

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

**THE SUPREME COURT  
OF THE  
UNITED STATES**

CAPTION: UNITED STATES DEPARTMENT OF THE  
TREASURY AND MITCHELL A. LEVIN,  
ASSISTANT COMMISSIONER, Petitioners, v. GEORGE  
FABE, SUPERINTENDENT OF INSURANCE OF OHIO

CASE NO: 91-1513

PLACE: Washington, D.C.

DATE: Tuesday, December 8, 1992

PAGES: 1 - 42

ALDERSON REPORTING COMPANY  
1111 14TH STREET, N.W.  
WASHINGTON, D.C. 20005-5650  
202 289-2260

LIBRARY  
SUPREME COURT, U.S.  
WASHINGTON, D.C. 20540

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - X  
UNITED STATES DEPARTMENT OF :  
THE TREASURY AND MITCHELL A. :  
LEVINE, ASSISTANT COMMISSIONER, :  
Petitioners :  
v. : No. 91-1513  
GEORGE FABE, SUPERINTENDENT OF :  
INSURANCE OF OHIO :

- - - - - X  
Washington, D.C.  
Tuesday, December 8, 1992

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
11:03 a.m.

APPEARANCES:  
ROBERT A. LONG, JR., ESQ., Assistant to the Deputy  
Solicitor General, Department of Justice, Washington,  
D.C.; on behalf of the Petitioners.  
JAMES R. RISHEL, ESQ., Columbus, Ohio; on behalf of the  
Respondent.

C O N T E N T S

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

	PAGE
ORAL ARGUMENT OF	
ROBERT A. LONG, JR., ESQ.	
On behalf of the Petitioners	3
JAMES R. RISHEL, ESQ.	
On behalf of the Respondent	21
REBUTTAL ARGUMENT OF	
ROBERT A. LONG, JR., ESQ.	
On behalf of the Petitioners	36

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

2 (11:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in number 91-1513, United States Department of  
5 Treasury v. George Fabe.

6 Mr. Long, you may proceed.

7 ORAL ARGUMENT OF ROBERT A. LONG, JR.

8 ON BEHALF OF THE PETITIONER

9 MR. LONG: Thank you, Mr. Chief Justice, and may  
10 it please the Court:

11 For more than 200 years, Congress has determined  
12 the priority of Federal claims against insolvent debtors.  
13 The Federal priority statute, section 3713 of title 31,  
14 provides that claims of the United States in nonbankruptcy  
15 proceedings shall be paid first. This Court has  
16 repeatedly held that only the plainest inconsistency would  
17 warrant our finding an implied exception to the operation  
18 of so clear a command.

19 The question in this case is whether the  
20 McCarran-Ferguson Act created an exception to the clear  
21 command of section 3713. In our view, it did not, and our  
22 argument has three basic points.

23 First, the McCarran Act exemption applies to the  
24 business of insurance. A State statute regulating the  
25 priority of claims against the estate of an insolvent

1 insurance company does not regulate any business activity  
2 of insurance companies. Consequently, it is not a  
3 regulation of the business of insurance within the  
4 ordinary meaning of those words.

5 Second, the State priority statute does not  
6 possess the three characteristics of the regulation of the  
7 business of insurance identified in this Court's  
8 decisions. It does not result in the transfer or  
9 spreading of risk. It is not an integral part of the  
10 contractual relationship between insurer and insured, and  
11 it involves entities wholly outside the insurance  
12 industry.

13 QUESTION: Well, may I ask, Mr. Long why the  
14 statute doesn't perhaps meet the National Securities test  
15 since it is aimed at protecting directly or indirectly the  
16 relationship between the insurer and the insured to the  
17 extent that it covers the payout in the event of  
18 insolvency. I mean, there -- to that extent, it seems to  
19 perhaps meet the test.

20 MR. LONG: Well, let me give a two-part answer  
21 to that question.

22 QUESTION: Well, maybe not the whole statute,  
23 but insofar as it protects the insured.

24 MR. LONG: Well, first of all, I think the test  
25 that this Court has developed in cases since National

1 Securities is a three-part test. It's considerably  
2 narrower than simply whether the State regulation has some  
3 effect on the risk that the policyholder will not be paid.  
4 We think that test would be too broad if it were simply  
5 reduced back to that single factor.

6 The other part of the answer is, in fact, the  
7 priority statute has relatively little to do with whether  
8 a policyholder's claim is paid. Of course, it only comes  
9 into play in the event that the insurer becomes insolvent,  
10 and that's likely to be viewed as a relatively unlikely  
11 event by a policyholder. If it does happen, though, the  
12 real insurance against insolvency --

13 QUESTION: Well, it's more likely these days,  
14 isn't it? It might be a real concern.

15 MR. LONG: It may be more likely these days, and  
16 if it is a real concern of a policyholder, the real  
17 insurance against insolvency is not the priority statute,  
18 it is insurance guaranty funds, which have been  
19 established by all 50 States to pay claims of  
20 policyholders in the event the insurance company becomes  
21 insolvent.

22 QUESTION: Well, that may be, but I still think  
23 to the extent that the statute tries to deal with this  
24 situation, that it may very well be covered by McCarran-  
25 Ferguson.

1 MR. LONG: Well, to the extent that it does and  
2 that it meets the other factors that this Court has  
3 identified, it could be, but as I say, we don't think that  
4 it is -- has a -- is sufficiently close to the contractual  
5 relationship. It only applies in the event of insolvency.  
6 Then the guaranty fund is what steps in to pay the claims.  
7 And, you know, if the policyholder were required to rely  
8 on the priority statute, it would not provide a very good  
9 assurance because --

10 QUESTION: Well, it would provide something,  
11 wouldn't it?

12 MR. LONG: Well, only if there are enough assets  
13 in the estate of the defunct insurer to pay policyholder  
14 claims after paying --

15 QUESTION: Which varies from reorganization or  
16 insolvency to insolvency --

17 MR. LONG: That's correct.

18 QUESTION: You can't say categorically that the  
19 policyholders might not be helped by some sort of  
20 insolvency proceeding --

21 MR. LONG: I cannot. In the event that there is  
22 an insolvency and the guaranty fund does not cover a  
23 claim, if the assets of the insolvent insurance company  
24 were sufficient, it is true that a policyholder might  
25 recover a portion of his claim I would think in the

1 typical case; in an unusual case, the entire claim. But  
2 that possibility is not enough to bring the statute within  
3 the regulation of the business of insurance.

4 QUESTION: Well --

5 QUESTION: You said in your opening statement  
6 that you were going to show that this was not the business  
7 of insurance, as that term is ordinarily used. I think if  
8 you take the term as ordinarily used, you would say this  
9 did regulate the business of insurance.

10 MR. LONG: Well, we think it does not come  
11 within the ordinary meaning of the business of insurance  
12 because it doesn't regulate any business activity of  
13 insurers. There are, of course, State laws that are  
14 designed to regulate business.

15 QUESTION: Well, certainly insolvency may be the  
16 last step in the business.

17 MR. LONG: Well, but at the point where this  
18 statute comes into play, the insurance company has been  
19 declared insolvent. All of its assets have been taken  
20 over by a liquidator. Its business has been wound up, and  
21 the question is who gets the assets. There are different  
22 categories of claimants lined up, and --

23 QUESTION: But surely, how those assets are  
24 disposed of can very plausibly be argued to be a part of  
25 the business of insurance. How do you liquidate an

1 insurance company when it goes bust?

2 MR. LONG: Well, as I say, in our view because  
3 it's not a regulation of the business activities of the  
4 insurers, it should not be held to be a regulation of the  
5 business of insurance, and we don't think it meets the  
6 three-part test that this Court has identified, which is  
7 considerably more discriminating than simply a question of  
8 whether this statute may lead to the payment of a  
9 policyholder's claim.

10 And even to the extent you focus on that single  
11 factor, we think that the priority statute is really not  
12 very good protection in most cases. It's not something a  
13 policyholder, when he enters into a policy of insurance,  
14 is likely to think about as an important protection.  
15 There may be an analogy to if you deposit your money in  
16 the bank, you might think about the Federal Deposit  
17 Insurance. That's equivalent to the guaranty fund. It's  
18 unlikely you would think, well, the priority of claims in  
19 the event of insolvency is something that's also  
20 important. It's simply too remote from the contract of  
21 insurance.

22 QUESTION: Well, insurance companies are rated  
23 for solvency and financial strength all the time, and  
24 that's one of the first things a policyholder looks to.

25 MR. LONG: Well --

1 QUESTION: And it seems to me that when a  
2 policyholder, especially a major policyholder, looks at an  
3 insurance company, he looks at the strength of its assets.

4 MR. LONG: I think that's --

5 QUESTION: I think that's the most -- one of the  
6 most critical determinants in your choice of insurance  
7 companies, and your -- you say that it's irrelevant the  
8 moment the insurance company goes out of business.

9 MR. LONG: Well, of course, this statute applies  
10 if the State's regulations that are designed to protect  
11 the solvency of insurance companies fail and the insurance  
12 company is not solvent, but then the protection is the  
13 guaranty fund. That's what insures that the claim is  
14 paid.

15 Let me discuss the three factors that this Court  
16 has identified as relevant to determining whether a  
17 statute regulates the business of insurance because the  
18 test is broader than simply whether the statute was  
19 enacted to protect policyholders or whether it may affect  
20 the likelihood of a claim being paid.

21 In the Variable Annuity Life Insurance case, the  
22 Court concluded that the concept of insurance must involve  
23 some investment risk taking on the part of the company.

24 In the National Securities case, the Court held  
25 that the Federal securities laws applied to a merger of

1 insurance companies that had been approved by State  
2 insurance regulators. It concluded that the McCarran Act  
3 did not make the States supreme in regulating all the  
4 activities of insurance companies and that State laws  
5 aimed at protecting the interests of shareholders are not  
6 laws regulating the business of insurance.

7 Then in the Royal Drug case, the Court held that  
8 agreements between an insurer and pharmacies to supply  
9 prescription drugs to policyholders were not part of the  
10 business of insurance.

11 And most recently in Union Labor Life Insurance  
12 against Pireno, the Court held that an insurer's use of a  
13 peer review committee to determine whether policyholder  
14 claims are covered by the insurance contract is also not  
15 the business of insurance.

16 So, the Court has developed a three-factor test  
17 -- and it's a rather demanding test -- to define the  
18 boundaries of the business of insurance. The practice  
19 must have the effect of transferring or spreading risk  
20 from the policyholder to the insurance company. It must  
21 be an integral part of the policy relationship, and it  
22 must be limited to entities in the insurance industry.  
23 And the Ohio priority statute fails that demanding three-  
24 part test.

25 QUESTION: What part does it fail?

10

ALDERSON REPORTING COMPANY, INC.  
1111 FOURTEENTH STREET, N.W.  
SUITE 400  
WASHINGTON, D.C. 20005  
(202) 289-2260  
(800) FOR DEPO

1 MR. LONG: In our view it fails --

2 QUESTION: It makes two out of three anyway,  
3 doesn't it?

4 MR. LONG: In our view it fails all three parts  
5 of the test. The questions you've been asking go to  
6 whether it's an integral part of the relationship between  
7 the policyholder and the insurance company. We think it  
8 fails that part and clearly fails the other two parts as  
9 well. I can briefly explain our reasoning.

10 We think it clearly does not involve any  
11 transfer of risk from the policyholder to the insurance  
12 company. It just determines the order in which the --

13 QUESTION: Because Pireno is explicit on that,  
14 isn't it?

15 MR. LONG: I think Pireno is explicit on that,  
16 yes. It says that the risk is transferred at the time the  
17 contract is entered, and whether or not the claim is paid  
18 is not what the transfer of risk is all about. And  
19 there's also no risk spreading because that requires  
20 independent risks. Here we're talking about the risk of  
21 insolvency. All the policyholders and, indeed, all the  
22 creditors of the insurance company face precisely the same  
23 risk.

24 So, let me turn to the second factor, which is  
25 the one that is troubling you, whether it's an integral

1 part of the relationship between the insurer and the  
2 insured.

3 Now, again, in Pireno, the Court defined that  
4 rather narrowly. It noted first that it was distinct from  
5 the question whether the insurance contract is valid and  
6 the amount of the policyholder's claim under the contract  
7 -- and that's true here as well. It's quite separate from  
8 that.

9 And the priority statute also doesn't address  
10 the relationship between the insurer and the insured. It  
11 really addresses the relationship among all the creditors  
12 of this insurance company that has become insolvent. And,  
13 of course, many of those creditors are not policyholders,  
14 and some of them come ahead of policyholders.

15 And as we were discussing earlier, we don't  
16 believe that the Ohio statute so closely affects the  
17 reliability interpretation and enforcement of the contract  
18 as to satisfy this factor. We concede that it has some  
19 effect on the reliability in the sense that it may in some  
20 cases determine whether a part of a policyholder claim, or  
21 in a very unusual case the entire claim, is paid, but this  
22 Court's decisions make clear that some effect is not  
23 enough. Broadly viewed, any State regulation of insurance  
24 could be said to affect the reliability of the insurance  
25 contract.

1                   Certainly in Pireno the peer review committee,  
2                   which the very purpose of it was to decide whether claims  
3                   were covered and should be paid. You could argue --  
4                   certainly could argue that that was rather close to the --

5                   QUESTION: Would you be making the same argument  
6                   if administrative expenses and wages weren't also prior to  
7                   the United States claim?

8                   MR. LONG: Yes, we would be making the same  
9                   argument. We think the fact that --

10                  QUESTION: But the policyholders would be much  
11                  more benefited than I suppose.

12                  MR. LONG: Yes, they would be in an even better  
13                  position, but again we don't think it meets the three-  
14                  part test. It's not a regulation of the business of  
15                  insurance, and the --

16                  QUESTION: Well, I suppose the business of  
17                  insurance includes living up to their contract to pay  
18                  claims --

19                  MR. LONG: Well --

20                  QUESTION: -- which the policy requires them to  
21                  do if they've got the assets I suppose.

22                  MR. LONG: We are not suggesting that that  
23                  factor is not part of this Court's analysis. We're  
24                  suggesting, though, it is only a part and that it is not  
25                  sufficient by itself to bring this State statute within

1 the regulation of the business of insurance.

2 QUESTION: Well, I wonder what a policyholder  
3 would say about that, that it isn't part of the --

4 MR. LONG: Well, as I say --

5 QUESTION: -- part of the business of insurance  
6 to pay what he has been remitting his premiums for.

7 MR. LONG: Well, I think a policyholder looks  
8 first to the soundness of the insurance company and if the  
9 insurance company fails to these guaranty funds. The  
10 priority statute is really not something the policyholder  
11 is likely to think about or rely on and, indeed, he would  
12 be quite unwise to rely on it because it would rarely  
13 result in the payment of his claims.

14 And we also -- let me mention briefly the third  
15 Pireno factor. We think it's clear that this is not  
16 limited to entities within the insurance industry. It  
17 involves all types of claims, including claims of  
18 suppliers of goods and services --

19 QUESTION: But they are claims against the  
20 insurance company, aren't they?

21 MR. LONG: Well, they're all claims against the  
22 insurance company, but in Royal Drug, the contracts with  
23 the pharmacies were all claims involving insurance  
24 companies --

25 QUESTION: Well, but a lot of that language in

1 the earlier cases is dicta. I mean, you don't -- you  
2 didn't need that to decide those cases.

3 MR. LONG: Well, it was a factor. It was  
4 clearly a factor that the Court relied on in both Royal  
5 Drug and Pireno. The Court was not clear about which  
6 factors were necessary to the decision of its case, but it  
7 was a part of its analysis. It has become an established  
8 part of the test for the business of insurance. It's --  
9 it is one factor to consider.

10 Let me mention a third argument we have, which I  
11 haven't gotten to yet, which in many ways I think is our  
12 strongest argument in this case. We think the purpose and  
13 enactment history of the McCarran Act, which is something  
14 this Court has considered in its prior cases, strongly  
15 indicate that Congress did not allow -- intend to allow  
16 the States to determine the priority of claims against the  
17 United -- claims of the United States against insolvent  
18 insurance companies.

19 The Federal priority statute that's at issue in  
20 this case is one of the oldest statutes of the United  
21 States. It was enacted in 1789. It was the fifth statute  
22 enacted by the first Congress. It has remained in effect  
23 throughout the history of the United States with very  
24 little substantive change. It provides that claims of the  
25 United States in nonbankruptcy proceedings shall be paid

1 first.

2 And as I said, the Court has held in three case,  
3 Moore, Key, and Emory, that only the plainest  
4 inconsistency would warrant our finding an implied  
5 exception to the operation of so clear a command. It's  
6 uncontested, by the way, that the Federal priority statute  
7 applies to the claims at issue in this case, and would  
8 preempt the State priority statute unless it's blocked by  
9 the McCarran Act.

10 And we don't believe, looking at the purpose in  
11 history of the McCarran Act, that this is what Congress  
12 had in mind. And we look first -- I think the best way to  
13 understand this is chronologically. If you look first at  
14 1936, in that year this Court decided a case, United  
15 States against Knott, K-n-o-t-t, that involved the  
16 application of the Federal priority statute to claims of  
17 the United States against an insolvent insurance company.  
18 And in that case, the Court held that the Federal priority  
19 statute applied, and it preempted an inconsistent State  
20 law, a Florida law.

21 8 years later --

22 QUESTION: Let me stop you with Knott for a  
23 second. I haven't reread that. Is that the case that  
24 said that if the assets had been in trust, they would not  
25 have been part of the estate. And so, if they set up --

1 the statute had set up the liquidation procedure a little  
2 differently, the United States could not have reached the  
3 assets.

4 MR. LONG: That's absolutely right. That was  
5 the principal issue in Knott, but the first part of the  
6 holding was that the Federal priority statute applied to  
7 these claims as long as they were assets of the insolvent  
8 insurance company.

9 QUESTION: So, is the -- ultimately at stake in  
10 this case is whether the States perhaps have to adopt a  
11 little different program where they make sure these assets  
12 are kept in trust and therefore avoid your priority claim.

13 MR. LONG: That is -- the Federal priority  
14 statute only applies to assets that are assets of the  
15 debtor that are in the debtor's estate. If the assets  
16 were not in the debtor's estate, the Federal priority  
17 statute would not apply.

18 QUESTION: While I've got you interrupted, could  
19 you also explain to me? They have a footnote in their  
20 brief that points out that it's only as to insurance  
21 companies that this problem exists because in the  
22 bankruptcy code, the statute does not apply. It seems to  
23 me almost perverse for the Government to take this  
24 position to derogate the claims of policyholders whereas  
25 it doesn't as to general creditors normally. How does

1 that all fit together?

2 MR. LONG: Well, that is what Congress has done.  
3 Congress amended this priority statute in 1978 when it  
4 passed the bankruptcy code. So, Congress is very clear  
5 that it has the somewhat lower priorities for Federal  
6 claims in bankruptcy, but it has maintained this first  
7 priority in nonbankruptcy proceedings.

8 QUESTION: Is it possible that they assumed that  
9 McCarran-Ferguson, even though I understand your argument  
10 to the contrary, took care of the insurance companies?  
11 That just seems to me a senseless distinction. Now, maybe  
12 there's a reason --

13 MR. LONG: I have a strong argument that I'd  
14 like to make in a second, but I don't think it's  
15 necessarily a senseless distinction if you recognize that  
16 Congress is not writing these priorities. There's  
17 actually a difficult problem of draftsmanship that occurs  
18 when you may have two competing priority systems. But  
19 Congress may have felt that if it's not writing the  
20 priorities and Federal judges are not applying them, that  
21 it's going to stick with the old first priority from 1798,  
22 and we don't think that's unreasonable.

23 But let me get back to our -- very quickly go  
24 through our argument about purpose and enactment history.

25 8 years after Knott in 1944, the Court decided

1 the South-Eastern Underwriters case. It held that the  
2 business of insurance is interstate commerce. That was  
3 what precipitated the McCarran-Ferguson Act 1 year later  
4 in 1945. And this Court has recognized time and time  
5 again that McCarran was a response to South-Eastern  
6 Underwriters. It was basically intended to turn back the  
7 clock to the days prior to that decision by giving back to  
8 the States their traditional authority to tax and regulate  
9 the business of insurance.

10 Congress made clear that it did not intend to  
11 confer any additional regulatory authority on the States  
12 that they did not possess prior to South-Eastern  
13 Underwriters. And, of course, this Court had held in  
14 Knott, prior to South-Eastern Underwriters, that the  
15 States had no authority to overrule the Federal priority  
16 statute in insurance company insolvency proceedings.

17 And it's not surprising that the Court reached  
18 that result in Knott and reached it unanimously because  
19 prior to South-Eastern Underwriters and prior to the  
20 McCarran Act, even under the narrow view of the Commerce  
21 Clause that prevailed as to insurance companies at that  
22 time, it was clear that Congress had the power to enact a  
23 Federal priority statute under the Bankruptcy Clause,  
24 under a separate head of power under the Constitution.

25 So, we think it would be extraordinary to

1 conclude that in enacting the McCarran Act, Congress  
2 intended to expand the regulatory authority of the States  
3 beyond the authority that they had traditionally exercised  
4 and to leave the determination of the priority of claims  
5 of the United States entirely to the States, which  
6 predictably would result in the kind of priority statute  
7 that we have here where the claims of the United States  
8 are not only subordinated to claims of policyholders, but  
9 also to claims of general creditors, which of course can't  
10 possibly be justified on the basis of protecting  
11 policyholders.

12 So, to summarize our argument, we think the Ohio  
13 priority statute falls outside the ordinary meaning of the  
14 business of insurance because it does not regulate any  
15 business activity of insurers. We think it does not  
16 satisfy this Court's three-part test for defining the  
17 business of insurance, which is a narrow and demanding  
18 test, and finally, it was clearly not part of the States'  
19 traditional authority, prior to South-Eastern Underwriters  
20 and the McCarran Act, to regulate the priority of claims  
21 of the United States. And the McCarran Act was passed to  
22 restore, but not expand the States' authority.

23 Mr. Chief Justice, if there are no further  
24 questions, I'd like to reserve the balance of my time.

25 QUESTION: Very well, Mr. Long.

1 Mr. Rishel, we'll hear from you.

2 ORAL ARGUMENT OF JAMES R. RISHEL

3 ON BEHALF OF THE RESPONDENT

4 MR. RISHEL: Mr. Chief Justice, and may it  
5 please the Court:

6 There's one point that I want to make clear at  
7 the outset before going to the core legal question in this  
8 case, and that is even after an insurance company is found  
9 to be insolvent, it still functions as an insurance  
10 company with respect to the claims of its policyholders  
11 that arose before a finding of insolvency. The company's  
12 contractual relationship with these policyholders is  
13 unchanged. The risk the company assumed upon contracting  
14 with these policyholders remains and is still being  
15 developed, and the company's obligation to pay these  
16 claims of these policyholders is unsatisfied, unrelieved.

17 QUESTION: That would lead to the conclusion I  
18 suppose that the trustee in bankruptcy of a -- an  
19 insolvent insurance company is subject to entirely State  
20 regulation because that's the business of insurance.  
21 Right?

22 MR. RISHEL: Largely that's true.

23 QUESTION: Does that mean the Federal bankruptcy  
24 act can't -- that a State could have rules that contradict  
25 the Federal bankruptcy act?

1 MR. RISHEL: Absolutely. Absolutely, and we do.  
2 In insurance insolvency, a winding up is not governed by  
3 the Federal bankruptcy laws. It's governed by an entire  
4 chapter of our revised code that provides for the -- all  
5 the provisions with respect to the authority of the  
6 superintendent of insurance when he winds up an insolvent  
7 company.

8 QUESTION: They do not go into Federal court at  
9 all?

10 MR. RISHEL: No, they do not, Your Honor. In  
11 fact, we've cited cases in our brief where officers,  
12 directors, or owners of insurance companies have tried to  
13 take insurance companies into Federal bankruptcy -- in  
14 bankruptcy court arguing that once there was a finding of  
15 insolvency, they were no longer an insurance company.  
16 They were something else. And the Federal courts have  
17 held that the insolvency of the company does not change  
18 the entity. It is still an insurance company, and it  
19 cannot be a debtor in Federal bankruptcy court.

20 QUESTION: You said the insurance company is  
21 liable for claims that arose before the insolvency?

22 MR. RISHEL: Yes, Your Honor. That was the  
23 point I made as respect -- it's unchanged as to those.

24 Now, as to the core legal test here from the  
25 Court's case in Pireno, we believe that test applies, and

1 we believe the statute meets that test.

2 I don't --

3 QUESTION: winding up?

4 MR. RISHEL: Well, Justice White, there is  
5 typically in these insolvencies the provision of State law  
6 that terminates those -- the -- terminates --

7 QUESTION: The policies?

8 MR. RISHEL: -- the policies usually 30 or 60  
9 days after a finding of insolvency.

10 QUESTION: Right.

11 MR. RISHEL: A notice goes out. The  
12 policyholders are afforded an opportunity to get new  
13 coverage, and the coverage is cut off --

14 QUESTION: Right, right.

15 MR. RISHEL: -- so as to minimize the claims and  
16 maximize the assets that can be distributed.

17 QUESTION: And what do the -- what right does  
18 the policyholder whose policy has been cancelled have  
19 against the insurance company?

20 MR. RISHEL: If he has a claim that --

21 QUESTION: No, not if he has a claim. Does he  
22 -- say he hasn't had any accidents or anything. He just  
23 -- normally he might have been able to cancel his policy  
24 and get a refund.

25 MR. RISHEL: Well, he can get a return of the

1 premiums.

2 QUESTION: Okay.

3 MR. RISHEL: Okay?

4 QUESTION: If there's any money.

5 MR. RISHEL: If there's any money, yes.

6 QUESTION: Would that claim be among the  
7 preferred?

8 MR. RISHEL: It would be the same class as if  
9 there were -- it would be classified the same as if the  
10 policyholder had a claim.

11 QUESTION: Okay.

12 MR. RISHEL: With respect to the --

13 QUESTION: Mr. Rishel, how about the provision  
14 of the Ohio statute giving priority to general creditors  
15 over the Federal Government? How does that relate to the  
16 business of insurance and fall within the exception?

17 MR. RISHEL: I think it gets to a question  
18 that's really not the legal question here, Your Honor, and  
19 that is the question isn't how has Ohio chosen to regulate  
20 the business of insurance. The question is whether we  
21 have chosen to regulate the business of insurance. I  
22 don't think that question would be changed if the order in  
23 our statute were the State of Ohio gets its claims paid  
24 first, the Federal Government's claims are paid next, and  
25 then the policyholders' claims are paid. From a practical

1 standpoint, we might not be here, but the legal question  
2 is the same. It's not how Ohio has regulated the payment  
3 of claims in the event of insolvency. It's that we have  
4 done that. We have regulated.

5 QUESTION: Well, do you think we have to look at  
6 each provision of the statute to see whether it survives,  
7 or do you think we have to look at it as a whole?

8 MR. RISHEL: No. I don't think you need to look  
9 at each provision. I think you have to look at it as a  
10 whole and ask does it do something to regulate the  
11 relationship between the insolvent company and its  
12 policyholders to effectuate the payment of claims. And it  
13 does that. And as I said, the question isn't how have we  
14 regulated. The question is have we regulated the business  
15 of insurance as defined by the Court in Pireno.

16 QUESTION: I gathered from your brief that you  
17 were asserting that the protection of policyholders was  
18 really the primary purpose of this liquidation process.

19 MR. RISHEL: In actuality and practice it is,  
20 Your Honor, but it need not be to satisfy this Court's  
21 test in Pireno.

22 QUESTION: I know, but it's pretty hard to think  
23 that the primary purpose is protection of policyholders if  
24 you put some other claims ahead of it.

25 MR. RISHEL: Well, in terms of the

1 administrative claims that are ahead of it --

2 QUESTION: That's normal.

3 MR. RISHEL: -- that's normal. And also, the  
4 minute second class of claims, employee wages up to  
5 \$1,000, that's fairly typical also in other claims  
6 priorities, and they really don't dilute that.

7 QUESTION: Well, I know, but it still cuts into  
8 what the policyholders get.

9 MR. RISHEL: Well, it would to a certain extent.

10 QUESTION: Well --

11 MR. RISHEL: In this case, the assets of this  
12 company have grown from the time of insolvency from about  
13 \$26 million up to over \$68 million, and that's after all  
14 the administrative expenses have been paid.

15 QUESTION: And you think that it was perfectly  
16 proper to -- as a regulation of insurance, to put general  
17 creditors ahead of the United States.

18 MR. RISHEL: Yes, Your Honor, I do. And the  
19 State of Ohio put them in front of their own claims also.

20 As to Pireno, I would agree with the Solicitor  
21 General this morning that -- his argument is to the effect  
22 I believe that you can't just have a mechanical  
23 application of this test. As he says in his brief, you  
24 have to appreciate the pedigree of Pireno, and I would  
25 also say that's the essence of Pireno. And that comes

1 from National Securities.

2 And the real essence of this whole question is  
3 whether or not the State law is aimed at protecting  
4 regulating the relationship between the company and its  
5 policyholders either directly and indirectly. If so,  
6 those laws are the business of insurance.

7 With respect to the three tests of Pireno, if I  
8 could start with the third test, the statute only applies  
9 to insurance companies. It's limited to an entity that's  
10 in the insurance business, and that's the insolvent  
11 company. And all the claims against the insurance company  
12 are claims against the insurance company. I think Pireno  
13 is easily satisfied.

14 Now, as to this third test, the Government  
15 interjects a requirement that I don't think is in this  
16 Court's opinions or is logical. And they state in their  
17 brief that the regulation has to be peculiar or unique to  
18 the business of insurance. I don't read that anyplace in  
19 the Court's cases, nor does it make any sense because  
20 licensing is not a unique form of State regulation of  
21 insurance, but licensing or State laws which regulate the  
22 licensing of an insurance company clearly regulate the  
23 business of insurance.

24 As to the second test of Pireno, the Ohio  
25 statute reinforces the contractual relationship between

1 the insurer and insured, and --

2 QUESTION: Excuse me. I think what the  
3 Government is saying is suppose you have a licensing law  
4 that requires you to get a license to dispose of water  
5 into the street or something, and any business that wants  
6 to dispose of water has to get that license. That would  
7 not -- even though an insurance company also with other  
8 businesses has to get that license, that would not be a  
9 law regulating insurance.

10 MR. RISHEL: No, absolutely it would not.

11 QUESTION: Well, that's what the Government  
12 means by the fact that the law must be one directed at  
13 insurance and not a general one.

14 MR. RISHEL: I agree with that, but I don't  
15 think that's the point. Maybe I wasn't clear. They said  
16 it had to be peculiar. This type of regulation had to be  
17 peculiar, and since priority statutes weren't peculiar to  
18 insurance, they couldn't satisfy the third prong of the  
19 Pireno test, and that was my point. I don't think it has  
20 to be peculiar. I think it has to regulate the business  
21 of insurance.

22 QUESTION: But if there were a separate priority  
23 statute just for insurance, your answer would be  
24 different. Just for insurance company wind-ups.

25 MR. RISHEL: I don't understand, Your Honor.

1 QUESTION: Is the -- maybe I'm confused on  
2 something. Is the Ohio priority statute a general statute  
3 which happens to mention insurance companies, or does it  
4 apply by its terms only to insurance company bankruptcies?

5 MR. RISHEL: It applies only to insurance  
6 company insolvencies, Your Honor. It does not apply as a  
7 general proposition to anything but insurance companies.

8 QUESTION: So that you can say that the priority  
9 statute is limited within the meaning of Pireno.

10 MR. RISHEL: Absolutely.

11 QUESTION: Yes, okay.

12 MR. RISHEL: Absolutely.

13 QUESTION: -- apply to paying off all the  
14 creditors of the insurance company before the United  
15 States claims, and it may be that some of the debts that  
16 they owe has hardly any connection with an insurance  
17 company.

18 MR. RISHEL: Well, they would -- as to the  
19 general creditors, I mean, all the debts that are before,  
20 except for general creditors, relate to the actual  
21 business of insurance, the policyholders. I mean, that's  
22 what this statute regulates. That's why it prefers those  
23 claims.

24 Now, as to the second criteria, as I said, we  
25 believe it's integral with the whole policy relationship.

1 It undergirds that relationship at a time when the  
2 policyholder is truly in a situation where they may not  
3 get paid, and it also satisfies the first prong of the  
4 Pireno test because it effectuates on a continuing basis  
5 the actual spreading of risk among policyholders.

6 The arguments by the Government as to the  
7 guaranty fund, our response to that is, yes, guaranty  
8 funds exist. Yes, they pay some policyholder claims, but  
9 that doesn't matter.

10 The best evidence of the fact that guaranty  
11 funds are not the panacea that might be suggested is the  
12 fact that the Federal Government's claim for \$10.7 million  
13 is still unpaid. It's not covered by any guaranty fund.  
14 Like many claims against the insurance company here,  
15 they're not covered by the guaranty funds because they  
16 arose out of bonds.

17 Guaranty funds -- and I'll use Ohio's as an  
18 indication. The Ohio guaranty fund has a definition of  
19 what's a covered claim, and then it has 18 enumerated  
20 exceptions from that coverage. It also has a monetary  
21 limit. So, as to those policyholders whose claims are not  
22 covered by guaranty funds or are not covered in whole by  
23 guaranty funds, the only chance they have to receive the  
24 protection they purchased is through the insolvency  
25 procedures in the State of Ohio.

1           As to the Knott decision, I thought that the  
2 Solicitor General did an excellent job of distinguishing  
3 that case from this case in his reply brief. On page 14,  
4 his footnote number 9, I believe, the last sentence at the  
5 bottom of the page says Federal -- Knott, and he gives the  
6 citation. Federal priority statute inapplicable if State  
7 statute divests insurance company of title to assets. I  
8 think that's a very succinct holding of this Court's  
9 decision in Knott.

10           And then I'd ask you to look at appendix page A3  
11 in our brief, section 3903.18 of the Ohio Revised Code,  
12 another section of our insurance liquidation act, which  
13 says the liquidator shall be vested by operation of law  
14 with the title to all of the property, contracts, and  
15 rights of action and all of the books and records of the  
16 insurer ordered liquidated, wherever located, as of the  
17 entry of the final order of liquidation.

18           So, what didn't happen in Knott happened here,  
19 and that as a matter of law, the title to the assets  
20 passed to the superintendent of insurance, and Knott is  
21 just plainly not applicable to this case.

22           QUESTION: But they didn't pass before their  
23 Federal priority lien attached, did they?

24           MR. RISHEL: It passed at the moment of  
25 insolvency.

1 QUESTION: Yes, but that's also when the Federal  
2 priority lien attached.

3 MR. RISHEL: At -- yes, that's one of the  
4 criteria.

5 QUESTION: So, we have a tie there. Who wins  
6 on --

7 MR. RISHEL: Well, I think -- well, I don't  
8 think we have a tie, Your Honor. I don't think this act  
9 applies. The history given by counsel is interesting, but  
10 I think the most interesting piece of the whole enactment  
11 history was Senator Ferguson's answer to a question of  
12 whether or not this law applied to all Federal laws at the  
13 time, and his answer was a simple yes, that's the intent  
14 of it. And the statute says no act of Congress, and then  
15 it enumerates certain exceptions.

16 QUESTION: Well, now you're going into the  
17 McCarran-Ferguson argument rather than the distinction of  
18 Knott.

19 MR. RISHEL: That's correct, but --

20 QUESTION: I was just questioning whether you  
21 really had a valid distinction of the Knott case.

22 MR. RISHEL: Well, I do, if I can get back to  
23 that. In the Knott case, the Federal Government went  
24 after certain monies that had been on deposit in Florida.  
25 They were placed there by a New Jersey company that became

1 insolvent and went into rehabilitation in New Jersey, and  
2 the Federal Government went after those special deposits  
3 in Florida. It didn't come after the assets in the hands  
4 of the rehabilitator.

5 QUESTION: No, and it did not -- it was not able  
6 to reach those deposits in Florida either.

7 MR. RISHEL: No, it was. I mean, they were --  
8 in that case, they were granted priority to those assets  
9 in Florida.

10 QUESTION: The United States was.

11 MR. RISHEL: The United States was, yes.

12 QUESTION: Yes.

13 MR. RISHEL: Now, so, they didn't go after those  
14 assets here. They went after the assets, the title to  
15 which have transferred to the superintendent of insurance.  
16 So, Knott is distinguishable, and indeed, the law in Knott  
17 I think supports our position better than theirs.

18 QUESTION: Well, did the lower court in this  
19 case address this argument? Your -- I understood Mr. Long  
20 to acknowledge that if the property was not part of the  
21 liquidation estate, the United States would have no claim.  
22 Now you're arguing that it was not part of the estate. If  
23 that's right, it seems we don't even have to look at the  
24 McCarran Act.

25 MR. RISHEL: The property is part of the estate.

1 The question is whether or not the title to the property  
2 remains in the company. In Knott, the title to those  
3 assets in Florida remained in the company. It didn't  
4 become assets of the estate. The assets the Government  
5 seeks here are the assets of the liquidation estate, the  
6 title to which passed to the superintendent of insurance.

7 QUESTION: But am I correct that you are now  
8 arguing that you win regardless of how we construe the  
9 McCarran Act?

10 MR. RISHEL: I think we have the better position  
11 on Knott, and I think if you apply the test from Pireno,  
12 we win, yes.

13 QUESTION: Well, but Pireno has got to do with  
14 the McCarran Act. I mean --

15 MR. RISHEL: Right.

16 QUESTION: But I'm trying to understand if the  
17 assets are not part of the estate, then the United States  
18 doesn't reach them under the statute, and if you're right  
19 -- that would have been a simple way for the court of  
20 appeals to decide the case, but they didn't, as I  
21 understand. They didn't --

22 MR. RISHEL: No, they did not. They applied the  
23 tests from Pireno after examining the other cases.

24 QUESTION: Did you make this argument in the  
25 court of appeals?

1 MR. RISHEL: We made basically the same  
2 arguments --

3 QUESTION: About Knott?

4 MR. RISHEL: We made -- we tried to distinguish  
5 Knott. What I didn't have in the court of appeals was  
6 what I have here, and that's the Solicitor General's  
7 distinction of the case, which I think is terrific.

8 In conclusion, the court of appeals correctly  
9 found that the Ohio statute is part and parcel of the  
10 large, complex, specialized administrative system adopted  
11 by the State of Ohio to regulate the life of a domestic  
12 insurance company from inception to dissolution pursuant  
13 to the authority granted the State by McCarran-Ferguson.

14 The Government would transform that complex,  
15 specialized administrative system into a claims collection  
16 process for the primary benefit of the Federal Government.  
17 To allow the Federal Government to assert a priority under  
18 the Federal Claims Priority Act would allow for the very  
19 Federal statutory interference with State regulation which  
20 Congress eliminated in McCarran-Ferguson.

21 Under a correct application of the McCarran-  
22 Ferguson Act and the phrase business of insurance, as  
23 defined by this Court, we believe that the Federal  
24 Government's claim against the American Druggists'  
25 Insurance Company is to be determined by the Ohio statute

1 and not by the Federal Claims Priority Act.

2 We would respectfully request the Court to  
3 affirm the decision of the Sixth Circuit Court of Appeals.  
4 Thank you.

5 QUESTION: Thank you, Mr. Rishel.

6 Mr. Long, you have 7 minutes remaining.

7 REBUTTAL ARGUMENT OF ROBERT A. LONG, JR.

8 ON BEHALF OF THE PETITIONERS

9 MR. LONG: Thank you --

10 QUESTION: Mr. Long, before you get into  
11 anything else, does the Government agree with the  
12 proposition that the bankruptcy act doesn't apply to --

13 MR. LONG: Yes, that's correct. Congress  
14 has --

15 QUESTION: Well, then I really have trouble with  
16 the rest of your argument if, indeed, a trustee in  
17 bankruptcy is conducting the business of insurance --

18 MR. LONG: Well, Congress has --

19 QUESTION: -- I cannot imagine how his paying  
20 out to one or another claimant or the order in which he  
21 pays out to a claimant isn't part of the business of  
22 insurance.

23 MR. LONG: Well, Congress has expressly provided  
24 that insurance company insolvencies shall not be handled  
25 through the Federal bankruptcy process, but in passing the

1 Federal bankruptcy code, they also amended this Federal  
2 priority statute that we have here before us today. The  
3 amendment said that the Federal priority statute shall not  
4 apply in proceedings under the Federal bankruptcy code  
5 because of the different priorities Congress established.  
6 But Congress left in effect the Federal priority statute,  
7 the first priority as to nonbankruptcy proceedings, and  
8 there was no indication that it intended to change the  
9 rule that the Federal priority statute applies in  
10 insurance company insolvency proceedings, just as it  
11 applies in other types of State receiverships and in  
12 proceedings against insolvent estates of decedents.

13 QUESTION: What is the provision that renders  
14 the bankruptcy act inapplicable? It's a provision of the  
15 bankruptcy act itself? It's not just simply McCarran.

16 MR. LONG: Yes, I'm sorry. I believe it's cited  
17 in our brief, and I'm sorry I do not -- cannot remember  
18 it. But it is expressly provided in the bankruptcy code  
19 that it shall not apply to bankruptcies of insurance  
20 companies and financial institutions.

21 QUESTION: I see. Well, might not that be  
22 considered an acknowledgement in the bankruptcy code that  
23 the United States considers a bankruptcy trustee to be  
24 engaging in the business of insurance?

25 MR. LONG: No. We think the opposite, and

1 that's really our basic position in this case, is that  
2 Congress has always been very precise about priorities of  
3 claims of the United States. It has always decided that  
4 for itself. When it wanted the United States to have any  
5 position other than first, it said so, and it has done  
6 that in the Federal bankruptcy act. It has excluded  
7 insurance company insolvencies from the bankruptcy code,  
8 but it has left in effect -- and it's amended in '78 and  
9 again in 1982, this Federal priority statute, which this  
10 Court has held many times is very broad, is very clear,  
11 and this Court will not imply an exception to its clear  
12 command unless Congress has very clearly indicated that  
13 there must be one. And the history of the McCarran-  
14 Ferguson Act plainly indicates that this was not what  
15 Congress had in mind.

16 Let me say just a word about Knott. I think the  
17 distinction suggested this morning, which is a new  
18 suggestion, was not argued below, doesn't work anyway.  
19 The Federal priority statute has been applied many times  
20 over the years when a receiver has been appointed or a  
21 liquidator to take over the assets of an insolvent debtor.  
22 That's one of the classic acts of bankruptcy. That's one  
23 of the main situations in which the statute is triggered,  
24 and it's -- the Court has never held that that works -- it  
25 moves the assets away from the debtor. It's the debtor's

1 estate at that point. The assets are still there.  
2 They're just in the debtor's estate.

3 QUESTION: Priority statute gives the United  
4 States priority over administrative expenses in the  
5 liquidation?

6 MR. LONG: Yes, that is -- it is a first  
7 priority. In -- the practice of the Government has always  
8 been to allow, you know, reasonable administrative  
9 expenses to be paid, and I should add that we also have a  
10 practice --

11 QUESTION: But that's just a matter of grace I  
12 gather.

13 MR. LONG: Yes.

14 QUESTION: Yes, all right.

15 MR. LONG: And we also have a practice of  
16 granting a release once claims of the United States have  
17 been settled so that there's not uncertainty about whether  
18 the United States will come forward with additional  
19 claims.

20 QUESTION: Mr. Long, you're talking about the  
21 practice of the United States. Have there been a fair  
22 number of State liquidation proceedings involving  
23 insurance companies in which there has been no contest  
24 about the Federal Government's priority?

25 MR. LONG: I --

1 QUESTION: Because there don't seem to be many  
2 cases on --

3 MR. LONG: I tried to find that out from the  
4 Federal Government.

5 QUESTION: Then where do you get the basis of  
6 your statement about practice?

7 MR. LONG: I think there were not a great number  
8 of insolvencies, and the United States often didn't file  
9 claims in the past. And also, this practice of the States  
10 of prioritizing claims and placing the United States  
11 rather low seems to have begun only in the late '60's in  
12 Wisconsin. It's a fairly recent development. We don't  
13 have claims in every insurance company insolvency  
14 proceeding because we often don't have any bonds with the  
15 company and may not have any tax claims.

16 The basic argument here today by respondent is  
17 that any State law aimed at protecting policyholders is a  
18 regulation of the business of insurance within the meaning  
19 of McCarran-Ferguson. We think that is too broad a  
20 definition. We think that is inconsistent with this  
21 Court's prior decisions, and in particular, that would be  
22 inconsistent with the antitrust -- the application of the  
23 antitrust laws to the business of insurance, which is also  
24 at issue here and is also an interest of the Federal  
25 Government.

1           So, we urge the Court not to reject its prior  
2 decisions and adopt that much broader test. I mean, it  
3 really is true that in a general sense every State law  
4 regulating insurance companies is aimed at protecting  
5 policyholders.

6           And finally, very briefly, on the third factor,  
7 there was a argument that something that's not unique to  
8 the insurance industry shouldn't be covered by this  
9 factor. In fact, the purpose of that factor, this Court  
10 has said, is to recognize the importance of intra-industry  
11 competition. Congress thought that was particularly  
12 important in the insurance business that insurance  
13 companies needed to cooperate on rates and statistical  
14 information and so forth.

15           So, we think that is actually a relevant  
16 consideration, although again our principal submission  
17 under that factor is that a lot of these claims involve  
18 the ordinary business relationships of an insurance  
19 company with suppliers of goods and services like the  
20 relationship in Royal Drug with pharmacies that this Court  
21 said was not a part of the business of insurance.

22           If there are no further questions, I thank the  
23 Court.

24  
25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Long.  
The case is submitted.

(Whereupon, at 11:51 a.m., the case in the  
above-entitled matter 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:

U S Dept. Of Treasury and Mitchell A. Levine  
✓ George Fabe

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

BY Lona M. May

(REPORTER)

RECEIVED  
SUPREME COURT, U.S.  
MARSHAL'S OFFICE

'92 DEC 15 P2:36