

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: UNUM LIFE INSURANCE COMPANY OF AMERICA

Petitioner v. JOHN E. WARD

CASE NO: 97-1868 e.2

PLACE: Washington, D.C.

DATE: Wednesday, February 24, 1999

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNUM LIFE INSURANCE COMPANY :

4 OF AMERICA :

5 Petitioner :

6 v. : No. 97-1868

7 JOHN E. WARD :

8 - - - - -X

9 Washington, D.C.

10 Wednesday, February 24, 1999

11 The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States at  
13 11:10 a.m.

14 APPEARANCES:

15 WILLIAM J. KAYATTA, JR., ESQ., Portland, Maine; on behalf  
16 of the Petitioner.

17 EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,  
18 Department of Justice, Washington, D.C.; on  
19 behalf of the United States as amicus curiae  
20 supporting the Petitioner in part and the Respondent  
21 in part.

22 JEFFREY L. EHRLICH, ESQ., Arlington, Virginia; on  
23 behalf of the Respondent.

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

2 (11:10 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in No. 97-1868, UNUM Life Insurance Company of  
5 America versus John Ward.

6 Is it "YOU-num" or "OO-num"?

7 Mr. Kayatta.

8 ORAL ARGUMENT OF WILLIAM J. KAYATTA, JR.,

9 ON BEHALF OF PETITIONER

10 MR. KAYATTA: Mr. Chief Justice, may it please  
11 the Court:

12 This is an action for plan benefits under ERISA.  
13 Now, the plan in question in this case is an insurance  
14 policy. It is not a self-funded plan. Citing this fact,  
15 the Ninth Circuit has determined that certain claim  
16 administration rules in this ERISA plan cannot be enforced  
17 in this Federal action because California courts would not  
18 enforce those same claim administration rules under common  
19 law principles that are regularly applied by California  
20 courts in breach of insurance contract cases.

21 There are two basic flaws to this holding.  
22 First, the Ninth Circuit has disregarded Congress' intent  
23 to create uniform exclusively Federal rules for claims  
24 administration and enforcement without reference to  
25 varying State laws, even State laws that regulate

1 insurance.

2 Second and independently, the Ninth Circuit has  
3 misapplied ERISA's statutory preemption clause by  
4 determining that California's notice prejudice rule is a  
5 rule that regulated insurance and by determining that a  
6 rule of California common law that precludes a plan  
7 administrator from doing what Congress says the  
8 administrator can do does not relate to an employee  
9 benefit plan.

10 QUESTION: Well, you do agree that, even under  
11 ERISA, a State law that satisfies McCarran-Ferguson Act  
12 requirements is not preempted? There is a savings clause?

13 MR. KAYATTA: We agree there is a savings  
14 clause. We do not agree that any law that satisfies  
15 McCarran-Ferguson is automatically saved. You could have  
16 a law that satisfies the definition of business of  
17 insurance that this Court could determine is not a law  
18 which regulates insurance.

19 Secondly and more importantly, this Court has  
20 held in Pilot Life, reaffirmed it in Taylor, and then  
21 again in John Hancock, that even laws that are otherwise  
22 saved under the savings clause are preempted if they stand  
23 as an obstacle to one of Congress' purposes in enacting  
24 ERISA or in a specific provision.

25 QUESTION: Not just the broad general purpose of

1 ERISA, because if you did that wouldn't you have to call  
2 every one of them in favor of the beneficiary, because the  
3 purpose of ERISA was to protect people's insurance,  
4 workers' insurance, right? Isn't that the -- I mean,  
5 ERISA wasn't passed to make life easy for insurers.

6 MR. KAYATTA: ERISA made a number of balances.  
7 One of its primary purposes was to make employers more  
8 likely to have these plans to benefit workers. That is  
9 the major benefit that ERISA produces for employees, and  
10 it has been fabulously successful, in large part because  
11 of what this Court did in Pilot Life.

12 Now, having said that, I agree with you that an  
13 amorphous purpose of ERISA without some clear foundation  
14 in the record is not enough to preempt a law that would  
15 otherwise be saved.

16 QUESTION: Well, what does the savings clause  
17 save? One argument that you made that I thought certainly  
18 would require modification is that if you have a policy  
19 term and it's something written into the policy, that  
20 wipes away the savings clause. And that can't be right.  
21 It's not given to private ordering to do away with the  
22 savings clause.

23 MR. KAYATTA: We agree with that, Your Honor,  
24 and we're not saying that you can do away with the savings  
25 clause. The savings clause -- we also agree that the

1 analysis starts with the presumption that State law is  
2 saved. However, the second stage of the analysis then  
3 says, is this within the savings clause?

4 And the third stage, and this is the stage we're  
5 talking about now, says even if it is within the savings  
6 clause it will not stand, it will be preempted, in certain  
7 circumstances. And the most important circumstance is the  
8 one identified by this Court in Pilot Life and reaffirmed  
9 in Taylor and Hancock, which is when you go to the heart  
10 of ERISA's -- Congress did not do many things in ERISA.  
11 It left the substantive benefits of plans, particularly  
12 welfare plans, totally alone and silent.

13 But what it directed its attention to was  
14 erecting a comprehensive, uniform Federal civil  
15 enforcement scheme modeled after section 301 of the LMRA.  
16 And you cannot -- this Court has held that that purpose is  
17 not to be frustrated.

18 QUESTION: Why couldn't the Federal scheme adopt  
19 the same rule as California? I mean, if this is a  
20 proposition of general contract law in California and  
21 other States, would you have any objection to the Federal  
22 courts -- I mean, let's say we remanded to the Ninth  
23 Circuit and they say: I guess you're right, we shouldn't  
24 have applied this provision of California law; but as it  
25 happens, Federal law's the same way. Would that be all

1 right?

2 MR. KAYATTA: That would -- that would eliminate  
3 one of the problems with what the Ninth Circuit has done.

4 QUESTION: The one you just talked on.

5 MR. KAYATTA: Yes, because now you would be  
6 doing what Congress said for the courts to do and what you  
7 told the courts to do, which is in a 502(a) action apply  
8 the statute and as necessary develop a uniform body of  
9 Federal common law. So if you're now saying, okay, we're  
10 not going to have a Federal court's decision in an ERISA  
11 action as to how to interpret a plan mandated by a State  
12 common law, we're going to develop Federal common law,  
13 then the Court would confront several other questions.

14 One would be are we going to develop a common  
15 law that conflicts with any other substantive provisions  
16 of ERISA, and there are two in particular which the Court  
17 would need to pay attention to. One is that which was  
18 identified by this Court as one of the core aspects of  
19 ERISA, which is the role that the written plan instrument  
20 plays under ERISA. So the Federal court would need to  
21 say, before we go and say that the plan fiduciary must  
22 not, as Congress ordered him, act in accordance with a  
23 written plan instrument, we need to satisfy that there is  
24 some other Federal interest here that would overbear that,  
25 such as for example if you had a facial illegality of a



1 policy that might be a circumstance.

2 The key point is, though, that the analysis  
3 would be one of Federal law and the Federal courts can  
4 look to State law, the Restatement states courts law  
5 around the country, to inform itself as to what the common  
6 law might be on a uniform Federal basis.

7 QUESTION: May I interrupt just for one  
8 question. I just don't know the answer because I don't  
9 have the Act clearly enough in mind. Was the term of the  
10 Act, the term that you just used, "written plan  
11 instrument," as distinct from something like, say, "terms  
12 of the plan," a more generic term?

13 MR. KAYATTA: I do not believe the three words  
14 "written plan instrument" appear in a row. However, what  
15 it says is "written plan document."

16 QUESTION: So it's referring to the words. What  
17 I'm getting at is, and I think you've answered my -- the  
18 question that was in the back of my mind -- is would we  
19 have to say that the terms of the plan as ERISA used it  
20 might be the terms of the plan as modified by applicable  
21 State law?

22 I think your answer implicit in what you said is  
23 no, because ERISA is referring to the document and the  
24 document cannot possibly include an accommodation of State  
25 law, a modification of its terms. Is that fair?

1 MR. KAYATTA: And we're now addressing, if I  
2 understand your question correctly, not to 301, 502 field  
3 preemption that we talked about in the beginning.

4 QUESTION: Right. I'm jumping ahead.

5 MR. KAYATTA: Now we're on to the written plan.

6 QUESTION: Yes.

7 MR. KAYATTA: And I think this Court in Curtiss  
8 Wright captured it this way, that reliance on the face of  
9 the written plan document -- those were this Court's words  
10 -- is one of ERISA's core functional requirements.

11 QUESTION: If ERISA uses the word "document,"  
12 that's -- even without any other explication from us,  
13 that's pretty strong language for your position.

14 MR. KAYATTA: Yes, it is. And ERISA section  
15 404(a)(1)(D) specifically in Congress' words requires that  
16 the fiduciary act in accord with the plan documents.

17 QUESTION: Okay.

18 QUESTION: And the savings clause is shoved  
19 aside, then, every time the plan document -- suppose  
20 California law had said the people who make benefit claims  
21 take time to get their act together, so we are mandating a  
22 two-year proof of claim period, and if insurers put in  
23 their policies anything less than that it doesn't count.  
24 Suppose that were the California law and California said,  
25 we are adopting this to regulate insurance, to regulate

1 insurance sales in this state; insurer, you must give  
2 everybody two years. But in your ERISA plan you have 1  
3 year and 180 days.

4 MR. KAYATTA: The example you pose has not just  
5 the preemption problem, but, because you pick notice  
6 prejudice, it runs head-on into some other provisions of  
7 ERISA. If I understand the thrust of the question, I  
8 think it is a State says you must have this provision in  
9 your policy and an insurance company doesn't do it and  
10 then says: Aha, we don't have it in our policy, the State  
11 law is preempted, and so we get by with this. If that's  
12 the question --

13 QUESTION: My question is this very specific  
14 one.

15 MR. KAYATTA: Yes. Well then, let me address  
16 this very specific one.

17 QUESTION: You must give people two years to put  
18 in a proof of claim.

19 MR. KAYATTA: I do not think that a State could  
20 do that with the specific one, because in that situation,  
21 even though you would have a facial illegality of the  
22 policy if the underlying rule were saved, such as for  
23 example the rule in Metropolitan-Massachusetts, but here  
24 the underlying rule is a dictate to Federal courts as to  
25 how they must enforce or interpret language in the plan,

1 and that --

2 QUESTION: No, it isn't how they interpret it.  
3 It says it's x'ed out of the plan. The plan cannot have  
4 such language. There's nothing to construe. But saved is  
5 the State statute, so the State statute displaces the term  
6 of the plan, just as in Massachusetts-Metropolitan Life.  
7 They didn't cover mental health, the law says, the State  
8 law, says you must cover mental health.

9 So I'm giving you that same situation. It's not  
10 -- the plan is out. The State law is written into the  
11 contract.

12 MR. KAYATTA: All right, if the State law says  
13 you have to have this notice provision in your contract  
14 and the policy does not --

15 QUESTION: Not in your contract. We don't care  
16 whether you put it in your contract. That's the law of  
17 this State.

18 QUESTION: Something else is void.

19 MR. KAYATTA: Well, then, then if the State law  
20 doesn't say that it's improper to have a contract without  
21 this language, it simply says that whatever your language  
22 we're going to deem it to be this --

23 QUESTION: It doesn't say anything about deem or  
24 whatever your language. It says every insured shall be  
25 given by every insurer a minimum of two years to put in a

1 proof of claim.

2 MR. KAYATTA: Well, then the policy would not  
3 comply with the mandatory State insurance statute. In  
4 that situation you would have a facial illegality on the  
5 policy. The question with notice prejudice, however,  
6 would still remain can a State dictate the claims  
7 administration procedures under ERISA, which is --

8 QUESTION: Then you're saying that California  
9 courts, because it's a court-made rule that we're dealing  
10 with, notice and prejudice, they just used the wrong  
11 words. They should have said, our rule is,  
12 notwithstanding anything that's in an insurance contract,  
13 no insurer can claim a delay unless the delay prejudiced  
14 the insurer.

15 MR. KAYATTA: That is what the California rule  
16 essentially says.

17 QUESTION: Yes, that's the rule. But the court  
18 says, now, we want you to understand that if you say  
19 anything to the contrary in your policy that's void.

20 MR. KAYATTA: In effect, that's what the  
21 California common law rule does. But the rule does not  
22 say that no policy can be issued that provides otherwise.

23 QUESTION: Well, would the answer be different  
24 if it did?

25 QUESTION: That seems just caviling.

1 MR. KAYATTA: Well, the answer would -- the  
2 answer to this particular question, we would get over one  
3 hump. We would have a facially illegal policy if it did.

4 QUESTION: Well, let's make it even easier than  
5 that. I don't know how it works in California, but in  
6 many, maybe most, States, the policy terms have to be  
7 submitted to the insurance commissioner before a policy  
8 can be sold using those terms.

9 MR. KAYATTA: That's right.

10 QUESTION: The commissioner says: I won't  
11 approve the policy. No policy gets approved unless it has  
12 these particular terms in it: Time is not of the essence  
13 absent prejudice. And in that case do you concede that we  
14 would not even have the issue in front of us because it  
15 would have been perfectly proper under ERISA for  
16 California to say you can't sell the policy; if they did  
17 sell the policy, it would have the terms in it that we're  
18 arguing about?

19 MR. KAYATTA: In that -- we're not conceding  
20 that, because in that circumstance what California would  
21 be doing is directing its attention not to the 502 issue,  
22 but to the other provisions in ERISA which say and  
23 delegate to the Secretary the authority to promulgate  
24 regulations on claims administration matters. That would  
25 be the problem with a statute that said this, is it would

1 be California saying, no matter what the Secretary says is  
2 a reasonable claims procedure --

3 QUESTION: I see your argument.

4 MR. KAYATTA: So I'm off to a different argument  
5 here, which is why that statute would not work. That  
6 statute -- and that's why --

7 QUESTION: But that's ultimately, I suppose,  
8 your answer to Justice Ginsburg's question, too, then. I  
9 mean, you're not caviling, because you say at the end of  
10 the day, no matter how you do it, if the State purports to  
11 require this term, it is in fact violating the plenary  
12 grant of authority over administration, which is Federal.

13 MR. KAYATTA: Well, I'm saying two things, yes,  
14 and perhaps you're saying it better than I am.

15 QUESTION: I'm sure I'm not.

16 MR. KAYATTA: I think how the State does it does  
17 make a difference, and I can come back to it if you like.  
18 But yes, in either situation it would not be the State  
19 purporting to do something substantive that Congress has  
20 not directed its attention to.

21 QUESTION: Well, supposing that a State wanted  
22 to impose on your client this requirement of notice and  
23 prejudice in submitting claims. Is there any way it could  
24 do it?

25 MR. KAYATTA: Well, practically it certainly

1 could, because any State bar of that sort insurance  
2 companies will comply with.

3 QUESTION: Well, but that's not an answer in a  
4 court.

5 MR. KAYATTA: And as a legal matter, I do not  
6 think a court can dictate -- a State can dictate the  
7 claims administration procedures under an ERISA plan. We  
8 don't get to that question.

9 QUESTION: So what is your answer to my  
10 question, that there is no way a State can legally require  
11 the sort of notice and prejudice with respect to claims  
12 that California has here?

13 MR. KAYATTA: In an ERISA plan, as a matter of  
14 imposing State law, that's correct.

15 QUESTION: So that your case -- there's a lot of  
16 talk in the briefs about this being a common law rule.  
17 That's really irrelevant to your position? It'd be the  
18 same if it were a statute or a regulation of the insurance  
19 commissioner of California; is that correct?

20 MR. KAYATTA: No, it's not, Justice Stevens.

21 QUESTION: I thought you told the Chief it was.

22 MR. KAYATTA: It is not irrelevant because the  
23 fact that it was a common law rule I think means that this  
24 isn't even that case.

25 QUESTION: Yes, but would produce the same



1 result in your view --

2 MR. KAYATTA: Yes.

3 QUESTION: -- whether it were a common law rule,  
4 a statute, or a regulation by an insurance commissioner?

5 MR. KAYATTA: Yes, we would get to the same  
6 result, for a different reason, for a reason that is also  
7 applicable here. But we would lose one of the other  
8 reasons that is applicable here, that being our argument  
9 that a common law rule of this type does not regulate  
10 insurance.

11 QUESTION: I don't understand that because what  
12 business is it of the Federal statute what -- how a State  
13 makes its law, whether the State makes its law through its  
14 courts, through its administrative agencies, through its  
15 legislature.

16 I thought ERISA itself makes that clear, that  
17 the savings clause saves State law, and then it's up to  
18 the State, not the feds, to tell the State how it's going  
19 to go about making its laws. Doesn't ERISA save court law  
20 as well as administrative law as well as -- ERISA doesn't  
21 put a statute on a higher plane than a court decision,  
22 does it?

23 MR. KAYATTA: ERISA defines the term "laws" to  
24 include all laws on that point. But the issue here is  
25 under the savings clause is this a law that regulates

1 insurance. So that poses the question, what did Congress  
2 mean when it says a law which regulates.

3 QUESTION: That's back to Swift against Tyson,  
4 you know, where a statute had one level for diversity  
5 jurisdiction, but that a common law didn't. It seems to  
6 me it would be unusual for Congress to have reimposed that  
7 sort of requirement.

8 MR. KAYATTA: Well, I don't quite see the  
9 analogy, because the issue here is, given that Congress  
10 said a law which regulates insurance, did it have in mind  
11 common laws of this type, particularly --

12 QUESTION: General common laws. Mr. Kayatta, am  
13 I not correct that you would say a statute would be just  
14 as bad under your "doesn't regulate insurance" theory if  
15 the statute were framed not as specifically as Justice  
16 Ginsburg's proposal, but it was a statute which said in  
17 all contracts, not just insurance contracts, in all  
18 contracts either party -- well, time is not of the essence  
19 unless there's prejudice?

20 MR. KAYATTA: That's correct.

21 QUESTION: You would say that that fails for two  
22 reasons, both because it impinges upon the administration  
23 of the scheme which is given to the Secretary and,  
24 secondly, because it does not regulate insurance.

25 MR. KAYATTA: That's correct.

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QUESTION: It's a general statute.

MR. KAYATTA: That's correct.

QUESTION: What's special about this? That is, if I assume, which I think I am at the moment, California has a law and the law says insurance contracts, but not others, that have in them a phrase that says you have to notify us at a certain point can only be read to mean you have to notify us or you still win even if you miss the deadline unless we're prejudiced -- that's the rule, right? That's the rule we're talking about?

MR. KAYATTA: That is the rule.

QUESTION: And it only applies to insurance companies, says the SG. They haven't found one case that applies to anything else.

MR. KAYATTA: Well, by name it only applies to insurance companies.

QUESTION: And they've found no case in their research that says it applies to anything else.

MR. KAYATTA: That's not what they've said.

QUESTION: Well, what I have them as saying is: "Our survey of California law reveals no cases where the State courts applied the notice prejudice rule as such" -

-

MR. KAYATTA: Exactly.

1 QUESTION: -- "outside the" -- oh, "as such"?

2 MR. KAYATTA: Yes, and the reason they say "as  
3 such" is because we've cited in our case, as does the  
4 amicus VACLI, the mechanic' lien case, a notice to a  
5 conservatee case, a real estate case.

6 QUESTION: Okay, okay. Let's now make mine an  
7 assumption. So we assume it's an insurance contract.  
8 Now, we know that insurance contracts, the States regulate  
9 them to death. I mean, that may be good, but I mean they  
10 have dozens and dozens and dozens of regulations. You  
11 have to have big print and you have to have this or that.

12 Well, fine. So what's special about your  
13 regulation? Why does 502, which just says you have to  
14 have a procedure for recovery, suddenly preempt your  
15 regulation when it doesn't preempt any one of a thousand  
16 others that govern when you can recover against an  
17 insurance company, when you can't recover, what their  
18 contract has to say, what print it has to be in, whether  
19 it has to be in English? I like that one.

20 You know, what's special?

21 MR. KAYATTA: Well, what's special is because it  
22 purports to dictate the enforcement and interpretation of  
23 claims administration procedures, and that is the one area  
24 in particular that Congress meant to preempt the field  
25 entirely on.

1 QUESTION: Well, why is it more of a procedure,  
2 a claims administration procedure, to say, insurance  
3 company, your contract allows you to enforce that notice  
4 requirement only when there is prejudice, than to say,  
5 insurance company, that contract means you still have to  
6 pay unless it's written in plain English, unless it has  
7 four-point type, unless? Why is the one procedure, but  
8 the other isn't?

9 MR. KAYATTA: Because we are in a 502(a) action  
10 and Congress said it intended that those actions would be  
11 exclusively Federal actions modeled on 301. In a 301  
12 proceeding you would not bring a --

13 QUESTION: Well, this is a 502 action. It  
14 doesn't mean that there still can't be a rule regulating  
15 insurance, the business of insurance, that is applicable.

16 MR. KAYATTA: If you're talking about a rule --  
17

18 QUESTION: They did bring it under 520.

19 MR. KAYATTA: That's correct, but the rationale  
20 that this court adopted for finding that a 502(a) action  
21 is an exclusive remedy -- and the State law might have  
22 lots of remedies that would be fully applicable in a State  
23 court; you can't bring them, you can't pursue them, you  
24 can't get those damages here -- the rationale was  
25 Congress' instruction that this be modeled after 301.

1           QUESTION: But this isn't a remedy. It's not -  
2   - they're not bringing an action under California whatever  
3 private right of action. They're bringing an action under  
4 ERISA, and they say the statute's got this savings clause  
5 contemplating that there will be in actions under ERISA an  
6 element for State law. And certainly there was a big  
7 impact of State law in the Metropolitan Life. It really  
8 had a much more, at least as far as I can understand it,  
9 much more intrusive impact on the insurance company than  
10 this notice and prejudice.

11           MR. KAYATTA: In Metropolitan Life the Court  
12 enforced an injunction against Metropolitan violating a  
13 State law that required that certain benefits with respect  
14 to which ERISA was silent be included in policies. Here  
15 we have a 502(a) action which is an exclusive remedy.

16           Now, let me address the point that, okay, is  
17 this not a remedy? It's the same remedy; why can't we  
18 have a different rule subsidiary in the pursuit of that  
19 remedy? Well, if you say that, then you have rejected the  
20 rationale for having the exclusive remedy in the first  
21 place, was that plan administrators and courts would be  
22 able to determine the legality of their actions without  
23 looking to varying State law modeling it after 301. And  
24 you could not in a 301 action say, oh, this isn't the  
25 remedy, so we're going to import common law.

1 The Allis-Chalmers case --

2 QUESTION: What State law would govern?

3 Presumably it would be the State law of each claimant?

4 Would that be it? I mean, would more than one State law  
5 apply to this, to this document?

6 MR. KAYATTA: Well, you would first need to do a  
7 choice of law analysis. Then you would need to not only  
8 determine what the State common law is, but then you would  
9 need to perform the type of analysis in every instance of  
10 what is the source of this State law and is it different  
11 enough from general law in that particular State. So  
12 literally you could have one State which has a notice  
13 prejudice rule which simply says, as in all contracts, we  
14 will not enforce these provisions, and in another State  
15 you say we only do it if you trace it back 50 years and  
16 you see it exclusively. This would be a significant  
17 burden.

18 QUESTION: And they can both apply to the same  
19 plan, because -- because the claimants are in different  
20 States.

21 MR. KAYATTA: That's correct, that's correct.

22 QUESTION: 301 doesn't have a savings clause and  
23 that's -- what you're trying to say is the savings clause  
24 cannot operate at all when it comes to plan  
25 administration?

1 MR. KAYATTA: If you say that Congress meant  
2 that we would have 301 here, but with a savings clause,  
3 that's the equivalent of saying we don't have 301, because  
4 everything in ERISA --

5 QUESTION: Yes, but we do have it.

6 QUESTION: We do have the savings clause.

7 MR. KAYATTA: Yes, everything in ERISA preempts  
8 but for that savings clause anyhow. Why, then, does 502,  
9 as this Court found and as Congress intended, have a  
10 special preemptive force by reference to 301? It is  
11 because 301 occupies the field of enforcement and  
12 administration, and in fact was the reason this Court  
13 cited in Taylor for taking the extraordinary step of not  
14 enforcing the well-pleaded complaint.

15 QUESTION: I don't see anything in 502 that  
16 refers to 301.

17 MR. KAYATTA: Congress specifically said that it  
18 intended 502(a) --

19 QUESTION: Where did it say that?

20 MR. KAYATTA: In the committee, the committee  
21 report.

22 QUESTION: Let's talk about the statute.

23 MR. KAYATTA: Well, that's what this Court said  
24 in Pilot Life as well. It specifically referenced that  
25 and came to the conclusion of that, and then in Taylor



1 expanded upon it.

2 If I might, I would reserve the remainder of my  
3 time.

4 CHIEF JUSTICE REHNQUIST: Very well, Mr.  
5 Kayatta.

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

7 ORAL ARGUMENT OF EDWIN S. KNEEDLER

8 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE,  
9 SUPPORTING PETITIONER IN PART AND RESPONDENT IN PART

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

12 I'd like to address several things at the outset  
13 in terms of petitioner's argument that the notice  
14 prejudice rule conflicts with provisions of ERISA itself,  
15 before I get to the insurance savings clause. First,  
16 counsel mentioned or argued that the application of the  
17 notice prejudice rule would be inconsistent with the  
18 requirement that a fiduciary administer the plan in  
19 accordance with its terms. Actually, what section  
20 1104(a)(1)(D) of Title 29 says, it should be administered  
21 in accordance with the documents and instruments governing  
22 the plan "insofar as such documents and instruments are  
23 consistent with the provisions of this subchapter."

24 This subchapter includes the insurance savings  
25 clause. So to the extent the insurance savings clause

1 makes State law applicable to the plan, the administrator  
2 is required to comply with State law in the same way that  
3 the administrator would obviously be required to comply  
4 with Federal law.

5 QUESTION: So the argument based on, in effect,  
6 on the word "document" is essentially a circular argument?

7 MR. KNEEDLER: Yes, because the statute itself  
8 says only insofar as it's consistent with the subchapter,  
9 which itself incorporates State law.

10 The other point that's been argued is that  
11 section 503 of ERISA, which requires plans to have claims  
12 adjudication procedures in accordance with regulations of  
13 the Secretary, somehow occupies the field or ousts any  
14 notice -- any application of a rule like the notice  
15 prejudice rule.

16 And we think that is also incorrect. Section  
17 503 says nothing about the filing of claims. The  
18 Secretary's regulations under section 503 say nothing  
19 about the time period for the initial filing of a claim.

20 QUESTION: Could the Secretary adopt regulations  
21 like the notice prejudice rule and then occupy the field?

22 MR. KNEEDLER: We believe she could, but section  
23 503 and certainly the regulations as they're now written  
24 do not occupy the field. The very first section of the  
25 regulations say that they establish minimum standards for

1 claims, and that appears on page 105A of the appendix.  
2 The regulations establish minimum procedures. They don't  
3 address at all the time period for filing claims. And  
4 most significantly, they provide in three separate  
5 different subsections, (c), (d)(3), and (g)(3), that where  
6 the plan provides for an insurance company to administer -  
7 - to administer the policy, that the claims process --  
8 excuse me -- an insurance company that is subject to  
9 regulation under State law, that the claim may provide for  
10 claims to be adjudicated by the insurance company.

11 So the regulations themselves refer to the fact  
12 that insurance companies are subject to State regulations.

13 QUESTION: Do other States have similar notice  
14 prejudice rules, to your knowledge?

15 MR. KNEEDLER: According to the amicus brief  
16 filed by the National Association of Insurance  
17 Commissioners, 26 States have similar --

18 QUESTION: What about this "as such"? He did  
19 throw me a little bit with that. I mean, you said, well,  
20 really this -- California applies this notice prejudice  
21 rule only to insurance companies. That's how I read your  
22 statement.

23 MR. KNEEDLER: Right. Well --

24 QUESTION: And then Mr. Kayatta said, well, you  
25 said we haven't found a case in California that applies

1 the rule "as such."

2 MR. KNEEDLER: There are -- there are parallel  
3 principles of general contract law that aren't precisely  
4 the same, but that will relieve a party to a contract of a  
5 default.

6 QUESTION: Well, then he says, well, once you  
7 say that, his point is that, well, this is just like, you  
8 know, a rule that says offer is good on acceptance or  
9 something. I mean, it's a general principle of contract  
10 law and that doesn't fall within any special insurance  
11 clause, although of course insurance companies, like other  
12 companies, are bound by it.

13 MR. KNEEDLER: Well, but the important point,  
14 though, is that from the outset -- and this is explained  
15 at some length in respondent's brief. From the outset,  
16 this particular rule has been explained and articulated  
17 and evolved in insurance-specific terms. It is  
18 articulated in terms of notice to the insurer and now the  
19 insurer bears the burden of proof in showing an absence of  
20 prejudice, which is an insurance-specific burden of proof  
21 rule.

22 QUESTION: It's not just a branch, then, of the  
23 condition subsequent law?

24 MR. KNEEDLER: Right, no. It has been  
25 articulated from the outset. All the California cases,

1 and there is a wealth of them, show that it is an  
2 insurance-specific rule.

3 QUESTION: And we have a court of appeals  
4 holding to that effect.

5 MR. KNEEDLER: Yes, we have a court of appeals  
6 holding to that effect.

7 QUESTION: Interpreting State law.

8 MR. KNEEDLER: Right, and this Court --

9 QUESTION: Which we presume is correct.

10 MR. KNEEDLER: That's correct, and the District  
11 of Columbia Circuit also interpreted specifically the  
12 California notice prejudice rule as being an insurance-  
13 specific rule. This Court does normally defer to a court  
14 of appeals rule or interpretation of State law.

15 It's also quite clear that a State common law  
16 rule can regulate. That's been clear in this Court's  
17 preemption cases and other areas -- Garman, Medtronic,  
18 Tripalone, cases like that -- the Court has made clear  
19 that State common law rules may regulate.

20 And also, just one further point on Justice  
21 Breyer's question. If a State passed an insurance-  
22 specific statute that had a rule applicable to insurance  
23 and there was also another statute of the State applicable  
24 to banking that had a similar rule, I don't think that the  
25 law would be rendered not an insurance law since it

1 regulates the terms of an insurance contract.

2 QUESTION: Mr. Kneedler, applying the same  
3 principles, do you think that California's Elfstrom rule  
4 is one that applies general agency principles or is  
5 insurance-specific?

6 MR. KNEEDLER: We believe that that's a general  
7 agency principle, and in fact the respondent doesn't try  
8 to defend it on any other ground, nor did the court of  
9 appeals.

10 QUESTION: Are you going to address whether this  
11 notice prejudice rule is something regulating the business  
12 of insurance?

13 MR. KNEEDLER: Yes, I would like to address  
14 that. In this Court's decision in Metropolitan Life, the  
15 Court really went through a two-step analysis. The first  
16 and I think primary focus should be on whether the law is  
17 one regulating insurance within a commonsense or  
18 straightforward meaning of that term. And in Metropolitan  
19 Life the Court held that a mandated benefits provision to  
20 be included in the contract of insurance regulates  
21 insurance within a commonsense understanding of that term,  
22 and specifically focused on the fact that "contract of  
23 insurance" is one of the phrases mentioned in the deemer  
24 clause and that that was the sort of thing intended to be  
25 saved to the States under the insurance savings clause.

1           The notice prejudice rule is directly parallel  
2 to that. You could look at it either as a mandatory term  
3 in a contract, in effect, that untimeliness will not be a  
4 ground for rejecting the claim unless there is prejudice,  
5 or that it effectively renders unenforceable a provision  
6 in a contract that has a time limit unless prejudice is  
7 shown.

8           QUESTION: It doesn't alter the allocation of  
9 risks insured against at all. I mean, those other things  
10 do. Those other things say certain risks the insurance  
11 company is going to have to take. That is, certain  
12 aspects of the risk insured against. The risk insured  
13 against here is not the risk of how late you make the  
14 claim.

15           MR. KNEEDLER: But we do not believe that that  
16 is essential. And even where the Pireno factors apply  
17 under the McCarran-Ferguson Act directly, the Court has  
18 said that no one factor is dispositive. We don't think,  
19 particularly since the phrasing of the insurance savings  
20 clause seems to us to be broader -- it talks about laws  
21 regulating insurance, not regulating the business of  
22 insurance -- that those factors have to be applied  
23 literally.

24           I think it's important to look at the Court's  
25 decision in FMC versus Holliday, where the Court held that

1 a State law, anti-subrogation law, regulates insurance  
2 within the meaning of the insurance savings clause, and  
3 that certainly did not allocate the risk, the initial risk  
4 for the injury or the occurrence. What it did was simply  
5 say that if the insured recovers on a policy against the  
6 wrongdoer that there is no recovery from the insurance  
7 company on that.

8 So we think the commonsense view of it is that,  
9 at least if the issue concerns something that is in the  
10 contract of insurance -- and this Court said in  
11 Metropolitan Life, referring to the National Securities  
12 case, that the relationship between the insured and the  
13 insurer, the contract of insurance and its enforcement,  
14 are at the very core of what Congress intended to save to  
15 the States under the insurance -- excuse me, under  
16 McCarran-Ferguson.

17 We think the contract of insurance and the  
18 relationship between the insured and the insurer is at the  
19 core here as well of what Congress intended to save to the  
20 States. There's no question that the notice prejudice  
21 rule goes to the relationship between the insured and the  
22 insurer and goes to the enforceability, one of the  
23 important things saved to the States, of the contract  
24 provision that is included within, either included within  
25 the contract or is rendered unenforceable in the absence



1 of a showing of prejudice.

2 I would like to -- no the Elfstrom rule, the  
3 second point of the case, we do believe that the Elfstrom  
4 rule very clearly does relate to an ERISA plan.

5 QUESTION: What is the rule? On the one hand,  
6 the rule is, it seems to be a rule of law that the  
7 employer is always the agent of the insurance company, but  
8 the Ninth Circuit didn't treat it that way.

9 MR. KNEEDLER: The Ninth Circuit seemed to treat  
10 it more as a factual question under general agency law,  
11 and that's why we believe it is not -- that it is not  
12 saved. But we do believe that it could be applied as a  
13 matter of Federal common law.

14 QUESTION: Do you know which it is in  
15 California? Is it a rule of law or is it a matter of  
16 fact?

17 MR. KNEEDLER: I actually think it's a  
18 combination of the two, because it depends on the  
19 predicate fact that the employer has actually assumed some  
20 responsibilities for administering the contract.

21 QUESTION: Well, if we're going to believe the  
22 Ninth Circuit for one thing, why don't we believe them for  
23 the other one?

24 MR. KNEEDLER: Well, the Ninth Circuit did not  
25 say that it was --

1 QUESTION: Well, you say they treated it that  
2 way. Did they treat it as something that they shouldn't  
3 have treated it as?

4 MR. KNEEDLER: Well --

5 QUESTION: I mean, I think we have to assume  
6 that they applied the State law properly.

7 MR. KNEEDLER: For these purposes, we don't  
8 think it matters whether it's law or fact. It is a rule  
9 of general applicability and not focused on the insurance  
10 contract.

11 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
12 Kneedler.

13 Mr. Ehrlich, we'll hear from you.

14 ORAL ARGUMENT OF JEFFREY L. EHRLICH

15 ON BEHALF OF RESPONDENT

16 MR. EHRLICH: Mr. Chief Justice and may it  
17 please the Court:

18 I think the place to start is back with the  
19 savings clause in ERISA, where Congress said that any law  
20 of any State that regulates insurance would be saved from  
21 preemption. As I hear UNUM's argument, they are trying to  
22 define or add conditions to this by redefining the notice  
23 prejudice rule or the savings clause to exclude a rule  
24 that they characterize as administrative.

25 But in our view the notice prejudice rule can't

1 be accurately described as administrative, because it  
2 changes a condition precedent for coverage under the  
3 policy. The policy said that Mr. Ward had to make a claim  
4 within a particular period of time and if he didn't do so  
5 UNUM wouldn't have to pay.

6 QUESTION: Is that a question of coverage or a  
7 condition for the payment of benefits? I mean, when we  
8 usually talk about coverage under the policy we usually  
9 refer to the substantive terms -- what kinds of injuries,  
10 disabilities, and so on are covered. Is it fair, then, to  
11 characterize it as a coverage provision?

12 MR. EHRLICH: Justice Souter, I believe it is  
13 fair because in its effect it determines whether or not  
14 the coverage is available to the claimant in this  
15 situation, and the State has changed it. UNUM admits that  
16 the notice prejudice rule alters the terms of its policy,  
17 and in fact it's that alteration that forms the entire  
18 basis of its claim that there's a conflict with section  
19 502.

20 QUESTION: Well, it alters the terms, but it  
21 doesn't necessarily alter the coverage. I mean, the two -  
22 - the terms include more than what the coverage is. They  
23 include, you know, when you have to apply.

24 MR. EHRLICH: Well, there's no doubt that Mr.  
25 Ward --

1           QUESTION: Where you have to mail your notice,  
2 is that -- is that a coverage provision?

3           MR. EHRLICH: No, I wouldn't say that's a  
4 coverage provision. But here UNUM has treated the claims  
5 provision or the requirement in its policy that if you  
6 don't meet it we don't have to pay your claim. So that  
7 goes directly to whether coverage exists for Mr. Ward, and  
8 California has said that that kind of --

9           QUESTION: They could say the same thing about  
10 the wrong address: You sent your thing to the wrong  
11 address and therefore you're not covered. So that's a  
12 coverage provision, too.

13          MR. EHRLICH: I don't know that -- the word  
14 "coverage" is not what Congress put in the savings clause.  
15 It says "any law that regulates insurance." So even if  
16 the notice prejudice rule is seen as a rule that somehow  
17 only applies to the administration of the policy, I'm not  
18 sure that that suddenly automatically means that it's not  
19 within the scope of the savings clause.

20          I have a great difficulty, I think UNUM has  
21 great difficulty, or would have difficulty, in trying to  
22 square its argument with the Court's holding in FMC, where  
23 the Court said that the anti-subrogation law, which  
24 doesn't affect the coverage of the policy -- the insurer  
25 still has to pay, but may be entitled after the fact to

1 recover what it paid from the insurer -- the insured, if  
2 the insured can recover it from a third party. And  
3 Pennsylvania passed a law saying you can't have that kind  
4 of term.

5 And the Court said that that law invalidated the  
6 subrogation provisions and therefore it controlled the  
7 terms of the insurance policy and therefore it was a law  
8 that regulated insurance.

9 QUESTION: Doesn't that -- doesn't that change  
10 the scope of the insurance company's risk? I mean, he's  
11 at risk only if, only if money to cover the loss is not  
12 collected from somebody else.

13 MR. EHRLICH: The insurance -- the risk to the  
14 insured is the same, Justice Scalia. The person is  
15 injured, the person goes to the insurance company, and the  
16 insurance company pays the claim. After the fact, if  
17 there is some other pocket that the injured person can  
18 recover from, then the insurance company may stand to be  
19 reimbursed. But it doesn't change --

20 QUESTION: Well, but the insurance company's  
21 risk is considerably changed.

22 MR. EHRLICH: My understanding is that the risk,  
23 the transfer of risk, goes to what the insured must no  
24 longer be responsible for.

25 QUESTION: No, I think it goes to the allocation

1 of risk between the two.

2 QUESTION: You can also say that the risk is  
3 changed if some claims that have come in late have to be  
4 paid or if they're not. I mean, if you want to press the  
5 thing.

6 MR. EHRLICH: I think that's right, and in the  
7 Fabe decision the Court's position was that a statute, an  
8 Ohio preference for insureds who have the misfortune of  
9 having their insurance company go into receivership, was  
10 sufficiently addressed to the spreading of risk because it  
11 assured that the policy would be performed in  
12 circumstances where it otherwise might not be performed.  
13 And that's really, the notice prejudice rule can be  
14 described in the same way.

15 QUESTION: He would like to describe it, I take  
16 it, as simply a branch of contract law, where courts have,  
17 with contracts of adhesion for example, tried to make  
18 certain that defendants can't avoid their bargain through  
19 what courts have considered a number of technicalities,  
20 and therefore because this is simply a branch of that  
21 broader law and really no different from that broader law,  
22 and because it's so carefully, it's so closely bound up in  
23 when a judge will permit a plaintiff to -- a defendant to  
24 assert a certain kind of claim, it's like court  
25 administration. It's like -- I'm trying to get you to

1 focus on what I think is the characterization of it that  
2 would help him, so that you can reply to that.

3 MR. EHRLICH: I want to be very careful in  
4 responding to your question, Justice Breyer, not getting  
5 hung up in "as such," because the notice prejudice rule is  
6 not just a branch or an application of a broadly applied  
7 principle. California courts have applied it only in the  
8 insurance context. And if you are a party to any kind of  
9 other contract in California, a mortgage, a lease, any  
10 other kind of contract, and you miss a notice deadline in  
11 the policy, you have no assurance. You cannot come into  
12 court in California and say, oh, there's a rule that means  
13 I don't have to comply with this notice unless the other  
14 party who's trying to enforce it can bear the burden of  
15 showing substantial prejudice.

16 That rule, that kind of categorical application,  
17 only applies in California to insurance policies, and  
18 that's why it's not accurate to say, well, this is really  
19 just Restatement section 229. In all of the other  
20 contexts, if a party is trying to assert that principle  
21 that there's a disproportionate -- forfeiture would be  
22 disproportionate or apply Restatement section 229, you'd  
23 have to come before the court in a case by case basis,  
24 invoke the court's discretion or equity that in the terms  
25 of that particular contract the equities are with you,

1 that it's not a material term of the contract, and you  
2 would be the person that would have to bear the burden.

3 But here California by rule has categorically  
4 changed it and the rule only applies in insurance  
5 policies. And although UNUM has cases where the words  
6 "notice" and the words "prejudice" appear fairly close to  
7 each other, there's no notice prejudice rule.

8 QUESTION: Suppose, suppose the Secretary  
9 decided that this just makes the administration of plans  
10 impossible, that every plan administrator has to figure  
11 out what the law is in 50 different States and go through  
12 the same job of determining whether it is narrowly applied  
13 to insurance or it's a general law and so forth, and he  
14 says: We're going to adopt a rule that'll apply to all.  
15 Can the Secretary do that, to all plans?

16 MR. EHRLICH: So as I understand your question,  
17 would it be valid if the Secretary under its authority  
18 under section 503 adopted a rule, and would that preempt  
19 the field?

20 QUESTION: Yeah. How could it preempt the field  
21 when you have this express exemption for State laws  
22 regulating insurance?

23 MR. EHRLICH: That would -- I think that's  
24 correct. I think that the Secretary's power to promulgate  
25 regulations --



1 QUESTION: Of course, the government doesn't  
2 like that. The government wants to have it both ways.  
3 But it seems to me that if this is indeed the regulation  
4 of insurance the Secretary has no control over it.

5 MR. EHRLICH: The Secretary's power is obviously  
6 delimited by the terms of what Congress gave the Secretary  
7 in ERISA and what Congress -- part of what the Secretary  
8 has to work with is the fact that laws that regulate  
9 insurance are saved.

10 QUESTION: But I mean, you know, that doesn't  
11 help your case a whole lot, because that means that there  
12 could be all sorts of different rules in different States  
13 pertaining to the administration of insurance plans, and  
14 they would all be applicable.

15 MR. EHRLICH: Well --

16 QUESTION: And it could make -- it's clear that  
17 Congress wanted administration of these plans to be  
18 simple.

19 MR. EHRLICH: I suppose that when the rule --  
20 there are rules of administration and rules that go  
21 directly to whether the claim's going to be paid. It  
22 seems to me that here this rule is really no different  
23 than the rules that the Court has already found regulate  
24 insurance, such as the anti-subrogation statute.

25 And in the National Securities case, when the

1 Court defined for the purposes of the McCarran-Ferguson  
2 Act what the scope of the business of insurance was, the  
3 Court said that if it's a rule that addresses the  
4 relationship between the insurance company and its insured  
5 or if it goes to the type of contract that can be issued,  
6 its reliability, its enforcement, or its interpretation,  
7 that's within the scope of the business of insurance.

8 It seems that the Court should apply the same,  
9 or that Congress would no doubt -- that was said before  
10 ERISA was enacted -- and when Congress put a savings  
11 clause in that let States regulate insurance, that it must  
12 have known that that might create some disuniformities.  
13 And the Court has recognized that in Metropolitan Life.

14 I don't see any conflict here between the  
15 ability to change the terms of the contract under the  
16 savings clause and then the power to enforce the contract  
17 once it's been changed or permissibly altered. That  
18 argument, which UNUM makes, would completely swallow up  
19 Metropolitan Life and the FMC versus Holliday case, where  
20 in neither of those cases did the insurance -- well, in  
21 one case, in Metropolitan Life, the policy did not contain  
22 the mandated benefit provision. And in FMC, the policy  
23 contained a provision that was unenforceable. And in both  
24 cases, if it's saved it would be enforced.

25 Under UNUM's approach, the savings clause would

1 just disappear because any time the State exercised the  
2 power that Congress gave it to regulate insurance and  
3 changed or altered the terms of the policy, then there  
4 would be a conflict and it would not be enforceable.

5 So I don't see any conflict with 502, and  
6 obviously the government doesn't see any, either.

7 I guess I would part also company with UNUM's  
8 attempt to rely on this three-part Pireno factor that the  
9 Court developed in a different context, which was to  
10 decide whether the State law -- I'm sorry, whether a  
11 particular business practice regulates the business of  
12 insurance. UNUM has changed the test and substitutes the  
13 word "law" for "business practice," and as a result UNUM's  
14 formulation would be: Does this law constitute the  
15 business of insurance? And that's not the test under  
16 ERISA.

17 The test is whether it's a State law that  
18 regulates insurance. And as the Court in Fabe recognized,  
19 the category of laws that regulate the business of  
20 insurance is necessarily broader than simply the business  
21 of insurance, and UNUM is confusing its tests here.

22 So in our view, where the State has changed the  
23 terms of the insurance policy, as it did in FMC, as it did  
24 in Metropolitan Life, and the Court held that common sense  
25 dictated it was regulating insurance, the same rule is

1 applicable here.

2 QUESTION: Are you going to address the Elfstrom  
3 rule?

4 MR. EHRLICH: I have very little to add to the  
5 Elfstrom rule than what we've already said in the briefs,  
6 and so I would ask the Court to simply resolve the case by  
7 reaffirming what it said in Metropolitan Life, which is if  
8 a State law regulates insurance it's saved, and that the  
9 Court will not read limitations --

10 QUESTION: I didn't know that you were making  
11 that particular argument. Elfstrom -- well, maybe you  
12 are. It's my confusion about what the Elfstrom rule is.  
13 I thought you said -- didn't the Ninth Circuit say it  
14 didn't relate to --

15 MR. EHRLICH: That's right, that was the Ninth  
16 Circuit's view.

17 QUESTION: The Ninth Circuit didn't say anything  
18 about the savings clause.

19 MR. EHRLICH: No, Your Honor. I apologize. I  
20 didn't mean to indicate at all that I said that the  
21 Elfstrom rule or the general agency principles that the  
22 Ninth Circuit applied were saved.

23 QUESTION: But you just said something about  
24 savings, and that wasn't --

25 MR. EHRLICH: I was trying to wind up and sit

1 down, Your Honor.

2 (Laughter.)

3 QUESTION: But the Council of State Governments  
4 did say something about savings in Elfstrom, and your  
5 brief doesn't pick that up. Your brief just talks about  
6 it doesn't relate to.

7 MR. EHRLICH: I don't -- I didn't understand the  
8 government's position to be that the Elfstrom rule was a  
9 rule that regulated insurance.

10 QUESTION: No, I'm not talking about the SG.  
11 I'm talking about the Council of State Governments. They  
12 filed a brief on your side.

13 MR. EHRLICH: Yes. Yes, they did. Yes, Your  
14 Honor.

15 QUESTION: And they said they think that this is  
16 a law that regulates insurance and therefore it's saved.

17 MR. EHRLICH: Justice Ginsburg, we didn't make  
18 that argument because we were troubled by the fact that  
19 what the Ninth Circuit appeared to apply were generally  
20 applicable rules, and so it looked to us maybe too much  
21 like the situation in Pilot Life, where the Court said  
22 that a rule that was generally applicable in all cases  
23 wouldn't be specifically directed at insurance. So we  
24 didn't make that argument.

25 QUESTION: But you did make the argument that

1 the Ninth Circuit really didn't apply Elfstrom, which I  
2 find very difficult to follow in view of the language of  
3 the Ninth Circuit. It said Elfstrom, Elfstrom, Elfstrom.

4 MR. EHRLICH: It was difficult, Your Honor. But  
5 in our view, as I read the California Supreme Court's  
6 decision in Elfstrom, the court established that if the  
7 employer assumed these administrative duties then as a  
8 matter of law it was the agent. The Ninth Circuit  
9 remanded for a factual finding.

10 QUESTION: To see if it had assumed the duties.

11 MR. EHRLICH: Well, another clue to what we view  
12 as the way the Ninth Circuit read the Elfstrom rule was  
13 the discussion of the Oregon case where the Ninth Circuit  
14 sort of harmonizes Elfstrom and all other rules that are -  
15 - might initially seem at odds with each other, and comes  
16 out saying that Elfstrom is one end of a continuum and  
17 there are other cases on the other end of the continuum.  
18 And actually we read Elfstrom to require no more -- I'm  
19 not saying it right because I hadn't focused on this. But  
20 the Ninth Circuit reformulated the Elfstrom rule so that  
21 it was no longer a categorical rule where you simply said,  
22 well, if the employer is the administrator then it's the  
23 agent, and instead it said we look to the facts of the  
24 matter on a case by case basis.

25 QUESTION: Is it your view that if you win on

1 the notice prejudice rule we don't have to fuss with the  
2 Elfstrom rule?

3 MR. EHRLICH: That is our view.

4 QUESTION: That's the heart of your argument, if  
5 I got the message.

6 MR. EHRLICH: That is the heart of our argument,  
7 yes. And with that --

8 QUESTION: And that's a good time to sit down.

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
10 Ehrlich.

11 Mr. Kayatta, you have three minutes.

12 REBUTTAL ARGUMENT OF WILLIAM J. KAYATTA, JR.

13 ON BEHALF OF PETITIONER

14 MR. KAYATTA: Thank you, Your Honor.

15 Subrogation, an anti-subrogation rule, is  
16 classic risk-spreading. It says who has the primary risk,  
17 who has the secondary risk. It says as between the  
18 insurer, the insured, a tortfeasor, and another insurance  
19 company, who will have the primary risk-bearing when it  
20 comes to the loss.

21 Deferring -- the Court does defer to considered  
22 decisions, particularly repeated ones as in Bishop and  
23 Runyon, of the circuit courts regarding State law. But it  
24 is something different to defer to the Federal legal  
25 conclusion given to that State law. Here the issue is

1 under Federal law is the California law, whatever it might  
2 be, sufficiently specific or sufficiently general to fall  
3 on the applicable side of the line, and I don't think that  
4 that's something --

5 QUESTION: So the question isn't the content of  
6 the State law. It's what the State law -- how the State  
7 law qualifies as a matter of Federal law.

8 MR. KAYATTA: That's correct.

9 QUESTION: Which we can re-examine de novo.

10 MR. KAYATTA: That's correct.

11 And then secondly, I think we have to be very  
12 careful about simply adopting a provision that says  
13 essentially everything that's in the Restatement of  
14 Contracts or Trusts, as long as it is given an insurance-  
15 specific name and applied and adopted repeatedly in  
16 insurance cases, where it will be applied the same each  
17 time because insurance policies by State law often have  
18 the exact same language, so you will get -- and they  
19 happen to be the source of a lot of litigation -- so you  
20 will get lots of these cases having the same name. And  
21 that would cover essentially the entire Restatement of  
22 Contracts.

23 QUESTION: But that would -- I know you said  
24 this is not like McFadden, but there's lots of things that  
25 regulate insurance, like false and deceptive selling



1 techniques and representations in policies, that are in  
2 insurance codes of fair practices, and they surely have  
3 common law derivation just like here. So they become not  
4 -- they don't regulate the business of insurance if they  
5 have a strong common law underpinning?

6 MR. KAYATTA: I agree you have to -- there is a  
7 spectrum here and we need to draw a line someplace. I  
8 think when we're talking about something that is a  
9 classic, it's in the Restatement of Contracts and it's  
10 simply applied here and it varies from State to State the  
11 label being given to it, how administrators are then to  
12 apply that creates such a burden on administrators where  
13 they were supposed to not have to refer to State law, much  
14 less try to determine is the label dispositive.

15 QUESTION: Well, now you're shifting to  
16 something else. You're shifting away from the common law  
17 derivation. But I was thinking all of consumer protection  
18 law has some roots in the common law.

19 MR. KAYATTA: That would then lead us, if we  
20 follow that to its end, that leads us to a conclusion that  
21 there is no limit to this definition.

22 QUESTION: What you're saying is that half of  
23 what's in an insurance code doesn't count because it's  
24 derived from the common law, but applied to, specifically  
25 to the insurance industry.

1 MR. KAYATTA: I'm saying that I don't think the  
2 rule could be at either end of the spectrum. I don't  
3 think we could have a rule that says if it's at all, in  
4 any respect analogous to anything in the common law, then  
5 it's not directed. Conversely, I don't think --

6 CHIEF JUSTICE REHNQUIST: Your time has expired,  
7 Mr. Kayatta.

8 The case is submitted.

9 (Whereupon, at 12:05 p.m., the case in the  
10 above-entitled matter was submitted.)  
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## 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:

UNUM LIFE INSURANCE COMPANY OF AMERICA Petitioner v. JOHN E. WARD  
CASE NO: 97-1868

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

Mark T. Egan