

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

CAPTION: AMERICAN MANUFACTURERS MUTUAL INSURANCE  
COMPANY, ET AL., Petitioners v. DELORES SCOTT  
SULLIVAN, ET AL.

CASE NO: 97-2000 C. 2

PLACE: Washington, D.C.

DATE: Tuesday, January 19, 1999

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   AMERICAN MANUFACTURERS                   :

4       MUTUAL INSURANCE COMPANY,           :

5       ET AL.,                               :

6                   Petitioners               :

7           v.                               :   No. 97-2000

8   DELORES SCOTT SULLIVAN, ET AL.       :

9   - - - - -X

10   Washington, D.C.

11   Tuesday, January 19, 1999

12                   The above-entitled matter came on for oral  
13   argument before the Supreme Court of the United States at  
14   10:02 a.m.

15   APPEARANCES:

16   MICHAEL W. McCONNELL, ESQ., Chicago, Illinois; on behalf  
17       of the Petitioners.

18   MALCOLM L. STEWART, ESQ., Assistant to the Solicitor  
19       General, Department of Justice, Washington, D.C.; for  
20       the United States, as amicus curiae, supporting the  
21       Petitioners.

22   LORALYN McKINLEY, ESQ., Philadelphia, Pennsylvania; on  
23       behalf of the Respondents.

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On behalf of the Petitioners	3
MALCOLM L. STEWART, ESQ.	
For the United States, as amicus curiae,	
supporting the Petitioners	18
LORALYN McKINLEY, ESQ.	
On behalf of the Respondents	25



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

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in No. 97-2000, American Manufacturers  
5 Mutual Insurance Company v. Delores Scott Sullivan.

6 Mr. McConnell.

7 ORAL ARGUMENT OF MICHAEL W. McCONNELL

8 ON BEHALF OF THE PETITIONERS

9 MR. McCONNELL: Mr. Chief Justice, and may it  
10 please the Court:

11 As you know, in this case there are two  
12 questions presented, one having to do with the State  
13 action doctrine, one having to do with procedural due  
14 process. And although my clients could prevail on either  
15 of these theories, I'd like to begin by urging this Court  
16 to reach both of these questions.

17 Certainly the Court has authority to reach both  
18 because even if the private insurance companies are found  
19 to -- not to be State actors and, thus, to have no further  
20 liability in the case, there do remain other parties in  
21 the case, the Commonwealth of Pennsylvania, and the School  
22 District of Philadelphia, and they are -- they are  
23 certainly affected by the due process holding in and of  
24 itself. But more important --

25 QUESTION: Have they petitioned, Mr. -- Mr.

1 McConnell?

2 MR. McCONNELL: They did petition. Their  
3 petitions were denied. They are, of course, parties in  
4 this Court pursuant to this Court's rules.

5 More important, from our point of view, is the  
6 effect upon the system in Pennsylvania were this Court to  
7 leave -- to affirm on the State action question but to  
8 leave the due process holding of the Third Circuit in  
9 place.

10 There is a single, comprehensive, integrated  
11 workers' compensation system in Pennsylvania that involves  
12 both government employers and private employers, both  
13 private insurance companies and a government insurance  
14 company with exactly the same rules and obligations  
15 applying to all of them and, very importantly, with risk  
16 sharing among them in the form of assessments that are --  
17 that are put into a fund for the purpose of dealing with  
18 the -- with the risk of providing -- of medical providing  
19 of unnecessary and unreasonable care. Should --

20 QUESTION: Mr. McConnell, from what you've said,  
21 it seems to me that if the due process question were  
22 decided in your favor -- as you mentioned, you have the  
23 State insurance fund in there and public employers. If  
24 the due process question is decided in your favor, isn't  
25 the State action question academic?

1 MR. McCONNELL: Your Honor, that may very well  
2 be true. I do think that the State action question is  
3 logically prior, and so I assume that the Court must reach  
4 that question first, but in terms of full relief -- excuse  
5 me.

6 QUESTION: That was the way we decided Jackson  
7 v. Metropolitan Edison. We have the State -- we decided  
8 the State action question first because we thought it was  
9 prior, but we did not go on to decide the due process  
10 question.

11 MR. McCONNELL: Yes, Your Honor, although in the  
12 -- in the San Francisco Athletic case, the Gay Olympics  
13 case, the Court did both decide a State action question  
14 and the First Amendment question which was logically  
15 related to -- to the two. So, the Court -- the Court  
16 certainly has authority --

17 QUESTION: Leaving -- leaving later generations  
18 to say that one-half or the other is dictum.

19 (Laughter.)

20 MR. McCONNELL: Lower courts, fortunately,  
21 aren't free to say that, Justice Kennedy.

22 Well, if I can now turn to the State action  
23 issue. At stake in this doctrinal question is whether to  
24 constitutionalize major aspects of the administration of  
25 workers' compensation and other State mandated but not

1 State provided insurance and employment -- and employee  
2 benefit programs. If these issues involve State action,  
3 then quintessential questions of regulatory policy that  
4 are now decided by private parties subject to regulation  
5 by the State will become the regular business of the  
6 Federal courts.

7 QUESTION: What's your best argument to  
8 distinguish Tulsa Professional Collection? It seems to me  
9 to be one of the cases that's closely on point.

10 MR. McCONNELL: Well, Your Honor, in -- in Tulsa  
11 -- an ordinary private citizen, such as the administrator  
12 of an -- of an estate does not have the power to -- to  
13 end, to cut off the rights of their creditors. That is  
14 not something that private citizens can do on their own.  
15 In Tulsa, they go to the State and the State provides the  
16 active assistance that enables them to accomplish this  
17 result, that is, cutting off their creditors' claims, that  
18 they couldn't do on their own.

19 In our case, by contrast, private companies  
20 regularly withhold the payments to -- pending resolution  
21 of -- of disputes. There's no need for government  
22 assistance. This is something which is done in the  
23 private realm on a regular basis.

24 In fact, what goes on in our case --

25 QUESTION: So, the distinction is between



1 cutting it off all together and simply deferring payment?

2 MR. McCONNELL: Well, Your Honor, it has to do  
3 with -- what the -- what the private party can do is  
4 withhold payment pending some kind of legal process that  
5 comes down the road, which is, of course, the standard  
6 practice with insurance. If you have -- if you're  
7 involved in a fender bender and you have a dispute with  
8 your insurance company, the insurance company will decline  
9 to pay, and then -- and you will have some sort of a cause  
10 of action against the insurance company. That is all  
11 that's going on in this case.

12 In fact, rather than State assistance in this  
13 case, all we have is -- is a limitation on what would  
14 otherwise be the perfectly private right of a private  
15 company to withhold payments pending resolution of a  
16 private dispute. And the Court was very clear in Jackson,  
17 as well as other cases, that regulation of private  
18 activity does not make that activity into -- into State  
19 action.

20 QUESTION: Well, that is true if you focus just  
21 on the specific action here, to wit, failing to pay  
22 benefits while you determine if it's reasonable or  
23 necessary. But if you look at the compensation --  
24 workers' compensation scheme in a broader fashion, it is  
25 true, is it not, that Pennsylvania deprives people of

1 their private State tort action as part of the overall  
2 workmen's comp scheme? Does that bring this any closer to  
3 State action?

4 MR. McCONNELL: Well, Your Honor, workers'  
5 compensation is a substitute for private tort, but that  
6 seems to support our contention that this is private  
7 action. Workers' compensation has a different set of  
8 substantive rules, no-fault liability, instead of  
9 negligence liability, and has a somewhat different set of  
10 procedurals, a streamlined administrative procedure  
11 instead of having to go to court.

12 But in other respects, it remains the liability  
13 of private employers to their workers for work-related  
14 injuries. The obligation is not an obligation of the  
15 State of Pennsylvania. The obligation is a -- is an  
16 obligation mandated by the State, but a private obligation  
17 imposed upon the employer and then insured by the -- by  
18 the insurance company.

19 QUESTION: But you've pointed out the  
20 unseemliness of having two regimes. The State fund, which  
21 certainly is a State actor -- to bring them together, if  
22 you're right on the due process -- well, if you're wrong  
23 on the due process point, we wouldn't get to the due  
24 process point for your -- on your theory of State action.  
25 We wouldn't because it might be advisory.

1 MR. McCONNELL: I don't think that's correct,  
2 Justice Ginsburg. If we're wrong on our theory of State  
3 action, then the due process issue is certainly presented.

4 QUESTION: Yes, but if you're right on your  
5 theory of State action.

6 MR. McCONNELL: If we're right on our theory of  
7 State action, we still have -- there are still parties  
8 before this Court who are bound by the judgment of the  
9 Third Circuit and who are confessedly State actors.

10 QUESTION: Well, you say --

11 MR. McCONNELL: And this Court certainly has the  
12 authority to -- to reverse the Third Circuit.

13 QUESTION: If you're right on your theory of  
14 State action, you say you're also right on your theory of  
15 due process. And we've certainly given more than one  
16 reason for our outcome in -- in other cases.

17 QUESTION: Well, if you're right on your theory  
18 of State action, you wouldn't get involved with due  
19 process because you wouldn't be a State actor.

20 MR. McCONNELL: Your Honor, we would not.  
21 However, other parties that are still present within this  
22 Court under this Court's rules remain bound by the due  
23 process holding of the --

24 QUESTION: But there would be -- wouldn't there  
25 be a financial effect on -- on you depending on the due

1 process outcome? Because in -- as I understand the  
2 scheme, you all contribute to the fund for, whatever you  
3 call it, recoupments by companies that pay and then later  
4 are determined not -- not to have been liable, so that the  
5 amount that you have to contribute to that fund will vary,  
6 I suppose, depending on how the due -- could vary,  
7 depending on how the due process point comes out.

8 MR. McCONNELL: That's exactly right, Justice  
9 Souter. The -- the risks of -- of these mispayments, that  
10 is payment for medical care that turns out not to be --  
11 not to be reasonable and necessary, is borne by the system  
12 as a whole, private insurers as well as public insurers.  
13 So, we have a direct financial interest in the outcome as  
14 applied to the government parties in this case as well.

15 But as this -- as the discussion so far has  
16 already indicated, that this case is a -- does not involve  
17 a traditional public function in any -- in any sense.  
18 That is to say, neither the provision of workers'  
19 compensation nor the specific decision in this case to  
20 suspend payments in what amounts to a commercial dispute  
21 is traditionally a public function, let alone an exclusive  
22 public function.

23 Moreover, the decisions made here are not  
24 mandated by the State. Even the Third Circuit concedes  
25 that it is totally up to the insurance companies whether



1 to invoke utilization review. But what's more, they are  
2 not even significantly assisted by the State. They are  
3 regulated by the State, to be sure; that is to say, that  
4 the State is involved in -- in requiring certain filings  
5 and in -- and in requiring a prompt payment and in setting  
6 forth a particular form of dispute resolution mechanism.  
7 But those are limitations on what would otherwise be the  
8 private authority of --

9 QUESTION: Mr. McConnell, would you clarify one  
10 thing for me? Under the Pennsylvania system, is it  
11 possible that the insurer might pay for treatment, let's  
12 say, chiropractic treatments, over a period of months and  
13 then conclude maybe it should suspend further payment and  
14 raise the question of whether it's reasonable and  
15 necessary?

16 MR. McCONNELL: Yes, Justice O'Connor. The  
17 assumption here is that a course of medical treatment  
18 that's appropriate in one month is not necessarily  
19 reasonable or necessary in some other period.

20 QUESTION: Is every payment a new issue, if you  
21 will, or not?

22 MR. McCONNELL: Every bill --

23 QUESTION: Or -- or does that add up to some  
24 sort of expectation on the part of the patient?

25 MR. McCONNELL: Well, every bill is a new

1 payment, Your Honor, and so when the doctor submits the  
2 bill, the insurance company decides whether -- if there's  
3 no question about its appropriateness, they simply pay  
4 within the 30-day period. If they believe that there's  
5 some question, then they submit it for utilization review  
6 and withhold payment pending that.

7 And that brings us to the due process issue,  
8 because I'd like to be -- like to talk about what is the  
9 impact on the individual worker of this kind of a -- of a  
10 -- of an arrangement. Note that the --

11 QUESTION: Yes, because if the worker were  
12 receiving some kind of a series of medical treatments and  
13 thought at least that it was helping and then, all of a  
14 sudden, it suspended, is there some kind of a -- an  
15 expectation that we have to weigh in the balance?

16 MR. McCONNELL: Well, Your Honor, I don't think  
17 that people automatically assume that just because they've  
18 been receiving a course of treatment that it necessarily  
19 is going to be something that they have forever.

20 But let me be more specific about that because I  
21 think it's important to distinguish between the effect on  
22 the treatments that have already been received and then  
23 for the future.

24 For those that have already been received, the  
25 worker is essentially not affected. The question is, is

1 the doctor going to be paid? The focus of this litigation  
2 has been on the indirect effect, the fear that because of  
3 the process being invoked, that their medical provider  
4 might choose not to provide further treatments in the  
5 future. And the Third Circuit seemed to operate on the  
6 assumption that a suspension in payment was tantamount to  
7 terminating the medical benefits, but I think any  
8 reflection upon that will show that that is simply not the  
9 case.

10 What the medical provider has to do, the medical  
11 provider becomes on notice that someone is going to be  
12 examining the reasonableness and necessity of the course  
13 of treatment. And that medical provider will continue to  
14 provide the treatment if he believes that an impartial  
15 process will conclude that it's reasonable and necessary.  
16 It's only in the case where the medical provider himself  
17 realizes that the bill in the end is likely not to be  
18 payable that -- that the medical -- that the course of  
19 treatment will be -- not be provided.

20 But, Your Honor --

21 QUESTION: Do you say this as a matter of logic  
22 or experience? There are other States that have a similar  
23 regime. Has it, in fact, turned out that doctors are  
24 concerned about not being paid by anyone and so indeed  
25 suspend treatment?

1 MR. McCONNELL: Your Honor, I think it's a  
2 matter of the logical implication of this -- of this  
3 statutory scheme. The doctors will be paid if the  
4 conclusion of -- of full process is that the -- that the  
5 medical procedures are reasonable and necessary, and they  
6 will be compensated for the delay in payment by 10 percent  
7 annual interest. The only reason that the doctor would --  
8 or the provider would not continue treatment is if he had  
9 some doubt about the -- the outcome of that proceeding.

10 And far from being a denial of due process, Your  
11 Honor, I would submit that is exactly what we want health  
12 care providers to be thinking about, that is, is the  
13 course of treatment that -- that I'm proposing reasonable  
14 and necessary. And by putting --

15 QUESTION: Well, the -- the provider may simply  
16 say, I think it's reasonable and necessary and I think  
17 I'll win at the end of the day, but I'm not interested in  
18 spending my time litigating. This -- this is simply a  
19 patient I don't want to bother with. It's too much  
20 trouble.

21 MR. McCONNELL: Well, Your Honor, if that  
22 amounts to a due process violation on the part of the  
23 worker, then any scheme --

24 QUESTION: Well, I'm not sure it amounts to a  
25 violation. I'm simply saying that it is -- it is -- it is



1 -- it is one of the factors that I think have got to be  
2 considered in assessing the interests involved.

3 MR. McCONNELL: Well, Your Honor, any scheme  
4 that -- that requires the doctor to justify the treatment  
5 is going to have that effect. Even if we paid in advance,  
6 subject to recoupment, the doctor would have to spend time  
7 litigating. So, that is not a product of this particular  
8 scheme.

9 The only thing this particular scheme does is  
10 that it forces the health care provider to -- to bear the  
11 risk that at the end of the day the -- the care that he's  
12 providing may not be within the statutory limits.

13 QUESTION: Am I right about the scheme? I'm --  
14 I'm just trying to be sure I understand it. Is it the  
15 case -- suppose a worker is -- everybody agrees he's -- he  
16 was injured at work. And he -- his doctor submits a bill  
17 that is absurd. Let's imagine trips to Florida, whatever  
18 it is, totally absurd. The law is that the medical  
19 insurer has to pay that bill unless he files a piece of  
20 paper, according to this scheme, and if he files that  
21 piece of paper, the State sends it to a doctor, another  
22 doctor, who looks at it for reasonableness, and then there  
23 are further proceedings that take place. In other words,  
24 unless he submits that piece of paper, he has to pay.

25 MR. McCONNELL: Exactly.

1 QUESTION: If he submits the piece of paper, he  
2 doesn't have to write a check. He doesn't have to pay a  
3 penny --

4 MR. McCONNELL: That's exactly right.

5 QUESTION: Thank you.

6 MR. McCONNELL: That's exactly right.

7 It's so reasonable as a system that it is --

8 QUESTION: How does it compare -- how does it  
9 compare with the determination of the disability, if  
10 there's a disagreement between the patient's doctor --  
11 let's say the question is, is this person totally disabled  
12 or only partially disabled? Is he temporarily disabled or  
13 permanently disabled? Is there the same thing when  
14 there's a disagreement for immediate suspension?

15 MR. McCONNELL: No, there's not, Your Honor.  
16 That's -- it is assumed that once the person is disabled,  
17 that they remain eligible for the disability benefits  
18 until the insurance company has invoked a process and --  
19 and until after that process has been complete.

20 QUESTION: The payments would continue during  
21 the process.

22 MR. McCONNELL: The payments would continue in  
23 the interim.

24 QUESTION: If the insurer unreasonably filed  
25 this piece of paper and unreasonably delays payment and

1 causes some injury to the patient in that fashion, does  
2 the patient have a cause of action?

3 MR. McCONNELL: No, Your Honor. Because this is  
4 workers' compensation, the liability, both for the  
5 employer and for the insurer, is strictly limited to --  
6 within the workers' compensation scheme. Other outside  
7 forms of liability are -- are preempted.

8 QUESTION: Against the insurer as well as the  
9 employer.

10 MR. McCONNELL: That's the way I understand the  
11 law.

12 QUESTION: May I ask if -- if on review of a --  
13 of a decision by the insurance company to terminate  
14 payments, is that -- is that de novo, or does one side or  
15 the other have the -- have the presumptively correct?

16 MR. McCONNELL: Within the utilization review  
17 process itself, if the -- it's -- it's de novo, but that  
18 unless the -- but there's an effect of presumption in  
19 favor of the care because if the utilization reviewer is  
20 unable to determine whether or not it is reasonable and  
21 necessary, he must find that it is.

22 QUESTION: How would you describe the employee's  
23 legal interest in the case? A claim or an anticipatory  
24 claim? Because the Third Circuit said it was an  
25 entitlement, which seems to me somewhat of a loose use of

1 that term. But how do you describe what the employee has?

2 MR. McCONNELL: Justice Kennedy, I believe that  
3 what the -- the employee is a third party beneficiary of  
4 -- of a contract between his employer and the insurer.  
5 But I don't believe that anything hinges upon that  
6 characterization.

7 I'd like to --

8 QUESTION: May I -- just one quick question. If  
9 you win on the State action issue, that would mean you --  
10 you could cease giving notice to the employee. That's  
11 what would really be at issue here I suppose.

12 MR. McCONNELL: The actual notice to the  
13 employee is given by the State and not by the insurance  
14 company. So, I don't know that the notice would be  
15 affected by that.

16 QUESTION: That's the revised procedure where  
17 the State gives the notice.

18 MR. McCONNELL: If the State sends the notice to  
19 the employee.

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

21 QUESTION: Thank you, Mr. McConnell.

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

23 ORAL ARGUMENT OF MALCOLM L. STEWART  
24 FOR THE UNITED STATES, AS AMICUS CURIAE,  
25 SUPPORTING THE PETITIONERS



1 MR. STEWART: Mr. Chief Justice, and may it  
2 please the Court:

3 The Government agrees with the petitioners both  
4 that the withholding of payments under the workers'  
5 compensation scheme is not State action and that even if  
6 the insurers were regarded as State actors, the scheme  
7 would comport with due process.

8 As to the State action question, in our view the  
9 insurance company's actions under the Pennsylvania  
10 workers' compensation statute are no different in  
11 principle from an insurance company's actions in any other  
12 context. That is, the company gets the claim in order to  
13 determine whether it believes itself to be liable for  
14 payment. It must undertake an internal process of  
15 studying the facts, studying the laws, deciding what its  
16 rights and obligations are.

17 If the company determines that it's not liable  
18 for payment, the -- it withholds payment, the consequence  
19 may well be the triggering of a State adjudicatory  
20 mechanism. And the conduct of that adjudicatory mechanism  
21 may well involve considerable State action, but the  
22 insurer itself is not a State actor.

23 And the only difference between the Pennsylvania  
24 workers' compensation scheme and other insurance contexts  
25 is that a slightly different legal standard applies:

1 fault if the employer's fault is not at issue and, second,  
2 the onus is on the insurer to invoke the utilization  
3 review process, whereas in the normal context, as -- as  
4 Mr. McConnell pointed out, if the insurance company denies  
5 a claim, it would be up to the -- the claimant to file  
6 suit or undertake other remedies.

7 And I think more generally we could analogize  
8 the insurance company to the defendant in any private  
9 civil action. That is, whenever somebody is sued for  
10 money, the defendant will first be required to make an  
11 internal determination as to whether it considers itself  
12 to be liable. It will have to decide whether to concede  
13 liability, enter into settlement negotiations, or  
14 undertake to defend against the suit on the merits.

15 But the -- the defendant's, the private  
16 defendant's, decision to insist upon judicial resolution  
17 of the dispute doesn't amount to State action. Again, the  
18 conduct of -- the resolution of the lawsuit by courts and  
19 juries will involve State action, but the private party  
20 who participates in -- in the dispute is not a State  
21 actor.

22 And in our view, the mistake that the Third  
23 Circuit made was in focusing on the quantity of the  
24 contacts between the insurance company and State officials  
25 during the URO process. That is, the Third Circuit

1 pointed out that the -- the insurance company is required  
2 to file a form with the bureau. It will be required to --  
3 to file other documents in connection with the URO process  
4 itself.

5 Again, the same thing is true of any other civil  
6 action between private parties. There's extensive  
7 connection, interaction between the parties and the court  
8 in the sense that they file briefs and pleadings, but the  
9 private parties are not thereby engaged in State action.

10 QUESTION: Is the UR examiner a State actor?

11 MR. STEWART: We believe that it is. Certainly  
12 the workers' compensation judge who made the -- the final  
13 determination would be a State actor and we believe that  
14 the UR -- that the utilization review organization would  
15 also be a State actor because it is --

16 QUESTION: Who is the -- who is the URO? Is it  
17 a private doctor, a group of private doctors?

18 MR. STEWART: My understanding is that they are  
19 organizations which will -- they will be selected at -- at  
20 random. They will assign the -- the case to doctors in  
21 the same or a similar specialty. They are -- they are  
22 private people. They are not full-time State employees.  
23 But in our view they would be exercising delegated  
24 authority from the State, performing a classic  
25 adjudicatory function of resolving a dispute between

1 private parties. So, we think that the UR itself would be  
2 a State actor, but neither the insurance company nor the  
3 provider would become a State actor simply by contesting  
4 the -- the question before the UR.

5 QUESTION: So, if the UR cut off notice -- cut  
6 off plans without any notice, then you'd have a Tulsa  
7 Collection case.

8 MR. STEWART: Well, certainly if -- if -- to  
9 take the easiest example, if the doctors on the -- if the  
10 utilization review organization was composed of people who  
11 had a financial interest in the outcome of the dispute,  
12 you would have a classic due process violation because the  
13 UR itself would be subject to procedural due process  
14 rules. Its resolution of the dispute might or might not  
15 affect a party's constitutional rights.

16 I think what's -- what's crucial in this case  
17 with respect to the due process issue is that, at least as  
18 the case comes to this Court, there is no dispute as to  
19 the adequacy of the procedures by which the UR and the  
20 workers' compensation judge will make the ultimate  
21 determination as to whether expenses are reasonable and  
22 necessary. That is, the plaintiffs do not contend that  
23 the State procedures, at least as modified by the new  
24 notice that the State is giving, fail to provide an  
25 adequate mechanism for making that determination in the



1 end. Their only complaint is with the withholding of  
2 payment by the insurer, pending the UR's determination of  
3 the dispute.

4 And in our view, as -- as Mr. McConnell said,  
5 that's a practice that is consistent with the way that  
6 ordinary dispute resolution typically works. That is,  
7 when a person has a claim against him for money, the usual  
8 rule is that the person can withhold payment pending  
9 resolution of the dispute.

10 And in a sense, the -- the workers' compensation  
11 scheme here is more favorable to the employee and the  
12 doctor than the typical rule would be because if the -- if  
13 the doctor prevails before the UR, if the UR makes the  
14 determination that the care is reasonable or necessary,  
15 the insurance company is required to pay at that time,  
16 even if the insurance company intends to seek further  
17 review before the workers' compensation judge. So, the  
18 State doesn't even allow the insurer to wait until the  
19 final resolution of the dispute. The State has simply  
20 said the insurance company doesn't have to make payment  
21 until some neutral arbiter has agreed with the health care  
22 provider that particular services are reasonable or  
23 necessary.

24 The only type of exception to the general rule  
25 that this Court has recognized in -- is in cases such as

1 Goldberg v. Kelly where a claimant has initially  
2 established all the prerequisites to entitlement to a  
3 stream of benefits and where State officials attempt to  
4 cut off those benefits on the ground that circumstances  
5 have changed such that the individual has become  
6 disentitled, and in that context, the Court has said that  
7 procedural due process protections apply, that there is a  
8 deprivation of property.

9 But here, the initial determination that the  
10 worker is eligible for workers' compensation, that he was  
11 injured on the job and has become disabled does not itself  
12 imply any determination as to the reasonableness or  
13 necessity of any particular course of treatment. So, when  
14 the -- the UR -- when the insurer invokes the UR to  
15 determine that question, it's not asking to -- for a  
16 ruling that circumstances have changed, that something  
17 which was originally established is no longer true. It's  
18 simply asking for an initial determination that a  
19 particular course of treatment is reasonable or necessary,  
20 and in our view that's fully consistent both with the --  
21 the typical dispute resolution process and with  
22 constitutional due process principles.

23 If there are no further questions.

24 QUESTION: Thank you, Mr. Stewart.

25 Ms. McKinley, we'll hear from you.

1 ORAL ARGUMENT OF LORALYN MCKINLEY

2 ON BEHALF OF THE RESPONDENTS

3 MS. MCKINLEY: Mr. Chief Justice, and may it  
4 please the Court:

5 Before I address the legal issues that are  
6 before the Court, I'd like to clarify a few things about  
7 the workers' compensation system in Pennsylvania and how  
8 the utilization review processes actually work.

9 Workers' compensation in Pennsylvania is a no-  
10 fault system which was substituted for the claimant's  
11 right to sue their employer for -- in tort for work-  
12 related injuries.

13 It is an exclusive system. Not only is the  
14 worker precluded from suing the employer for negligence or  
15 any other common law action that he might have had prior  
16 to the passage of the act, but the individual is trapped  
17 into the system. The individual is not permitted to go  
18 outside of the system to secure medical treatment. So,  
19 while utilization is going on, regardless how long that  
20 might take -- and as the experience of the named  
21 plaintiffs indicates, it can take years to be resolved.  
22 During that --

23 QUESTION: But you are only contesting the time  
24 before the URO, as I understand it. Once the URO makes  
25 its determination and it goes to the ALJ -- the URO

1 procedure itself doesn't take years, does it? That takes  
2 30 to 70 days.

3 MS. McKINLEY: Well, the process itself is  
4 integrated. The utilization review process is part of the  
5 State system for the determination of disputes over  
6 reasonableness and necessity of medical care. The  
7 utilization review process is the first step, but if the  
8 utilization review organization makes an adverse decision  
9 to the claimant, which is made without notice to the  
10 claimant and without an opportunity for the claimant to be  
11 heard --

12 QUESTION: Well, we -- we've over that now  
13 because I think it's taken as given under the new State  
14 notice. There is notice. There is an opportunity to  
15 submit something in writing. So, I thought that the issue  
16 was only suspending payment in the interim.

17 And my question is, how long is the interim you  
18 are challenging? I -- I probably misunderstood you then  
19 because I had assumed that you were talking about the URO  
20 determination, and if that determination were adverse, you  
21 were not saying that there was a due process right to  
22 continue to get paid after that. I thought you were just  
23 talking about the URO period.

24 MS. McKINLEY: I think, Justice Ginsburg, that  
25 you raised two separate issues.



1           The first issue, as to the Commonwealth  
2 defendants, obviously there is a final order by the Third  
3 Circuit, the petition this Court was denied. The  
4 Commonwealth has changed its procedures, but there's still  
5 an issue as to whether the Third Circuit ought to be  
6 reversed based on its due process findings in which there  
7 was no notice and no opportunity to be heard. That is  
8 what the petitioners have requested in this case.

9           The second question has to do with the impact of  
10 the request for utilization review and the suspension of  
11 payments that results. Once the utilization review  
12 organization makes its decision, it then goes into another  
13 aspect of the State system, and during that entire  
14 process, from the minute the utilization review is invoked  
15 until the appeals are completed, the person is not able to  
16 receive medical treatment unless they can find a doctor  
17 that can treat them for free.

18           QUESTION: Yes, but if one -- I understand your  
19 argument to say this person's own doctor thinks they  
20 should be paid, and until the utilization review person  
21 makes a determination, it isn't fair to take these  
22 benefits away. But once that determination is made by an  
23 independent, private examiner, then it seems to me it's a  
24 separate question, that it isn't all one. Something  
25 significant has changed once the URO says that's an

1 unreasonable charge.

2 MS. McKINLEY: All right. We agree that under  
3 the present as the State has revamped the -- the  
4 procedures after the Third Circuit's decision, once the  
5 utilization review organization makes that determination,  
6 there has been due process and there's nothing that the  
7 claimant can do about it.

8 QUESTION: Right. So, we're not talking about  
9 years. We're talking about -- the only due process claim  
10 you can and are making is the one that concerns the URO  
11 process, and that doesn't go on for years.

12 MS. McKINLEY: It goes on for months. The  
13 individual -- I'm sorry. Go ahead, Justice Breyer.

14 The utilization review is invoked by the  
15 insurance carrier. There are no --

16 QUESTION: The briefs say 30 to 70 days.

17 MS. McKINLEY: There are no limits as to how --

18 QUESTION: Is that -- is that 30 -- is that  
19 accurate --

20 MS. McKINLEY: No. We don't think it is  
21 accurate.

22 QUESTION: -- that the statute says 30 days, but  
23 it can go --

24 MS. McKINLEY: It's clearly not 30 days. As you  
25 can see from the experience of the named plaintiffs in the

1 -- in the complaint, there are no limits as to how long it  
2 takes the State to refer the -- or the request to the  
3 utilization review organization.

4 QUESTION: Where did the 30 to 70 -- the average  
5 is something like 70 days --

6 MS. McKINLEY: I have no idea, Your Honor,  
7 because this case was dismissed on a 12(b)(6) and there is  
8 no record.

9 After the decision goes to the utilization  
10 review organization, they have 60 days because they have  
11 30 days to acquire the records, 30 days to make a  
12 decision. It then goes back. The decision is circulated.  
13 So, it often takes more than 30 or 60 days in order for  
14 this process to be completed.

15 And during that process, which takes at least 2  
16 and a half months at the best -- at best, the individual  
17 is precluded from receiving medical treatment unless --  
18 unless the doctor is willing to provide the treatment for  
19 free.

20 QUESTION: Wait. I don't understand.

21 QUESTION: Where did that -- why is that  
22 different from what -- from what would have obtain under  
23 the system which you say workers' compensation replaced?  
24 You began by saying that you've been forced into this  
25 system from a private tort system.

1 MS. McKINLEY: Right.

2 QUESTION: Now, in a private tort system,  
3 couldn't the same thing happen? Couldn't the insurer just  
4 simply say I don't think this is a proper claim and I'm  
5 not going to pay it?

6 MS. McKINLEY: Yes, but this is not a private  
7 tort system. This is clearly a public benefit system.

8 Pennsylvania, by any --

9 QUESTION: Well, but -- but you -- you don't  
10 claim you're any worse off than -- than what you would  
11 have been like without workmen's comp.

12 MS. McKINLEY: Not without workers' comp --

13 QUESTION: I mean, in fact, you might have to  
14 wait years until completion of -- of all the appellate  
15 proceedings in -- in a private tort suit --

16 MS. McKINLEY: But --

17 QUESTION: -- against the insurer.

18 MS. McKINLEY: But in that system you don't have  
19 a public benefits system, which we clearly do in this  
20 situation.

21 QUESTION: What about any medical? I mean, all  
22 of us have medical insurance. I thought you said twice  
23 we're talking about a person who doesn't -- you were  
24 talking about a patient who won't get treated.

25 MS. McKINLEY: That's correct.



1 QUESTION: I thought that this was about  
2 reimbursing the doctor. I mean, all of our doctors might  
3 not get reimbursed if the insurer decides the treatment  
4 they're getting is unreasonable, but that hasn't stopped  
5 my doctor from treating me. And I -- and I -- and I don't  
6 -- I don't know -- maybe I've mixed this up. That's why  
7 I'm asking you. But I -- I thought we were talking about  
8 the doctor running the risk that the insurer won't  
9 reimburse him if the insurer considers the bill  
10 unreasonable.

11 And -- and are there a lot of doctors who --  
12 whom that fact discourages from giving treatment? There  
13 might be.

14 MS. McKINLEY: There are certainly many  
15 doctors --

16 QUESTION: It doesn't discourage yours or mine,  
17 does it?

18 MS. McKINLEY: Well, I -- I can't say about  
19 yours or mine, Your Honor, but clearly in this situation,  
20 as the experience of most of the named plaintiffs  
21 indicates, doctors don't treat unless they're going to get  
22 paid within the -- within the --

23 QUESTION: You know, but they'll get paid for  
24 what the insurer considers reasonable. So, are the  
25 plaintiffs in this case -- were -- were the plaintiffs --

1 I'm interested. I'm not asking rhetorically. Were they  
2 -- were they -- did they -- were they denied treatment?

3 MS. McKINLEY: Yes.

4 QUESTION: Why?

5 MS. McKINLEY: They were.

6 QUESTION: I thought 5 out of the 10 continued  
7 to receive treatment?

8 MS. McKINLEY: No, it wasn't five. I believe it  
9 was three. Three of the named plaintiffs received  
10 treatment. Others did not receive any treatment during  
11 the years that it took to resolve the utilization review  
12 -- the utilization review request.

13 And I would like to point out that there's a  
14 typographical error in our brief at page 5 and 6 on the  
15 statute. Part of Act 44, which imposed the preclusion  
16 upon a claimant from even going outside the system, but if  
17 the claimant wins the lottery, the claimant still can't  
18 for medical treatment while this medical process is going  
19 on. It should say 531 -- section 531(7) instead of  
20 531(i).

21 QUESTION: Well, to say -- to say you can't go  
22 outside the system, I mean, that's really true long before  
23 workmen's compensation came in. You can, if you're  
24 injured without a workmen's compensation, depend on  
25 private tort law. You know, you can pay your own expenses

1 if you want to, but in order to get reimbursed for your  
2 medical expenses, you have to follow the procedure of  
3 suing in court or compromising with the insurer.

4 MS. McKINLEY: That's correct, Your Honor, but  
5 Pennsylvania substituted that system. They put in place a  
6 public benefit system in which the --

7 QUESTION: Why do you --

8 MS. McKINLEY: -- plaintiffs have a property  
9 interest.

10 QUESTION: Just a minute. Slow down, will you?

11 What do you gain for your case by calling it a,  
12 quote, public benefit, closed quote, system?

13 MS. McKINLEY: We think that it changed the  
14 nature of the property right. Clearly a State can't have  
15 a public benefit system in which it does not ensure due  
16 process. They have to --

17 QUESTION: What do yo mean by public benefit  
18 system?

19 QUESTION: What's a public benefit system?

20 MS. McKINLEY: I mean a system that is  
21 guaranteed by State law, which is administered by State  
22 law, in which all of the criteria, all of the -- the  
23 payments, the nature of the payments, the amount of  
24 payments, when the payments can be made, when they can be  
25 stopped, the administration, everything is controlled

1 directly by the State.

2 QUESTION: Why isn't that essentially true of a  
3 tort system? I mean, the State determines the content of  
4 tort law, the obligation to pay, the procedure by which  
5 the -- the payment obligation may be contested. It's -- I  
6 mean, in each case the system, it seems to me, is equally  
7 a public benefit system on -- on your -- on your theory.

8 MS. McKINLEY: What the petitioners are  
9 basically analogizing this to is car insurance and other  
10 kinds of private commercial insurance. That's not what  
11 this is.

12 QUESTION: Yes, but what about the answer --  
13 what about the answer to my question? It seems to me that  
14 every feature that you've just described under the comp  
15 system, as -- as being a reason for calling it a public  
16 benefit system, is a feature that you could equally  
17 describe in the same terms under the traditional tort  
18 system.

19 MS. McKINLEY: No, because it's not guaranteed.  
20 This system guarantees coverage --

21 QUESTION: Well, it -- it guarantees, if one  
22 determines eligibility, for the coverage.

23 MS. McKINLEY: That's correct.

24 QUESTION: And the tort system guarantees  
25 payment if one fulfills the conditions before a finder of



1 fact or a jury for -- for liability and damages. And in  
2 each case, the State sets the criteria for payment. One  
3 is a no-fault system, the other is not. But each, in  
4 effect, is equally imposed by the -- by the State I would  
5 suppose.

6 MS. McKINLEY: What the State has done is to  
7 substitute that system. The plaintiff does not have to go  
8 through that process in order to be determined eligible.  
9 All they have to do is to -- to sustain a work injury.  
10 And each of the --

11 QUESTION: Well, now, just a minute. You have  
12 to show that under traditional workmen's comp that the  
13 injury arose out of and in the course of your employment,  
14 don't you?

15 MS. McKINLEY: That's correct, and there is  
16 no --

17 QUESTION: So, there's a criteria just as there  
18 is in tort law where you have to show negligence. It's  
19 not as if you could simply be injured and automatically  
20 get coverage.

21 MS. McKINLEY: But for the purposes of  
22 utilization review, all of that is assumed. The insurance  
23 carrier cannot dispute whether the person is eligible for  
24 workers' comp.

25 QUESTION: But -- but your argument is that this

1 is a public benefit system, and I -- I think the question  
2 suggests that we're curious as to know why that makes it  
3 different analytically from the traditional tort system.

4 MS. McKINLEY: Because the State has the duty,  
5 in the context of this system, which it has imposed on  
6 itself. Clearly the State can't just delegate to the  
7 insurance company the right to --

8 QUESTION: Well, what -- what duty has the State  
9 imposed on itself?

10 MS. McKINLEY: The State guarantees the benefit,  
11 number one. The State guarantees that the benefits will  
12 be paid, that there is a source for the payment of those  
13 benefits through several different mechanisms, and --

14 QUESTION: Are you -- are you saying that if --  
15 if the workmen's compensation insurer should default, then  
16 the State comes in and itself makes the payment?

17 MS. McKINLEY: Yes, I am saying that.  
18 Pennsylvania has a security fund that does just that.

19 What we're --

20 QUESTION: Is the security fund appropriated  
21 public money or is the security fund a fund established by  
22 contributions of insurers?

23 MS. McKINLEY: I'm not exactly sure how it  
24 works, but I know that --

25 QUESTION: Well, it would make a difference,

1     though, I would think to your argument, wouldn't it?

2             QUESTION:   Yes.

3             MS. MCKINLEY:  I don't think it does, Your  
4     Honor.  I don't think it makes any difference whether the  
5     State says to the insurers we're going to tax you, you  
6     have to pay us a certain amount of money every year in  
7     order to insure coverage like they do in unemployment, for  
8     instance, or whether they say, you have to go out and get  
9     this insurance yourself, and if you can't get it on the  
10    private market, we will provide it for you through our  
11    State workers' insurance fund to make sure it's there.

12            QUESTION:  Basically what I think is worrying at  
13    least me is if you were to win this case on the State  
14    action point, what about Blue Cross-Blue Shield?  What  
15    about accident insurance in Massachusetts where, after  
16    all, there is a State fund to pay for uninsured?  What  
17    about ERISA where there is a Government fund to pay for  
18    those people when the companies go bankrupt leaving a  
19    pension?  There are dozens of very complex regulatory  
20    schemes that involve insurance companies, some but not all  
21    of which have State backup funds.  They're all  
22    complicated.  They all regulate private employers up,  
23    down, and sideways.  All right?

24            Now, we just see one more here, and so, what's  
25    the difference between yours -- or do you think that all

1 private employer action or insurer action involving health  
2 care, involving pensions, et cetera, insurance of any sort  
3 that's regulated is government action?

4 MS. McKINLEY: No, that is not what we're  
5 suggesting. We've never suggested that. What we have  
6 here --

7 QUESTION: Then what's the difference?

8 MS. McKINLEY: -- is a unique context in which  
9 the benefits are guaranteed. The State can say to you --

10 QUESTION: They're guaranteed in ERISA. They  
11 are guaranteed in Massachusetts in respect to uninsured  
12 motorists. There are -- it's common to have State money  
13 backing up insurance that's given by private people.

14 MS. McKINLEY: But you have to look at the way  
15 the statute works. In those situations, the insurance  
16 company does not have to invoke a legal process like it  
17 does in this context because we're not talking about a  
18 commercial setting. The insurance company and the State  
19 are intertwined in the delivery of these benefits to -- to  
20 injured workers and in the way those benefits are  
21 terminated, if and when they are --

22 QUESTION: But does due process require the  
23 particular scheme Pennsylvania has? I mean, suppose  
24 Pennsylvania had said, we're going to have a workers'  
25 compensation scheme, but we're going to have a check on



1 the reasonableness of the bill before it's paid, and  
2 that's the statute. And so, they set up this checking  
3 office and you never -- the worker, the doctor -- doesn't  
4 get paid until the State official says that's okay. Would  
5 that be a violation of due process?

6 MS. MCKINLEY: Well, certainly if the individual  
7 is precluded from receiving treatment during that time --

8 QUESTION: Not precluded from receiving  
9 treatment, certainly not. And the State's position is our  
10 system is meant to work fairly. If a doctor's charge is  
11 fair and reasonable, we'll pay it promptly. And they have  
12 time limits on how long this review can take place, but  
13 nobody gets paid up front without any check. Would that  
14 be unconstitutional? Does due process require that the  
15 provider's word be accepted?

16 MS. MCKINLEY: I don't think it necessarily  
17 does. But in the context of this -- of this system, we  
18 have a system that vests a property right in the  
19 individual. Prior to the act -- prior to Act 44, the  
20 insurance carriers --

21 QUESTION: Well, I wish you address my question.  
22 Let -- let's take my hypothetical scheme that the doctor's  
23 bill goes to a checker and it is not paid until the  
24 checker says okay. Is it unconstitutional to run a  
25 workers' compensation system that way?

1 MS. McKINLEY: I think it would depend on how it  
2 works. For instance, if you have a situation like the  
3 named plaintiffs here, where they've been receiving  
4 treatment for sometimes years for very serious work  
5 injuries --

6 QUESTION: No. I wish you would focus on  
7 mine --

8 MS. McKINLEY: I'm trying to.

9 QUESTION: Nothing is going to happen for years  
10 because there's going to be a check on each bill. And so,  
11 there won't be a payment unless a stop signal is given  
12 within 30 days. But there will be -- in other words, you  
13 will have to get a green light instead of this system that  
14 Pennsylvania now has where a red light can be turned on.

15 MS. McKINLEY: I think as long as it's quick,  
16 very quick, and as long as the individual has a right to  
17 be heard and the treatment is not stopped during a lengthy  
18 process, probably that system will be constitutional, but  
19 clearly that's not what we have here.

20 Act 44 --

21 QUESTION: I don't know what you mean by the  
22 treatment not stopping because I've given you -- my  
23 question is, must there be payment first during litigation  
24 or can there be like it would be in the tort system? You  
25 get paid eventually if you're right, but there's no

1 immediate right to be paid.

2 MS. McKINLEY: It doesn't necessarily have to be  
3 that -- that way -- you're correct -- as far as a due  
4 process -- for due process purposes.

5 But in this particular context, what we have is  
6 a situation in which claimants had a vested entitlement to  
7 their medical treatment prior to Act 44. That -- that  
8 treatment could not be stopped by an insurance carrier.  
9 The insurance carrier in this case is relying upon the  
10 authority of State law which is delegated to them through  
11 the passage of this act. That's why the direct challenge  
12 to the law is so important here. It is State power that  
13 is being exercised in a way that was never permitted to be  
14 exercised before. The State always exclusively controlled  
15 the circumstances under which an insurance carrier could  
16 stop paying medical treatment and --

17 QUESTION: Excuse me. Are you saying that your  
18 answer to Justice Ginsburg's question, which was that it  
19 would have been okay, would change if the State had  
20 initially had a system in which it paid the medical bills  
21 -- in which the insurer had to pay the medical bills  
22 immediately and then changed to a system in which for  
23 everybody, nobody gets any payment until the medical bills  
24 are substantiated? In the latter situation you say it  
25 would be unconstitutional because the earlier statute had

1 conferred a vested right to get the payment immediately.

2 MS. McKINLEY: What I'm saying is that in this  
3 context what we have is a transfer of State power from the  
4 State to the insurance carrier.

5 QUESTION: No. I want you to answer my  
6 question.

7 QUESTION: You've been -- you've been asked  
8 several questions, Ms. McKinley, and the people who have  
9 asked them have felt you haven't answered them. Try to  
10 answer to questions directly.

11 MS. McKINLEY: I'm attempting to do that.

12 I'm sorry. Could you repeat your question?

13 QUESTION: The question is -- you recall Justice  
14 Ginsburg's question, a State system in which you don't get  
15 any payments until you establish that -- that it was  
16 reasonable medical care. As I understand your position,  
17 you say that's okay because there was no vested right  
18 anyway from the beginning.

19 MS. McKINLEY: Right.

20 QUESTION: Would your answer to that question be  
21 different if Justice Ginsburg's system were imposed by the  
22 State after the State had initially had a system in which  
23 you could get your medical payments immediately? And then  
24 the State found out too many of them were unreasonable, so  
25 it said, we're changing the system. From now on you don't



1 get any payments until after you've established -- you've  
2 established -- that it's reasonable and necessary. And in  
3 that situation, would your answer to Justice Ginsburg be  
4 different?

5 MS. McKINLEY: I'm not sure it would be  
6 different. What -- I think what you're getting at is --

7 QUESTION: Well, what I'm getting at is it seems  
8 to me you say that once a State passes a statute enacting  
9 a certain welfare scheme, everyone has a vested interest  
10 in that welfare scheme, and any change from it -- I mean,  
11 it's your characterization that it's a welfare scheme.  
12 I'm not sure I agree with it, but assuming it is, any  
13 change from that original welfare scheme is the  
14 elimination of a vested right and is therefore invalid.

15 MS. McKINLEY: Not necessarily. Not  
16 necessarily. It depends upon the nature of the property  
17 interest that the State has conferred to begin with. And  
18 in this situation, what we had was a State conferring a  
19 property interest that could not be divested without the  
20 State itself making a determination that the treatment was  
21 not reasonable and necessary.

22 QUESTION: No, but the -- I think you're saying,  
23 though, that the State cannot change its law. Maybe we  
24 misunderstood your argument. I understood your argument  
25 to be something like this, that in the original State --

1 the -- the version of the workmen's comp scheme that  
2 preceded this one, there was an obligation of immediate  
3 payment. There was -- there was no option, in effect, to  
4 -- to file the protest as there is now. And I understood  
5 you to say that that was the reason why the State could  
6 not go to the scheme that it has gone to without providing  
7 this -- this prior notice and hearing.

8 And it sounds to me as though what you're  
9 arguing is that, in effect, the State cannot change its  
10 law, that there is a due process reason that forbids the  
11 State to make it harder to get the benefit, that due  
12 process is a one-way ratchet. If -- if that's not your  
13 argument, then I think probably all of our questions could  
14 be forgotten.

15 MS. McKINLEY: No. That's not our argument.  
16 We've never suggested that the State can't change the  
17 context under which an individual receives public  
18 benefits.

19 QUESTION: Then what is the relevance of the  
20 fact that in the scheme prior to the modification that is  
21 in question here, there was an obligation to pay without  
22 an option to withhold payment under protest? What is the  
23 relevance of that for your argument?

24 MS. McKINLEY: Because the nature of the  
25 property interest hasn't changed. There's no dispute that

1     these individuals --

2             QUESTION: But the nature of the property  
3     interest was derived from the State law, wasn't it?

4             MS. McKINLEY: It was and --

5             QUESTION: And now the State law has changed and  
6     you have agreed with me that the State can change its law.  
7     There's no due process right to -- to have the law  
8     continue. And that's -- so, that's why I -- I don't  
9     follow your argument.

10            MS. McKINLEY: Well, there's no due process  
11    right to necessarily have the law always be the same, but  
12    in this context, you have a State system providing public  
13    benefits to individuals. The State has to ensure due  
14    process in that system. We have never suggested that the  
15    State does not have the right to come in and say we need  
16    to contain costs in the system. We've never said that  
17    that --

18            QUESTION: It sounds like you're saying that if  
19    the State is more generous, then it's going to be saddled  
20    with the due process obligations that it wouldn't have if  
21    it had been less generous to the worker.

22            MS. McKINLEY: No. The State always has the due  
23    process obligation. That's the whole point. The State --

24            QUESTION: But you have just said if the State  
25    doesn't pay up front, if it says we want proof before we

1 pay any bill, then you wouldn't have your claim about no  
2 suspension. Due process wouldn't require it. But if the  
3 State says, we're going to pay but if it turns out that we  
4 think it's getting unreasonable, we'll stop.

5 That -- that's what's the hardest thing for me  
6 to accept about your due process argument. You seem to  
7 say the State could do anything it wants. It doesn't have  
8 to pay any bill without a check. You told me that. But  
9 once it is more generous in paying immediately, then it  
10 has these extra requirements.

11 MS. McKINLEY: We don't have to -- we don't have  
12 to even look at the prior statute before Act 44 to answer  
13 the question. In the context of a benefit delivery  
14 system, the State always has to proceed -- if they're  
15 going to use a State established procedure, which they  
16 clearly have here, due process has to be included in that  
17 process. This Court has said that over and over again.  
18 You can't have a State established procedure --

19 QUESTION: My question is what process is due,  
20 and you told me that in a case of -- that the State could  
21 say, we'll check every bill, and that wouldn't violate due  
22 process. So, why is it different when they say we'll  
23 start by paying, but if we think it's unreasonable, we'll  
24 stop?

25 MS. McKINLEY: Because you're taking away a



1 vested property right, and that's what the problem is,  
2 through a State established procedure. This Court has  
3 said over and over again that when you have a State  
4 established procedure and a private individual --

5 QUESTION: So, if you were to prevail, an  
6 appropriate answer for the State would be to say, we're  
7 going to move this checking system up and we're not going  
8 to pay any bill without -- without determining as insurers  
9 -- isn't that the way insurers ordinarily work? They  
10 don't pay you just on -- you call up and say something  
11 happened to me. I want to be paid.

12 MS. McKINLEY: I think that's correct. That's  
13 in a completely different system, in a commercial system  
14 where the tort laws clearly are in place. But that --

15 QUESTION: Let me get into these hypotheticals  
16 for a second. Do I correctly understand that it's your --  
17 your theory that once the State has started to make  
18 payments, they have, in effect, given the injured worker a  
19 property right that cannot be terminated without following  
20 certain due process procedures. That's the essence of  
21 your argument, as I understand.

22 MS. McKINLEY: That's exactly what I'm saying.

23 QUESTION: But can one not respond by saying the  
24 right is not an unlimited right to continued payment  
25 forever. The right is merely a right to continue payment

1     until the -- until a serious question is raised, that it's  
2     inherent -- it's a limitation on the right rather than a  
3     termination of the right that the request for review  
4     triggers.

5             MS. McKINLEY: That's correct. We've never said  
6     that they can't have a utilization review system. That's  
7     perfectly fine as long as the individual has an  
8     opportunity to be heard and notice of the -- of the  
9     process until -- until that happens. If the evidence  
10    shows that treatment is not reasonable and necessary,  
11    we've never suggested that they have a right to continue  
12    having treatment forever. That has never been our  
13    argument. All we've said is that the individual requires  
14    notice and an opportunity to participate before the  
15    suspension takes place.

16            QUESTION: Well, is that then -- is it different  
17    in your -- I take it the same statute, the same scheme  
18    applies whether the insurer protests the first bill or  
19    whether he protests the 18th bill.

20            MS. McKINLEY: That's correct.

21            QUESTION: But you're only talking about the  
22    second and subsequent bills.

23            MS. McKINLEY: That's -- that's really the --  
24    that's really where the problem comes in.

25            QUESTION: You're not talking about that first

1 bill. It's as if the insurer pays the first -- if he  
2 doesn't pay the first bill, you say that has nothing to do  
3 with your case.

4 MS. McKINLEY: Because you don't have -- you  
5 don't have --

6 QUESTION: Is that right? Am I right? Am I  
7 right?

8 MS. McKINLEY: That's correct. I think that's  
9 correct. You don't have an interruption in something that  
10 the person has and believes that they have. And -- and  
11 the State hasn't vested a property interest in that  
12 individual.

13 QUESTION: All right. Then -- then I guess from  
14 the State's point of view, it becomes difficult for them  
15 to decide what this due process right does or does not  
16 apply to because there will be -- you know, there will be  
17 a series of medical bills and they won't all be for the  
18 same thing, and the -- the insurance company will protest  
19 some and they won't protest others. And which one does  
20 this apply to and what's a continuation of a payment? Oh,  
21 I mean --

22 MS. McKINLEY: Well --

23 QUESTION: How in your mind is all that stuff  
24 sort itself out?

25 MS. McKINLEY: The real -- the real problem

1 comes in in the way the cost containment actually works  
2 and what they're really focusing on is ongoing treatment  
3 and the experience of the named plaintiffs shows that. We  
4 have people that have serious work injuries, people who  
5 are going to need treatment for the rest of their lives.  
6 They're receiving therapy --

7 QUESTION: All right, but you see -- I  
8 understand that. My question was just how in your view is  
9 it supposed to work in terms of sorting out the people for  
10 whom this is a continuation of treatment and those for  
11 whom it's a new treatment and those for which it's a new  
12 treatment in some -- do you see the problem?

13 MS. McKINLEY: Well, there are --

14 QUESTION: I'm just asking you how you've sorted  
15 that out --

16 MS. McKINLEY: There are --

17 QUESTION: -- in your mind.

18 MS. McKINLEY: There are precertification  
19 provisions in the act for that particular thing.  
20 Precertification provisions. For instance, if an  
21 individual wants to have an MRI and the insurance company  
22 isn't sure, they can -- there is a precertification  
23 provision in the statute so that they can take a look at  
24 it before the MRI even happens. So, you don't have to  
25 worry about it.



1           What really happens and what the insurance  
2 carriers are really targeting their behavior toward in  
3 this case is the ongoing treatment, the treatment in which  
4 people have a vested interest. And in order for them to  
5 stop it, they cannot do it by themselves. This is not a  
6 self-executing statute.

7           QUESTION: Is there anything in the Third  
8 Circuit's opinion that says what it's talking about is  
9 limited simply to those situations in which there has been  
10 an ongoing set of treatments of the same sort that now the  
11 company wants to terminate?

12          MS. McKINLEY: No, I don't believe there's  
13 anything --

14          QUESTION: So, as far as we're concerned, we're  
15 dealing with an opinion that applies as much to the first  
16 treatment as to the last treatment.

17          MS. McKINLEY: Except that it's not --

18          QUESTION: Is that right?

19          MS. McKINLEY: Yes, but it doesn't --

20          QUESTION: That's right, okay.

21          MS. McKINLEY: -- really work that way. That's  
22 -- that's what I'm trying to tell you.

23          I would like to go back to Justice Kennedy's  
24 point about Tulsa because it's our position that for State  
25 action purposes, Tulsa controls this case. This is a case

1 in which the statute is not self-executing. The insurance  
2 company has to invoke a State established procedure in  
3 order to interrupt the property interest at stake here,  
4 and the State remains substantially involved in that  
5 procedure.

6 The petitioners would like to divorce the  
7 decision to initiate the process from the process itself,  
8 and we submit to you that that is not appropriate. This  
9 process is a State process from start to finish --

10 QUESTION: Of course, in Tulsa, the claim was  
11 cut off completely.

12 MS. McKINLEY: Yes, but --

13 QUESTION: Here there's just a procedure  
14 established to defer its adjudication.

15 MS. McKINLEY: Yes, but this Court has said time  
16 and time against that interim deprivations of property are  
17 subject to due process constraints just as complete  
18 deprivations of property. It goes to the nature of what  
19 process is due, not whether process is due at all.

20 QUESTION: How in your opinion is the insurance  
21 company supposed to deal -- in your opinion under the  
22 Constitution as you see it -- with a claim that's clearly  
23 fraudulent, vastly overstated? Is it supposed to just pay  
24 the bill? The Constitution requires it to pay this bill  
25 regardless and then try to get its money back after these

1       hearings, et cetera, or not?

2               MS. McKINLEY: Well, first of all, outside of  
3       the system, they would clearly have the right to do that.

4               QUESTION: I'm asking how you --

5               MS. McKINLEY: But in this system, they should  
6       ask for utilization review, and they will --

7               QUESTION: Can you just say -- do they have to  
8       pay the bill initially and then try to get the money back,  
9       even the clearly fraudulent ones?

10              MS. McKINLEY: Yes, they do.

11              But, you know, the whole premise here is that  
12       what we have here is a huge system in which people are  
13       running around making fraudulent claims and doctors are  
14       running around giving fraudulent treatment. That is  
15       ordinarily not the case. We're not here suggesting that  
16       there are no claims out there like that. What we are  
17       suggesting is that you can't throw the baby out with the  
18       bath water.

19              QUESTION: Thank you, Ms. McKinley.

20              Mr. McConnell, you have 1 minute remaining.

21              MR. McCONNELL: I waive my time for rebuttal.

22              CHIEF JUSTICE REHNQUIST: Very well.

23              The case is submitted.

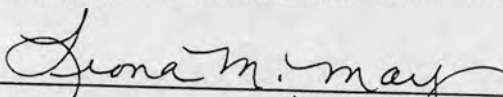
24              (Whereupon, at 10:59 a.m., the case in the  
25       above-entitled matter was submitted.)

## CERTIFICATION

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

AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY, ET AL.,  
Petitioners v. DELORES SCOTT SULLIVAN, ET AL.  
CASE NO: 97-2000

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

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