OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: FMC CORPORATION, Petitioner V.

CYNTHIA ANN HOLLIDAY

CASE NO: 89-1048

PLACE: Washington, D.C.

DATE: October 2, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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FMC CORPORATION, :

Petitioner :

v. : No. 89-1048

CYNTHIA ANN HOLLIDAY :

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Washington, D.C.

Tuesday, October 2, 1990

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

APPEARANCES:

H. WOODRUFF TURNER, ESQ., Pittsburgh, Pennsylvania; on behalf of the Petitioner.

DAVID L. SHAPIRO, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of United States, as amicus curiae, in support of the Petitioner.

CHARLES ROTHFELD, ESQ., Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now on No. 89-1048, the FMC Corporation v. Cynthia Holliday.

Mr. Turner.

ORAL ARGUMENT OF H. WOODRUFF TURNER

ON BEHALF OF THE PETITIONER

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

This is a statutory construction case revisiting the preemption provisions of the ERISA statute. The issue is whether they preempt the application of State anti-subrogation automobile insurance laws as applied directly to self-funded employee welfare plans.

The courts of appeals have decided three cases involving this exact question. Two have found preemption as to self-funded plans, whereas one, the Third Circuit below, found no preemption. In all the courts of appeals have address nine cases involving essentially this question of which seven have found preemption and two, including the court below, found no preemption.

Now the section 514, the preemption provision of the ERISA, contains a tripartite preemption provision. First, there is the broad preemption clause that this

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Court has had occasion to construe on a number of occasions. Secondly, there is an insurance savings clause, so called, which exempts from the general preemption provision, the traditional State area of insurance regulation.

Thirdly, there is the so-called deemer clause, which indicates -- which is at issue here and this is the first time that this Court has had the third provision, the deemer clause, directly before it, although you had occasion to analyze it rather thoroughly in considering the savings clause in the case of Metropolitan Life Insurance Company.

Now the broad preemption clause has been held to be deliberately expansive, designed to establish a pension plan regulation as exclusive a Federal concern. Preempted are State laws which relate to an ERISA plan -- that's the statutory term -- in that they affect the administration of a plan or directly impact the provisions of a plan.

Now the courts of appeal have uniformly held that State insurance laws prohibiting the subrogation of automobile injury claims relate to ERISA insofar as they are attempted to be applied to ERISA plans and they are thus preempted unless saved by the insurance savings clause.

The plan here -- the law here in Pennsylvania

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relates to this plan, because it reaches right into the plan as promulgated and removes a provision calling for the plan to have the right of subrogation when the planned beneficiary recovers against a third party tort feasor.

Now the insurance savings clause saves from preemption State laws regulating insurance and in this instance may protect --

QUESTION: Purporting to --

MR. TURNER: Pardon me?

QUESTION: Regulating -- are you talking about the deemer clause now or the insurance?

MR. TURNER: No, the insurance clause. I'm going through first the broad preemption clause, then the insurance clause which may protect an anti-subrogation from preemption unless the deemer clause imposes its limiting power upon the insurance savings clause.

Now the deemer clause is a limitation in turn upon the insurance savings clause. In fact, in the Metropolitan Life case this Court said that the deemer clause modifies the insurance savings clause and so it would appear from the plain language of the statute.

QUESTION: Well, the deemer clause uses the word regulate. It applies -- you're not -- an employee benefit plan shall not deemed to be an insurance company for purposes of any State law purporting to regulate insurance

companies. Now, does that term need definition?

MR. TURNER: Well, it goes on. It's more than just purporting to regulate. It says purporting to regulate insurance companies, insurance contracts, banks, trust companies, et cetera. That's -- I don't know that the phrase needs particular definition. Although, you know, the word purporting to is what the Third Circuit ceased upon and suggested that the inclusion of the word purporting in that statute amounted to the word pretextually. Or the State had, through some back door or pretextual method, endeavored to regulate these plans.

I don't believe we need to go that far. Indeed, the briefs that have been filed in this Court by my friends here do not attempt to defend that interpretation as it was rendered in the Third Circuit, which I must say was also the interpretation that the Sixth Circuit took in the Northern Group case. They both seemed to think that that would purport somehow implied a pretextual approach which we don't think is justified by the -- by the language.

The deemer clause does not necessarily have to attack a pretextual expansion of State regulation but one which goes beyond the regular historical exception of the insurance industry as we have known it in the McCarran-Ferguson Act and elsewhere.

Now, in Metropolitan Life this Court saved a mandated benefits law as applied to an insured plan, but noted that the same law would be preempted as to a self-funded plan, and pointed out that while the Court recognized that that placed some difference between self-funded plans and insured plans, that that was a difference that was inherent in the program established by Congress.

And in order to reach that analysis, the Court analyzed the whole of section 314, the whole preemption section, so that most of the courts of appeals have followed the analysis set forth in the Metropolitan Life case. And I think that would be careful approach for the courts of appeals because after all, while it was not the holding of Metropolitan Life, it was nonetheless an integral of that Court -- of your Court's analysis only 5 years ago, a unanimous Court.

The Third Circuit, in addition to injecting a pretextual concept, also injected some -- another new concept that isn't founded in the statute. And that was what was called the core ERISA concept to date used to say that subrogation laws were not within the core ERISA concerns and therefore the anti-subrogation laws would not be dealt with by the deemer provision.

On the other hand, the Sixth Circuit, in straying from the implications and analysis of

Metropolitan Life, injected a theory of balancing State versus Federal interests. And that is, again, not grounded at all in the statute. The court indicated that in looking at a particular State regulation, that there should be a balancing as to the relative significance that the State had in the matter had versus the Federal Government.

And here again that seemed to have no basis in the act.

QUESTION: Your position, Mr. Turner, then is that all of the preemption doctrine could be pretty well spelled out of the try -- of the language of the tripartite preemption provision, the broad preemption clause, the exception for the business of insurance and then the deemer provision that says an employee benefit plan shall not be deemed to be the business of insurance.

MR. TURNER: Chief Justice, that's exactly our view. And the happy -- the happy import of that view is that it is a relatively convenient rule of decision. It --- as opposed to a core ERISA concept or something else, it's not vague and imprecise or hard to define. There might be borderline case that arise but it seems to be a more helpful rule to guide the planned administrators in the lower courts.

QUESTION: Mr. Turner, let me -- may I ask you

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two questions. These cases get us awfully confused, but is this much perfectly clear. That if your client had been an insured plan, there would be -- there would be no preemption because it comes within the second clause, doesn't it?

MR. TURNER: I believe that is right, Justice -

- QUESTION: And if that is true -- I guess I have trouble -- what sense does it make -- why is your client being treated differently? What is Congress trying to do here?

MR. TURNER: Congress -- and it took me a long while to come to this view, indeed, after the briefs were written. And I reread three articles that are cited in the briefs which somehow brought the matter into focus to me. And those are the 1967 law review article by Mr. Goetz, the 1976 article by Brummond, and the 1973 note in the Georgetown Law Review. Those are all cited.

And what those three articles did was describe, each of them in their own different perspective, the historical conditions that were existing at the time Congress enacted ERISA in '74. And it was this in the late 1960's and early '70's, these self-funded or uninsured plans were growing in both number and size.

The State insurance commissioners were viewing these phenomena. They didn't appear to be within the

definitional jurisdiction of the State insurance commissioners. They -- but the commissioners nonetheless viewed them as something rather like insurance. So, they were trying to decide how to expand their regulatory turf as it were.

Two proposals were made. One, model legislation was proposed by the National Association of Insurance Commissioners in 1964. However, that model legislation was never adopted in any State. So, failing the legislative route, the State sought judicial determinations that self-funded plans were the equivalent of insurance and were therefore within the purview of the existing State regulations. There was a Monsanto case in the Missouri State court system that illustrates this.

Now, in 1974 when this pulling and tugging was going on, the Congress enacts ERISA and it would appear very logical if Congress had been aware of the efforts of the State insurance commissioners to expand their regulatory power to incorporate the health care -- the self-funded benefit plans.

And I would suggest that based on this -- I grant you, Your Honor, extrinsic evidence or historical context that the deemer clause was intended to resolve this question. And it was intended to resolve it in favor of the application of Federal law and ERISA rather than

encouraging the expansion of the State insurance commissions' power in this manner.

Congress was willing to brook the extent of State insurance regulation as it stood, but they in a timely manner decided to resolve this question of what law should regulate these new --

QUESTION: -- by saying that these entities should not become subject to State insurance regulation because they would be considered insurance companies.

MR. TURNER: They --

QUESTION: It's very interesting. I think it's the brief of the State legislature or one of the State organizations, recites precisely the same history and comes to the opposite conclusion.

MR. TURNER: Yes, Your Honor, I think that they missed the point of the articles. They cite these articles and go through it. But I think one can come to a differing interpretation, perhaps depending on which line you're trying to establish. But it seems to me when Your Honor says what was the sense of this, is it an aberrational distinction or is it one that makes sense. If it's been analyzed that way it seems Congress made a decision and that they -- and this decision furthermore is consistent with the broad preemptive sweep of 514(a), the -- which says this shall be basically a -- these funds and

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pensions will be nationally regulated so there's a uniform system.

QUESTION: How do you deal with the other argument that's kind of related to this that the second clause -- I get the names mixed up -- uses the word person. It doesn't use the word insurance company, whereas the deemer clause says you shall not be deemed to be an insurance company. But it really doesn't take a noninsured plan out of the term person and --

MR. TURNER: Well --

QUESTION: -- shall not relieve any person from any law which regulates insurance, banking, or securities. And we have a law which I guess everybody agrees does regulate insurance, bankings, and securities. And apart from the preemption provision, your client would be a person subject to that law.

MR. TURNER: Yes, I don't know that the word person is where to focus though on 1144(b)2(A), where it says, nothing in this subchapter shall be construed to exempt of relieve any person from any law of any State which regulates insurance.

I think, Your Honor, they focus more on the insurance word there and they say that somehow when you get down into (b), into the so-called deemer clause, that the words are not exactly congruent. But if you read the

third clause, it seems very possible to read it as broader than the insurance savings clause, as if Congress said, we're going to make this lid larger than the pot to make sure that nothing escapes from the insurance savings clause that shouldn't go out of it.

But I don't think the lack of congruity in language means anything of significance. The --

QUESTION: It would, sir, if the status is being subject to State regulation depended on your being an insurance company, status as that kind of person, then you don't become that kind of person just because you're an ERISA fund.

MR. TURNER: No, but you are an employee benefit plan, which is the type of entity that my client is and which is what is specifically -- so that if it's a person under (a) -- it seems to me that type of person is what is carved out.

QUESTION: What is carver -- it cannot be called an insurance company by reason of the deemer clause. But the question I have is whether one has to be -- a person has to be an insurance company to be a person who is obligated to obey State laws regulating insurance, banking, or securities. That's the question that runs through my mind.

MR. TURNER: The -- as best I could tell, Your

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Honor, that a person would be incorporating any type of entity here, and I don't -- I'm sorry, I'm just not much help perhaps. I don't -- I can't take your point further.

QUESTION: Well, my point is that the -- your client is a person, whether or not it is an insurance company within the meaning of the deemer clause, and maybe that's enough to answer the case.

MR. TURNER: If the Court please, I would reserve the balance of --

QUESTION: Counsel, may I just ask -- we've received amicus briefs from people on the health care professions cautioning that our decision in this case might affect freedom of choice, chiropractors, et cetera. Is -- will that necessarily be the case if we follow your interpretation?

MR. TURNER: In this particular case, you don't, of course, need to reach that. It would in all probability be that sort of mandated benefit law that would not survive as applied to self-funded plans and that if there is to be mandated benefits or freedom of choice of providers and so on, that it would be up to Congress to supply that under the national regulatory scheme.

QUESTION: So, you were thinking that there would be preemption because it relates to insurance?

MR. TURNER: I'm thinking that there may be as

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applied to a self-funded plan only. You see it would -- the freedom of choice laws as so-called in the States would be saved by the insurance savings clause, but they may, as applied to self-funded plans, be preempted. So that, as I say, if there is to be -- if that arises and people are disturbed about it, they should -- the answer is to have Congress mandate benefits which in the health and welfare area, Congress chose not to do in the 1974 original ERISA enactment.

QUESTION: Thank you, Mr. Turner.

Mr. Shapiro.

ORAL ARGUMENT OF DAVID L. SHAPIRO

ON BEHALF OF UNITED STATES, AS

AMICUS CURIAE, IN SUPPORT OF PETITIONER

QUESTION: Mr. Shapiro, could I ask that you take a stab at explaining why Congress would have wanted to treat self-insured plans differently?

MR. SHAPIRO: Your Honor, Congress did not give us -- I should have said thank you, Mr. Chief Justice -- Congress did not elaborate in great detail on why in the first place it excepted insurance regulation from the scope of preemption, and that brought the plan itself under -- plans themselves outside the scope of the savings clauses, as we argue.

But I believe that the explanation lies in the

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combination of two factors. One is the long standing recognition of State interests in the areas of traditional insurance regulation, a recognition that's embodied in the McCarran-Ferguson Act and which led to the enactment of the savings clause.

I think it was then realized, particularly as the preemption clause was broadened out at conference, although the deemer predates that, I think it was realized that if the plans themselves would be subject to regulation under this recognition of traditional State power, that the purpose of preemption, both the original narrow purpose of preemption and the broader purpose of preemption as it emerged from conference would be severely -- severely (inaudible).

So, I think the reason for this distinction is that effort which is bewildering admittedly at times had effort to preserve State power to regulate insurance companies and insurance in traditional ways but not to regulate plans directly through that device. And that's why I think the deemer clause is such an essential complement to the saving clause.

The time that I have available I would like to focus on an argument that -- that is made for the first time in this Court by the respondent and by her amicus, the National Conference of State Legislatures, in an

approach that is very different from the approach of the court of appeals.

They argue that while the savings clause is a broad reservation of State authority to regulate insurance, the deemer clause is, in its turn, only a very narrow exemption to the savings clause. They say that the deemer clause relates only to those laws that regulate insurance as a business, a phrase that they do not exactly define but which appears to govern such State laws as those affecting licensing or capital structure requirements or perhaps premium levels.

The deemer clause in their view leaves very broad authority to regulate benefit plans directly as a result of the savings clause.

We submit that argument fails on every ground. It fails because it's contradicted by the broad text of the deemer clause, and we believe it fails because it is flatly inconsistent with the purpose of the preemption provisions that this Court has recognized in such cases as Fort Halifax and others.

Looking first at the text of the deemer clause, the respondents emphasize the phrase that no plan shall be deemed to be an insurance company or to be engaged in the business of insurance.

They go on the fact that the deemer clause is

much broader. It says no plan shall be deemed to be an insurance company or other insurer or engaged in the business of insurance, and then there follows a clause that they studiously ignore for purposes of any law of any State regulating insurance companies or insurance contracts.

We submit that section 1719 of the Pennsylvania law is plainly a law of the State regulating insurance contracts.

QUESTION: Mr. Shapiro, you omitted two important words when you quoted the statutes: "purporting to regulate" which suggest to me that statutes which in terms define the regulated entities as insurance companies, insurance contracts, banks, and so forth. And what they're saying is if that's the manner of bringing the person under State regulation, it just doesn't apply to ERISA fund.

Does that stop an ERISA fund from being a person within the meaning of the second clause?

MR. SHAPIRO: Well, there are two aspects to your question, Your Honor. I think first the word purporting as such does not mean that the State has to expressly deem someone to be an insurance company. Purporting could be expressly or by implication. The dictionary is clear on that. We don't think purporting

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requires either a pretext, as the court below suggests, or a specific announced purpose.

We think the fact that this State law deals with insurance subrogation provisions is sufficient to satisfy the word purporting.

Now, the second part of your question focuses --

QUESTION: Then the word purporting is redundant, is totally unnecessary?

MR. TURNER: We don't think it adds anything.

QUESTION: You don't think it adds any meaning?

MR. TURNER: No, we don't think it -- in fact the word purporting is also found in the statute in the definition of a State, and the use of the word purporting there I think is very similar to the use here. That is, the definition of the word State would add the meaning of the preemption provision also contains the word purporting in the same context that we claim it is here.

With respect to the word "person" that you focus on in the savings clause, we believe that the question is whether the deemer clause effectively takes this out of the savings clause because this State law, the State law that is at issue here, is a law which we submit does regulate insurance contracts and, in doing so, deems a plan to be an insurer.

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Indeed, if the plan were not an insurer for purposes of this law regulating insurance contracts, the case would not fall within the savings clause at all. In other words, we believe the very factors that bring it within the savings clause also bring it within the deemer clause because the plan is effectively deemed by the State law to be an insurer for the purposes of a law regulating insurance contracts, telling insurers that they are not allowed to put a subrogation provision in their contract. If they do, they will be void.

The effect of the respondent's argument we submit is to give the States very broad authority to regulate plans directly outside the very limited area of -- of capitalization requirements and licensing. It would allow them to regulate such matters as fiduciary responsibilities. It would allow them to regulate disclosure. The very core concern that the court below conceded was foreclosed to the States.

However, it would allow the States free reign to prohibit provisions and plans, require provisions and plans, eliminate efforts of the plans to achieve uniform administration. In our view the most remarkable statement in the brief of the NCSL is that the deemer clause is simply not directed at the relationship between the insured and his insurer.

Now the respondents and their amici suggest that the effect of our argument is to leave a regulatory vacuum. We submit that it is not a regulatory vacuum. It is a recognition in the preemption provisions of Federal responsibility, responsibility of the courts to develop a Federal common law to deal with these issues, a responsibility on Congress to engage in continuing oversight. Both branches have been meeting that responsibility.

Congress has several times amended the deemer clause, the preemption provisions to allow a wise health care act, to deal with special problems of multi-employer plans. Congress and the courts have been recognizing the responsibility that the preemption provisions impose on them.

And so for those reasons and because the respondent's argument would undue the clear purpose of the preemption clause, we join the petitioner in urging --

QUESTION: The point that there is no regulatory gap, because this Court is a power to fill the gap. Is that so?

MR. SHAPIRO: No, it stops -- this Court --

QUESTION: It's common law that fills the gap.

MR. SHAPIRO: That's part of it, Your Honor. It's a broad responsibility of all the Federal courts that

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they haven't engaged in. But it's also responsibility of a continuing oversight by Congress and specific amendments to the preemption provisions that recognize that responsibility as well as the broad scope of the preemption clause.

Thank you.

QUESTION: Thank you, Mr. Shapiro.

Mr. Rothfeld, we'll hear now from you.

ORAL ARGUMENT OF CHARLES ROTHFELD

ON BEHALF OF THE RESPONDENT

MR. ROTHFELD: Thank you, Mr. Chief Justice, and may it please the Court:

The statute that Mr. Turner and Mr. Shapiro have been describing today I think very simply is not the statute that Congress wrote. They read the deemer clause as though it said, notwithstanding savings clause, all State laws that regulate insurance are preempted insofar as they apply to self-insured but not to fully insured ERISA plans.

The Congress could of course have said that if that's what Congress had meant to do. But Congress didn't say that and it didn't say anything like that. Instead, it used different and rather curious formulation. It said that ERISA plans shall not be deemed to be insurance or in the insurance business for purposes of a defined set of

State laws, laws purporting to regulate insurance companies or insurance contracts.

QUESTION: Or of any law of any State purporting to regulate it.

MR. ROTHFELD: That's right, Your Honor. But it defines the types of laws that are preempted, those purporting to regulate insurance companies or insurance contracts. It think the answer to this case must lie in deciding what it is Congress meant by at formulation, the language that it used.

The petitioner and the Solicitor General don't provide that answer. They say that the deemer clause was designed essentially to take away from the States so far as self-insured plans are concerned all of the regulatory authority that was given back to them by the savings clause. But that can't possibly be right. Because the savings and deemer clauses don't use symmetrical language.

A savings clause saves all State laws in the language of the statute that regulate insurance. It uses general terms, that regulate insurance. The deemer clause in contrast says that ERISA plans can't be deemed to be insurance companies for a narrower subset of laws, laws that purport to regulate insurance companies or insurance contracts. So there must be some laws that are saved by the savings clause as a general regulation of insurance

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that are not preempted by the deemer clause because they did not purport to regulate insurance companies or insurance contracts.

There is no room in the scheme set out by Petitioner and the Solicitor General for those laws that are not --

QUESTION: Why is that broader -- why is that broader? One says regulates insurance. Now, what does insurance consist of unless it consists of either insurance -- regulating insurance companies or regulating insurance contracts. I can't imagine what else. What is --

MR. ROTHFELD: I think this case actually is one thing that falls within that gap or outside of those two terms. If all Congress had meant by regulates insurance companies or insurance contracts is insurance, that wouldn't have been any need to put into the deemer clause, which was written after the savings clause had been drafted.

QUESTION: Well, they may have used different language, but I don't see how you can possibly get any broader than -- I don't know -- what is -- what is contained within the meaning of insurance that does not consist of either insurance companies or insurance contracts?

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MR. ROTHFELD: Well, I think, Your Honor, the language of the deemer clause purports to regulate insurance companies or insurance contracts, is directed as I think was suggested by Justice O'Connor's question, at laws that in terms regulate insurance companies or insurance contracts. And this statute, to give one, Pennsylvania statute issued here, doesn't do that.

QUESTION: It certainly regulates the right of an insurer to -- to be subrogated.

MR. ROTHFELD: Well, I think it is a regulation of causes of action, the word subrogation. Let me again focus on the statutory language.

QUESTION: Subrogation is not something that you find across the board in the law. It's typically an insurance remedy when they pay off someone they've insured to go after the tort feasor. So, I mean it isn't as it this were a generally applicable statute that applied to all sorts of situations. Subrogation is typically an insurance technique.

MR. ROTHFELD: That -- that's true, Your Honor, but that doesn't make it a law that regulates insurance contracts. An insurer may have, and in fact insurers do have, common law rights of subrogation. If, to give an example, an insurer omitted from its insurance contract, as many do, the type of subrogation clause that FMC

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includes in its plan, that insurer could attempt to assert a common law right of subrogation, which is a tort right, not a contractual right, against the policy holder.

And the Pennsylvania law would apply to that insurer to precisely the same extent as it applies in this case. I think that can't be deemed a law that purports to regulate insurance, insurance contracts, although it is a law that deals with insurance. It simply provides that no one has a cause of action for subrogation in defined circumstances.

QUESTION: It would still -- even as it affects the common law remedy, it would still purport to regulate insurance companies.

MR. ROTHFELD: Well, I think that the use of the term insurance -- laws that regulate insurance companies, Your Honor, are directed at a different type of law. As the court in Metropolitan Life characterized, laws that regulate insurance companies are typically those that set reserve and capitalization requirement that are directed at the operations of insurance companies.

QUESTION: That's -- that's by no means as self-evident, or that's not the only possible meaning of the word "to regulate insurance." That's a fairly narrow reading, don't you think?

MR. ROTHFELD: Well, to regulate insurance

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companies and insurance contracts. Again, Your Honor, I think it's important to look at the entire package or preemption provisions which were written at the same time and were designed to be read together. The preemption clause, as Mr. Turner has said, is written very broadly. It uses the language "relate." It says it preempts all State laws that relate to ERISA plans.

The deemer clause, in contrast, uses much narrower language. It says laws that regulate insurance companies or insurance contracts. So, it can't be that every State law that affects an insurance company or affects insurance contracts is preempted by the deemer clause or there would be no explanation for the differing language used in the two provisions.

Indeed, as Justice O'Connor suggested in -- in her question, the Court has interpreted the term regulate in the savings clause -- the term "regulate insurance" -- in the Pilot Life decision of a few years ago. And the court there said in accordance with the common understanding of the term to regulate insurance is not enough that a law happens to affect insurance generally or that even that it's principal effect is on insurance. It must be specifically directed to insurance.

I think the same -- since the same word is used in the deemer clause, it must have the same meaning and,

therefore, a law that purports to regulate insurance companies or insurance contracts must be a law that is directed specifically at insurance companies or insurance contracts.

And the anti-subrogation provision, quite clearly as I said, is not such a law. I think that interpretation is even stronger in the deemer clause as Justice Stevens' question suggested, because it uses the language "purport." And to purport to do something I think seems to have a common understanding that it does it in terms. And that accords I think with the terms used throughout the preemption provisions.

So, as I said, the language of the -- of the deemer clauses and the savings clause simply are not symmetrical. The deemer clause was written after the language of the savings clause was in place and, therefore, I think presumably Congress meant something by using different statutory language and, therefore, it cannot be as petitioner and the Solicitor General say that the deemer clause simply takes away from the States everything that the savings clause gave to him.

QUESTION: With respect to employee benefit plans.

MR. ROTHFELD: With respect to employee benefit plans.

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QUESTION: I guess that interpretation is --

MR. ROTHFELD: With respect to insurance. I'm sorry, Your Honor.

QUESTION: -- interpretation is the perhaps assisted by that phrase in there, in the deemer clause "or to be engaged in the business of insurance or banking" for purposes of any law or to be engaged -- they shall not only not be deemed to be an insurance company, but they shall not be engaged in the business -- shall not be deemed to be engaged in the business of insurance or banking. What seems to be envisioned is a law that is directed against either an insurance company or -- that is expressly directed against an insurance company or someone who is engaged in the business of insurance.

MR. ROTHFELD: I think that's right. There is clearly a certain opacity to the terms of the statute, Your Honor. But I think that you are right and I'll explain in a moment that in fact the statute was directed at precisely those types of State regulations.

QUESTION: The problem I have with that, Mr. Rothfeld, is that I don't see how it makes any sense. I mean, I can understand why the position urged by your opponents make some sense. This I don't understand.

MR. ROTHFELD: Well, I think precisely the reverse is true, Your Honor.

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QUESTION: All right. Tell me.

MR. ROTHFELD: In answering Justice Stevens' related question, Mr. Turner suggested that Congress' purpose was to slice apart self-insurance from the insurance industry, people engaged in the business of insurance as you've described. What he didn't answer, Justice Stevens' question, why Congress would want to do that. And I can't imagine any reason why Congress would want to do that.

But the answer that is provided in the briefs of petitioner and the Solicitor General is that it might be more expensive for self-insurers to provide self-insurance if they have to comply with State laws like the anti-subrogation provision and that might discourage them from creating plans. And they similarly say that if might be an administrative inconvenience if self-insurers must comply with varying State laws in different States.

But to the extent those points are valid and should say those are the only ERISA policies that they pointed to. They are -- those points are valid to precisely the same extent of fully insured plans as to which they concede, as they must, that States laws are fully applicable. It will be more expensive perhaps for a employer to purchase insurance from an insurance company if the insurance company can't assert a subrogation right,

just -- just as it will perhaps be more expensive for a self-insurer to provide self-insurance if it can't assert a subrogation right.

And so far as administrative convenience is concerned, virtually all self-insurers like petitioner itself hire insurance companies to operate their plan. So, it's no more inconvenient for a self-insurer than for a fully insured plan to comply with varying State laws.

It's impossible to imagine why Congress, given the policies of ERISA, would have wanted to draw that kind of distinction. Now, in fact, I think it's clear from the background of the provisions, and I think the very background that Mr. Turner alluded to and some of the sources that he alluded to, what distinction Congress actually did want to draw. It was concerned, as the language of the deemer clause suggests -- as your question suggested, Justice Scalia -- Congress was concerned with State laws that are directed at business, people engaged in the insurance business in particular, as Mr. Shapiro I think very nicely summarized, types of laws that are applied to insurance companies -- licensing laws, perhaps reserve and capitalization requirements.

And the reason why Congress would be concerned with those types of statutes is quite clear. It would -- if the ERISA plans had to comply with those types of

business regulations, self-insurance would effectively become impossible, and all ERISA plans potentially would be subject to State licensing and notification requirements, which are of course precisely the requirements that are imposed by the ERISA statute and which Congress presumably did not want States to duplicate.

If self-insurers had to comply with those sorts of laws, they would have to obtain certificates of authority from State insurance departments. They would have to file required disclosures with State insurance departments. They, as I said, might have to meet reserve and capitalization requirements. In short, a self-insurer would have to create its own captive insurance company. And some of the sources that Mr. Turner cited, such as the article by Professor Goetz, allude to precisely that problem. That was a concern at the time that ERISA was drafted.

And it's quite clear that that's the sort of thing that Congress was concerned with. The language of the deemer clause is addressed specifically to that problem, insurance companies, people engaged in the insurance business.

And I should add that there is compelling circumstantial evidence that Congress was concerned with

that problem when it wrote the deemer clause -- again, as Justice Stevens noted, the very evidence that Mr. Turner has used for a different purpose.

In the late 1960's and '70's self-insurance was becoming common, but the only judicial authority on the question of what self-insurance amounted to were decisions holding that self-funded plans operated by insurance companies for the benefit of their own employees, while they provided insurance, were not engaged in the insurance business for purposes of statutes imposing premium and related taxes. Those plans therefore were exempted from those taxes.

Now at that time, in the early 1970's, when the original versions of ERISA were drafted and reported at a committee, they all included the savings clause. None of them included the deemer clause, which is not surprising, because there would have been no reason to think the deemer clause was necessary to protect plans from those types of laws, given the existing authority.

In 1973, while ERISA was under consideration, the first State court decision going the other way was decided. It was the Monsanto case alluded to by Mr. Turner in which a State court in Missouri held that a self-insured plan, operated by an employer not an insurance company, was engaged in the insurance business

for purposes of Missouri law and therefore had to obtain a certificate of authority from the State insurance department.

The effect of that decision was to put the self-insurer out of existence. The deemer clause suddenly appeared in the House version of ERISA later that year without explanation. Now, the timing certainly suggests that the deemer clause was directed at that type of State legislation which would put self-insurers out of existence and require all ERISA plans to comply with those types of business regulation.

And there is more compelling evidence in the evolution of the statute that's what Congress had in mind. At the time the deemer clause was written, the basic preemption clause was quite narrow. It addressed only fiduciary obligations, notice and disclosure requirements.

The deemer clause couldn't have been expected to preempt more than the preemption clause. And, therefore, at the time it was put in the statute, its language could have been thought to preempt only those kinds of State laws, the State laws addressed at fiduciary obligations purporting disclosure, the same types of general laws that are involved in State business regulations.

QUESTION: Mr. Rothfeld, you use the term the deemer clause preempting. I don't understand under your

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analysis, the deemer clause preempts anything. Just that the insurance savings clause excludes a lot of regulations from preemption. But the deemer clause just saves a lot of self-insured entities from becoming State-regulated insurance companies.

MR. ROTHFELD: Well, I think --

QUESTION: Which is not -- that doesn't preempt anything.

MR. ROTHFELD: I'm using preemption as a shorthand. I mean, I think it has the effect of excluding them from State regulation by -- by providing that they can't be treated as regulated entities under -- under State law for defined -- I emphasize for the defined purposes of the deemer clause.

QUESTION: Mr. Rothfeld, do you agree with the reasoning with the court of appeals in this case, which this certainly supports the results you want, about the ERISA core concerns?

MR. ROTHFELD: Well, I don't think that we endorse all of language of the analysis used by the court of appeals, but certainly we agree with their general -- general conclusion and their general approach which is that one has to examine whether or not a State law falls within the type of State regulation that the deemer clause was aimed at that the deemer clause is not the sweeping

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preemption provision that is contended for by petitioner and the Solicitor General.

So, I can't endorse all of their -- all of their language or analysis, but I think --

QUESTION: How would this statute have to read to come within the deemer clause? It -- it -- it would have to be narrower so it would simply have to say that there shall be no subrogation of insurers in insurance contracts?

MR. ROTHFELD: I think that --

QUESTION: Then -- then it would be covered by the deemer clause.

MR. ROTHFELD: I think the statute providing that insurance contracts could not contain subrogation clauses would be -- it would be a different kind of statute. Now, as I -- let me draw --

QUESTION: What -- what about a more general statute that doesn't just speak of whether such a provision in the contract would be valid but it just says insurance companies shall have no write of subrogation, neither by contract nor at common law?

MR. ROTHFELD: No, Your Honor, I don't think that would fall within the terms of the deemer clause.

QUESTION: That would not fall --

QUESTION: Not regulate insurance contracts?

MR. ROTHFELD: I think that if it is a statute -- again, and I return to the Pilot Life case which interpreted the phrase regulate. If it's not -- even though it reaches insurance companies and insurance contracts, if it reaches more it is not a statute that in terms is directed specifically to that.

QUESTION: So, it would have to regulate only insurance contracts and not any other kind of contracts?

MR. ROTHFELD: I think that's right, Your Honor, although --

QUESTION: It doesn't say that. It just says purporting to regulate.

MR. ROTHFELD: Well --

QUESTION: It purports to regulate insurance contracts. Now, it purports to regulate things beyond insurance contracts as well.

MR. ROTHFELD: Well, I think, Your Honor, obviously there is a distinction between the statute you hypothesize and the Pennsylvania law that's at issue here. So, whatever the outcome in the case you're discussing, it wouldn't control here, because this is a much more general statute. If it --

QUESTION: It's not clear that statute would apply to this contract either, is it?

MR. ROTHFELD: I'm sorry.

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QUESTION: It's not clear that his hypothetical statute would even apply in this case.

MR. ROTHFELD: I think that's true, Justice Stevens. But whether or not a statute that in terms regulated insurance contracts and went on to regulate in subpart (b) some other thing, falls within the terms of the deemer clause I think is beside the point here, because this statute quite clearly doesn't in terms regulate insurance contracts at all. Although it obviously has an effect on insurance contracts, that can't be enough given the language that Congress chose for it to regulate insurance contracts.

And in any event, as I was suggesting, I think that Congress has in mind particular kinds of State insurance regulations -- those that are directed at the business aspects of insurance, which I think is supported both by the activity that led up to the creation of the deemer clause and is supported by the only specific piece of legislative history which addresses how it is Congress wanted the entire package of preemption provisions to operate which is explanation by Representative Dent, who was the floor manager and principal sponsor for ERISA in the House and a member of the committee that wrote the deemer clause.

He explained that the deemer clause -- that they

preemption provisions were modeled on another Federal statute which preempted regulation of health maintenance organizations or HMO's. That statute was directed only at the organization and operation of HMO's and in particular it preempted State capitalization and reserve requirements applied to HMO's. But it didn't regulate the relationship between HMO's and their participants. And I think that's the line Congress intended to draw in the deemer clause.

And as I suggested before, that's the only line Congress rationally could have been trying to draw. There if no explanation in the policies of ERISA as to why Congress possibly wanted -- would have wanted to apply different preemption rules to self-insured and to fully insured plans.

It would create irrational distinctions from the same point of the plan participant, who is after all the intended beneficiary of ERISA. It makes no difference whether the employer self-insures or purchases insurance. In either case, he's going to get the same benefits. And yet petitioner would distinguish on that completely fortuitous basis in deciding who gets the protections of State health law.

Their reading also would create irrational distinction even within plans. Most self-insurers enter into what are called stop-loss agreements with insurance

companies in which the insurance carriers agree to pay individual claims that exceed a certain amount or to pay all claims once the plan pay-out reaches a certain point.

Well, you seem ready to pounce, Justice. I don't want to invite it.

QUESTION: No, I didn't want to interrupt your -- your point here.

MR. ROTHFELD: Well, I think to finish with that point, petitioner's reading would mean that whether or not any particular plan was covered by State law would turn on whether or not the plan had reached the stop-loss point. It would mean that whether an individual claim was governed by State law, it would turn on whether that claim was submitted before or after the stop-loss point had been reached. And since insurance carriers concededly are covered by this Court -- are covered by State law under this Court's decisions, it's impossible to imagine why Congress would have wanted to draw that line.

Petitioner seems to suggest in its reply brief that the answer for this problem is simply to preempt State law as it applies to insurance companies that have entered into stop-loss agreements. But that is completely without support in the statutory language. The deemer clause says that ERISA plans can't be deemed to be insurance companies. It doesn't say that insurance

companies must be deemed to be ERISA plans.

And finally, the rule contended for by Petitioner is simply inconsistent with ERISA's basic policies. The statute was enacted -- its purposes are expressed in the statutory text -- to expand the protections of plan participants. But ERISA itself does not impose substantive requirements on welfare benefit plans of the sort involved here.

Petitioner's reading would sweep aside all the benefits -- all the protections of State law without putting anything in its place. And again, it is very difficult to imagine why Congress would have intended that result from a statute enacted for the express purpose of protecting participants and plans.

Now, the Solicitor General, to his credit, has --

QUESTION: Now, let me cut in there now. All right. What about as an explanation for why Congress wrote it this way, simply however irrational it might be, the sacrosanct nature of State insurance regulation? Congress might well have thought, look it, the States have always dealt with regulating insurance companies. If they are somehow affecting ERISA plans through their regulation of an insurance company that sells insurance to those plans, we're not going to mess with that because basically

Federal Government has always left it to the States to regulate insurance companies.

MR. ROTHFELD: Well --

QUESTION: You know, you might think that as a policy matter that's not a good idea and maybe it's irrational, but it could have happened, couldn't it?

MR. ROTHFELD: Well, I suppose anything could have happened, Justice Scalia. But there is (a), no evidence whatsoever that Congress had that in mind. I think that is inconsistent with the -- the entire distinction between self-insured and fully insured that's sort have been hypothesized by petitioner and the Solicitor General is not present in language of the deemer clause itself.

The deemer clause doesn't refer to the self-insured or to fully insured plans. It refers to plans and the term plan is defined by ERISA as any program that provides benefits to plan participants through the purchase of insurance or otherwise. So, they are saying that Congress, by use of the word plan which is defined separately to mean everything, meant to distinguish between self-insured and fully insured plans.

So, I think the entire distinction that's the foundation of their argument simply is not consistent with everything that Congress did elsewhere in ERISA.

I should -- I should add one thing in response to what Mr. Shapiro said. The Solicitor General does have a solution to the problem of the regulatory vacuum which he acknowledges is a serious concern. His solution is to have the Federal courts step in and create a general Federal common law of insurance. And we certainly agree that is there is to be sweeping preemption, Federal courts would have no choice but to step in.

But that obviously would create enormous problems of precisely this sort that petitioner is trying to avoid. It would invite confusion and uncertainty. It would make it impossible for plans and plan participants to gauge their obligations if those obligations are set in the course of litigation on a case-by-case basis according to an inchoate and evolving body of Federal common law. The inevitable result would be increased litigation and inconsistency, and this Court would of course be called upon repeatedly to straighten out this new Federal common law of insurance, something that all Federal courts are not well positioned to do because --

QUESTION: What you're saying that if we adopt the Solicitor General's position, we'll have to take more ERISA cases than if we don't?

(Laughter.)

MR. ROTHFELD: I'll leave that to your

imagination, Justice Stevens.

(Laughter.)

MR. ROTHFELD: In fact, they would be worse than ERISA case because the Court would be called upon not only to interpret a statute but to invent a new Federal common law of insurance without really any clear guidance on what the content of that insurance law should be, at least no clear guidance --

QUESTION: That might be easier than trying to figure out this statute.

(Laughter.)

QUESTION: Mr. Rothfeld, what about the exception in the deemer clause for a plan established primarily for the purpose of providing death benefits? How does that exception make sense under your interpretation and under the Government's interpretation?

MR. ROTHFELD: Well, I'm not sure that it makes sense under --

QUESTION: Anybody's?

MR. ROTHFELD: Well, there's no explanation whatsoever anywhere as to what Congress could have had in mind, and it's sort of difficult to imagine. I think that a self-contained plan which is directed specifically at death benefits, it may have thought that that was less likely to be a -- a large intrusion on self-insurers and

less likely to drive self-insurers out of existence all together, a problem of more general State health and medical insurance regulations as applied to self-insurers. I would hypothesize that, but again there is no clear evidence of what Congress was thinking when it wrote that.

QUESTION: I think it makes more sense --

MR. ROTHFELD: One -- one final point that if the court -- if the Federal courts ever were forced into the position of developing a Federal common law, by far the most sensible thing for them to do would simply be to borrow State rules of decisions, which is something that is done in other analogous areas, but that of course would make the entire strained exercise of finding preemption entirely unnecessary. But there is, fortunately, no need to do that because there is no evidence whatsoever anywhere that Congress had the intent to create the broad preemption contended for by petitioner and the Solicitor General.

Mr. Turner alluded to the breadth of the preemption provision, but this case concededly falls within the savings exception and, therefore, all the comments about the breadth of the preemption provision simple fall out of the case.

Here the focus must be the language and purpose of the deemer clause. Petitioner and the Solicitor

General say that that clause was designed to create a sweeping preemption in areas historically committed to the States. They say Congress did that using what is clearly language that has a certain opacity to it, that Congress did it without a word of explanation or debate anywhere in the legislative history.

Now, that clearly is implausible. Their reading would create all sorts of irrational distinctions between plans, between plan participants, even within plans. It is quite clearly inconsistent with the basic purposes for which ERISA was enacted. There's no reason to imagine that Congress had that in mind. And it does not even have the virtue of simplicity, because it would require the Federal courts generally and, Justice Stevens, this Court in particular to step into the role of creating a general Federal common law of insurance, which would invite litigation.

There is no reason for the Court to strain to find preemption in those circumstances as it would have to do.

Therefore, the judgment of the court of appeals should be affirmed.

If there are no further questions --

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Rothfeld.

The case is submitted.

(Whereupon, at 1:57 p.m., the case in the above-entitled matter was submitted.)

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