

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: BARBARA A. DeBUONO, NEW YORK COMMISSIONER
OF HEALTH, ET AL., Petitioners v. NYSA-ILA
MEDICAL AND CLINICAL SERVICES FUND, ETC., ET
AL.

CASE NO: 95-1594

PLACE: Washington, D.C.

DATE: Monday, February 24, 1997

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IN THE SUPREME COURT OF THE UNITED STATES

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 BARBARA A. DeBUONO, NEW YORK :
 COMMISSIONER OF HEALTH, ET AL., :
 Petitioners :
 v. : No. 95-1594
 NYS-ILA MEDICAL AND CLINICAL :
 SERVICES FUND, ETC., ET AL. :
 - - - - - X

Washington, D.C.

Monday, February 24, 1997

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:50 a.m.

APPEARANCES:

M. PATRICIA SMITH, ESQ., Assistant Attorney General of New York, New York, New York; on behalf of the Petitioners.

EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioners.

DONATO CARUSO, ESQ., New York, New York; on behalf of the Respondents.

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P R O C E E D I N G S

(10:50 a.m.)

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3 CHIEF JUSTICE REHNQUIST: We'll hear argument next in
4 Number 95-1594, Barbara DeBuono v. NYSA-ILA Medical and
5 Clinical Services.

6 Ms. Smith.

7 ORAL ARGUMENT OF M. PATRICIA SMITH

8 ON BEHALF OF THE PETITIONERS

9 MS. SMITH: Mr. Chief Justice, and may it please the
10 Court:

11 State laws of general applicability relate to ERISA
12 plans only when they both operate upon a plan in its capacity
13 as a plan, and when the effect of that law is to dictate or
14 restrict and not merely influence plan choice.

15 The health facility assessment, a gross receipts tax
16 imposed upon hospitals in New York, does not relate to ERISA
17 plans which operate their own hospitals because neither of
18 these elements is present.

19 The impact of the HFA upon plans is no more than that of
20 the laws that were upheld by this Court in the Blue Cross v.
21 Travelers case and the Court's recent opinion in California v.
22 Dillingham. Like those laws, the HFA does not dictate or
23 restrict plan choice.

24 Like the surcharges in Travelers, the HFA may have an
25 economic impact upon a plan's cost of providing benefits.

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1 This impact may occur regardless of whether plans own their
2 own hospitals or purchase hospital care services from third
3 parties. In either case, the economic impact of the law is
4 not enough to make the law relate to plans.

5 Notwithstanding the fund's ownership of the hospital in
6 this case, the HFA also does not relate to the plan because it
7 operates upon the fund not in its capacity as a plan but as a
8 provider of medical services. The HFA is part and parcel of
9 the State regulation of hospitals, and the provision of
10 medical services is not a plan function which ERISA preemption
11 was designed to protect.

12 When plans choose to provide the types of benefits which
13 are not strictly financial but which involve services, those
14 services remain subject to generally applicable State
15 regulation whether plans purchase those services from third
16 parties or choose to provide those services in kind. The
17 operation of a hospital, like the operation of a day care
18 center, the practice of law, and employees' training programs,
19 are not plan functions --

20 QUESTION: Ms. Smith, do you agree with the outline
21 offered by the Solicitor General as sort of a summary of this
22 Court's holdings in this area?

23 MS. SMITH: Yes, Your Honor.

24 QUESTION: Would you adopt the same outline yourself
25 without variation?

1 MS. SMITH: Your Honor, the outline of this -- what this
2 Court has decided --

3 QUESTION: Well, they construct a kind of four-part
4 simple test.

5 MS. SMITH: Yes.

6 QUESTION: Do you agree with that?

7 MS. SMITH: Yes, Your Honor. Where we differ from the
8 Solicitor is not necessarily in outcome but somewhat in
9 analysis.

10 In this case, the respondents, who would agree that many
11 generally applicable laws would not relate to them even if
12 they were imposed directly upon them, respondents claim that
13 this case is different because when you operate your own
14 hospital you're acting as a provider of medical services,
15 which they say is what an ERISA plan is meant to do.

16 QUESTION: And do you agree that all general health laws
17 that would affect clinic operations are validly applied to an
18 ERISA health clinic?

19 MS. SMITH: Yes, Your Honor.

20 QUESTION: The standards of degrees required for people
21 engaged in the health care business, and so forth?

22 MS. SMITH: Absolutely, Your Honor. When the State is
23 regulating generally in the health care area, those are areas
24 of traditional State concern. If ERISA plans choose to
25 operate in those areas, they take basically the marketplace as

1 the State is regulating the marketplace of those areas.

2 QUESTION: And I suppose there might be some
3 disagreement by respondents on that issue.

4 MS. SMITH: The respondents' argument is that at least
5 in the health care area, but I think that their theory is
6 equally applicable to those other four benefit areas that
7 involve services -- day care, prepaid legal services, and
8 apprenticeship training -- that when plans operate in those
9 areas, the State may not regulate them. At least, they may
10 not tax them, I believe is the respondents' argument.

11 Our disagreement is that in those areas, those services
12 remain subject to State regulation. One looks at the plan
13 as --

14 QUESTION: Well, do you think the same principles should
15 govern whether a general tax law or a general State
16 requirement for background training or cleanliness concerns or
17 something of that kind --

18 MS. SMITH: In these --

19 QUESTION: -- the same principles govern the answer to
20 both questions?

21 MS. SMITH: In these service areas -- in these service
22 areas, yes, so a generally applicable health care tax, a
23 generally applicable day care tax, or in these four service
24 areas, whether, if you can regulate in those areas in a
25 generally applicable way you can tax in those areas in a

1 generally applicable way.

2 QUESTION: Ms. Smith, I don't understand what you think
3 the effect of the very broad language, relates to, is. What
4 does it bring to this enterprise that we're engaging in that
5 wouldn't be affected by our ordinary preemption principles?

6 MS. SMITH: Justice Scalia, the way that the Court has
7 formulated preemption analysis to date, there are two prongs.
8 There's the refer-to prong, as the Court refers to it, and the
9 connection prong.

10 What the relates-to analysis does to date is that if you
11 had general preemption provisions, conflict-of-field
12 preemption provisions, a State law which referred to ERISA
13 plan which kept them out of those fields would not be
14 preempted.

15 But to date, the -- this Court has held that a State law
16 which specifically refers to ERISA plans, even if it gives
17 ERISA plans better protection -- for instance, in the Mackey
18 case the part of the law that required the State garnishment
19 law not to apply to ERISA plans this Court held was preempted,
20 so --

21 QUESTION: But that's normal field preemption, isn't it,
22 that you cannot -- you can neither reduce nor increase the
23 protection that the Federal Government gives. That's what
24 normal field preemption would produce.

25 MS. SMITH: My understanding of field preemption, Your

1 Honor, is that a State law that specifically kept whatever was
2 being regulated out of the field would not be preempted.

3 QUESTION: I don't know what you mean. What -- that
4 kept whatever was being regulated out of the field?

5 MS. SMITH: Right. For instance, if it was a question
6 of nuclear safety and the law said something about State,
7 whatever -- and you can't be in the nuclear safety area, that
8 that would not be preempted. That is my understanding of
9 field preemption.

10 But in this case, when the State garnishment law says
11 ERISA plans are not subject to the garnishment law, this Court
12 has held that because it specifically referred to and applied
13 only to ERISA plans, it was not preempted -- it was preempted,
14 sorry.

15 QUESTION: In any event, do I understand that -- you
16 said you agreed with the Government's outline as a summary of
17 what this Court has held, that however you might wish Justice
18 Scalia's concurring opinion in the Dillingham case to be
19 speaking for the majority, the majority has not yet spoke that
20 way.

21 MS. SMITH: That's correct, Your Honor. We do agree
22 with the Government's outline.

23 QUESTION: But how would this case come out, do you
24 think, under Justice Scalia's field preemption theory?

25 MS. SMITH: Your Honor, we are asking the Court

1 basically, in making this distinction between services and
2 plans, to carve out --

3 QUESTION: Well, I think the question I asked you was,
4 how would the case come out if you were to apply normal field
5 preemption principles to it?

6 MS. SMITH: It would come out that this law does not
7 relate to plans because the service area is outside the field
8 of employee benefit plans, that while employee benefit plans
9 are concerned with the funding and payment of benefits, that
10 the services which those benefit payments may fund, the
11 quantity of the services, the quality of the services, the
12 availability of the services, are not an area with which ERISA
13 is concerned with.

14 QUESTION: But does it work to distinguish that which is
15 doing the providing, namely the plan, and that which the plan
16 buys, like the services?

17 I mean, that distinction seems to run throughout the
18 cases, but for the area of pensions itself, where the fund is
19 basically writing a check, so it's quite closely tied up with
20 the fund.

21 But in the benefits area, they're buying something, so
22 is it the case -- how does that distinction work between the
23 plan itself -- this is another case in which we've -- other
24 cases have tried to make the same distinction. The
25 Government's tended to resist it, I think -- and that which

1 the plan buys.

2 When you get to that which the plan buys, there's no
3 field preemption. Rather, you look bit-by-bit to see if that
4 which the plan buys and the State's regulating that conflicts
5 specifically with the purpose of Congress.

6 MS. SMITH: That distinction works very well, Your
7 Honor. In this case, the respondents are claiming that
8 they're not buying anything.

9 QUESTION: No, no, but that just happens to be because
10 they went and supplied it themselves.

11 MS. SMITH: Right, but --

12 QUESTION: That's just an artifact of the situation.

13 MS. SMITH: But basically that is the distinction that
14 we are asking the Court to draw.

15 Most ERISA benefits are strictly financial. It's money
16 and the contingency upon. Pension benefits, money and the
17 contingency of retirement. Death benefits and the contingency
18 of death.

19 There are only four ERISA benefits that actually involve
20 services. In other words, services that plans may buy, and
21 that would be day care, apprenticeship training, prepaid legal
22 services, and health --

23 QUESTION: I mean, you've really looked into this a lot,
24 and so what I'm quite serious is -- if there were some words
25 in an opinion that said when you look into that area which,

1 when you look into those things which the plan buys, as
2 opposed to the management of a trust, when you look into that
3 area, normally there is no preemption unless the State law
4 conflicts with a purpose of Congress, and a rather specific
5 purpose at that.

6 Now, would that cause trouble?

7 MS. SMITH: No, Your Honor, not in our view.

8 QUESTION: Not in this case it wouldn't but I mean, in
9 your experience in general would it cause trouble?

10 MS. SMITH: No, Your Honor, not in our view, because in
11 general, again, we're dealing with a very limited area of
12 ERISA benefits that actually involve something that the plan
13 purchases as opposed to money that the plan is giving, and
14 when ERISA plans are operating as ordinary commercial
15 entities, they may well purchase services.

16 They may purchase -- they may purchase, you know,
17 fiduciary services. They may purchase stationery. They may
18 purchase whatever, and clearly we don't think that anyone
19 would contest that when they're operating in those commercial
20 capacities, purchasing those entities, that ERISA preemption
21 would apply. Whether you --

22 QUESTION: But you don't want to draw a line -- the
23 difference between buying the service, because I think this is
24 a case where the plan itself is providing it, so I think in
25 your brief you try to look at the other side of it and say

1 when you're talking about plan funding, plan administration,
2 that's what ERISA covers.

3 MS. SMITH: That's correct, Your Honor, but you could
4 also look at this when an ERISA plan provides services in
5 kind, they're simply purchasing them in a different way.

6 QUESTION: Yes --

7 MS. SMITH: Instead of purchasing them from a third
8 party, they are directly purchasing them from the doctors
9 and --

10 QUESTION: But it would have a direct financial effect.
11 If the ERISA plan buys clinic services elsewhere in New York,
12 then this tax is going to be paid by the entity that actually
13 provides the service, and so it may in fact cost ERISA
14 something less, because it's not paying the tax.

15 MS. SMITH: Your Honor --

16 QUESTION: But if it were to provide the services
17 itself, then the ERISA plan is certainly liable for the full
18 tax, so it may end up costing ERISA less to contract out.

19 MS. SMITH: Your Honor, in this case the incidence of
20 the tax is not on the ERISA plan but on the hospital which,
21 although it's not critical to my argument, is a separately
22 incorporated corporation.

23 The hospital can, like any other entity, determine how
24 it's going to fund the tax. It could pass it on to its
25 customers, in this case, the ERISA plan participants, in

1 higher copays.

2 In this particular case, it could decide to pass it on
3 to its other customers, the other plans that have services
4 there, or the Worker's Comp carriers, or the fund could pay
5 it. It's really no different than if it's Mount Sinai that's
6 paying the tax.

7 In this case, it's not the fund that's paying the tax,
8 or that has the incidence of the tax. It's the medical
9 centers themselves.

10 QUESTION: But what I run into, you know, with my own
11 thought there is, I run into a problem.

12 I mean, I can easily say, let's distinguish what's
13 normally bought, even though in your case it happens to be
14 provided, from the running of the fund, and let's say in the
15 former situation and grouping your case with the former,
16 normally there is no preemption unless you find a specific
17 conflict.

18 Then I run into these -- the benefit cases where the
19 fund was buying certain medical benefits, really, and the
20 Court said no, it's preempted where you have the pregnancy --
21 you know, the certain rules on what you can buy or not buy,
22 which were really regulations of what was bought, rather than
23 regulations of the fund, so how do you work with those cases?

24 MS. SMITH: Your Honor, in those cases you're impacting
25 upon what the fund is paying, what services, as opposed to the

1 services themselves.

2 So, for instance, the State of New York can regulate
3 surgery, and it could say, there's too much surgery in the
4 State of New York. No one can have surgery unless there's a
5 second opinion.

6 What the court -- what the State can't say is, and
7 anyone who pays for the surgery must also pay for the second
8 opinion, because you're dealing with coverage issues: what is
9 a plan paying for, as opposed to what services are available
10 in the marketplace.

11 If there are no further questions, Your Honor, I will
12 reserve the rest of my time.

13 QUESTION: Very well, Ms. Smith.

14 Mr. Kneedler, we'll hear from you.

15 ORAL ARGUMENT OF EDWIN S. KNEEDLER

16 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

17 SUPPORTING THE PETITIONERS

18 MR. KNEEDLER: Mr. Chief Justice, and may it please the
19 Court:

20 The health facilities assessment tax at issue in this
21 case as applied to the hospitals owned by the plan is not
22 superseded by ERISA under ERISA's express preemption
23 provision. The assessment law is a law of general
24 applicability that operates in the field of health care, a
25 field that this Court identified in Travelers as one of

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1 traditional State regulation.

2 The legal incidence of the tax, and in tax law legal
3 incidence is often very important, is on hospitals. The
4 impact on the plan is only incidental from its capacity as the
5 owner of the hospital. It is not on the plan in its capacity
6 as such.

7 The assessment law, therefore, does not relate to the
8 ERISA plan at issue in this case because it does not intrude
9 into the field of regulation of ERISA welfare benefit plans
10 which section 514(a) preserves for exclusive Federal
11 regulation.

12 The purpose of section 514(a) --

13 QUESTION: Mr. Kneedler --

14 MR. KNEEDLER: Yes.

15 QUESTION: -- how do you think the so-called field
16 preemption notice, the field preemption doctrine would play
17 out in these ERISA cases --

18 MR. KNEEDLER: I think --

19 QUESTION: -- and how would that apply here?

20 MR. KNEEDLER: In this case, the field preemption
21 analysis would certainly lead to sustaining the State tax,
22 because the State tax operates, again, in the area of health
23 care. It operates with respect to a facility owned by the
24 plan. It does not operate in the field of ERISA plans as
25 such, and therefore we think it would not be preempted. We --

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QUESTION: Do you think that principle would explain most or all of our previous cases?

MR. KNEEDLER: It would explain most. It would not explain all. I agree with counsel for the State that it would not in particular explain the Mackey case, or not as readily. The portion --

QUESTION: Which is what?

MR. KNEEDLER: The portion of the Mackey case that held that an express exemption from State garnishment laws for ERISA plans was preempted.

Ordinarily, when you have field preemption, if the State enacts a law that gets State law out of the way to secure the field for Federal occupation, that would ordinarily not be something that would be preempted by field preemption.

Having said that, with all respect, there is a bit of an anomaly about having an express exception for ERISA plans in a case like Mackey preempted where the State is trying to clear the way for exclusive Federal regulation and get out of the way something that is beneficial to a plan, not something that just regulates it in a more beneficial way, but removes State law from the setting altogether, would not normally be a problem with field preemption.

QUESTION: Mr. Kneedler, there -- is it not fair to say that there is also some inconsistency in our expression of the

1 rule we were applying in the earlier cases as compared with
2 the expression that we've used in the last few?

3 MR. KNEEDLER: Yes. I think the Court's more recent
4 cases have tended to focus on the objectives of the -- of
5 ERISA, and that can be tied, we think, rather directly as a
6 textual matter to the field preemption argument.

7 QUESTION: What is the field preemption? That is to
8 say, I've never fully understood this. If a State passes a
9 law, and it was the purpose of Congress in a Federal statute
10 that the State not pass this kind of law, then it's preempted.

11 MR. KNEEDLER: Right.

12 QUESTION: Is that called conflict preemption, or field
13 preemption? I mean, in the instance when there is no direct
14 conflict, I mean, isn't it in both instances a question of
15 looking to the purpose of Congress and seeing if this is the
16 kind of law that --

17 MR. KNEEDLER: Right. Now, in this case --

18 QUESTION: If that's right, then if you use the word
19 field preemption, what will it do in general? How should it
20 be used?

21 MR. KNEEDLER: Well, for example, it's very important
22 under ERISA because the Court has said on a number of
23 occasions, and we agree with this, that ERISA preempts State
24 laws in some circumstances even where ERISA itself does not
25 furnish governing law, in particular in the design of ERISA

1 plans themselves, what benefits to offer, who they would be
2 paid for, paid to, what the amount of them will be.

3 Even though ERISA does not dictate particular benefit
4 levels, its purpose was to leave that to employers and
5 employees to negotiate to come up -- to leave to private
6 ordering, and so State law that would regulate the benefit
7 structure, even though it doesn't conflict with any particular
8 provision of ERISA addressing that, would conflict with
9 Congress' purpose to insulate that from State regulation.

10 QUESTION: In a broad sense, Mr. Kneedler, I suppose any
11 preemption involves a conflict.

12 MR. KNEEDLER: That's --

13 QUESTION: Any preemption is conflict preemption.

14 MR. KNEEDLER: In that sense, under this, and
15 particularly when you have an express preemption clause,
16 anything that conflicts with the express preemption clause.

17 QUESTION: And I thought in our cases what conflict
18 preemption meant was, where an inconsistent obligation is
19 placed upon the regulated party. If the Federal Government
20 tells you to do X, and the State tells you to do not X --

21 MR. KNEEDLER: Right, or --

22 QUESTION: -- that is a conflict.

23 MR. KNEEDLER: Right, or perhaps including the category
24 where the State law would stand as an obstacle to the full
25 accomplishment of the Federal purpose.

1 QUESTION: Yes.

2 MR. KNEEDLER: Which affecting benefit structure would,
3 we think --

4 QUESTION: Whereas I thought we've said field preemption
5 would apply where the Federal law tells you to do X, and the
6 State law says do X plus 10, which wouldn't -- you're doing X,
7 but you're doing more than X.

8 MR. KNEEDLER: Right.

9 QUESTION: But if the Government wanted this thing to be
10 complete, and we're occupying the field, you're not supposed
11 to address this area at all, X plus 10 would be preempted.

12 MR. KNEEDLER: That's correct, and so the sorts of
13 things that are occupied by the field, some of them are
14 addressed by ERISA itself, but things having to do with the
15 internal management of the plan -- benefit structures,
16 investment decisions, fiduciary responsibilities, things
17 having to do with the way the administrator handles the
18 plan -- and with respect to those things, we think the things
19 that the State can't regulate it ordinarily can't tax.

20 The things that the State can regulate the State
21 ordinarily can tax, and it's instructive that subsection
22 b5(b)i, which was part of a special provision adopted for the
23 Hawaii health care plan, specifically says that the exemption
24 for that does not affect State tax laws as they may relate to
25 ERISA plans, and the background and structure of that shows,

1 we think, that Congress intended that State tax laws be
2 treated generally as -- the same way that regulation is and,
3 after all, tax is a species of regulation.

4 QUESTION: Well, how would field preemption play out in
5 the context of direct State regulations going to the
6 educational background of employees in the clinic, and
7 cleanliness requirements, and so forth?

8 MR. KNEEDLER: As to that, they would not be preempted
9 because they do not address the internal affairs of an ERISA
10 plan as such in its capacity as a plan with respect to
11 funding, and financing, and what services will be paid for.

12 Such a State law regulates the services that are in turn
13 either purchased or furnished in kind by the ERISA plan, so
14 under that view of field preemption what the -- the field the
15 State is in is substantive health care regulation, licensing
16 of the facility and what-not.

17 And in general, the distinction that Justice Breyer made
18 we would agree with, and it was essentially our position in
19 Travelers as well that where the ERISA plan steps out of its
20 internal management of plan structure and purchases something
21 in the market, either pencils for the office or services in
22 kind, State substantive regulation or taxation of a -- a sales
23 tax for purchasing something wouldn't be preempted.

24 QUESTION: What else besides sales tax? What taxes does
25 an ERISA plan have to bear?

1 MR. KNEEDLER: We think it would have to pay, for
2 example, unemployment compensation taxes that -- for its
3 employees.

4 We think, on the other hand, if the State tried to tax
5 the income to the plan itself, which is a species perhaps of
6 regulating the corpus of the trust funds, if there's a
7 separate trust fund, if the State tries to regulate the corpus
8 of the trust by regulating investment decisions, we think
9 that's at the core of what ERISA would not allow, and
10 therefore it may well be that the State could not tax the
11 corpus of the trust itself.

12 But where the State is leaving -- or the trust, the plan
13 is leaving its internal operations and going out into the
14 marketplace by hiring employees or purchasing goods and
15 services, including services in kind that are paid for by the
16 ERISA plan --

17 QUESTION: Well, what if the State --

18 MR. KNEEDLER: -- the State could regulate it.

19 QUESTION: What if the State taxes numerous other
20 corpuses that have nothing to do with ERISA plans as well?

21 MR. KNEEDLER: That would -- it's that point we think
22 that may make that a closer question, and we would urge the
23 Court not to decide that question in this case.

24 QUESTION: Would that be field preemption or conflict
25 preemption? Would you -- if you feel it couldn't be taxed,

1 wouldn't that be because you think that there is an indication
2 in the legislation that Congress did not want it taxed?

3 MR. KNEEDLER: Right. Congress intended to preserve the
4 assets in the fund for the benefit of the employees, but we
5 think that that could also be a species of field preemption,
6 because the State could not directly regulate investment
7 decisions by holding fiduciaries to different standards or
8 requiring diversification requirements in the portfolio.

9 QUESTION: But that's just why -- that's exactly why I'm
10 nervous about the words, field preemption, because in trying
11 to work out what the field is you have to make roughly the
12 same analysis that you'd have to make on purpose. Do you have
13 a use of the word, field? I mean, if we were to use the word
14 field preemption, how would you use it?

15 MR. KNEEDLER: I would, I think, refer to whether the
16 State law is addressing the ERISA plan as an ERISA plan, in
17 its capacity as an ERISA plan, not when it is purchasing goods
18 and services outside of the plan's operations.

19 QUESTION: Thank you, Mr. Kneedler.

20 MR. KNEEDLER: I think it's the former that's the field.

21 QUESTION: Thank you.

22 Mr. Caruso, we'll hear from you.

23 ORAL ARGUMENT OF DONATO CARUSO

24 ON BEHALF OF THE RESPONDENTS

25 MR. CARUSO: Mr. Chief Justice, and may it please the

1 Court:

2 We are dealing here with a State tax on the corpus of
3 the fund. What's being taxed are the contributions that are
4 being paid to the fund by the employers required under the
5 collective bargaining agreements to make those contributions,
6 and benefit payments being made for the benefits that the
7 ERISA fund is paying, so this case involves a tax.

8 There's a clear indication in the legislation itself and
9 in the legislative history of ERISA that Congress intended
10 tax -- State tax laws to enjoy no charmed existence. They
11 were to be treated like any other law, any other State law
12 that relates to a plan. That is the language of the statute.

13 And when the fund is being required to pay a State
14 assessment on the very activities that makes the fund a fund,
15 the very health care benefits that the fund is paying out, the
16 contributions that the employers are paying for those
17 benefits, I submit to you that it's self-evident that the tax
18 in this case relates to the fund.

19 QUESTION: Why not the sales tax on items that the fund
20 uses to operate?

21 MR. CARUSO: I think in that case the fund is actually
22 acting not as a fund but as a purchaser. What we're saying
23 there is, we would tend to agree that if you use the concept
24 that was first developed I believe in the Shaw case, the
25 tenuous, remote, and peripheral concept, that when the plan is

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1 acting in a capacity that any other private entity would be
2 involved in, then the plan is to be treated like any other
3 private entity.

4 QUESTION: But when the plan is operating a private
5 hospital, why shouldn't it be treated like any other hospital?

6 MR. CARUSO: Because a plan does provide benefits. If
7 you look at the definition of ERISA, ERISA says that any plan
8 or program to provide health benefits through insurance or
9 otherwise, and the ERISA definition --

10 QUESTION: What about other benefits that a plan might
11 provide, like legal services? Do you say the same thing about
12 that?

13 MR. CARUSO: Well, if the plan is providing legal
14 services and there's been a tax imposed on the contributions
15 that the plan is providing to the attorneys who are providing
16 the services, I would say yes, that that tax would be
17 preempted, because that tax is being imposed on the very
18 activities that make the plan a plan.

19 QUESTION: Well, what about the State requirement that
20 anyone giving legal services has to be a licensed attorney? I
21 mean, that affects the cost. That's going to cost the plan
22 more if it's legal benefits, so you'd be back here arguing
23 that, I suppose.

24 MR. CARUSO: Well, obviously that's not the case that we
25 have here today, but we're not looking at it from a cost

1 standpoint, Justice O'Connor. What we're saying is, look at
2 the activity.

3 What we're saying is, if you're buying pencils, you're a
4 purchaser. You can impose the sales tax. If you're engaging
5 in employing individuals as part of your operations of the
6 clinic and there are employment taxes to be paid, well, you
7 are an employer. You're not a plan.

8 But when you're providing benefits, and it's the
9 contributions for those benefits that the State is taxing, we
10 say there, there you are taxing the plan as a plan.

11 QUESTION: But my question related not to the tax but to
12 this sure knowledge that the State law requirement that legal
13 advice be given by licensed attorneys will cost more. It's
14 going to cost the ERISA plan, the fund, more money.

15 MR. CARUSO: We would say, and the probabilities are in
16 that situation, if you look at the structure and objectives
17 and ERISA, that there probably was not an indication of
18 congressional intent, as there was in the Travelers case, that
19 Congress intended ERISA to preempt that type of regulation,
20 and in this case we have explicit language in the statute that
21 says State tax laws, they don't have a charmed existence. We
22 want them treated like anything else.

23 QUESTION: Well, that refers to the Hawaii exception,
24 doesn't it?

25 MR. CARUSO: I'm sorry, Justice Souter.

1 QUESTION: Doesn't that reference to State tax laws
2 refer to the specific provisions for the Hawaiian plans?

3 MR. CARUSO: I think it refers to the Hawaiian plan, but
4 what it says is, it kind of mirrors the language of the
5 preemption clause and says State tax laws that relate to plans
6 shall not -- shall be preempted, in essence. I'm
7 paraphrasing.

8 And I think the concern there was that the Hawaii -- the
9 dispensation for the Hawaii plan might have created some
10 indications that there were certain tax aspects of the Hawaii
11 plan, that in fact Hawaii in some prior litigation involving a
12 prototype of its plan had taken the position that the State
13 enactment there was a tax, and therefore there was some Tenth
14 Amendment protection.

15 There's some indication then that Congress was
16 specifically concerned about the approach being taken by
17 Hawaii in this prior litigation and saw the need to point out,
18 as it did in 1974 when it rejected the executive branch's
19 request that State tax laws be exempted from the preemption
20 provision, that they should not have any charmed existence --

21 QUESTION: Mr. Caruso --

22 MR. CARUSO: -- that they should be treated like any
23 other law.

24 QUESTION: May I ask you a different question? Am I
25 right that your argument assumes the definition of provide as

1 that word occurs in ERISA, and I think you're assuming that
2 provide means provide in any way or by any means, whereas I
3 would have thought that provide means -- in order to have
4 general application, I would have thought that provide meant,
5 provide the means or the funds for the purchase or obtaining
6 of these various kinds of benefits, and if it -- if provide is
7 defined in the latter way, then I take it that would be the
8 end of your argument, but perhaps I don't understand your
9 argument.

10 MR. CARUSO: Of course, I disagree with your definition
11 because I think the term otherwise was being used. Otherwise
12 has a very broad meaning.

13 QUESTION: Okay, but if the definition were as I've
14 suggested, then your argument would fail, I take it.

15 MR. CARUSO: Then I take it you would be saying that the
16 tax is being imposed not on the plan but on a hospital.

17 QUESTION: To put it crudely, to provide means to
18 finance. If that is what provide means in ERISA, then your
19 argument would not -- would not get you to victory in this
20 case.

21 MR. CARUSO: I'm afraid I'm not -- I don't feel that I
22 can concede that point, because I think what Congress was
23 saying is that they have structured a system of national tax
24 exemption. It's very clear, ERISA plans are not subject to
25 taxation under the Federal system, and I think what was

1 intended by the legislative history was, there was an
2 indication by Congress that we're going to not allow the
3 States to tax --

4 QUESTION: No, but on my theory, if we're going to treat
5 pro -- if we're going to treat the word provide as, in effect,
6 synonymous with financing, then it would follow that the
7 taxation here is not on the ERISA plan as the financing
8 authority but, rather, on the ERISA plan wearing a different
9 hat in operating a hospital, and if that's the way we analyze
10 it, then I take it your argument would fail.

11 MR. CARUSO: I mean, that's one way to look at it, but
12 the way I look at it, if Congress said that a State law
13 that -- a State tax law that relates to a plan is preempted,
14 and the plan is the party that's paying that tax on the
15 activities that make it a plan, then I would submit that if
16 this type of law is not preempted, I don't know what other
17 type of tax --

18 QUESTION: So in other words, if they have a travel
19 bureau, if they decide in the -- the ERISA plan decides to set
20 up its own travel agent to arrange for employee vacations, and
21 there's a uniform tax in the State on travel agents, it
22 doesn't have to pay.

23 MR. CARUSO: That -- we would take the position that
24 that doesn't involve the activities of the plan as a plan.

25 QUESTION: Well, why -- so if they have to pay that if

1 they set up a travel bureau to arrange for employee vacations,
2 why do they have to -- how do they get out of paying when they
3 set up a hospital to provide the employee medical treatment?

4 In both cases it's something that a plan normally buys --

5 MR. CARUSO: Right, but it's not --

6 QUESTION: -- from others, but in this particular
7 instance it provides it itself.

8 MR. CARUSO: But it isn't buying it here. I mean, there
9 seems to be this understanding on the part --

10 QUESTION: It isn't buying it with the travel agent
11 either. It's their own travel agent.

12 MR. CARUSO: But when -- a travel agency may have one
13 point, but in the case of a clinic that we operate, this is
14 not like a commercial clinic. We don't open this clinic to
15 the public. We're limiting these operations only to our
16 ERISA-covered participants.

17 QUESTION: Mr. Caruso, it says through insurance or
18 otherwise. Suppose your plan decided to provide its health
19 benefits through insurance, and instead of buying insurance
20 from anybody, it ran its own insurance company. Would State
21 insurance laws not apply?

22 MR. CARUSO: Well, we're getting into the other area
23 where we get into the --

24 QUESTION: It's exactly parallel. Through insurance or
25 otherwise. You're doing it otherwise, and you say since we're

1 doing it otherwise, the State laws that regulate the otherwise
2 don't apply. Suppose you did it through insurance? Would the
3 State laws governing insurance apply? You became your own
4 insurance company.

5 MR. CARUSO: I would say no, because there's a --
6 there's the deemer clause in ERISA itself which says that the
7 State may not consider an ERISA plan an insurance company for
8 purposes of insurance regulation, so this issue here where --

9 QUESTION: Well, but --

10 QUESTION: You wouldn't need it, then.

11 QUESTION: That really means the -- where you haven't
12 set up an insurance company, the deemer clause.

13 MR. CARUSO: It's where your -- there is insurance
14 regulation that the State is trying to apply to the fund as an
15 insurer. It's taking the position, well, this is really
16 insurance regulation, and I think Congress has specifically
17 said in that situation when you're the direct provider of
18 insurance, in essence --

19 QUESTION: Right --

20 MR. CARUSO: -- you've got a different status --

21 QUESTION: You wouldn't have to say that.

22 MR. CARUSO: -- as opposed to going out and purchasing
23 it.

24 QUESTION: Why was the deemer clause put in the statute
25 if, as you tell us, it is clear from the general preemption

1 provision that if you're providing insurance directly you
2 can't be regulated, just as if you're providing otherwise
3 directly you can't be regulated?

4 I mean, it seems to me that they envisioned insurance,
5 but they said elsewhere in the statute the States aren't going
6 to regulate you.

7 MR. CARUSO: Well, in the insurance area --

8 QUESTION: As an insurer, okay.

9 MR. CARUSO: In the insurance area they specifically say
10 insurance regulation.

11 QUESTION: But what about the otherwise? The otherwise
12 is hospitals. That's the most obvious way.

13 MR. CARUSO: Right.

14 QUESTION: But it doesn't say in a deemer clause, shall
15 not be deemed to be a hospital.

16 MR. CARUSO: I understand that. They didn't do it there
17 because Congress didn't envision that a State was going to be
18 taxing the operations of a plan when the plan was directly
19 providing services as a plan. There was no need for it to say
20 that we have to deem it not to be a hospital, because a plan
21 is a hospital.

22 And I understand that under Justice Souter's definition
23 that if provide means only to finance, then I think perhaps
24 the result would be different, but I'm suggesting to you that
25 the word otherwise allows plans to do more than just pay

1 insurance or provide financing, but rather to actually engage
2 in the provision of the services directly.

3 QUESTION: But you do agree that the plan-operated
4 medical center would be subject to regulations, the State
5 qualifications for physicians, for staff people --

6 MR. CARUSO: We're not suggesting otherwise. I mean,
7 again, it's not our case. It hasn't arisen yet. Maybe it's
8 an area that may have to be addressed at some later time to
9 see whether ERISA can be read to indicate that Congress had an
10 intent to restrict regulation in that area.

11 QUESTION: But I don't --

12 MR. CARUSO: I can't see it.

13 QUESTION: I don't --

14 MR. CARUSO: I don't see it.

15 QUESTION: You don't see which, that --

16 MR. CARUSO: I do not see that anything in ERISA would
17 suggest that the State could not exercise its traditional
18 police powers in regulating health care service.

19 What I say here is, though, that when I look at ERISA
20 there is a specific provision on taxation. What I'm saying,
21 when the tax is being imposed on the plan when the plan is
22 engaging in hospital --

23 QUESTION: But if we take out your tax reference and
24 say, we read that as discrete to this special Hawaii situation
25 so please concentrate on the statute without that provision,

1 then what is your distinction between the tax --

2 MR. CARUSO: I would hope you wouldn't do that, because
3 I think if you looked in 1974, the executive branch actually
4 went to Congress and said to Congress --

5 QUESTION: Well, I'm asking you to do that. And now
6 distinguish for me the taxation from the regulation, without
7 the special reference to taxation that you find.

8 MR. CARUSO: Well, I think there's a direct relationship
9 when the fund is being asked to take some of its assets and
10 provide those assets to the State, to the State's general
11 coffers. I don't think ERISA intended that type of State
12 imposition on ERISA plans. I mean, it's just contrary to the
13 whole structure of tax exemption --

14 QUESTION: Well, it can't just be that it's getting
15 money from the State, from -- and putting it into the State's
16 coffers, because you've already said unemployment
17 compensation, sales tax, that's all okay, even though that
18 comes out of the corpus.

19 MR. CARUSO: I agree with you. What I'm saying, when
20 it's being imposed on the fund's contributions and benefit
21 plans, not on it's incidental activities in providing the
22 services, and I think if you take the position -- what I'm
23 particularly concerned about is if we're going to slice it
24 that thin, that what's to prevent the States from taxing the
25 income of the funds, from tax -- if they're allowed to tax the

1 contributions, that's the corpus. I mean --

2 QUESTION: The line, I think, that they want to draw,
3 the Government, is to say, distinguish between, in the benefit
4 area, that which does the buying, namely the plan, and that
5 which is bought, namely, the benefits, and in the case where
6 you're talking about the latter, by and large you can impose
7 uniform taxes, and if it turns out that in a particular
8 instance the former, namely that which does the buying, itself
9 decides to provide that which is normally bought, it's treated
10 as if it bought it.

11 Now, that's a clear line. It's administrable. It --
12 you take away your horror cases by saying, fine, if they
13 provide a horror tax, that's different, and what line would
14 you provide? I mean, you see, that's the virtue of --

15 MR. CARUSO: Well, if you took that approach, then
16 that's what saying, that --

17 QUESTION: Yes.

18 MR. CARUSO: -- if ERISA -- an ERISA plan cannot be
19 defined as the direct provider. That's what you're in essence
20 saying, that it really becomes the hospital, even though
21 becoming the hospital is what an ERISA plan is supposed to do.

22 QUESTION: Well, they don't always -- they don't
23 necessarily -- the ERISA plan I take it in many instances buys
24 hospital care from others. It doesn't often --

25 MR. CARUSO: It does that on occasion.

1 QUESTION: Yes, well --

2 MR. CARUSO: In that situation then it would be treated
3 like other buyers.

4 QUESTION: So why -- but if you take your position, then
5 what you do is, you simply get the ERISA plans themselves,
6 through a real tax advantage, to start going into the
7 businesses of providing those things which normally would be
8 bought from others, and they'd get a tax break. Why? Why
9 would Congress want that?

10 MR. CARUSO: Because Congress has done it that way, and
11 I think you'll find that if you look at the Metropolitan Life
12 case, that the same type of special status was given to self-
13 insured plans.

14 QUESTION: So your actual answer, if you happen to have
15 an ERISA plan that bought paid vacations for its employees,
16 and they decide to go into the travel business limited to
17 employees, the answer then to the question is, they're tax
18 exempt, right, in your view?

19 MR. CARUSO: Correct.

20 QUESTION: Yes, okay.

21 MR. CARUSO: Correct.

22 QUESTION: But am I correct in understanding you do --
23 you would not make the same argument about regulations such as
24 the requirement of a second opinion of a physician?

25 MR. CARUSO: That's correct.

1 QUESTION: You draw the --

2 MR. CARUSO: That is correct.

3 If there are no further questions, thank you.

4 QUESTION: Thank you, Mr. Caruso.

5 Ms. Smith, you have 5 minutes remaining.

6 REBUTTAL ARGUMENT OF M. PATRICIA SMITH

7 ON BEHALF OF THE PETITIONERS

8 MS. SMITH: Your Honor, the HFA is not a tax on benefit
9 contributions. It's a tax on hospital receipts.

10 The characterization is equally applicable to any time a
11 plan purchases services from any hospital, so when Mount
12 Sinai, a private, nonplan-owned hospital, receives benefit
13 payments from any other plan, Mount Sinai can claim we can't
14 pay the HFA because the plan made these payments. It's a
15 contribution, and therefore it's a tax on plan contributions.

16 While to the plan that makes the payments when they're
17 purchasing services, whether it's health care services or day
18 care services, it may represent a benefit payment, to the
19 taxed entity, to the hospital, to the day care center, it is
20 simply income.

21 Secondly, in these service areas, if you can regulate
22 these entities, you should tax them, you should be able to tax
23 them, because ERISA makes no distinction in its preemption
24 provision between regulatory laws and tax laws.

25 With or without the Hawaii prepaid legal services -- I

1 mean, sorry, the Hawaii prepaid -- yes, health service
2 exemption, State tax laws are treated the same. They are
3 relate -- they are preempted only if they relate-to, and the
4 State's argument is in these service areas you may regulate
5 without regard to ERISA plans, and therefore you may tax in
6 these areas without regard to the fact that ERISA plans are
7 purchasing services in these areas.

8 Finally, Your Honor, outside of these service areas the
9 tax issue is a complicated one, and one which is really not
10 fully addressed in these briefs. For instance, the notion
11 that ERISA plans are carte blanche exempt from Federal and
12 State taxation is simply not correct.

13 I would urge you in this case not to get into a general
14 tax analysis, and the State itself is limiting its argument to
15 the purchase of services and the taxing of services in these
16 areas which are matters of traditional State concerns. It's
17 not necessary to determine whether the States can tax the
18 corpus of trusts. Those are -- present different and perhaps
19 more complicated issues.

20 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Smith.

21 The case is submitted.

22 (Whereupon, at 11:34 a.m., the case in the above-
23 entitled matter was submitted.)
24
25

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:

*BARBARA A. DeBUONO, NEW YORK COMMISSIONER OF HEALTH, ET AL.,
Petitioners v. NYSA-ILA MEDICAL AND CLINICAL SERVICES FUND, ETC., ET
AL.*

CASE NO. 95-1594

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

BY *Donna Maria Federico*-----

(REPORTER)