OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-325 et al. & 84-356

TITLE METROPOLITAN LIFE INSURANCE COMPANY, Appellant V. COMMONWEALTH OF MASSACHUSETTS; and
TRAVELERS INSURANCE COMPANY, Appellant V. COMMONWEALTH OF MASSACHUSETTS

PLACE Washington, D. C.

DATE February 26, 1985

PAGES 1 thru 40

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IN THE SUPREME COURT OF THE UNITED STATES

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METROPOLITAN LIFE INSURANCE COMPANY,

Appellant

V. No. 84-325

COMMONWEALTH OF MASSACHUSETTS;

and

TRAVELERS INSURANCE COMPANY,

Appellant

V. No. 84-356

COMMONWEALTH OF MASSACHUSETTS

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Washington, D.C.

Tuesday, February 26, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 o'clock p.m.

APPEARANCES:

JAY GREENFIELD, ESQ., New York, New York;
on behalf of the Appellant.

ADDISON LANE McGOVERN, ESQ., Boston, Massachusetts;
on behalf of the Appellant.

MS. SALLY A. KELLY, ESQ., Boston, Massachusetts;
on behalf of the Appellees.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Metropolitan Life Insurance Company against Massachusetts and the companion case.

Mr. Greenfield, you may begin whenever you are ready.

ORAL ARGUMENT OF JAY GREENFIELD, ESQ.

ON BEHALF OF THE APPELLANT

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

This case is here on appeal from the Supreme Judicial Court of Massachusetts. It concerns the validity of a state law which we have been calling Section 47B. The question is whether that state law is preempted by either of two federal statutes, ERISA or the NLRA. I will address the ERISA issue and my colleague, Mr. McGovern, will address the NLRA issue.

We have between ourselves allocated 20 minutes to the ERISA argument and I hope to save some of that time for rebuttal.

We are concerned with Section 47B to the extent that it relates to welfare plans governed by ERISA. By its express terms, that statute directly regulates and relates to employee welfare plans. The statute provides, and I quote, "That any employee's health and welfare fund

which provides hospital expense and surgical expense benefits and which covers Massachusetts residents shall provide certain specified benefits for mental or nervous conditions."

Now, the statute also regulates and relates to ERISA plans in another respect. It provides that any policy of insurance issued to an ERISA plan shall furnish the same detailed benefits.

So, there are two relevant parts to the statute, the part that requires the plan to provide the specified benefits, that is direct regulation, and the part that requires policies purchased by those plans to provide the same benefits. If the plan is insured, the plan must provide those benefits. That is -- for lack of a better term -- but accurately indirect regulation.

There is no question concerning the purpose of this statute. It is clear from the very extensive report of a legislative committee that the purpose is to change the manner in which mental health care is funded and provided in Massachusetts. The Commonwealth not only concedes this, the Commonwealth positively asserts it.

There brief says for one example that the purpose of the statute is, and I quote, "The Massachusetts State Legislature adopted Section 47B to address the problems of treating mental illness."

Another place in the brief: "Section 47B

implements a broad policy with respect to treatment of mental illness."

So, the purpose of this statute is not to prevent unfair trade practices by the insurer and it is not to guarantee that the insurance company is going to be solvent when a claim is filed. The purpose, I submit, is not to regulate insurance. Insurance comes into the picture only as a means, a vehicle, for shifting costs and expanding services.

There is no question that this statute is pre-empted by ERISA to the extent it seeks to regulate plans directly. That was conceded by the Commonwealth before a lessee insurer and those foreclose any fair dispute on the subject.

Nor can there be any serious question concerning the impact of 47B as it is construed by the state and by the majority of the court below.

If an ERISA plan does obtain insurance, if it is self-insured, 47B is preempted. Benefits cannot --

QUESTION: The Supreme Judicial Court held invalid the part that attempted to directly regulate the plan, didn't it?

MR. GREENFIELD: The Commonwealth conceded its invalidity before that time and the Supreme Judicial Court noted that, Justice Rehnquist.

QUESTION: Well, didn't it also hold it was invalid?

MR. GREENFIELD: Not in the words "we hold it is invalid." It was just assumed --

QUESTION: Assumed by everybody.

MR. GREENFIELD: That is not a serious question and I don't think the Commonwealth would contend otherwise now.

The question here is that if a plan buys insurance the position is that the benefits can be mandated. I mean, the Commonwealth says and the Supreme Judicial Court held that if a plan chooses to buy insurance the state can mandate the entire benefits package, each and every item in it.

Now, the Supreme Judicial Court and the Commonwealth, they don't suggest that this distinction between insured and uninsured plans makes any sense and it really doesn't. No one has ever attempted to say that is sensible. Neither do they suggest that the distinction promotes a statutory purpose. It seriously undermines that purpose.

Section 3 of ERISA makes it clear that there is to be no distinction drawn between insured and uninsured plans. It provides -- it defines welfare plans, employee welfare plans, as those which provide health benefits, and I quote, "Through the purchase of insurance or otherwise."

Section 2 of the statute says that it is the policy

of the Act to present the interest of participants in employee benefit plans and their beneficiaries.

Yet, what we have here is that by making insurance disadvantageous plans are induced to give up the protection that an insurance policy provides.

Now, the majority opinion below presents a multi-state plan, the multi-state insured plan with several choices and I submit they are Hobson's choices, one choice. The plan can provide a series of different benefit packages that are tailored to the mandated benefit laws of particular states. If Oregon has one statute, you give the Oregon benefit. If North Carolina covers cleft palates, you give that, in Massachusetts you give that, but the bottom line is there is no uniform plan and there is much greater administrative expense. Employers and employees in particular states will either have to pay the higher premiums or sacrifice wanted benefits for less desired mandated benefits.

Another choice that an insured plan faces is this: Assuming that the state laws are not in conflict, the plans could comply with the laws of all states in a uniform plan. You simply provide the most generous benefit given any place.

Now to state a self-evident proposition that may have been lost sight of by the court below, just as there is no such thing as a free lunch, there is no such thing

as a free benefit. The mandated benefit has to be paid for. So, to offset the additional expense you either have to reduce wages or you have to sacrifice a benefit that you want for a benefit that you don't want and there is some very vivid testimony at the trial as to how this worked. One union had to give up dental benefits and eye-glass benefits that they very badly wanted and had to increase eligibility requirements in order to get mental health benefits about which they were less concerned.

QUESTION: But that is true of any resident of Massachusetts operating under this statute, isn't it, that they may have to give up some benefits that they want in order to get the unwanted perhaps mental health benefit.

MR. GREENFIELD: That is not only true, that is one of the reasons why the opinion below is incorrect, Justice Rehnquist.

QUESTION: I don't see why it follows that it is incorrect.

MR. GREENFIELD: Because Congress made it quite clear that it wanted the benefit package to be a matter of private choice. To take an example, a coal miner has different health priorities, different needs, different desires than an airplane pilot would have. And, Congress very clearly left that part to private regulation.

QUESTION: But it also exempted from the preemption

state laws pertaining to insurance.

MR. GREENFIELD: I submit that that does not answer the question, that raises the question. Is this a state law that regulates insurance within the meaning of ERISA? And, to answer that question you have got to look both at the preemption clause and at the savings clause. Congress made it very clear that the preemption clause was to be construed as broadly as possible. When it went into committee, there were two bills and each bill said there would be pre-emption in certain defined areas, those areas in which ERISA regulated.

When it came out of committee, just before it was enacted, the present preemption clause which this Court accurately described as unique in its scope came out saying that everything was preempted. And, the chief senators and congressmen involved in this, Senator Javits and Congressman Dent, they made it very clear that they were doing this in order to keep the states out of this regulatory field entirely.

And, this is really what this Court noted in Shaw and it is what this Court noted in Alessi. You shouldn't be able to do indirectly that which you are precluded directly.

QUESTION: I suppose in the legislative history, in the comments of Senators Javits --

MR. GREENFIELD: Williams and Dent.

QUESTION: -- and Dent there was no direct reference to benefits under the policies of insurance, was there?

MR. GREENFIELD: There was not. There was some legislative history making it quite clear that in pension plans there was supposed to be private choice and there is no rational way to read the statute to distinguish in between pension plans and employee benefit plans.

QUESTION: Mr. Greenfield, does the McCarran-Ferguson Acts provision have any aspects that merit our attention as well wherein it says that no subsequent act of Congress is going to be construed to invalidate a state law regulating the business of insurance?

MR. GREENFIELD: Well, I think it has been held, and I don't think seriously disputed by the Commonwealth -- It was held in the Hewlett-Packard case in the Ninth Circuit -- that ERISA is a statute which relates to the business of insurance, so that aspect of the McCarran Act doesn't apply to.

Now, there have been --

QUESTION: Well, it occurs to me that the language is so similar to the exemption that is enacted here in the ERISA Act that it might have something.

MR. GREENFIELD: Well, let me go to McCarran for

a second, Justice O'Connor. The McCarran-Ferguson Act deals with state statutes for the purpose -- that is the word the statute uses -- for the purpose of regulating the business of insurance and the purpose -- Unless you simply say that a statute has that purpose whenever it has the word i-n-s-u-r-a-n-c-e in it you cannot, I think, fairly say that this Massachusetts statute is for the purpose of regulating the business of insurance. The purpose is to reallocate costs from the state through the insurance companies to employers and employees and to increase the use of out-patient facilities as opposed to hospitalization. It is spelled out very clearly. It is in at least four places in the Commonwealth's brief.

But, McCarran-Ferguson shouldn't apply here for another reason.

QUESTION: Well, but the terminology in McCarran-Ferguson, I guess, is the regulation of the business of insurance, isn't it?

MR. GREENFIELD: The purpose of regulating the business of insurance, yes.

QUESTION: And that has been interpreted to cover insurance policy benefits, hasn't it?

MR. GREENFIELD: I don't think -- Well, this Court has considered that clause on many occasions, of course. I am aware of no case which applies that clause to a statute

as to whether a state can mandate benefits.

But, I would go one step further. I would say that McCarran-Ferguson -- I would go two steps. I would say first of all that McCarran-Ferguson is of no help in deciding this case and I would say, second, that if you look to McCarran-Ferguson it really supports our position more than the Commonwealth's position.

The Court is very familiar with McCarran-Ferguson. It arose as a reaction to Southeastern Underwriters when Paul versus Virginia was overruled in about 1944 or 1945 and there was a great fear that this would knock out all the state regulation of insurance no matter where it was.

This Court had held in the National Securities case and Royal Drug, Pireno, time and time again that what you were trying to do is give states the power that they had before Southeastern Underwriters.

Now, before Southeastern Underwriters and really up until this time, up until this case almost, when people spoke about the regulation of insurance what they were talking about is to protect the insured from the insurer, to protect overreaching by the insurance company.

QUESTION: How about a law that says insurance companies have to insure people who are otherwise uninsurable, kind of a risk pool, would you say that is a regulation of insurance?

MR. GREENFIELD: I would say that is a different question.

QUESTION: Would you say it is a regulation of insurance under the McCarran-Ferguson Act?

MR. GREENFIELD: I would say under the McCarran-Ferguson Act it might be but I really haven't considered that question until this second. I would say that might be but I am not just sure. That is much different though than what we have here. What we have here is a state is telling the insured you have to buy something you don't want. It is not simply telling the insurance company you have to maintain certain reserves, you can't engage in fraud, you have to pass certain licensing requirement. It is telling the insured you must purchase a benefit you don't want, instead of getting the eyeglass, you have to get the mental health treatment. I don't think that is the type of law that is a regulation of insurance within the meaning of the savings clause if -- and this is a very important if -- if you are going to read the savings clause and the pre-emption clause together so as to give vitality to both.

We are not saying that all of those laws, these hypothetical laws have to go out. We are saying just the contrary. The regulation of insurance as it meant at the time of McCarran-Ferguson and as to a substantial degree it meant in 1974 when ERISA came on board never contempated

this type of statute.

QUESTION: But these kinds of statutes are requiring an insurance policy to cover certain risks if they covered others are not brand new as I understand it.

MR. GREENFIELD: Well, the statute that says that the insured must purchase a policy with that risk, that didn't exist when the savings clause first came in in 1970. This is much different, Mr. Justice Rehnquist, than the statute which says you must offer it. That is not what we have here.

QUESTION: I can see that each law has a different effect but why is one less the regulation of insurance than the other?

MR. GREENFIELD: Because regulation of insurance traditionally has meant protecting the insured and insuring the -- and guaranteeing the insurance company's solvency. This does --

QUESTION: I would think regulating the business of insurance would mean doing whatever the legislature thought wise to govern how that business is carried out.

MR. GREENFIELD: But, this is regulating -- If you take the literal definition the way the state is taking it and you say that whenever there is the word "insurance" it is saved and it is not preempted there is nothing left to the preemption statute, the preemption clause. You can

no longer have uniformity. I submit it is simply --

QUESTION: Well, there is certainly a lot left of a preemption clause. Even assuming all the parade of horribles you suggest would follow, a plan doesn't necessarily have to get insurance.

MR. GREENFIELD: That is right. But, ERISA seems to make it quite clear that a plan should have an option and what is the sense of that. I submit what is the sense of having a rule that says that if you give up the security of insurance you then can have the benefits package that you want, but if you are going to take insurance you then have to take the mandated benefit. The result of that is that it really increases the likelihood that when the claim is made there won't be funds there. I submit it is almost a whimsical distinction to say that if you are uninsured you are not regulated, but if you are insured you have to give the benefits we mandate. There is no useful policy served by that. It is just contrary to the purpose of ERISA.

QUESTION: Part of that stands for the way Congress phrased the exemption from the preemption clause. Why did Congress put in the exception for regulation of the business of insurance?

MR. GREENFIELD: Well, when Congress first put -- I think there is quite a good reason for that because they didn't want -- the preemption clause is quite broad and

it became broader during the summer of 1974. Congress didn't want a lot of arguments being made that traditional insurance regulation, advertising, fraud, reserves, that they could be escaped by saying I am dealing with an ERISA plan. An insurance company shouldn't be able to say you can't attack me for false advertising, Commonwealth of Massachusetts, because my advertising is directed to an ERISA plan and it is preempted. That was the type of thing Congress was trying to say.

When Congress first --

QUESTION: Those regulations certainly as well create pockets of differing moods in different states, do they not?

MR. GREENFIELD: What type of regulation?

QUESTION: The type of regulation you are talking about, your so-called traditional regulations.

MR. GREENFIELD: Yes, but they are not regulation of plans. It is a big difference to tell an insurance company you can only invest in certain types of debt securities than it is to tell a plan you have to purchase coverage for cleft palate or mental health if you are going to be insured, but if you are not insured you don't have to purchase it.

Yes, there are different regulations. One state can require that you have so much in debt and another state

can require you to hold less in debt. But that is not a regulation of a plan.

What we have here is a regulation of a plan. It is indirect, but, as I said, an indirect regulation is no different than a direct.

With the Court's permission I will reserve whatever time --

QUESTION: One factual question about the statute. Does this apply to out-of-state coverage?

MR. GREENFIELD: It applies to any Massachusetts resident no matter where the statute is issued.

QUESTION: You could write a policy on a multi-state plan that did not have the mental coverage in it for the people who are not in Massachusetts, is that right?

MR. GREENFIELD: That plan couldn't violate Massachusetts statute unless there were employees --

QUESTION: Even though the issuing insurance company -- I don't know where your headquarters are. Okay, I see. Thank you.

MR. GREENFIELD: The statute is designed to apply no matter where the policy is issued so long as it is a Massachusetts resident. And, you get the fairly bizarre result and you really get it of two people sitting next to each other, one who lives in Massachusetts, one who lives in Albany, New York, and they are getting different benefits.

And that is just the type of thing that Congress didn't want.

QUESTION: They are not sitting next to each other, but I understand the example.

(Laughter)

QUESTION: That is so even though the policy is issued in Massachusetts.

MR. GREENFIELD: We are --

QUESTION: Or aren't any policies issued in Massachusetts?

MR. GREENFIELD: I don't want to say none are because I am not sure. We are dealing here -- This case focused on policies that were not issued in Massachusetts. But the argument really wouldn't make any difference. The preemption is total and it shouldn't be evaded by this type of indirection.

CHIEF JUSTICE BURGER: Mr. McGovern?

ORAL ARGUMENT OF ADDISON LANE McGOVERN, ESQ.

ON BEHALF OF THE APPELLANT

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

As Mr. Greenfield mentioned, I will address the Appellants' second issue on this appeal, National Labor Relations Act preemption of Section 47B.

Here the focus is, of course, not on the express

language of a statutory exemption provision, but on an implied preempted intent derived from the purposes or objectives of the National Labor Relations Act and the federal labor policy served by that Act.

Appellents in essence say this: Section 47B undercuts the federal labor policy that this Court has termed the fundamental premise of the NLRA, private bargaining by the parties to a collective bargaining agreement without official compulsion over the substantive terms of the agreement, whether that compulsion be by the states or by the National Labor Relations Board.

Now, to this end Appellants make three principal points. First, this Court's decisions in Oliver and Alessi establish that when a state law does exercise compulsion over substantive terms, when the law by its legal effect limits or restricts the parties' solution of a problem which Congress has required them to negotiate in good faith towards solving, the state law is properly preempted.

For this protective rule to apply, however, the subject involved must be a mandatory subject of collective bargaining and there must be no other federal legislation evidencing a congressional intent to authorize or allow as an exception the particular form of state interference under study.

Second, Section 47B, as we shall see, does exercise

compulsion over the substantive terms of insured, collectively bargained benefit plans. It does limit by its legal effect the parties' solution with respect to a mandatory subject of collective bargaining health benefits, more specifically mental health benefits.

Third, there isn't an exception to the general rule that applies here. There is no federal statute authorizing this form of state intrusion, nor is there a broad exception for public health laws as the court below has proposed for the purpose of preemption here is not the preservation of the primary jurisdiction of the NLRB, the purpose here is the protection from state regulation of a subject matter that Congress has intended to leave unregulated.

As this Court has emphasized in two very recent decisions, Brown against the Hotel Workers and Belknap against Hale, preemption grounded on this purpose is not rebuttal, not presumptive, not rebuttal, and doesn't encompass exceptions of the types that are associated with the Garman line preemption theory. If Congress intended the matter to be unregulated, then regulation by a state does constitute an obstacle to the purposes of Congress and preemption is warranted.

Now, what does 47B do, what is its effect in the collective bargaining context? Under Section 47B the parties

to insured, collectively bargained benefit plans covering Massachusetts residents are faced with we say a difficult, no-win choice. Either way, whatever alternative is chosen, they are compelled to arrive at a result which differs from the one they would have arrived at in the absence of the state statute and mandatory subjects of collective bargaining are directly involved.

One alternative, of course, is to succumb to the statute's mandate and to accept the change in the plan's terms to include the mental health benefits specified in the statute.

The other alternative is to give up all health insurance, to operate as an uninsured plan so that the terms of Section 47B can't take hold. But, of course, this too means a change is compelled with respect to a mandatory subject of bargaining. The decision whether to have insured benefits, the decision whether to have insurance as opposed to uninsured benefits is itself such a mandatory subject.

As the record in this case shows, the first alternativ succumbing to the state-imposed solution can very often result in a benefits package that the workers distinctly do not want. There is only so much money available for wages and benefits. It is one finite piece of pie. A state command to insert or to increase a mental health benefit means that other more desired benefits must be omitted or

reduced.

There was very vivid testimony, as Mr. Greenfield mentioned, at the trial by James Dawson, an ex-plummer who organized many of the early plans, benefit plans, in New Hampshire. New Hampshire union members, using his words, were antagonistic and beligerent about the New Hampshire mandated benefit law because they had to give up the vision and the dental benefits that they really wanted to make way for the mental health benefits which happened to be something that they didn't want.

The second alternative, giving up insurance, has, of course, undesirable consequences as well because many plans can't safely operate without the protection and stability of insurance and this is particularly true of small and medium sized plans and particularly those in cyclical industries like the construction industries in New England. But, in the end the conflict with federal labor law doesn't depend on which choice the parties make. The conflict lies in the state-imposed restriction on the parties' freedom of choice, the state's interference with the parties' own solution of a problem that Congress has required them to solve.

Now, the court below conceded that Section 47B, and I quote, "effectively controls the content of insured welfare benefit plans," including collectively bargained

plans. Nevertheless, it declined to rule in favor of federal preemption, relying instead on two proposed exceptions to preemption, exceptions that this Court, the Supreme Court, has never used.

Now, one of these proposed exceptions, the McCarran-Ferguson Act we are leaving for our brief. The Act itself provides that its provisions simply do not affect in any manner the application of the NLRA.

The second proposed preemption exception for what is termed public health laws deserves one additional comment. As was mentioned earlier, no such exception is applicable where the purpose is the protection of matters Congress intended to leave unregulated. The tension between the federal interest in guarding national labor policy and the state interest in regulating health and safety can be and has been alleviated in another way. Brown, Belknap, Oliver, Alessi, all of them permit intrusive state legislation whenever Congress has specifically demonstrated an intent to allow the particular type of state intrusion.

Congress in OSHA, the Occupational Safety and Health Act, has expressly authorized the states to legislate concerning various occupational, safety and health issues. A number of them have done so. In fact, much of the existing state legislation in the employment area that we know is there, laws concerning minimum wages, maximum work weeks,

child labor, sex discrimination, age discrimination, unemployment compensation, workers compensation can be explained in exactly this manner. Congress in various federal laws has deliberately and selectively authorized the states to regulate those aspects of employment which in the view of Congress should be subjected to state regulation within limits set by Congress, nothwithstanding the encroachment on federal labor policy.

Congress has not, however, authorized the form of state intrusion produced by Section 47B.

Now, the fundamental premise of our national labor policy is that the goal of industrial peace is best served by allowing the parties the freedom and flexibility to thrash out their own solution to problems of mandatory subjects of bargaining unrestricted by solutions imposed by either the state legislatures or the NLRB except where Congress specifically indicates otherwise. Interference here, we say, with that policy is plain, the exceptions proposed are not applicable, and preemption therefore is warranted.

CHIEF JUSTICE BURGER: Ms. Kelly?

ORAL STATEMENT OF SALLY A. KELLY, ESQ.

ON BEHALF OF THE APPELLEES

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

In the Commonwealth's view there are two issues before the Court today. First, is Section 47B a state

insurance law? If it is ERISA clearly excepts Section 47B from preemption.

Second, did Congress intend that the National Labor Relations Act preempt state insurance laws such as 47B?

As to these two questions I would like to make three points. First, Section 47B is a state insurance law. Second, insurers press today for this Court to make policy judgments. Contrary to policy judgments and directives already made by the Congress in plain language in ERISA, the Commonwealth suggests that this Court should decline the invitation. And, third, federal labor policy does not require preemption of Section 47B.

Turning to point one, why do I say Section 47B is a state insurance law? First, in examining it, it prescribes minimum amounts of mental health benefits that must be included in insurance policies in Massachusetts. It unquestionably spreads the risk of mental health care among all insureds in Massachusetts and in that sense it is a reflection of a legislative judgment that the costs of mental health care should be underwritten by insurance policies and the risk of those costs should be shared.

Second, Section 47B prescribes the term to be included in an insurance policy. Obviously then Section 47B is concerned with the type of policy that can be issued

by an insurer doing busines in Massachusetts.

Third, Section 47B imposes its requirements on insurance companies. It alters the voluntary market for insurance.

In each of these three respects, I would suggest Section 47B fits squarely within the tradition of insurance regulations discussed by this Court in SEC versus National Securities, the classic case discussing the meaning of the McCarran-Ferguson Act.

In this sense then the Commonwealth suggests Section 47B fits squarely within the tradition of insurance regulation under the McCarran-Ferguson. That Act, which was enacted by the Congress in 1945 at the request of insurance companies, I might add, declared that the states would have primacy in the regulation of insurance in the federal system.

Section 47B satisfies criteria this Court has used in interpreting that Act constitutes the basis that many state and federal courts have used to uphold mandated benefit statutes very similar to Section 47B.

Now, turning to ERISA itself, we find a statute enacted subsequent to the McCarran-Ferguson and after a series of decisions by this Court defining insurance for McCarran-Ferguson purposes.

ERISA contains four clauses of relevance today.

First, there is ERISA's general preemption clause which clearly, generally preempts all state laws that relate to employee benefit plans, but that clause is followed by the so-called insurance savings clause. In this clause, Congress provided that, and I quote, "any law of any state which regulates insurance," is excepted from ERISA's general preemption scheme.

The Commonwealth believes that this clause constitutes an explicit reaffirmation of the McCarran-Ferguson Act's directive that the states are to have primacy in the regulation of insurance.

Third, the third clause in ERISA is the so-called deemer clause. In that clause Congress prohibited the states from carrying on historical practice of directly seeking to regulating employee benefit plans. The deemer clause in that sense functions as a remedy for the historic practice by the states.

The fourth clause of relevance in ERISA is an explicit affirmation of existing federal law. ERISA contains a clause that says ERISA shall not be construed so as to alter, amend, modify, invalid, impair or supercede any other federal law.

The Commonwealth suggests that the preexisting McCarran-Ferguson Act was thus explicitly reaffirmed in the ERISA preemption scheme.

And, while it is undoubtedly true that in ERISA Congress sought to broadly preempt state law, Congress with very plain language clearly excepted state insurance laws from the broad preemption scheme.

QUESTION: Can you contribute anything to our understanding, Ms. Kelly, about why this insurance modification of the general preemption section was enacted by Congress?

MS. KELLY: Your Honor, on that point I would say that the legislative history, while scant on the subject of the insurance savings clause, recognizes that Congress intended that there be certain exceptions to the broad preemption scheme. At the same time I would add that it is quite clear that ERISA's main focus is on pension regulation. Welfare benefit plans receive much less regulation in the ERISA scheme than pension plans.

We suggest in our brief that one reason for this less regulation is that Congress understood that the states were going to continue their usual role of regulating insurance companies and thereby providing significant protection to employee welfare plan holders who receive benefits through the purchase of insurance.

Turning now the the policy --

QUESTION: Ms. Kelly, may I ask one question? Does the record tell us -- or maybe I should know -- the

relative proportion of uninsured and insured plans?

MS. KELLY: The record reveals that the vast majority are in insured plans.

QUESTION: Most of them are insured?

MS. KELLY: That were before the Massachusetts court at a trial, Justice Stevens.

Turning now the policy questions before the Court, the insurers are today pressing in a real sense for this Court to alter policy judgments already made by the Congress in ERISA. I would like to discuss three of those policy issues.

First, the insurers press for this Court to read a gloss on to the insurance savings clause. They insist that we avoid a plain reading of the statute and instead insert a word, "traditional," in the savings clause. There are several reasons for this Court to decline the invitation.

First, there is the plain language that Congress used, which is in Title II, be given its ordinary meaning.

Second, to read a gloss on to the savings clause freezes the states and to a certain extent freezes insurance laws into a statically historic position. Such freezing of the states would in a sense, we think, do violence to the proposition that in their separate realms the states and the federal government are free to legislate.

QUESTION: Ms. Kelly, in your view could a state

like Massachusetts specify the pregnancy benefits that insurance policies must provide through its regulation of insurance savings clause?

MS. KELLY: In our view, the state -- in the absence of other laws regulating pregnancy benefits, the state might seek to enact a law that provided a certain minimum amount of coverage for pregnancy.

QUESTION: How would you then reconcile that with the Shaw case?

MS. KELLY: The Commonwealth believes that in Shaw the Court was dealing with an exception from the ERISA preemption scheme for disability benefit plans. In the ERISA scheme, disability benefit plans, which is what Shaw was concerned with, are separate from ERISA. Entire plans are excepted from the application of ERISA.

So, a plan that was enacted by a state legislature -- Excuse me, a law that was enacted by a state legislature saying that the state disability laws were to include a specific amount of pregnancy benefits would in its entirety be exempt from ERISA.

But, the law before the Court today --

QUESTION: But, the state could operate indirectly insofar as insurance policies are issued by requiring the same thing in a way.

MS. KELLY: In a sense the state could, although

to my knowledge, the pregnancy benefits are usually provided in disability insurance laws which, as I say, are exempt from ERISA coverage in their entirety.

But, Justice O'Connor, there is no doubt that in ERISA Congress enacted an exception in the insurance savings clause that allows insurance laws to indirectly control the content of employee benefit plans.

The Commonwealth has never denied that and, in fact, argues strenuously that that is something that Congress enacted and it is for Congress to change that if it becomes a problem.

There is no evidence in this case that through the indirect regulation of insured employee benefit plans that is operative because of the insurance savings clause any employee in the United States has been injured, any employee welfare has gone bankrupt, or any employee welfare plan has gone to self insurance.

Indeed, in this case, the trial judge noted quite extensively in his findings that the arguments regarding indirect regulation had in a sense constituted a failure of proof on the part of the insurers in this case. They simply proved no injury based on indirect regulation.

If the Court again reads traditional into ERISA the Court will also, in our view, be opening the flood gates to litigation. A torrent of cases will ensue asking this

Court and other lower courts to decide the boundaries of traditional insurance regulation.

The Commonwealth suggests that insurance regulation has always been a state law function and should remain as such.

In any event, in our view, it is clear that Section 47B is a traditional insurance law, for tradition in insurance regulation extends quite clearly to content control. There are many examples of this type of state insurance law and one that we would offer to the Court would be auto insurance laws. In our state, Massachusetts, auto insurance laws quite clearly are content control laws and they are traditional insurance laws. They have been around for a long time, therefore, there is no need for this Court to read a gloss on to the savings clause nor would any purpose be served by it.

Insurers make additional policy arguments. They, for example, argue that in ERISA Congress established national uniformity in plan content and in administration. That argument is simply incorrect. Congress clearly contemplated non-unformity of benefit plan administration and content in ERISA, for if Congress intended uniformity, why did it enact the several exceptions to ERISA's general preemption scheme? What would be the meaning of the insurance savings clause?

And, as Justice O'Connor pointed out in a question to Mr. Greenfield, insurers' own reading of the savings clause, that which adds the gloss of traditional on to it, leads in and of itself to significant non-uniformities throughout the country in benefit plans.

Obviously state laws regulating, for example, premiums that insurers pay will have an impact on plans in particular states.

These significant non-uniformities are the result of Congress' explicit leaving of insurance regulation to the states.

In the Commonwealth's view, Congress created uniformity in the area of pension and welfare, reporting, disclosure, and fiduciary standards in ERISA.

As to questions regarding these areas, in ERISA Congress clearly said there will be one answer and it will be a uniform federal answer.

But, as this Court noted in Shaw, ERISA is absolutely silent as to the content of employee welfare plans.

The insurers press another policy argument on this Court. That is the so-called self-insurance issue. Insurers suggest that self-insurance is promoted by 47B in that promotion of self-insurance is contrary to the intent of Congress in enacting ERISA. Again, the Commonwealth

believes that the insurers are simply incorrect. Congress in ERISA clearly contemplated that welfare benefits could be provided, and I quote, "through the purchase of insurance or otherwise."

There is an absolute failure of proof by the insurers that the statute at issue today promotes self-insurance, has harmed any employee, or led to the bankruptcy of any plan. The insurers instead seek to argue what they could not prove at trial, that self-insurance is some sort of an evil, that this Court should in a sense rewrite ERISA to make sure that self-insurance not occur in this country in employee welfare plans.

But, I would suggest self-insurance is an evil only for insurance companies for there is an absolute failure of proof that any employee welfare plan has been injured by self-insurance and obviously it is clear that where a plan goes to self-insurance insurance companies lose their profits.

Finally, any tendency to self-insurance promoted by ERISA is for the Congress to address and not this Court and for the Congress to alter and not this Court. In that sense the Commonwealth believes that the insurers are in the wrong forum to make that argument.

Finally, I would like to address the labor question before the Court today. From the Commonwealth's perspective,

federal labor policy requires no other result. Section 47B establishes the market place for insurance in Massachusetts.

As the McCarran-Ferguson Act, another state statute provides states regulate insurance. Insurers today who are generally strangers to the collective bargaining process seek to have this Court declare that because health benefits are a mandatory subject of collective bargaining no government, not the state government nor the federal government, can regulate insurance purchased to provide benefits to employees covered by collective bargaining.

This Court, the Commonwealth suggests, should reject this argument. 47B is a neutral state law. It does not give a weapon to either management or labor. It does not directly regulate the collective bargaining process and it applies only when insurance is purchased and then it applies by essentially regulating the market place for insurance in Massachusetts.

Section 47B requires a minimum amount of mental health benefits. Five hundred dollars for out-patient benefits, for example. This is a minimum above which collective bargaining agreements may go. It is similar in that sense to worker's compensation laws or unemployment compensation laws or auto insurance laws.

And, Section 47B must be read with the knowledge

that in the McCarran-Ferguson Act Congress declared that the states regulate insurance. Nothing in federal labor policy requires any other result.

QUESTION: May I ask right there, do you agree or disagree with the thrust of the argument that at the very least it does control one of the substantive terms of the collective bargaining agreement that would ordinarily be a subject of mandatory bargaining?

MS. KELLY: I do not agree with that as stated, Justice Stevens. I do agree that Section 47B affects a mandatory subject of collective bargaining, but I do not believe it controls it.

QUESTION: Well, if you had a collective bargaining agreement that said in so many words we will have health insurance, dental insurance, about six different things, but we will not provide any coverage for mental illness and then you impose the statute on it. You really are modifying the terms of the bargaining agreement.

MS. KELLY: Well, Justice Stevens, there would be two answers to that. First, Section 47B applies only where insurance is purchased.

QUESTION: I forgot. There is another term, that we want to have an insured plan too.

MS. KELLY: Okay. If you wanted to have an insured plan, the -- such an insurance plan could not be sold in

Massachusetts nor could it be purchased. In that sense, it would be similar to a collective bargaining agreement between an employer who delivered bread and drivers who drove the trucks that delivered bread.

In Massachusetts the drivers would have to be covered by minimum amounts of auto insurance. I think it is $100,000 worth of personal liability coverage. The -- No insurance company in our state could sell that employer a plan that provided less benefits nor could a collective bargaining agreement seek to force an insurer to sell such an insurance policy. Instead the collective bargaining process could and often do negotiate policies far higher than the minimum amounts required by automobile insurance.

That points out the absurd result, I think, of the insurers argument for under their argument no state insurance regulation would apply where a collective bargaining agreement was in effect. There would be in a sense a no-law land. Where you had a collective bargaining agreement, management or labor could use federal labor policy as a refuge from state insurance laws.

We do not believe that Congress intended such a result or that this Court should rule for such a result.

There is great irony in the insurers' arguments today. Two federal statutes designed to protect workers, ERISA and the National Labor Relations Act, would be obviated

by insurers who seek a ruling that neither the states nor the federal government regulate insurance sold to ERISA employee welfare plans or to provide benefits under collective bargaining agreement. This argument leads to the creation of a regulatory vacuum of enormous proportion where no one protects workers who have collective bargaining agreements and would seek to have insurance coverage or who have employee welfare plans that are insured.

If this Court interprets ERISA as saving from preemption only traditional insurance laws, courts throughout the country will be asked again and again to decide is a particular law traditional? The courts will in a real sense be locked into a static, historically position, admitting no growth in insurance regulation.

The Commonwealth believes that neither ERISA nor national labor policy requires such a result and respectfully requests that this Court hold that Section 47B is not preempted by ERISA or by the National Labor Relations Act.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Greenfield?

MR. GREENFIELD: Yes, Your Honor.

CHIEF JUSTICE BURGER: You have two minutes remaining.

MR. GREENFIELD: Fine.

ORAL ARGUMENT OF JAY GREENFIELD, ESQ.

ON BEHALF OF THE APPELLANT -- REBUTTAL

MR. GREENFIELD: Justice Stevens asked a question about self-insurance. I would note that there has been a dramatic increase in self-insurance over the past few years. This is pointed out in our brief.

One of the cases that my friend did not mention but which is quite important in this area is Alessi. Now, the position argued by the Commonwealth effectively permits the overruling of Alessi by a state.

In Alessi, as the Court will recall, New Jersey has a statute which said that you could not set off workmen's compensation against benefits from an ERISA plan. This Court said that that was preempted and indirect regulation was just as bad as direct regulation.

If New Jersey passed a statute which said that every insurance policy shall provide, that there shall be no setoff as a result of a workmen's compensation recovery, then, according to my friend, that would come within the savings clause and New Jersey could do it and Alessi become meaningless. The state commanded absolutely everything.

I want, in about the minute or so remaining, just to talk about regulatory vacuum as if this was something terrible. My friend finished up mentioning that.

What regulatory vacuum means is that the employers

and employees pick the benefits they need and are willing to pay for. And while we have heard words of irony about the insurance companies, speaking about public policy, the fact is that in this case the line up of amici is that on our side is the AFL-CIO, all the major employers, and a lot of small unions, the people who pay for this, the people who get it, are the people who want to pick their own benefits and that is what the preemption clause is designed to do.

Thank you.

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

(Whereupon, at 1:51 p.m., the case in the above-entitled matter was submitted.)

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84-356 - TRAVELERS INSURANCE COMPANY, Appellant V. COMMONWEALTH OF MASSACHUSETTS

nd that these attached pages constitutes the original ranscript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)