# OFFICIAL TRANSCRIPT
# PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1043

TITLE PILOT LIFE INSURANCE COMPANY, Petitioner V. EVERATE W. DEDEAUX

PLACE Washington, D. C.

DATE January 21, 1987

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(202) 628-9300

IN THE SUPREME COURT OF THE UNITED STATES

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PILOT LIFE INSURANCE COMPANY, :

Petitioner :

v. : No. 85-1043

EVERATE W. DEDEAUX :

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Washington, D.C.

January 21, 1987

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



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APPEARANCES:

JOHN E. NOLAN, JR., ESQ., Washington, D.C.;
on behalf of Petitioner

WILLIAM C. WALKER, JR., ESQ., Biloxi, MS;
on behalf of Respondent

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: Mr. Nolan, you may proceed whenever you are ready.

ORAL ARGUMENT OF JOHN E. NOLAN, JR., ESQ.

ON BEHALF OF PETITIONER

MR. NOLAN: Thank you, Mr. Chief Justice. May it please the Court:

This case involves the issue of federal preemption of state common law claims of general application in the context of ERISA. The real significance of the case is whether or not the federal system of regulation of employee benefit plans, as governed by ERISA, will now be largely supplanted by the varying state laws that Congress intended ERISA to replace.

Congress believed, and believes, that there are great advantages to ERISA, that those advantages admittedly do not include jury trials, punitive damages, consequential damages, de novo review of claims, decisions and other features that may be available from time to time under state law. If such state remedies are available, as the Court of Appeals opinion holds, then ERISA will effectively be nullified for all insured plans.

Now, this is more than 80 percent of the

health benefit plans in the United States, the vast majority of them. We argue that Congress could never have intended this result and expressly provided against it in ERISA. The focus of this case is an employee benefit plan governed by ERISA in its claims procedure as provided in Section 503 of ERISA.

Pilot Life, the petitioner in this case, is the named fiduciary for that plan as provided in ERISA and as designated in the plan itself, and Pilot Life has full responsibility for all claims decisions and claims administration. Mr. Dedeaux, the respondent here is a participant in that plan and his claim for benefits was denied by Pilot Life.

When it was denied, Mr. Dedeaux did not avail himself of the statutorily-mandated claims review procedure in ERISA, in Section 503. Instead, he filed suit in a Federal District Court in Mississippi, diversity jurisdiction. He claimed tortious breach of contract, fraud, and breach of fiduciary relationship.

He sought disability benefits, consequential damages for mental and emotional distress in the amount of $250,000, and punitive damages in the amount of $500,000. There was a demand of jury trial, no mention of ERISA in the case. The District Court granted

summary judgment for defendant. It held that ERISA provided the exclusive remedy.

The Court of Appeals for the 5th Circuit reversed, holding that Mr. Dedeaux's state common law claims of general application were preserved by the so-called insurance saving clause of ERISA which keeps from preemption the state laws that regulate insurance.

Now we say that that decision is wrong. The Congress in enacting ERISA sought to preempt all of the state law that came within the sphere of the statute, that the saving clause is not applicable to state laws like this because they don't regulate insurance and that, in any event, it was plain that Congress sought to prevent the direct application of any state law to an employee benefit plan.

In cases like this which involve federal preemption of state law, this Court has said, as it did most recently in California Federal v. Garrett, decided last week, that its sole task is to ascertain the intent of Congress, and to do that it looks at the language and the legislative history, and the structure and purpose of the statute.

The key language here is found in Section 514 of ERISA, it's entitled, "Effect on Other Laws." Section 514(a), is a sweeping, express provision for

preemption. It says that ERISA supersedes any and all state laws that may now, or hereafter, relate to any employee benefit plans.

It's followed in 514(b), by the so-called saving clause, which provides that nothing in ERISA shall exempt any person from any law of any state that regulates insurance. And that clause is immediately followed and modified by the so-called "deemer clause" which provides that no employee benefit plan shall be deemed to be an insurance company or engaged in insurance for purposes of any state law purporting to regulate insurance.

Now there are two things to notice about the language in 514. The first is that when Congress uses the term, "state law that regulates insurance," it is using a term of art and in this instance one that has acquired very specific meaning through years of interpretation under the McCarran-Ferguson Act.

The second is that Congress very plainly showed its purpose to prevent any direct regulation of employee benefit plans by state laws. That was the finding of this Court in the case of Metropolitan Life v. Massachusetts, decided a couple of years ago, where the Court said that the purpose of the deemer clause is to take out of the operation of the saving clause any

state laws that apply directly to an employee benefit plan.

These state common law claims not only apply directly to the employee benefit plan, but they clash directly with the key provision of ERISA with the provisions dealing with fiduciary responsibility, claims review, civil enforcement remedies. These are the core functions of ERISA.

They go to the very heart of ERISA regulation and that's why Congress provided that they couldn't be regulated by state law. The legislative history of ERISA plainly confirms the intent of Congress, that the fiduciary standards of ERISA, govern the entire claims administration process.

That was the finding of this Court in Mass. Mutual v. Russell, decided also a couple of years ago. It's in the opinion of the Court and it's very expressly in Justice Brennan's concurring opinion as well.

Congress intended that ERISA provide a uniform source of law for evaluating fiduciary standards, that that law would apply all over the United States, and that it would provide standards for fiduciary and that the federal courts would be used exclusively for cases of --

QUESTION: What was was the insurance

company's fiduciary duty or position in this case?

MR. NOLAN: In this case, Justice White, the insurance company had the responsibility for claims administration. It also had the insurance policy on -- it funded the plan.

QUESTION: It sold insurance, it sold insurance to the plan, I take it.

MR. NOLAN: It sold insurance to Entex and --

QUESTION: But, it wasn't a trustee of the plan?

MR. NOLAN: It was acting for the trustee and that's really the key to the case. It was performing the ERISA function that otherwise would have been provided by the trustee of the plan. It was acting in place of, and standing in the shoes of the trustee. It is the named fiduciary under ERISA and it was provided --

QUESTION: It is the named fiduciary?

MR. NOLAN: It is the named fiduciary under ERISA. To it was delegated the authority to make the decisions involved in claims administration; to confirm or deny claims submitted to it. That's the discretion and that's the function of the named fiduciary. So, it's playing the key role.

QUESTION: And under ERISA how do you get at a

claimed breach of fiduciary duty?

MR. NOLAN: At ERISA -- under ERISA you, if you have a case like this, first you go to the claims review procedure provided in 503. When you finish that you go to 502 which provides what this Court has referred to before as the six very carefully --

QUESTION: If your claim is denied, why you can contest it?

MR. NOLAN: If your claims is denied, you can contest it through the procedures provided expressly in the statute.

QUESTION: And what if you think its just too slow?

MR. NOLAN: Well, we -- our position is that this is the law that Congress provided. I suppose that from time to time --

QUESTION: Was the insurance company under this plan, or under the statute required to act within a certain time?

MR. NOLAN: Yes, it is. And if the claims review procedure, for example, is required to be finished in sixty days and then there may be an additional sixty days. If there has not been action at the end of that time then the claim is deemed to be denied under regulations provided by the Department of

Labor, and then you go into the civil enforcement proceedings. It's a very carefully --

QUESTION: And, and what is the civil enforcement proceeding in a court?

MR. NOLAN: The civil enforcement proceeding is in a court, yes. State or federal court; for some types of actions only federal court.

QUESTION: Well, let's assume you go to civil enforcement proceeding and you win and the insurance company has breached its fiduciary duty to act in time, or in some other way. Then what happens?

MR. NOLAN: Then you get whatever --

QUESTION: You get your claim paid.

MR. NOLAN: You get your claim paid.

QUESTION: With interest, I suppose.

MR. NOLAN: Possibly. You get attorney's fees, you get other types of equitable relief.

QUESTION: But, you get no remedy against the trustee, against the insurance company.

MR. NOLAN: Well, in this instance, Justice White, the insurance company, Pilot Life, is in effect the trustee.

QUESTION: All right, but you get no other remedy. You just make Pilot Life do what it should have done.

MR. NOLAN: It is correct.

QUESTION: Plus attorneys' fees.

MR. NOLAN: It is correct that you make Pilot Life do what it should have done. You are not necessarily limited to that remedy.

QUESTION: Well what can, what else can you get?

MR. NOLAN: Well you can get all of the civil enforcement rights provided in Section 502.

QUESTION: Well, can you get any --

MR. NOLAN: You can recover benefits under the plan. You can enforce, or clarify your rights.

QUESTION: But no consequential damages?

MR. NOLAN: No consequential damages.

QUESTION: So even if your not getting your money on time has caused you to lose some money, or to cost you some money, you can't have any remedy for that?

MR. NOLAN: Well, you can sue to obtain equitable relief specifically under the statute. You can sue to enjoin the fiduciary.

QUESTION: Well, I know, but can you get any money?

MR. NOLAN: You can have the fiduciary removed.

QUESTION: But, can you get any money, Mr. Nolan?

MR. NOLAN: Yes, you can get money.

QUESTION: In what form?

MR. NOLAN: In whatever form the court to which the application for equitable relief is made finds appropriate.

QUESTION: But, if there's a cause of action that's applied to all insurance companies in the state that says that bad faith or refusal to honor a claim is remediable by some damages or by punitive damages, that state law is inapplicable in ERISA context?

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

QUESTION: Mr. Nolan, you said that in the equitable side of the thing you could get money. Did I understand that correctly?

MR. NOLAN: Well, I said that you could get money in the context of seeking to obtain equitable relief from the Court.

QUESTION: Well, be more specific.

MR. NOLAN: Well --

QUESTION: I mean you can get the amount of the claim plus attorney's fees on the law's side I take it.

MR. NOLAN: That's correct.

QUESTION: And you say you could remove the trustee in equity. What sort of --

MR. NOLAN: You can enjoin the trustee, you can remove the trustee.

QUESTION: But now I want to know, because I thought you said that the equity side could award you some sort of money damages?

MR. NOLAN: Well, I did not say damages, Mr. Chief Justice.

CHIEF JUSTICE REHNQUIST: Well, what did you mean?

MR. NOLAN: I meant that an application for equitable relief to the Court, pursuant to the specific provisions of Section 502, can take whatever form the court, in that instance, might find appropriate.

QUESTION: Have you ever been --

MR. NOLAN: There have been a variety of --

QUESTION: Has there ever been a case where they, under ERISA -- and it's been around for a while now -- where some insurance company has had to pay a disappointed claimant some money on review?

MR. NOLAN: Well, I think that, generally speaking, punitive and consequential damages have not been allowed in ERISA cases by this Court or, by and large, by other courts.

QUESTION: That's really what this case is all about.

MR. NOLAN: That is what this case is all about.

QUESTION: And certainly a Court on equity never awards punitive damages.

MR. NOLAN: That's correct. The court on equity never does.

QUESTION: So, there is no prospect of recovery of punitive damages if the state law is preempted? Isn't that correct?

MR. NOLAN: I think that's right and I think that's the key distinction between state law and federal law here. This was to be achieved by Section 514, the effect on other laws provision, the preemption of state law to allow the federal system to control employee benefit plan regulations. That section is referred to --

QUESTION: But, Mr. Nolan, I really was puzzled, as the Chief Justice was, about your notion of some other money. Maybe there isn't all as much difference between the federal scheme and the state scheme, if there's some general equitable power to give money. I don't know about that myself.

MR. NOLAN: Well, I don't know --

QUESTION: And what section are you referring to when you say that?

MR. NOLAN: I don't know of a general

equitable power to give money. I know that -- I know that this Court in Mass. Mutual v. Russell, the case that was before it two years ago, reserved its judgment about anything more than the specific sections that were involved in that case. And, that was the thrust of the concurring opinion. I know that --

QUESTION: You argued that case?

MR. NOLAN: I argued that case, yes, Justice White.

QUESTION: Twice.

MR. NOLAN: It, I know also that the, that the law provides for equitable relief and I just can't presume to say that that could never include the concept of making someone whole. I think it very plainly did not include damages.

QUESTION: Well, what could it be other than restitution? I just think this argument strikes me as very strange and almost misleading. I understood that if the federal law preempts then there are no consequential damages available. There are no punitive damages available. There's no jury trial available and so on.

MR. NOLAN: That is correct. But, there is equitable relief under Section 502. And I don't know what form that would take. I think it's pretty clear

that it would not take the form of damages, punitive or consequential.

QUESTION: Punitive damages?

MR. NOLAN: Yes.

QUESTION: Now, Mr. Nolan, why isn't it a regulation of insurance if there is a state law that says insurance companies must act promptly on claims and if they don't there's -- then the insureds have remedies? Now, if an insurance company is stuck in violation of that law, if it has to pay some money, it comes out of its pocket, doesn't it? Why is that a regulation of a plan?

MR. NOLAN: Well, I think that in, where a plan exists, as it does in this case, the claims administration is provided by the named fiduciary.

QUESTION: All right.

MR. NOLAN: This Court has recognized that that whole function is controlled, governed by federal law under ERISA and the fiduciary standards of that law are applicable.

QUESTION: Well, that may be so, that may be so, but you think this, why should a state be preempted from providing a further remedy for a violation of a federal standard?

MR. NOLAN: Well, I guess the -- I guess the

clearest answer to that, Justice White, is shown by the circumstances of this case. I believe that it is accurate to say, beyond question, that if punitive damages are available under state remedies, no participant, no beneficiary, not Mr. Dedeaux nor anyone else, will utilize the provisions of Section 503 of ERISA which provides for claims review.

QUESTION: Perhaps you could say he has to exhaust those remedies before he can have an independent action.

MR. NOLAN: Well, you could, but his remedies there I guess would be viewed as never adequate if he had a shot at punitive damages in a state court. It isn't just that Mr. Dedeaux did this. I think it unmistakably clear that every litigant similarly situated would do it. If that happens, that reduces 503 to a dead letter. It repeals it in effect.

QUESTION: I suppose it would also raise insurance premiums substantially.

MR. NOLAN: Well, I think that, I think that in ERISA Congress had that concern, Justice White. I think that it was -- these plans are voluntary, nobody has to set them up. This is a law to provide for a voluntary system that companies will take on individually. So it was intended to be run efficiently

and effectively, and at low cost.

QUESTION: Does ERISA, Mr. Nolan, require that there be an independent trustee of some sort to administer the plan? Entex in this case couldn't do it itself?

MR. NOLAN: It requires that there be a trustee. The trustee does not have to be independent. Entex could have done it. Entex is the plan's sponsor and administrator, but has delegated to Pilot Life this key fiduciary role.

QUESTION: Do you have any, do you have any way of knowing what percentage of the administrators of ERISA plans are insurance companies?

MR. NOLAN: I think that it varies quite a bit. Generally speaking, I think that larger companies do more of it themselves. I think that the insurance companies are most important for medium-sized and small companies where the kind of catastrophic losses that may be available in the plan would be too much for their resources.

QUESTION: I suppose if an employer were a self-insurer there would be no question of the plan coming under the insurance savings clause.

MR. NOLAN: That's correct. That's correct. And there isn't. There are a myriad of variations. In

other words, there are insurance companies that only insure, they fund the plan; but an independent agency, another insurance company, a claims administrator, the plan sponsor, someone else administers the claim and makes the claims decisions.

There are other cases where the insurance company takes on all of the administration, including all of the claims part of it, but does not fund the plan. And so there are all of these varieties.

QUESTION: Mr. Nolan, what was the insurance exception meant to cover? I mean, you painted for us this picture of pristeen uniformity, but we have in the statute an exception that seems to indicate that there are some instances where the uniformity will be disrupted or otherwise you wouldn't need the exception.

MR. NOLAN: Yes.

QUESTION: What does the exception cover where without it you'd get a different result?

MR. NOLAN: That's the -- that is actually the key question, Justice Scalia, and I think that the clearest, most concise statement of that is found in a report of the House Labor Committee, it's dated January, 1977. It was referred to and relied on by this Court in the Metropolitan Life case and it goes directly to that point and the report says on the one hand it was clear

that the plans subject to ERISA needed to be freed of the possibility of state regulation.

On the other, it was important to limit the effect of pre-emption in order to avoid disrupting state efforts to regulate the conduct of other financial entities not subject to the federal act. So, I think that that really says it about as clearly as it can be said. Congress --

QUESTION: Do you need an exception for that?

MR. NOLAN: Excuse me?

QUESTION: Would you need an exception for that? I mean, what kind of thing that arguably would have been covered by the statute has been excepted from it by this provision, or is it just a, you know, better make doubly sure kind of an exception?

MR. NOLAN: I guess it could have been --

QUESTION: I tend to think exceptions are in there because without them something different would happen.

MR. NOLAN: Yes.

QUESTION: What different would happen if this exception weren't there?

MR. NOLAN: I think you're right, Justice, that it could have been done either way and perhaps the reason that it was done this way in this instance is the

McCarran-Ferguson Act and the tradition of insurance regulations that follows from it and Congress's awareness of that.

But, as far as the purpose of Congress is concerned there isn't anything in the legislative history that is inconsistent with the paragraph that I just read from the report.

QUESTION: All I'm asking for is an example of a case that would come out differently had the exception not been in the statute.

MR. NOLAN: Well, I guess the -- I'm not sure Metropolitan Life satisfied, satisfies that, but I think it probably comes pretty close to it. Any of, any of those -- Metropolitan Life was a case that involved a mandated benefits law of the state of Massachusetts and it's exemplary, I think, of the principle, what we're talking about here.

Anything that the state says, you have to put that in your policy, all of the regulation of insurance companies. I've read several law review articles in this subject in the course of preparing for this case, and the emphasis on insurance regulation is a thousand different regulatory features having to do with financial soundness and licensing and the selling of insurance and what the content of the policy is, and so

on.

You don't get to a question like this until you get into the operation of ERISA, in this instance until you get into the claims approval procedure. So, all of those cases in point of time back of where we are would be regulated by state insurance law.

QUESTION: I think you think Metropolitan Life really supports you here.

MR. WALKER: Yes, I think it very clearly does, Justice White, because it defines the deemer clause, not a clause which is necessarily self evident on its meaning on first reading. But the Court in Metropolitan said that the deemer clause takes out of the saving clause state insurance laws when they apply directly to employee benefit plans.

QUESTION: Well, Mr. Nolan, don't you think we'd have to cut back a bit on some of the language in that Metropolitan Life case for you to prevail here?

MR. WALKER: For us to prevail, no, Justice O'Connor, I don't. I think that the case is great for us because it does define the deemer clause. It says, the Court says, we aren't going to limit the deemer clause any further than Congress has limited it in the clause itself, and that's, the Court says, we're not going to limit the insurance saving clause any more than

Congress has limited it in the clause itself and in the deemer clause, and that's good enough for us.

I'd like to reserve the remainder of my time for rebuttal.

CHIEF JUSTICE REHNQUIST: Very well, Mr. Nolan. Now we'll hear from you, Mr. Walker.

ORAL ARGUMENT OF WILLIAM C. WALKER, JR., ESQ.,
ON BEHALF OF RESPONDENT

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

Petitioner says that this is a case in which Congressional intent is to be discerned, and I agree. Fortunately and rarely in this particular case, Congress has expressly stated in the saving clause itself, its intent, its intent to save from preemption state laws which regulate insurance. We don't have to look anywhere else. And, indeed, it says it in the language of statutory construction. It says, don't construe any other provision in this whole ERISA as exempting or relieving any person from state laws.

QUESTION: From the law of the state actually, right?

MR. WALKER: From the law of any state, you're right, which regulates insurance. Now, the distinction between the law of any state and state laws, I think, is

one that was made in petitioner's brief, but which was rejected as not significant in the brief of the United States. This Court used the term "state law" in describing the preemptive effect in the Metropolitan Life decision.

QUESTION: (Inaudible).

MR. WALKER: No, sir. But, the legislative history also says it, and it uses the term "state law," and indeed, of course, the presumption is against preemption. And indeed, Section 514(b)(2) says nothing in ERISA shall be construed. That includes 514(c), which has the definition and which the slight change in language is present. So --

QUESTION: (Inaudible) -- state law that said that insurance companies will act on a claim within a week, seven days, and that would end. The state said this includes insurance companies who insure ERISA plans; that that would be the controlling time limit.

MR. WALKER: Yes, sir. It certainly would be. And --

QUESTION: Despite what the plan said?

MR. WALKER: Yes, sir. That's certainly true and the important thing about that is, that's the distinction that the deemer clause makes. If the, if that same regulation purported to regulate plans by

calling plans insurance companies --

QUESTION: No, no, no.

MR. WALKER: -- it wouldn't work.

QUESTION: No. Or the state says the insurance company shall have thirty days to act and the plan says fifteen days. The state law would control.

MR. WALKER: Absolutely, if it's an insured plan.

QUESTION: Yes, yes, yes.

MR. WALKER: And, that's the distinction. The distinction is between insured and self-insured plans. And, the reason is --

QUESTION: So, it wouldn't make a bit of difference what the plan said in terms of the time or the procedure.

MR. WALKER: Absolutely.

QUESTION: And, the state law could say, if you don't act within thirty days, you're in court?

MR. WALKER: Yes, sir.

QUESTION: You don't, you can disregard all of the appellate procedures the plan might provide?

MR. WALKER: Yes, sir.

QUESTION: Well, Mr. Walker, I think that we have to focus on the deemer clause, because whatever is covered by the deemer clause is removed from the savings

clause, if you will, that you're relying on. So, we have to know whether the deemer clause extends to a trust established under a plan, whether or not the trustee is the insurance company that happens to be serving to insure that ERISA plan.

And if anything at all seems clear from the history, the congressional and legislative history, of ERISA, it would seem to be that remedies provided for employees covered by an ERISA plan, whether insured or not, are limited to those spelled out in the legislation.

And so I think there a very logical argument can be made and is being made that the deemer clause backs out of the savings clause at least the remedies provided for an insured employee.

MR. WALKER: Your Honor, that's certainly the argument the petitioner is making. In doing so, petitioner is failing to look at the precise language of the deemer clause which says expressly, that no plan or trustee shall be deemed to be an insurance company or in the business of insurance. In other words, the deemer clause comes in to limit the savings clause. The savings clause says --

QUESTION: Well, it says, "for purposes of any law of any state purporting to regulate insurance companies."

MR. WALKER: Yes. Yes, Your Honor. But, the deemer clause only limits the savings clause and the distinction has been made by this Court in the Metropolitan Life decision between direct and indirect regulation of plans. This Court has said that regulating an insurance company and an insurance-funded plan may in fact cause some consequences on the plan. But, that's okay, because Congress has said so and we're not in the position to decide Congress was wrong.

QUESTION: Well, that's why I asked Mr. Nolan if he didn't think you had to cut back on some of the language in that Russell case. He thought not, but I think there's some difficulties.

MR. WALKER: Yes, Your Honor. In the Metropolitan Life case, I think you absolutely do have to cut back on the language if you don't find for us. What the insurance companies want in this case, of course, is no regulation at all. They choose state regulation in the McCarran-Ferguson Act, because federal regulation is serious on the antitrust laws.

They now see that state regulation in the developing common law of bad faith is serious and they will have to do what they promised to do and pay claims that they owe and not cheat their insured's, so they say, wait a minute, ERISA's designed to take care of

this.

I submit that Congress has made this intent clear and if the insurance companies want to take this up with somebody they ought to take it up with Congress.

QUESTION: Well, do you really think that Congress intended to allow the very detailed civil enforcement procedures for an employee covered by an ERISA plan to be completely bypassed at the plaintiff's option?

MR. WALKER: In the case of insured plans, I do, because Congress says so in the saving clause. It saves insurance regulations.

QUESTION: But, it may have backed out of that in the deemer clause, that's the problem.

MR. WALKER: I don't think they backed out of it under the deemer clause. In the deemer clause, all that's said is you cannot sneakily regulate a plan by calling it insurance. We're not calling it insurance. Now, there's a difference that ought to be drawn and notice here between administrative services.

An insurance company can wear two different hats. It can simply come in and perform administrative services and that's all it does. If it does that it's not an insured plan. And, if it's not an insured plan, all of ERISA, including the specific enforcement

remedies, applies.

If on the other hand, it wore only the hat of insurance company selling a policy to an insured then it would be clear. We wouldn't have that problem of civil enforcement.

QUESTION: Mr. Walker, if what you say is true, if that interpretation is correct, there is a severe disadvantage in having an insurance company act as trustee under the plan. Right? I mean, --

MR. WALKER: Your Honor --

QUESTION: -- an enormous disadvantage. Is there any indication in the legislative history or any reason why Congress would have wanted to create that disadvantage?

MR. WALKER: First of all, the insurance companies don't usually act as trustees; they act as plan administrators. But there's still a serious disadvantage on that point.

QUESTION: (Inaudible).

MR. WALKER: And the, but the disadvantage does not apply if that's all they act as. In other words, the only disadvantage applies if they sell insurance policies. And that's because state law controls that.

QUESTION: Only if they're insurance companies?

MR. WALKER: (Inaudible) -- control it.

QUESTION: Yes. What I'm saying, is there any indication that Congress for some reason didn't want insurance companies to act as administrators, because that's going to be the result of what you're saying. And, nobody in his right mind is going to have an insurance company act as administrator. The fees are going to go up so much that it will make it impossible.

QUESTION: But, other companies are, just can't be self-insurers; they can't handle it. So the disadvantage is going to devolve on the smaller companies who either buy insurance or they won't have their plan.

MR. WALKER: First of all, some of -- if they only act as administrators there's no problem. It's only when they sell insurance. You're exactly right, Mr. Justice.

QUESTION: Why do you say that? Why do you say that?

QUESTION: They're not insurance companies if they don't sell insurance, right?

MR. WALKER: Well, they may be insurance companies for other purposes, but plenty of them perform administrative services only now.

QUESTION: What about -- I don't understand

your position. If you have an insurance company that administers a plan for say, General Motors which self-insures the payments and liability --

MR. WALKER: Yes, sir.

QUESTION: -- would not your -- wouldn't you have your state law cause of action in that case?

MR. WALKER: No, sir. And the reason is the Metropolitan Life case makes clear that in the case of self-insured plans, self-funded plans, the savings clause does not apply because the deemer clause eats it up. But in the case of insured plan --

QUESTION: Even if the state law required an insurance company which administers all sorts of insurance to avoid bad faith denials of benefits and all the rest?

MR. WALKER: Would not apply.

QUESTION: Would not apply.

MR. WALKER: The difference -- and this distinction is made in the Metropolitan decision.

QUESTION: Well, Mr. Walker, do you happen to know what percentage of all employees covered by ERISA plans are covered by insurance company benefits as opposed to self-insured?

MR. WALKER: No, ma'am. There are statistics that are offered by the petitioner in the United States

in their brief. Obviously it's a lot of them because of the interest that's been drawn by the insurance industry. I do think that it will have a consequence.

The consequence will be that the beneficiaries of these plans, the small plans, will get state law protection when that state has decided that it's important to have claims paid. ERISA after all was not drafted to protect insurance industries.

QUESTION: No, but it was partly drafted to encourage small companies to have such plans and maybe some will decide it's too expensive.

QUESTION: And, also to have some uniformity in the administration of these plans, which a lot of them cross several state lines. And you have just a great confusion of state law.

MR. WALKER: Yes, sir. The conflicting policies which this Court recognized in Metropolitan Life, it said, leave it to Congress. Congress drafted the statute in which these two policies go different directions.

QUESTION: Mr. Walker, do you know of any company that's big enough to be a self-insurer and yet calls in an insurance company just to administer the plan?

MR. WALKER: Yes, sir. I will --

QUESTION: Are there some that do that?

MR. WALKER: I have a bunch of cases like that. Penrod does it, for example. They use Life Insurance Company of the Southwest to perform administrative services only. Bordens uses Metropolitan to perform administrative services only, and I've experienced that.

As to the cost, I don't understand exactly why insurance companies say, if we're forced to pay punitive damages when we cheat our insureds, we're going to have raise rates. That's what bad faith is about. That's like Las Vegas saying that if we, if we're going to have to have a square table --

QUESTION: That's a great argument in theory, but if the insurance company has lost money on its ERISA business for the last two or three years, I can't believe that they aren't going to raise their rates.

MR. WALKER: Well, Your Honor, if they choose to do so, let them come to Congress and get an amendment to this statute and provide the information.

QUESTION: Well, that certainly is an argument.

MR. WALKER: They refuse to do that. Across the board they refuse to provide information about these losses they claim. If they want it, let them come to Congress instead of this Court, which is not a body

that's specifically designed to take care of this.

QUESTION: Yes, but the question we're considering now is whether Congress, in enacting ERISA with the various preemption savings clause, contemplating the sort of system that you're urging it did.

MR. WALKER: Well, I'm not sure what Congress contemplated, except I know what Congress said, and Congress said that insurance regulation is saved and said it broadly and this Court has agreed and read the statute and refused to limit it beyond what Congress has done. And Congress has had an opportunity to change that as this Court pointed out in Metropolitan, and yet it's not done so.

QUESTION: Well, do you have any reason to dispute the government's figures in the Department of Labor's study that 91 percent of health plans covering fewer than a hundred employees are insured plans and that 83 percent of those with over a hundred employees are insured plans?

MR. WALKER: I'm sure those figures were accurate at the time. It was about 1980. And, my personal experience has been that insurance companies are already changing over to administrative services only, at least in the large companies and that may have

changed somewhat. I don't know.

QUESTION: That would certainly be the trend.

MR. WALKER: Yes, sir.

QUESTION: If you win.

MR. WALKER: Yes, sir. And, of course, if this Court decided, which it has not clearly decided, the question of punitive damages under ERISA, in the Russell case, of course, it's been pointed out that that was reserved, and, while there's been a suggestion made that courts of equity may not award punitive damages, in Mississippi they may.

And I think in, generally they may, although I'm not sure they would reward them for breach of trust quite in this context. But, if this Court decided to allow punitive damages to protect the plan beneficiaries, the people ERISA was designed to protect, then insurance companies would all of a sudden be reading the savings clause very differently.

Because that's what this is about -- the question of whether insurance companies are going to be made to pay what they've already promised to pay in the first place, or whether they're going to be able to be outside the law altogether.

QUESTION: Well, under ERISA you can sue an insurance company and make it pay what it promised to

pay in the first place. What you want it to pay is a lot of consequential damages that might of resulted from its failure to pay what it promised to pay. (Inaudible).

MR. WALKER: Yes, sir. I want them to pay what they owe before somebody sues them. I want them to know that if they don't go ahead and pay and live up to their obligations they will have to pay more later.

If the most they will have to pay is what they owed anyway, and if a litigant has got to hire an attorney -- and by the way, attorney's fees are not automatic under ERISA; it's within the judge's discretion whether the plaintiff's attorney even gets attorney's fees -- I want them to have to treat their insureds fairly from the beginning. Mississippi bad faith law --

QUESTION: Mr. Walker, --

MR. WALKER: Yes, sir.

QUESTION: -- you say insurance companies are saved. Insurance companies were also saved in the McCarran-Ferguson Act.

MR. WALKER: Yes, sir.

QUESTION: But, Congress did not save anything except legislation governing insurance companies there, right?

MR. WALKER: Yes, sir. I agree with you.

QUESTION: Now, what --

MR. WALKER: Although that statute has -- I think some of this Court's decisions have suggested that that includes at least administrative regulation in addition to legislation. And, of course, the ERISA provision very --

QUESTION: But not, but surely not decisional law.

MR. WALKER: The Court has not expressly said that. It hasn't expressly not said it.

QUESTION: Oh, you think the McCarran-Ferguson may cover decisional?

MR. WALKER: It may cover decisional law, but I don't think that that's important for this case. I think this case has ERISA which very expressly deals with the problem and makes clear in the statute itself the decisional law is included.

QUESTION: Well, you think Congress's concern for state authority over insurance in one Act is totally unrelated to Congress's concern for state authority over insurance in another one?

MR. WALKER: No, sir. I think in both cases Congress --

QUESTION: Don't you think they both have the same scope?

MR. WALKER: I'm not sure they have exactly the same scope. I think in both cases Congress was trying its best to allow insurance companies to avoid federal regulation and to live where they were happy to live in the various states.

Now the insurance companies aren't happy there because of bad faith and they're trying to come back under the umbrella of ERISA. Now, I do think that the McCarran-Ferguson Act and the saving, and the regulation of insurance question is certainly related, as this Court has said in Metropolitan Life, to the questions here in ERISA.

But, I think it comes down the same way, as this Court said in the --

QUESTION: But, the language here is ambiguous if you assume that the definition of a law of any state is not necessarily the same as the definition contained in the act of state laws. And it's not the same phrase, so in this Act, it's at least ambiguous and in McCarran-Ferguson it's pretty clear, it seems to me, that it doesn't cover decisional law, because it refers there to any law enacted by any state. And, it says, "unless such act specifically relates".

MR. WALKER: Well, there's a --

QUESTION: (Inaudible) under McCarran-Ferguson

that it relates to legislation and perhaps implementing regulations, so if the two have to be construed in pari materia, I think you're going to lose on that point.

MR. WALKER: Your Honor, I don't think so because there's a presumption against preemption. And, to use the strained distinction between any law of any state and state law then I believe there is a presumption against. You all said in Metropolitan Life that there was a presumption against preemption and apply, and use that language in interpreting the savings clause.

And I think that if any presumption against preemption is applied certainly this kind of what I would view as restrained construction, this distinction should not be drawn.

QUESTION: Is this a negotiated plan?

MR. WALKER: Your Honor, I don't know. This --

QUESTION: Well, a lot of plans are in fact the result of collective bargaining?

MR. WALKER: As far as I know it was not. I don't know. I don't think that's part of the record anywhere. This case was brought at a time when nobody much knew ERISA was around, neither the plaintiff nor the defendant. The defendant found out about it a couple of years later and amended its answer, and I'm

not sure about that.

Well, Mississippi bad faith law and indeed any common law of general application, although Mississippi bad faith law specifically focuses on insurance and thus does not fall within that argument that's made, an argument that I don't accept by the petitioners. Certainly, it's designed to focus upon the insurance industry.

QUESTION: (Inaudible).

MR. WALKER: To force the insurance industry to do what it ought to do and to protect the people that ERISA is designed to protect. Happily it does that as well. Since it is a state law which regulates insurance, since this Court has said that that's where the inquiry stops, since in its reply brief the petitioner has almost admitted that even if it is a state law which regulates insurance they still win, the language in the Metropolitan case, correctly decided in my view, of course, is that that's where the inquiry stops.

There's a state law which regulates insurance. It is therefore saved from preemption. This is an insured rather than a non-insured plan.

QUESTION: Well, any state law of general applicability regulates insurance, right?

MR. WALKER: Yes, sir.

QUESTION: If we apply your first principle of presumption against preemption then I guess we would have to say that all state laws of general applicability continue to apply.

MR. WALKER: Yes, sir.

QUESTION: So long as they're being applied to insurance companies.

MR. WALKER: To regulate it. Of course, as Dean Keaton has said, and as his footnote in the U.S. Brief points out, that's the way insurance is basically regulated, through Court decision which interprets meanings of policies --

QUESTION: What about the Mississippi Statute of Frauds; would that apply? Would that be something that wasn't pre-empted?

MR. WALKER: I think first of all, the Mississippi Statute of Frauds might not relate to the plan in the first place. In other words, it might not fit under 514(a) in the beginning.

QUESTION: Well, what, but what if it did?

MR. WALKER: Since -- if some special wrinkle developed to deal with insurance policies, I would say it did.

QUESTION: Well, supposing it's just a general

statute of frauds that doesn't have any provision in it about insurance, but it just applies to all written contracts. The argument is, this is a written contract.

QUESTION: In this case, it regulates an insurance company, because the insurance company is one of the parties.

MR. WALKER: Well, you're asking me makes some assumptions that are not correct, but for purposes of argument I would say that a law of general application, first of all, if it's that general, is not going to be, is not going to relate to the plan. Secondly, assuming --

QUESTION: Why? I don't understand why.

MR. WALKER: Because it's got to focus on the plan in some way, some manner to relate to the plan. I mean, I'm not really prepared --

QUESTION: You mean, by its terms, about the law, by its terms has to refer to plans?

MR. WALKER: No, sir. To fit under 514(a) it doesn't take too much. And, of course, since that's not the issue in this case, since we've admitted that what we've got fits under 514(a), I can't point out the nuances to you.

But, a law of general application that applies

equally, then perhaps there's no reason to view it as insurance regulation. But, a law of general application, to simply use that phrase, "general application," when in fact it is applied to the insurance industry or insurance contracts, or insurance claims handling in a specific way, then that regulates insurance.

And, all insurance teachers agree that it regulates insurance. And, all insurance industry agrees as well that it regulates insurance (Inaudible) --

QUESTION: What if Mississippi law didn't focus particularly on an insurance company's duty to pay, but just say that any debtor's duty to pay, you could have a breach of good faith and recover punitive damages for the failure of a debt to pay the, debtor to pay the debt on time.

MR. WALKER: First of all, let me make clear that respondent's, I mean petitioner's argument in his reply brief that any intentional refusal to pay a contract justifies punitive damages, is clearly contrary to Mississippi law, contrary to Oliver Wendell Holmes, contrary to the Restatement Second of Contracts, Section 355, so that's not the general law.

But, assuming that it were, the -- if it is not applied directly or in any way more significantly

toward insurance companies than anything else, then I don't think (Inaudible) --

QUESTION: It applies to them more often than anybody else probably just because they happen to pay more claims than anybody else, or to be liable to pay more claims than anybody else.

QUESTION: (Inaudible) Even though that were true, by terms the doctrine applied to any debtor.

MR. WALKER: Well, let's put it this way, we do have a rule that says any debtor is supposed to pay his debts. All right? And, if he doesn't he's got to pay damages. And that's the general contract rule that was modified in the Beall case in which the court applied it in Mississippi law for insurance companies.

That's not a law which specifically focuses on insurance. It has not been applied more directly toward insurance than anything else as far as I can tell based on that narrow hypothesis. And, I don't think that it's, that it would be saved; frankly, I don't think it would be necessary for it to be saved. The --

QUESTION: Where do you get that limitation out of the statute, that it has to relate more narrowly to insurance companies?

MR. WALKER: It says "insurance regulation". In other words, it says state laws which regulate

insurance. The word "regulate" probably means something and the question is what precisely does it mean. It clearly includes a state law that's designed to force insurance companies to pay legitimate claims. The question is does it include --

QUESTION: Sure, but a general state law saying everybody shall pay his debts applies to insurance companies. Surely that regulates insurance companies.

MR. WALKER: It certainly may (Inaudible) --

QUESTION: It regulates them and everybody else.

MR. WALKER: It certainly may do that.

QUESTION: But, you're giving it a narrower interpretation because it would frankly seem somewhat absurd to give it a fuller --

MR. WALKER: No, sir. Absolutely not. It doesn't seem absurd to me.

QUESTION: Well, then your general principle of construe everything to avoid preemption, I would have thought you would have answered the Chief Justice's question entirely differently saying, yes, it covers all state laws.

I don't know how else your principle would play out in this case. Or otherwise you're not being

loyal to your principle and, you know, once you acknowledge that then we have to start drawing lines and I don't know why we should draw the line where you want us to between somehow applying specially to insurance companies and not applying specially.

Why we should draw it there rather than between, as McCarran-Ferguson did, between statutory regulation and non-statutory regulation or some other fashion?

MR. WALKER: The reason I'm having difficulty, I believe, is because the hypothesis is one that I think will be taken care of by never even coming up because of it not relating sufficiently to the plan in the first place under 514(a).

But assuming that it does, I agree with you, there is no reason in principle to draw a distinction if it has the effect of regulating and if that's the decision that this Court wants to -- wants to make, if it has the effect of regulating, fine.

QUESTION: I think that's a more, what should I say, consistent position.

MR. WALKER: This case involves state law regulating insurance. It involves state law that was expressly, clearly preserved by Congress in the statute itself. The 5th Circuit correctly construed this

Court's opinion in Metropolitan Life and recognizing that such state law was safe from preemption, we request the Court to affirm the 5th Circuit.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Walker.

MR. WALKER: No further questions?

CHIEF JUSTICE REHNQUIST: Mr. Nolan, you have three minutes remaining.

REBUTTAL ARGUMENT OF

JOHN E. NOLAN, JR., ESQ.,

ON BEHALF OF PETITIONER

MR. NOLAN: Just a few points, if the Court please. First, to respond to the Chief Justice's comment about what did Congress contemplate, I think that's very important. I think that's really what we're doing here.

What Congress contemplated is repeated over and over and over again in the legislative history. They contemplated a uniform system of federal regulation of employee benefit plans. There is by stark contrast not a single reference anyplace in the legislative history to preservation of any kind of a state cause of action like this. That's very significant. The legislative history of ERISA runs 15 volumes.

QUESTION: Well, it might have; it also might

be that silence may run the other way.

MR. NOLAN: Well, I think the silence, Justice White, runs toward the uniformity that you commented on earlier and that's what Congress was thinking of. It's inconceivable that Congress, in a legislative history that extensive, could make a major exception to what it was providing in the statute and make no reference to it.

QUESTION: Well, you might have expected somebody to say that the state causes of action are preempted.

MR. NOLAN: Well, there are references to state causes of action in a lot of other statutes as you know, Justice White, from the Silkwood case, as this Court knows, from Title VII and so on. There are a lot of different ways to do it, but none of those ways took place here.

The definition of the employee benefit plan very specifically includes plans funded through the purchase of insurance or otherwise. That's definitional in the statute. It isn't that Congress provided one statute for insured plans and another for self-insured plans.

Employee benefit plans are defined as plans that provide benefits through the purchase of insurance or otherwise.

QUESTION: Mr. Nolan, where do you draw the line that I was just discussing with Mr. Walker? You don't draw it between statute and non-statute. How do we know when its a law regulating insurance?

MR. NOLAN: We would draw the line, Justice Scalia, on the function and we think what function is the actor, insurance company in this instance, performing? If it is performing a compulsorily, an ERISA-mandated function, in this instance claims administration, we would say that that was ERISA and preemption applied.

QUESTION: Well, then the insurance company doesn't have to keep a certain reserve?

MR. NOLAN: All of that is regulated by state law. That doesn't really rise to the level of an ERISA.

QUESTION: No, but as far as, as far as his ERISA function is concerned, he's insuring under ERISA. Doesn't he have to comply with the state law requiring insurance companies --

MR. NOLAN: He does. Insurance companies for all of those kinds of considerations comply with state law. You don't get to an issue like this until you get into the administration of an employee benefit plan. And this function reaches into the very vitals of that

administration.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Nolan.

The case is submitted.

(Whereupon, at 11:03 a.m., oral argument in the above-entitled case was submitted).

# CERTIFICATION

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

85-1043 - PILOT LIFE INSURANCE COMPANY, Petitioner V.

EVERATE W. DEDEAUX

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BY Paul A. Richardson

(REPORTER)