the tort as separate  
23 and distinct and that it did not infringe on the Section  
24 301 rights. And as a result, he's able to bring that  
25 state court action. And again, the whole situation, it



1 accommodates, it accommodates. Mr. Lueck's action  
2 accommodates both the state interest and the federal  
3 interest under 301. The decision of the Wisconsin  
4 supreme court noted that. They paid due deference to  
5 the decisions of this Court. They're just saying that  
6 he's proceeding on a different -- he's proceeding on a  
7 different track. He's trying to get some recovery and  
8 redress, something that you're entitled to. He's trying  
9 to get the redress for -- for the abusive manner he was  
10 treated in.

11 Now, I know that the ERISA argument as posed  
12 by Justice Day is going to probably depend on how the  
13 decisions come out on the case that was previous to this  
14 one. However, I'd like to note again that there is a  
15 federal policy, at least as we stand now, that the  
16 federal policy that's put in the McCarran-Ferguson Act  
17 clearly shows that there should be no preemption here of  
18 the state right to regulate the insurance activities.

19 The situation that we have here is pretty much  
20 like what happened -- the provisions in the labor  
21 agreement, as far as the insurance benefits are  
22 concerned, the insurance portion of the brief, of the  
23 contract, indicates that Allis-Chalmers had a choice of  
24 whether or not to self-insure or whether or not to hire  
25 somebody, an insurance company, to insure them and that

1 type of thing.

2 Now, the question I'd pose to the Court is  
3 what would happen if Allis-Chalmers in this case allowed  
4 another insurance company to insure the disability plan;  
5 rather than Allis-Chalmers being self-insured, they  
6 hired another company, and they paid premiums to that  
7 company for those benefits.

8 If the argument of opposing counsel remains  
9 consistent, apparently that insurance company can claim  
10 the exemption for the same reason that they're claiming  
11 it now; that they are not amenable to any state  
12 regulation; that it's a Section 301 situation; and that  
13 if the insurance company doesn't pay, we'll go through  
14 the arbitration process and determine whether or not  
15 they have an obligation to pay in this case.

16 They have now -- the insurance company has now  
17 been able to avoid any liability by attaching itself to  
18 Allis-Chalmers. In big letters in my argument I  
19 basically would like to show the Court is a  
20 distinguishing case as far as Section 301 is concerned.  
21 The employer has changed hats. They are providing for  
22 insurance benefits. They've taken a self-insured  
23 position, and now they're claiming an immunity because  
24 of that self-insured position. And in addition to that,  
25 I guess that immunity would go to anybody they'd hire,

1 because the labor agreement provides for that type of  
2 benefit, and therefore, anybody they hire or anybody  
3 that does anything in respect to that insurance is going  
4 to be immune from the type of action that Mr. Lueck has  
5 brought.

6 He has nowhere to go, and to not allow him to  
7 go anywhere I think steps on a state decision, a  
8 majority decision, that can accommodate the vague  
9 statements as far as Section 301 is concerned. It's for  
10 actions arising out of contract. Wisconsin says it has  
11 -- this does not arise out of the contract. It's a  
12 separate and distinct tort. And therefore, it's my  
13 opinion -- and I --

14 QUESTION: But your complaint says nothing  
15 except contract.

16 MR. BOISITS: Excuse me?

17 QUESTION: Your complaint in this case says  
18 nothing except a violation of the contract.

19 MR. BOISITS: My complaint does not say that,  
20 Your Honor.

21 QUESTION: It doesn't say contract?

22 MR. BOISITS: My complaint is saying that one  
23 of the elements --

24 QUESTION: It doesn't say contract?

25 MR. BOISITS: Well, it mentions contracts,

1 Your Honor, but I am not going --

2 QUESTION: Well, that's all it said. It says  
3 the contract with Aetna Life and Casualty Company under  
4 contract number ACS-558781. You can't be more specific  
5 than that.

6 MR. BOISITS: But I'm going for something that  
7 does not -- that the contract does not provide for. The  
8 contract provides for payment of disability benefits.  
9 That's it. I'm going for a tortious action where again  
10 if the insurance company continued to sporadically make  
11 payments, Mr. Lueck wouldn't be able to do anything  
12 under the contract because he wouldn't have a grievance.

13 QUESTION: I think we have your point on that,  
14 counsel.

15 MR. BOISITS: All right.

16 QUESTION: Could you tell me where  
17 specifically it is that the agreements or the letter of  
18 understanding require that claims for benefits, disputed  
19 claims for benefits be arbitrated?

20 MR. BOISITS: For -- for the insurance  
21 benefits?

22 QUESTION: Yes.

23 MR. BOISITS: That would be on page 43.

24 QUESTION: Now, is this committee that that  
25 letter talks about, is that the -- are they the



1 arbitrators?

2 MR. BOISITS: No. They are a committee that  
3 deals solely with insurance-related matters, as  
4 indicated --

5 QUESTION: Well, I know, but now you -- where  
6 does it require that -- we're talking about an  
7 insurance-related matter, aren't we?

8 MR. BOISITS: Yes, we are, definitely.

9 QUESTION: And tell me where this letter  
10 requires something to be presented to arbitration.

11 MR. BOISITS: On page 43, second paragraph, it  
12 says, "The committee will be composed of two members,  
13 bargaining committee," et cetera. "It shall be the  
14 purpose of this committee to discuss for resolution any  
15 insurance issues," and then it says, "Questions within  
16 the committee's scope shall be referred to and shall not  
17 be processed in the first three steps of the grievance  
18 procedure."

19 QUESTION: Yes.

20 MR. BOISITS: Then it says, "If such a  
21 question is erroneously presented as a grievance, it  
22 shall be automatically referred to the committee, but it  
23 may be presented for arbitration in the established  
24 manner once they have discussed and have not been  
25 resolved."

1 QUESTION: Well, the committee is -- so where  
2 do you present it for arbitration?

3 MR. BOISITS: You present it to the  
4 committee. And if you file a grievance --

5 QUESTION: So the committee are the  
6 arbitrators.

7 MR. BOISITS: No. They're going to look it  
8 over and discuss it, and then they're going to say we  
9 agree, we've got a decision, or we don't have a decision  
10 and now we're going to go to arbitration.

11 QUESTION: And that would be under the main  
12 contract?

13 MR. BOISITS: That would be under the main  
14 contract, at least from my understanding of this,  
15 Justice. Perhaps opposing counsel is better versed as  
16 far as that.

17 QUESTION: But that word "may" is in there.

18 MR. BOISITS: Yes.

19 QUESTION: Now, does that require presentation  
20 to arbitration?

21 MR. BOISITS: No.

22 QUESTION: Well, I suppose --

23 MR. BOISITS: That's one of the reasons we  
24 brought the action, Justice.

25 Thank you.

1 QUESTION: If the company -- but if the  
2 company wanted to present it for arbitration, the  
3 claimant would have to go to arbitration.

4 MR. BOISITS: That's correct. Once he filed  
5 with the committee.

6 QUESTION: But, counsel, that letter can't  
7 alter the terms of the contract, can it?

8 MR. BOISITS: Justice, it is my -- it is my  
9 opinion both from the way it has been presented by  
10 Allis-Chalmers that those letters definitely alter the  
11 contract. They indicate specific amendments to the --  
12 to the contract itself.

13 CHIEF JUSTICE BURGER: Thank you, counsel.

14 MR. BOISITS: Thank you, Justice.

15 CHIEF JUSTICE BURGER: Do you have anything  
16 further, Mr. Kammholz?

17 ORAL ARGUMENT OF THEOPHIL C. KAMMHOLZ, ESQ.,

18 ON BEHALF OF THE PETITIONER -- REBUTTAL

19 MR. KAMMHOLZ: Your Honors, if you have no  
20 questions.

21 QUESTION: I have a question, Mr. Kammholz.  
22 Supposing that in this contract Allis-Chalmers, instead  
23 of acting as a self-insurer, had simply provided that as  
24 one of the benefits it was giving employees it would  
25 provide them with a disability policy with Aetna Life

1 Insurance Company, but the contract also said that any  
2 disagreement between the employees and Aetna Life  
3 Insurance Company over the payment of a disability would  
4 be submitted to arbitration the same way a grievance is  
5 to the conditions in the plant.

6 Do you think federal labor policy requires a  
7 state court to apply federal law to that situation?

8 MR. KAMMHOLZ: Yes, Your Honor.

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

11 (Whereupon, at 2:42 p.m., the case in the  
12 above-entitled matter was submitted.)  
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CERTIFICATION

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#83-1748 - ALLIS-CHALMERS CORPORATION, Petitioner v. RODERICK S. LUECK

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

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