

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: HUMANA, INC., ET AL. Petitioners v. MARY
FORSYTH, ET AL.
CASE NO: 97-303 102
PLACE: Washington, D.C.
DATE: Monday, November 30, 1998
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1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X
3 HUMANA, INC., ET AL., :
4 Petitioners :
5 v. : No. 97-303
6 MARY FORSYTH, ET AL. :
7 - - - - -X

8 Washington, D.C.

9 Monday, November 30, 1998

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:34 a.m.

13 APPEARANCES:

14 JAMES W. COLBERT, III, ESQ., Los Angeles, California; on
15 behalf of the Petitioners.

16 G. ROBERT BLAKEY, ESQ., Notre Dame, Indiana; on behalf of
17 the Respondents.

18 LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General,
19 Department of Justice, Washington, D.C.; on behalf of
20 the United States, as amicus curiae, supporting the
21 Respondents.

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

2 (11:34 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 97-303 -- spectators are cautioned to
5 remain quiet until you leave the courtroom. The Court
6 remains in session. Do not talk until you get outside.

7 Humana Inc, v. Mary Forsyth.

8 Mr. Colbert.

9 ORAL ARGUMENT OF JAMES W. COLBERT, III

10 ON BEHALF OF THE PETITIONERS

11 MR. COLBERT: Mr. Chief Justice, and may it
12 please the Court:

13 The issue presented before the Court here
14 reduces itself down to two questions. The first and the
15 most fundamental question is the meaning that Congress
16 intended to the phrase invalidate, impair, or supersede as
17 used in the McCarran-Ferguson Act.

18 Did Congress intend to afford to those words,
19 and particularly to the word impair, its common parlance
20 plain meaning, or did Congress intend a special,
21 restricted meaning, as respondents and the Government have
22 argued and as the Court below has found?

23 I suggest to the Court that that critical
24 question makes the second question easy. The second
25 question is, under a proper reading of the word impair,

1 and I focus on that because I think it is the critical
2 word, under a proper reading of the word impair, as
3 intended by Congress, is a State regulatory scheme
4 impaired by an alternative Federal remedy that renders
5 academic the State legislature's decision as to the
6 appropriate remedy to be afforded for the violation of
7 some standard?

8 Those are the two questions that I believe are
9 dispositive of the matter before the Court.

10 With respect to the first question, the Court
11 below did not attempt a parsing of the language. We do
12 not see anything in the decision of the Ninth Circuit or
13 of the other circuits that adopt the same view as the
14 Ninth Circuit, no attempt to go to the words of the
15 statute and ask, what does the word impair mean? What did
16 it mean to the 79th Congress when the McCarran-Ferguson
17 Act was adopted?

18 In the courts of appeal, what we had is an
19 interpretation by analogy. The McCarran-Ferguson Act has
20 about it an aspect of preemption in that it has an
21 analogous effect and therefore the Ninth Circuit and the
22 other circuits that go along with the Ninth Circuit have
23 reasoned, we believe incorrectly for the reasons set forth
24 in our briefs, that preemption and the special rules of
25 preemption apply.

1 QUESTION: Well, how do you say we should look
2 at the level of conflict between Federal and State law to
3 determine impairment? I mean, one way to look at this is
4 that the Federal RICO law gives a remedy that is not
5 precluded by State law, and that may be supplemental but
6 doesn't impair the State scheme.

7 MR. COLBERT: Whether a remedy is supplemental
8 of a State scheme or impairment of a State scheme depends
9 upon the answer to the question of whether we take
10 seriously the decision of the State legislature to limit
11 remedies.

12 If Nevada in this instance, when it had adopted
13 the private cause of action under its State insurance law,
14 had said, we -- had put a preamble in that said, the
15 legislature has considered and rejected enhanced damages
16 because of a concern for impeding the solvencies of
17 insurers for the purpose of giving windfalls to the first
18 person to get into the courthouse door, if we had such a
19 preamble, there could be no question --

20 QUESTION: But I thought the law didn't commute
21 punitive damages which have no lid and could be higher
22 than treble damages.

23 MR. COLBERT: But the limit on punitive damages,
24 which is critical to this issue, is that punitive damages
25 are not allowed where they impair the solvency of the

1 defendant. You may punish, but you may not destroy, and
2 the first goal of the insurance laws of the State of
3 Nevada and every other State in the Union is to protect
4 the solvency of the insurers.

5 RICO gives no discretion to the Court. Treble
6 damages are mandatory, and if that impairs the solvency of
7 the insurer, so be it. The same is not true of punitive
8 damages.

9 QUESTION: Well, I can understand if Nevada had
10 passed some statutory provision in expressing its intent
11 that its State remedies be exclusive, that this would be
12 an impairment, but absent that, it isn't so clear to me
13 that allowing the Federal remedy is an impairment.

14 MR. COLBERT: But why do we put the burden on
15 the State of Nevada to adopt the hypothetical preamble I
16 came up with a moment before? Why is it Nevada's burden
17 to justify its legislative decision? The structure of the
18 McCarran-Ferguson --

19 QUESTION: Well, it doesn't have to, but when
20 it's enacting its own laws it can certainly make it clear.
21 In the meantime, how is it an impairment?

22 MR. COLBERT: Well, what are we to have the
23 district courts do in applying Federal law in this
24 instance? Are we to now ask the Federal district courts
25 to examine the legislative history of every portion of the

1 insurance law in Nevada or the several States, and ask the
2 question, did the Nevada State legislature mean it when it
3 adopted --

4 QUESTION: Well, the obvious thing would be much
5 simpler. I mean, the obvious thing if you didn't know
6 anything about it, you'd say, well, this Court held that
7 insurance was interstate commerce. Surprise, surprise.
8 And at that point Congress is worried that it might have a
9 whole lot of laws out there that affect interstate
10 commerce, and it doesn't want those laws to affect
11 insurance. It doesn't want, in other words, to be taken
12 by surprise.

13 MR. COLBERT: Absolutely.

14 QUESTION: So Congress simply says, look all
15 these laws out there that we've passed, general laws
16 affecting interstate commerce, all right, they don't
17 preempt State insurance laws unless we specifically said
18 so by directing limited insurance, end of the matter,
19 period, and the only purpose that the word impair is doing
20 there is that sometimes you could in effect impair --
21 sorry. You could in effect preempt the State law by so
22 wrecking it through your preemptive interpretation that
23 although it's still on the books it's severely impaired.

24 In other words, impair does almost nothing, not
25 completely nothing but almost nothing, and now, if that is

1 so, you have the purpose achieved of what you think was
2 ordinary.

3 What's the evidence that what I just said is not
4 the case?

5 MR. COLBERT: Well, it is perfectly plain from
6 the debates and the enactment of the McCarran-Ferguson Act
7 that Congress was, as you've just suggested, Justice
8 Breyer, extremely concerned about inadvertent interference
9 with the State regulation of the business of insurance,
10 and it's for that reason that Congress placed upon itself
11 the burden of saying when congressional legislation would
12 apply, the reference in the McCarran-Ferguson Act to no
13 act of Congress except that specifically related to the
14 business of insurance.

15 And it is perfectly plain that Congress intended
16 more than just antipreemption, but remember --

17 QUESTION: It couldn't have said when it would
18 apply. I don't mean to cut you off, but obviously the tax
19 laws, for example, don't specifically mention insurance,
20 but they apply. I mean, thousands of Federal laws apply
21 to insurance, like everything else, so Congress couldn't
22 have meant just, we have to say specifically when Federal
23 law applies.

24 MR. COLBERT: When -- Federal law applies where
25 the Federal rule of decision results in a different answer

1 from the State rule of decision with respect to the
2 business of insurance, the relationship between an
3 insurance company and its insureds.

4 And the notion that it is somehow the burden of
5 the State of Nevada to say, when we adopted a private
6 remedy that allows only compensatory damages, we thought
7 about that, we thought about whether compensatory damages
8 would be sufficient, or whether we should have enhanced
9 damages, the notion that McCarran-Ferguson places on the
10 States the obligation to put such preambles in the law is
11 inconsistent with the observation you just made, Justice
12 Breyer, which was Congress didn't want Congress to
13 interfere by accident with the regulation of the States.

14 Congress could have provided that RICO applies
15 to the business of insurance. It can do so tomorrow, but
16 it is not Nevada's burden under the act to anticipate that
17 Congress will adopt a statute and then have an ambiguity
18 down the road as to whether or not the Nevada decision
19 with respect to remedies will or will not be respected by
20 the Federal courts.

21 QUESTION: Mr. Colbert, what is your authority
22 for saying that Nevada does not allow punitive damages
23 where they would threaten the solvency of the insurance
24 company?

25 MR. COLBERT: The Nevada law, Your Honor, I

1 believe is referenced in one of the amicus briefs, and I'm
2 sorry I don't have the citation at my finger tips.

3 QUESTION: Is it a case from the Nevada supreme
4 court?

5 MR. COLBERT: It is a case I believe from the --
6 I believe it is from the Nevada supreme court. I'm
7 embarrassed that I cannot give the Court the cite.

8 The principle --

9 QUESTION: It isn't in your brief?

10 MR. COLBERT: It is not in our brief, Your
11 Honor. It was not -- it is I believe a generally accepted
12 principle, not simply in Nevada but generally among the
13 States.

14 It may -- I appreciate that this Court has
15 struggled many times with punitive damages. I would
16 suggest that it is probably a constitutionally driven
17 principle, but of course --

18 QUESTION: Well --

19 MR. COLBERT: -- that's not before the Court.

20 QUESTION: -- we'll struggle even harder if we
21 can't find the case.

22 (Laughter.)

23 QUESTION: As far as your brief presentation is
24 concerned, the Nevada punitive damage provision has no cap
25 and that's it. That's all you put before us. I mean,

1 that's all that you -- that is before us on the parties'
2 presentation. Never mind the friends, but the parties
3 have one treble damages, one punitive damages with no cap,
4 no cap in the statute, right?

5 MR. COLBERT: That is correct. It is an issue
6 created by judicial interpretation.

7 QUESTION: And your position about the -- you
8 keep saying Nevada doesn't have to prove this or that.
9 It's slightly uncomfortable for you to be such a stalwart
10 champion of the State when we have the National
11 Association of Insurance Commissioners, which includes
12 Nevada's commissioner, saying, this is a harmonious
13 provision. This RICO harmonizes with our statute. It
14 doesn't impair it.

15 MR. COLBERT: Well, it does not surprise me that
16 the executive branch of the State wishes to have available
17 to it all of the possible remedies and weapons that it can
18 use to carry out the executive policy. The McCarran-
19 Ferguson Act --

20 QUESTION: Some insurance commissioners would
21 like to have stronger State insurance regulation laws.

22 MR. COLBERT: That's correct, Justice Scalia,
23 and they haven't been able to get them. That's why they
24 are supportive of the application of RICO, because they've
25 been unable to persuade the State legislatures to give

1 them comparable remedies, comparable weapons. It is the
2 State legislatures that are the beneficiaries of the
3 McCarran-Ferguson Act. It is to the State legislative
4 decision that Congress deferred, not --

5 QUESTION: Yes, but your argument, it seems to
6 me, on impair talks about impairing the business of the
7 insurance companies, not impairing any law. McCarran-
8 Ferguson says no act of Congress shall be construed to
9 invalidate, impair or supersede any law enacted by the
10 State.

11 MR. COLBERT: That is correct.

12 QUESTION: And what law enacted by Nevada was
13 impaired by this?

14 MR. COLBERT: It's Nevada Code section 686A,
15 Chapter 686A of the Nevada revised statutes, most
16 specifically sections .310 of that particular chapter,
17 which enumerates various acts which are rendered unlawful
18 under Nevada insurance law and provides a --

19 QUESTION: And are those laws still rendered
20 unlawful notwithstanding the application of RICO?

21 MR. COLBERT: Yes, Your Honor.

22 QUESTION: Well then, how are they impaired?

23 MR. COLBERT: Because Nevada elected not to
24 provide an enhanced damage remedy for violation of those
25 provisions, whereas the parallel substantive --

1 QUESTION: No, but the remedies provided in
2 those provisions may be enforced to the letter as far as
3 the Nevada legislature is authorized.

4 MR. COLBERT: Yes.

5 QUESTION: The -- in other words, the Nevada
6 laws can be fully enforced, notwithstanding the
7 enforcement of RICO, and that's -- for that reason it's
8 hard for me to see how those laws have been impaired.

9 MR. COLBERT: Well, I return to the question,
10 suppose the preamble to the private remedy contained in
11 that same statute expressly recognized the possibility of
12 enhanced damage and stated the decision of the Nevada
13 legislature to provide only compensatory damages, not
14 enhanced damages. That preamble does not exist, don't get
15 me wrong.

16 QUESTION: No, but even if it did, and they'd
17 say for that reason we've decided there's going to be a
18 cap on all State law causes of action, you may still
19 enforce the State law cause of action 100 percent, and
20 therefore, how is it impaired?

21 MR. COLBERT: Because you have made the decision
22 of the Nevada legislature to limit damages in that fashion
23 an idle act. You have -- you have as much impaired
24 their --

25 QUESTION: No, it's not an idle act. If you sue

1 in the Nevada courts you can only get those damages. It
2 still -- it defines the scope of the Nevada remedy, and
3 the Nevada remedy is precisely the same, whether or not
4 RICO is on the books.

5 MR. COLBERT: But keep in mind, Justice Stevens,
6 that the principal goal of insurance regulation in this
7 State and every other State is the protection of the
8 solvency of the carrier.

9 QUESTION: Oh, I'm not sure that's right. I
10 think they also have an interest in protecting
11 policyholders and the general public. It's not just to
12 protect the industry.

13 MR. COLBERT: Oh, no, I don't mean to overstate
14 it, but it clearly is the principal aim of all State
15 insurance legislation, because that is how you protect
16 policyholders.

17 The policyholders of an insurance company are
18 most protected if the company is still in existence to pay
19 the claim. If the ability of a company to pay the claims
20 of policyholders next year is impaired because a
21 policyholder this year recovered treble damages, you have
22 clearly impaired the principal goal of the State
23 regulation.

24 You cannot brush aside the decision of a State
25 legislature to award only compensatory damages to a

1 policyholder. That is, the policyholder will now get that
2 which the policyholder is entitled to receive under the
3 policy.

4 Giving a mandatory trebling of that amount with
5 no discretion in the trial court to reduce it is not
6 consistent with the notion that what you want to do is
7 have the insurance company here tomorrow to pay tomorrow's
8 claims.

9 Now, again, I cannot point the Court to a
10 preamble in the Nevada law that says, we, the legislature,
11 gave this thought when we were adopting the private right
12 of action that exists in Nevada law.

13 QUESTION: Well, what --

14 MR. COLBERT: Yes.

15 QUESTION: Mr. Colbert, what if a Nevada trial
16 judge had before him a case like this and the insurance
17 company says, well, the recovery -- we don't want you to
18 charge on punitive damages because the recovery might
19 threaten our solvency. What sort of an inquiry would the
20 trial judge make to decide whether or not to allow
21 punitive damages?

22 MR. COLBERT: Well, the traditional analysis,
23 Your Honor, is to examine the amount of the jury's award,
24 or I suppose if you get a bench trial award as well, and
25 to compare that with the net worth of the company to

1 ascertain whether payment of those sums would
2 significantly impair the net worth of the company.

3 It's a -- it is the kind of analysis that's done
4 all the time.

5 QUESTION: If that's so, that's what -- the kind
6 of thing that convinces me that impair can't mean impair,
7 or it must mean something quite weak.

8 On your theory, suppose Nevada passes the
9 following law: On good legal advice we've learned that
10 the Federal Government law can't impair ours, and on that
11 assumption we pass a law that all insurance companies will
12 pay a 5 percent corporate tax, and we pick this number 5
13 because we know they won't have to pay any more Federal
14 tax once we pass this law, because we think for them to
15 pay the Federal business tax, you know, under ordinary
16 corporate tax law, we'll really impair what we're trying
17 to do here, which is to raise 5 percent.

18 And they write it out as much as you want, and
19 every Federal trial judge in Nevada says, that's their
20 purpose all right. This whole law of theirs is wrecked,
21 impaired, if they have to pay under the general Federal
22 law the ordinary corporate tax.

23 MR. COLBERT: I don't believe, Justice Breyer,
24 that I have argued, nor can you read the McCarran-Ferguson
25 Act to go so far as to say it was an intention by Congress

1 to yield the Federal taxing --

2 QUESTION: But why not? It's a general law.
3 Why Federal tax law one wit more or less than Federal RICO
4 law?

5 MR. COLBERT: Because the imposition of the
6 Federal tax has no effect upon the collection of the State
7 tax.

8 QUESTION: Oh, yes, they find it does. They
9 say, as you've just said, we don't want to hurt the
10 company's position and how much money it has, and they
11 don't have enough money for both, and we've picked a rate
12 here that just works perfectly and, boy, the company will
13 be down the drain if they have to pay not only our rate,
14 but also the Federal rate.

15 I can draw it out as much as you want. We both
16 could. But that's -- once you see that, it seems to me
17 impossible to say that they really meant that word impair
18 literally the way you're taking it.

19 MR. COLBERT: But I see a distinction, if I may,
20 between the State indicating it wishes to collect its tax
21 and a State making a decision that the remedy that will be
22 afforded to a private litigant will be limited to that
23 which makes the litigant whole and provides no more for
24 the litigant, no enhanced damages, out of the view that
25 after all, all of these litigants -- at least all the ones

1 we're talking about here -- are policyholders.

2 They're all claiming the same pool of funds, the
3 ultimate availability of which is dependent upon the
4 continued solvency of the insurance carrier who's going to
5 pay all these claims, and to make a decision at the State
6 court level that as between different private litigants,
7 different policyholders, we are not going to permit
8 windfalls. We're only going to permit recovery.

9 I see a difference between that and the decision
10 on the part of the State that we're going to collect a
11 tax, and because we want to collect a tax, we're going to
12 urge that we have the ability under the McCarran-Ferguson
13 Act to restrict Congress' ability to tax the same entity.
14 You're not directing yourself at the same issue.

15 In the instance in which you have single damages
16 as opposed to enhanced damages, you really are asking
17 yourself the question, should I be taking money out of the
18 pocket, or potentially taking money out of the pockets of
19 policyholders next year in order to provide excess
20 compensation to policyholders this year.

21 It's the same body of people that the State
22 is -- the State legislation's intended to protect, and I
23 don't see the analogy between that and --

24 QUESTION: Yes, well, I'm -- you know, I'm not
25 sure you're really urging a different test from the test

1 that your opponents argue, the way you describe it.
2 You're asserting there's a conflict between the Federal
3 Government's providing for treble damages and the State's
4 desire not to have treble damages.

5 I mean, does it make sense to fight this on the
6 battlefield of whether we're going to have a conflict test
7 versus a, quote, impairment test?

8 MR. COLBERT: Not as you have used the word
9 conflict, Justice Scalia, but I'm afraid that we can get
10 ourselves lost in semantics.

11 The test that is being urged by the respondents
12 and the Government is what they call the direct conflict
13 test, and by that they --

14 QUESTION: You can't comply with one law and
15 comply with the other at the same --

16 MR. COLBERT: Exactly.

17 QUESTION: Well --

18 MR. COLBERT: And if we use conflict itself in
19 the more common parlance that we use -- that I've just
20 used since I've been speaking with Justice Breyer, then
21 conflict is a perfectly good word. I'm quite content --

22 QUESTION: You're content to have that as the
23 test, whether you conflict with the policy of the State?

24 MR. COLBERT: That is correct.

25 QUESTION: Okay.

1 MR. COLBERT: And I suggest that you find the
2 policy of the State only by looking, as the McCarran-
3 Ferguson Act directs us to, look at the laws of the State
4 enacted for the purpose of regulating insurance, and ask
5 yourself if the laws of the State are materially different
6 than the otherwise parallel Federal law, because --

7 QUESTION: You're not saying there's any
8 difference in substance, so does your whole case -- do I
9 understand correctly that your whole case turns on the
10 treble damage feature of the Federal law, which you say is
11 absent on the State side?

12 MR. COLBERT: It doesn't --

13 QUESTION: No difference in substantive
14 provisions?

15 MR. COLBERT: That is correct, Justice Ginsburg.

16 QUESTION: And then if you're not right about
17 the punitive damages -- suppose we don't have this case
18 that says we won't make the company insolvent. Suppose
19 there's no lid on punitive damages. First, there's treble
20 damages on the Federal side. Then is there an impairment?

21 MR. COLBERT: There is, and the reason is that
22 in punitive damage instance the trial judge always has the
23 discretion to reduce the punitive damage award. It's
24 never mandatory.

25 For RICO, it is mandatory. It does not matter

1 what the consequence may be to the insurance company. You
2 could have a situation in which, as a result of mandatory
3 treble damages, the insurance company defendant goes
4 straight into liquidation. It is insolvent.

5 You could have the same award come out of a jury
6 and the trial judge doesn't have to let that happen, and I
7 suggest it would be an abuse of discretion to allow that
8 to happen, and that is a very real difference.

9 Now, I'm not pretending in this case that the
10 award below is going to put this petitioner into
11 liquidation, but if you're -- but if you want to ask
12 yourself the question of whether we have an important
13 policy issue at the State court level, I think it's fairly
14 clear that we do.

15 QUESTION: So that RICO would be incompatible
16 with any State law that didn't provide for treble damages.

17 MR. COLBERT: Any State insurance law that
18 didn't provide for treble damages, that is correct, and I
19 said the treble damage provision in this case -- because
20 that's what we have. We have -- Nevada does have a
21 private cause of action, allows compensatory damages,
22 whereas RICO has treble damages. Obviously in other
23 States the points of distinction might be broader than we
24 have in this particular case, but in this case that is the
25 point of distinction.

1 QUESTION: Are there other more general Nevada
2 laws that could apply to insurance fraud?

3 MR. COLBERT: Nevada recognizes a common law
4 cause of action for bad faith failure to provide benefit.

5 QUESTION: And is that -- is the application of
6 that law somehow limited by the special provision
7 governing insurers?

8 MR. COLBERT: No, because the Nevada -- Nevada
9 insurance legislation does not purport to supplant other
10 Nevada State law. It has a preamble in which it indicates
11 that it is intended to comply with the requirements of
12 McCarran-Ferguson that there be State regulation, but
13 there is no indication, and I believe the contrary is
14 indicated, that Nevada intended by the adoption of its
15 insurance law to oust other Nevada State law.

16 That is not -- that's not the issue that
17 McCarran-Ferguson raises. McCarran-Ferguson directs the
18 court to compare the Federal laws of general applicability
19 with the State laws enacted for the purpose of regulating
20 the business of insurance, and that's the focus that --

21 QUESTION: I understand that, but whether you're
22 contravening some policy set forth in the State insurance
23 law in particular is affected by whether that State
24 insurance law is hermetically sealed, or whether in fact
25 the insurance company is subject to a lot of other State

1 laws anyway.

2 MR. COLBERT: Well, in this instance, although I
3 do not believe that it is dispositive of the question, in
4 this instance, as the district court noted below, Nevada
5 does have a little RICO, and the predicate acts listed in
6 Nevada's little RICO do not include violation of the
7 provisions of the Nevada insurance law that are implicated
8 by the conduct alleged.

9 If we're going to look to what the Nevada
10 legislature did, we do have some indication that the
11 Nevada legislature did not elect to provide treble
12 damages, as their little RICO provides, for this kind of
13 conduct, but I don't think claimants responsible --

14 QUESTION: What about violation by the insurance
15 company of that -- the common law fraud provision?

16 MR. COLBERT: Of the --

17 QUESTION: Would that come under the little
18 RICO?

19 MR. COLBERT: No, Justice Scalia. The little
20 RICO statute in Nevada is quite explicit with respect to
21 what it lists. The district court went through it. We've
22 discussed it in our brief. There isn't -- the
23 provisions --

24 QUESTION: Let me give you another --

25 MR. COLBERT: -- of the insurance law that are

1 implicated --

2 QUESTION: Supposing your Federal statute
3 authorizes a remedy for a RICO fraud that you can seize
4 the assets of the company that have been used to
5 perpetrate the fraud, but the Nevada statute does not have
6 that remedy in it. Could you enforce the Federal remedy
7 or not?

8 MR. COLBERT: No.

9 QUESTION: You could not.

10 MR. COLBERT: I think that would be a more
11 extreme example.

12 QUESTION: Yes.

13 MR. COLBERT: Mr. Chief Justice, may I reserve
14 the rest of my time?

15 QUESTION: Yes, thank you, Mr. Colbert. We'll
16 resume at 1:00.

17 (Whereupon, at 12:00 noon, the oral argument
18 recessed.)

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3 QUESTION: We'll resume the arguments in Number
4 97-303, Humana, Inc. v. Forsyth. Mr. Blakey.

5 ORAL ARGUMENT OF G. ROBERT BLAKEY

6 ON BEHALF OF THE RESPONDENTS

7 MR. BLAKEY: Mr. Chief Justice, and may it
8 please the Court:

9 My name is G. Robert Blakey and I represent Mary
10 Forsyth and the other respondents. Before I begin my
11 argument directly, and I do want to talk about the text of
12 the statute, I would like to make six very quick points
13 about the insolvency question that came up previously.

14 First, the case that my colleague was referring
15 to is Nevada Cement, 514 Pacific the 2nd, 1180. The case
16 holds that the purpose of punitive damages in Nevada law
17 is to vindicate the public interest without annihilating
18 the defendant.

19 Second point. I don't see how he has standing
20 to complain about the possibility of an insolvency. He
21 has conceded he's not insolvent. Surely as he's
22 construing the word impair, it would be impaired as
23 applied, so if we got it in a company where triple damages
24 would, in fact, make it insolvent, in that situation you
25 would have an impairment under his test, but not

1 otherwise.

2 Second, I cannot see where he finds his
3 limitation on punitive damages in Nevada law since, when
4 they put the limitation of triple damage, triple punitive
5 damages, they expressly excepted bad faith cases against
6 insurance companies. This legislature has recognized the
7 possibility of unlimited punitive damages subject to due
8 process.

9 Third --

10 QUESTION: I didn't get that last point.

11 MR. BLAKEY: The --

12 QUESTION: The punitive damages exception for
13 driving someone into insolvency does not apply to --

14 MR. BLAKEY: No, Your Honor. No. Let me see if
15 I can't make it clear. In 1987, Nevada passed tort
16 reform. That tort reform put a limitation on punitive
17 damages. If it's in excess of \$100,000 you can only get
18 three times the actual. If it's less than \$100,000
19 actual, you cannot get more than \$300,000.

20 QUESTION: Okay.

21 MR. BLAKEY: That limitation has an exception to
22 it. That exception to it is bad faith insurance, in which
23 those limitations don't apply. Therefore, the voice of
24 the law in this State has certainly not shown that kind of
25 solicitude towards insurance companies.

1 Next is -- and this I have to apologize for.
2 This was not part of the briefing, and so I didn't get it.
3 My mind has the fact that there's an Oklahoma district
4 court opinion that says you cannot collect triple damages
5 under RICO in a bankruptcy, and if that's good law, it
6 seems to me is what would happen in this case, if the
7 actual damage judgment sent them into bankruptcy, we
8 couldn't collect RICO triple damages against them in
9 bankruptcy anyway.

10 QUESTION: Well, do insurance companies go into
11 ordinary bankruptcy if there's an insolvency proceeding
12 under State law?

13 MR. BLAKEY: Mr. Chief Justice, that is in fact
14 my next point. Most every State has an insolvency fund,
15 so if a judgment put it into bankruptcy, the stock -- the
16 stockholders might lose, but the policyholders would be
17 paid by the insolvency fund, so in fact we've taken into
18 consideration in Nevada law the danger of insolvency.

19 QUESTION: Well, his point would be you would
20 need a bigger insolvency fund, which means you would need
21 higher premiums, and his point would be that the
22 legislature has carefully calculated what a good level of
23 premiums is, and it doesn't include the level necessary to
24 pump up the insolvency fund enough to cover treble
25 damages.

1 MR. BLAKEY: I hesitate to opine on insurance
2 law generally, but my understanding of many of the
3 insolvency funds is, they're not real funds. What they do
4 is just, they assess all the insurance companies for
5 whatever has to be paid. They do not necessarily assess
6 the other policyholders, except in the sense that they
7 would assess all policyholders generally.

8 The last two points I make, and it is extremely
9 quick, is his notion that actual damages makes somebody
10 whole flies into the face of all economic analysis. It
11 doesn't discount the opportunity cost and others, and I
12 would refer the Court on that point to an able opinion by
13 Judge Easterbrook in the context of a RICO case, and it is
14 Mosler v. the S&P Enterprises, and the relevant page is
15 888 Fed.2d at 1143-44.

16 And as to the general economic analysis of the
17 effect of triple damages, the studies particularly under
18 the antitrust law is, they result in actual settlements
19 and actual damage. Accordingly, you probably need triple
20 damages to make a plaintiff whole. Actual damages --

21 QUESTION: Through settlement, you mean?

22 MR. BLAKEY: Pardon?

23 QUESTION: You have treble damages, you can get
24 a settlement that makes you whole?

25 MR. BLAKEY: Yes, and if you don't have triple

1 damages, what you end up is some discount of actual
2 damages, so actual damages, a lot of -- like a lot of
3 phrases in the law, actual doesn't really mean actual.

4 To return to my argument, respondents'
5 construction of impair is premised on a misconstruction of
6 the purposes of the McCarran-Ferguson Act, and is
7 fundamentally inconsistent with the statute. As a
8 whole --

9 QUESTION: Is it common ground here among the
10 parties that we do have before us a State law that's for
11 the business of regulating -- for the purpose of
12 regulating the business of insurance?

13 MR. BLAKEY: Yes.

14 QUESTION: And that is the Nevada law which
15 prohibits the insurance companies to defraud their
16 policyholders?

17 MR. BLAKEY: Yes. It's inconsistent with the
18 statute as a whole, the section of which it is a part, and
19 the phrasing in which it is embedded. Respondents argue
20 that the purpose of the McCarran-Ferguson Act was to
21 privilege State law over Federal law.

22 Well, that's just not true. If you look at the
23 final text of the statute, it is a carefully crafted
24 compromise that in some situations does that, and in
25 others doesn't, and I've asked the Clerk to have available

1 to each of you respondents' Exhibit Number 1, which is the
2 actual text of the statute from the statutes at large, and
3 you can see it right on the face of the statute.

4 I've highlighted the five places in that statute
5 that adjust the relationship between Federal and State
6 law.

7 You start at the bottom. Section 4 preserves
8 labor law under a standard of, to affect in any manner.
9 That's the typical preemption of Federal labor law of all
10 State law. That's no privileges of State law in that.

11 Section 3(b) preserves the Sherman Act insofar
12 as agreements to boycott and coerce or intimidate is
13 there. It's fully applicable under this Court's
14 jurisprudence under conflict --

15 If you look at section 3(a), he got his reverse
16 field preemption for a temporary period of time in order
17 that the States could enact laws.

18 And finally, we move up to the crucial section,
19 but my point has been, this is a carefully balanced
20 statute that privileges Federal law sometimes and State
21 law the other, and for him to want to interpret it in
22 light of one of its purposes and not its others is to
23 forget that this is a compromise, not a recognition of a
24 jurisprudential proposition that State law is more
25 important than Federal.

1 If we look at the crucial language in the
2 statute -- Your Honors, this is section 2(b) -- we have to
3 look at two points in it. One, the crucial language, to
4 invalidate, impair, or supersede.

5 Let's take his common ground that supersede
6 means to displace, that invalidate means to eliminate but
7 not displace. If you give impair the kind of open-ended,
8 broad definition that he would give it, there's no role
9 left to play for invalidate and supersede. It's sucked
10 right out of the statute. Indeed --

11 QUESTION: I don't know that I agree with you,
12 Mr. Blakey, on that. It seems to me impair could be
13 having a lesser effect, short of invalidation or of
14 superseding, but nonetheless impairing.

15 MR. BLAKEY: But in that case, since impair is
16 met at a lesser stage, every time where you've had a
17 supersession, every time when you've had an invalidation,
18 you'd also have an impairment. Accordingly, you would
19 never spend any time in the future in looking at the other
20 two statutory words.

21 It seems to me the most plausible reading of
22 this phrase is, these are three alternative but not
23 mutually exclusive ways that State law or Federal law
24 could upset State law.

25 QUESTION: Are you saying that each word means

1 something different?

2 MR. BLAKEY: Well, there's a connotation that's
3 different.

4 QUESTION: Well, could you answer the question?

5 MR. BLAKEY: The answer, as I understand the
6 question, is, my position is that impairment would take
7 place in all three situations. Any time you were
8 superseded, you would be impaired. Any time you were
9 invalidated, you would be impaired.

10 Sometimes under his construction you would be
11 impaired but not invalidated and not superseded.
12 Therefore, the only operative word in the phrase would be
13 impaired, and the normal assumption is --

14 QUESTION: Yes, but you're explaining his view,
15 and I think the Chief Justice asked you what is your view.

16 QUESTION: Yes, I asked your view.

17 MR. BLAKEY: Oh, my view -- I'm sorry, Justice
18 Stevenson. My view is, these are three alternative ways,
19 not mutually exclusive, in which you can bring about a
20 conflict between State and Federal law.

21 QUESTION: And does each word, each of those
22 three verbs have a separate meaning, do you think?

23 MR. BLAKEY: Yes. In other words, when the
24 impairment met a conflict, it didn't supersede, it didn't
25 invalidate, but it arose to the level of a conflict, you

1 couldn't follow Federal law and State law, then that's
2 what it would -- exactly impairment would mean.

3 What he's done is, he's unhooked impairment from
4 any limitation. Indeed, he suggests that the word impair
5 is derived from 3270, which was the original McCarran-
6 Ferguson Act as introduced, but if you go to 3270, what it
7 said in that context was, apply to or in anywise to
8 repair -- impair, and what happened between 3270 and
9 S. 340 is that in anywise was dropped out, and this
10 Court's jurisprudence teaches that if you drop language
11 out, it's presumed to be deliberate.

12 QUESTION: I'm still a little puzzled, because
13 is it -- are you suggesting that a law could invalidate a
14 State law without impairing it?

15 MR. BLAKEY: No. No, on the contrary. I think
16 that invalidate -- these words are not necessarily
17 mutually exclusive, but my argument is that if impair is
18 construed as he does, impair would be the only operative
19 word.

20 QUESTION: It still seems to me under your
21 reading it is, too.

22 QUESTION: The same with yours.

23 MR. BLAKEY: No. No. What I'm --

24 QUESTION: Can you give me an example, under
25 your reading, of a law that would impair the State law

1 without invalidating or superseding it?

2 MR. BLAKEY: Okay. If -- suppose, in his
3 example, the State legislature squarely and unequivocally
4 said as against insurance companies in this State, only
5 actual damages can be recovered, and at that time it
6 abolished the State common law and it put an exception in
7 the State RICO so there wasn't insurance fraud there, and
8 the only way you could get -- or even more so, the only
9 remedy under State law would be an administrative
10 sanction.

11 The only remedy would be an administrative
12 sanction. I'm inclined to think in that situation he
13 would have a conflict.

14 If he's got a policy decision by the State
15 legislature that we're only to do administrative sanctions
16 against insurance companies. That might rise to the level
17 of a conflict.

18 QUESTION: Then Mr. Blakey, when you say he,
19 Humana I guess is a corporation, and your opposing
20 counsel, is that who you're referring to?

21 MR. BLAKEY: Yes.

22 QUESTION: I think it might be better to refer
23 to him as counsel.

24 MR. BLAKEY: Okay. If we take his reading of
25 the statute, this impair, at this level of broadness, he

1 gives no function to the proviso in this section.

2 The proviso in this section says, to the extent
3 that the States have enacted antitrust type statutes, to
4 that extent State law does trump Federal law, but to the
5 extent that they've acted it, that would mean, in effect,
6 impair, as he's defined it. Therefore, his reading of
7 impair in effect --

8 QUESTION: Mr. Blakey, my suggestion was that
9 you refer either to the petitioner or --

10 MR. BLAKEY: I apologize. Humana's construction
11 of the statute would in effect read as follows: no act of
12 Congress shall be applicable to the business of insurance
13 if it impairs such business regulated by State law, or
14 which is State law otherwise enacted for the purpose of
15 the business.

16 You cut out of it, to the extent that you cut
17 out of it invalidate, you cut out impair, and you cut out
18 of it supersede. That's his definition of impair. That
19 cannot be what it means.

20 QUESTION: What -- I'm having trouble what it
21 does mean. I mean, the normal thing, if you're just
22 looking to preemption analysis, you don't really -- you
23 normally don't look to what the State law's about except
24 in a limited extent.

25 You look to what the Federal law is about, and

1 you ask yourself whether or not this State law -- State
2 law prevents -- State law creates a direct conflict or
3 whether or not this Federal law has a purpose that the
4 State law significantly interferes with achieving.

5 Now, is that all we're supposed to do here?

6 MR. BLAKEY: Well, this Court's teaching -- yes
7 and no.

8 QUESTION: If the answer to that's yes, then all
9 it says is, if the Federal law would preempt a State law,
10 it doesn't.

11 MR. BLAKEY: Well, preemption in this Court --
12 well, I'm uncomfortable with the word preemption, because
13 that's a Whig's view of history, to read back into a 1945
14 statute preemption jurisprudence. They discussed it at
15 the time in terms of conflict. I am more comfortable
16 discussing it in terms of conflict.

17 Nevertheless, this Court's jurisprudence in
18 English suggested that there were three not mutually
19 exclusive ways to preempt, express, field, and conflict,
20 and we think that this is conflict, and the reason we
21 think that this is conflict is that the contemporary
22 jurisprudence of this Court discussed this in terms of
23 conflict.

24 Justices acting in dissent actually said, only
25 actual conflict impaired --

1 QUESTION: Oh, but that's exactly now the point,
2 because conflict can take place in one of two ways. You
3 put people under conflicting obligations, in which case
4 it's easy. But the harder case is typically where the
5 Federal law is trying to achieve a purpose, which purpose
6 the State law interferes with achieving.

7 Now, if we're just going -- is it your view that
8 the word impair applies only in that case, or is there
9 something else, like you look to the State purpose and see
10 if the Federal law interferes with achieving that purpose?

11 MR. BLAKEY: With all due respect, Justice
12 Breyer, I think this Court ought to spend its time
13 interpreting Federal law and not get into a quagmire of
14 State law, and this is not only a quagmire of State law,
15 it's a quagmire of --

16 QUESTION: Your answer is the first, not the
17 second.

18 MR. BLAKEY: Actually, it's both. I'm willing
19 to say that I think it's a direct conflict between Federal
20 and State law such that you couldn't do both. That's my
21 interpretation.

22 But if I accept his impair to the degree of
23 upset the balance, there are two things presupposed, first
24 that there was a balance, and second that it was upset,
25 and there are not one but several reasons to suggest that

1 there was no balance.

2 QUESTION: Before you go on, Mr. Blakey, I
3 wasn't aware that conflict preemption in the Federal
4 scheme -- you know, you mentioned the three types, field,
5 and so forth. I wasn't aware that conflict preemption was
6 limited to the case where you're put under conflicting
7 obligations. I would think that a State statute could
8 conflict with a Federal statute if it frustrated the
9 purpose of a Federal statute.

10 MR. BLAKEY: Well, in National Securities, this
11 Court held that impair in the McCarran-Ferguson Act meant
12 only direct impair, and saw it in terms of this kind of,
13 you can't do both.

14 This Court in Fabe saw that there was a conflict
15 by seeing it in terms of both.

16 I see that my time is almost exhausted. I would
17 suggest to you that there is no balance, 1) because the
18 face of the State insurance code recognizes that other
19 sanctions outside of the code are possible, in fact, now
20 has a private claim for relief.

21 Second, there's no indication that the common
22 law claims for relief with punitive damages has been set
23 aside, and the State RICO statute specifically includes
24 obtaining money by false pretenses, and if the Court wants
25 a case close to this fact situation, it is Bright v. The

1 Sheriff, 521 Pacific the 2d, 371.

2 They suggest there's no obtaining money by false
3 pretenses because we're complaining about what they didn't
4 give us. We're also complaining about what they caused us
5 to give them by virtue of fraud.

6 I would suggest that it would be unwise to go
7 down the route of conflict of this impairment
8 jurisprudence. You've got really clear jurisprudence on
9 conflict. You have Silkwood, ARC, English, and Cippolone,
10 all of which have looked to see the relationship between
11 Federal and State law, and have preserved as much as
12 possible State law.

13 As Justice O'Connor said in her concurring
14 opinion in Medtronic, there's no necessary conflict
15 between a Federal administrative remedy and State torts.
16 You just -- quote, an additional damage remedy is another
17 reason to comply.

18 Let me conclude by making a reference to Judge
19 Learned Hand. He says in his essay on the contribution of
20 an independent judiciary to civilization that enacted
21 law -- and he could have been talking about the McCarran-
22 Ferguson Act -- is not enactment of eternal principles of
23 jurisprudence. It's the resolution of a conflict, and
24 that compromise, that conflict ought not to be broadened
25 or narrowed. It ought to be read loyally as the language

1 indicates until such time as it is changed by the process
2 that created it.

3 In 1944, this industry came to Congress to get
4 an exemption, and they didn't get it. In 1989, this
5 industry is coming to this Court to get an exemption.
6 They ought not get from this Court what they could not get
7 from Congress.

8 Thank you.

9 QUESTION: Thank you, Mr. Blakey.

10 Mr. Wallace, we'll hear from you.

11 ORAL ARGUMENT OF LAWRENCE G. WALLACE

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

13 SUPPORTING THE RESPONDENTS

14 MR. WALLACE: Thank you, Mr. Chief Justice, and
15 may it please the Court:

16 The full text of the McCarran-Ferguson Act is
17 set out in the appendix to the blue brief, the
18 petitioner's brief, and textual analysis, particularly in
19 its historical context, takes us a long way in this case.
20 The special rule of statutory construction in section 2(b)
21 or 1012(b) does not say that no act of Congress shall be
22 construed to affect the insurance business.

23 It's quite specific in saying that no act shall
24 be construed to invalidate, impair, or supersede any law
25 enacted by a State to regulate or tax the business of

1 insurance.

2 QUESTION: You emphasized the word law when you
3 read that. Does that mean to say that a common law
4 decision of a court would not be regarded as law by you?

5 MR. WALLACE: Perhaps common law would be
6 included. That is not something that has come to the fore
7 in this case.

8 What the concern was in the dissents in
9 Southeastern Underwriters, in all of the entreating to
10 Congress, was that State laws would be inadvertently
11 repealed, that the authority of the States to regulate and
12 tax insurance was thrown into question.

13 Indeed, it was quite revealing, as we quote at
14 the top of page 19 in our brief, that Senator Ferguson
15 himself explained this provision as providing that no
16 Federal legislation shall by implication repeal any
17 existing State law unless the act of Congress specifically
18 so provides, so it was to preserve the authority of the
19 States to have their law that was what was foremost in the
20 minds, and what is stated here in the act.

21 It does not say that no act of Congress shall be
22 construed to impair or supersede any State policy, leaving
23 the courts open to speculation about negative implications
24 of what the State failed to enact.

25 QUESTION: Do you think you don't impair a law

1 if you impair the policy that the law seeks to further?

2 MR. WALLACE: Well, we tried to show how the
3 phrase impair a law was used in historical context to mean
4 in effect a partial repeal, or to render it partially
5 ineffective. It's quite difficult for Federal courts
6 construing this act of Congress to determine what are the
7 policies of Federal laws, let alone to try to come to
8 grips with whether a Federal statute should be thought to
9 in some way be inconsistent with an unstated policy of the
10 State law, and --

11 QUESTION: Let's assume you had a prologue to
12 the statute of the sort that was hypothesized this
13 morning, where the State legislature says very clearly we
14 don't think that insurance companies should be exposed to
15 treble damages because we're concerned about their
16 solvency and blah, blah, blah, blah, okay, and then
17 it proceeds to enact this thing.

18 Would you say that even in that stark situation
19 this RICO treble damage proceeding would not impair the
20 State law?

21 MR. WALLACE: That would be a much closer case
22 than this one, when you'd have an articulated State
23 policy, but it still is not a law that itself regulates
24 the business of insurance. It refrains from regulating,
25 and to the extent the State is purporting to limit --

1 QUESTION: Well, of course, that's just grammar.
2 Suppose it just said no court in this State shall enter
3 any judgment for punitive damages or for damages more than
4 compensatory damages.

5 MR. WALLACE: That would be --

6 QUESTION: If that's the law, how do we then
7 interpret the word impair to resolve that hypothetical
8 problem?

9 MR. WALLACE: The -- I think it would be, as I
10 say, a much closer case, but the fact is the State is not
11 in a position to tell the Federal Government what remedies
12 it can provide for patterns of criminal enterprises, and
13 to the extent that it purports to do that, it's a law
14 regulating the Federal Government rather than a law
15 regulating the business of insurance.

16 The argument can be made, but we're far from
17 that case here.

18 QUESTION: But we have to -- that is exactly the
19 question. I mean, it could come up in writing the
20 opinion. I mean, what you say in your brief is, you think
21 that impair a law, that phrase connotes partial
22 preemption, the displacement of some portion of a statute
23 or its preclusion in certain contexts.

24 So then isn't your answer, and explain if it
25 isn't, to Justice Scalia's question, write anything in

1 that preamble you want, including the very words that
2 Justice Scalia suggested, and your answer would be no,
3 RICO does not impair that statute, because the operative
4 words of that statute are the same which are at present
5 before us.

6 Is that your answer?

7 MR. WALLACE: The answer is that the statute
8 would stand because the courts of the State, which are the
9 State courts, not the Federal court, would still not be
10 able to award treble damages under State law, but --

11 QUESTION: So RICO would apply. RICO would
12 apply in Justice Kennedy's example, RICO would apply in
13 Justice Scalia's example, in your opinion.

14 MR. WALLACE: I think we could go that far, yes,
15 but we don't have to in this case, because the State --

16 QUESTION: All right, then, and if you don't
17 have to go that far in this case --

18 MR. WALLACE: They're reading negative --

19 QUESTION: -- if I were writing the opinion and
20 got to the phrase, the word impair means, and then there's
21 a blank, how would you fill it in?

22 MR. WALLACE: To render partially ineffective
23 what the State has ordained by law.

24 QUESTION: How is that different from supersede?
25 Wouldn't that be --

1 MR. WALLACE: Supersede is to replace with
2 something. There's a slightly different connotation.

3 QUESTION: All right. Try invalidate.

4 MR. WALLACE: Invalidate means to nullify or
5 render ineffective without necessarily replacing, but it
6 doesn't have the same connotation as impaired, doing it
7 only in part. Invalidate sounds like you're doing --
8 you're nullifying the whole thing.

9 QUESTION: If you invalidated it only in part it
10 wouldn't be an invalidation? I would think it was an
11 invalidation.

12 MR. WALLACE: Well, the connotation is somewhat
13 different. They're closely related terms.

14 QUESTION: Why didn't they say, invalidates or
15 supersede in whole or in part?

16 MR. WALLACE: Well --

17 QUESTION: I mean, that's only --

18 MR. WALLACE: They could say that, but that
19 isn't what it says.

20 QUESTION: May I suggest, Mr. Wallace, that the
21 statute can be read to impair a State insurance policy
22 that favors collective rate-making without affirmatively
23 commanding it, because clearly most insurance -- and that
24 that's exactly what they -- well, the Congress wanted to
25 preserve, even though it didn't invalidate any specific

1 law in itself, but just conflicted with the policy. Do
2 you understand what -- my question's a little garbled,
3 but --

4 MR. WALLACE: Well --

5 QUESTION: But they did not want the Sherman Act
6 to be construed to ban collective rate-making by States
7 where there was --

8 MR. WALLACE: That is quite correct, and there's
9 a special provision about the Sherman Act. That special
10 provision shows the limited reach of the rule of
11 construction, because that special provision says that
12 with respect to the antitrust laws if the State has a
13 system of regulation in place the Federal antitrust laws
14 are ousted except for boycott, intimidation, or coercion
15 so it shows that the special rule of construction is
16 something of a much more limited nature.

17 It must be remembered that RICO is not just a
18 one-way street with respect to the solvency of insurance
19 companies. We have amicus filings before this Court by
20 receivers of looted insurance companies who are using
21 civil RICO to try to get assets back in for the benefit of
22 the policyholders.

23 QUESTION: Mr. Wallace, if I were to ask you --
24 we took this case because it's a purported circuit split,
25 and we have the Ninth Circuit direct conflict.

1 As far as I understand this case and your
2 position is, you don't have -- that's really academic in
3 this case because these -- this Federal law is in total
4 harmony with the State law and so you don't have to decide
5 in this case other cases that might present the more
6 extreme example, or are you saying, yeah, pick one of
7 these tests?

8 MR. WALLACE: The conflict is about whether
9 civil RICO can be applied to claims against insurance
10 companies.

11 QUESTION: But in every State's law, or are we
12 to look at this State's law and say, as far as what
13 this -- it doesn't provide just an administrative remedy.
14 It provides for going to court, it provides for punitive
15 damages, as far as Nevada is concerned?

16 MR. WALLACE: Well, it would be much better to
17 have a uniform application.

18 It's true that treble damages might be available
19 under Massachusetts law, but Congress has seen fit to
20 provide treble damages for patterns of serious, indictable
21 criminal activity.

22 QUESTION: I think you've answered the question,
23 Mr. Wallace. Thank you.

24 Mr. Colbert, you have 4 minutes remaining.

25 REBUTTAL ARGUMENT OF JAMES W. COLBERT, III

1 ON BEHALF OF THE PETITIONERS

2 MR. COLBERT: Thank you, Mr. Chief Justice, and
3 may it please the Court:

4 Let me begin by thanking my opposing counsel
5 from respondents for answering the question I was unable
6 to answer from Justice Ginsburg before with respect to the
7 citation. That is the case that I had in mind as the
8 leading authority in Nevada on the limitations on the
9 award of punitive damages.

10 Let me move on to the areas where I'm not so
11 grateful for his argument. Let me begin first with the
12 standing question.

13 We heard a lot about standing this morning in
14 the prior issue. Surely there is no question before this
15 Court that Humana has standing to contest the
16 applicability of RICO to it, and surely there is no
17 question that this Court will not be announcing a rule of
18 law that determines whether a Federal statute applies or
19 not by looking at the financial condition of the defendant
20 against whom the Federal law is urged.

21 We have conceded that insolvency is not an issue
22 in this case, but that is not an answer to the
23 jurisprudential problem of whether the States are entitled
24 to have Federal deference under the McCarran-Ferguson Act
25 to decisions which are related to that consideration in

1 the general context.

2 And let me move, then, to the question of
3 impair, and whether a State statute that does not
4 contemplate multiple damages, as the Nevada statute does
5 not, is in fact impaired.

6 Several justices put to the Government and to
7 the respondents a hypothetical circumstance that I posed
8 this morning. Suppose the preamble of the statute
9 specifically recognized the State interest in preserving
10 the solvency of the insurance company and the potential
11 impediment to that State purpose, that treble damages,
12 mandatory treble damages provide.

13 The respondents conceded that if that preamble
14 existed, RICO would impair Nevada law. The Government did
15 not make such a concession, but I suggest that the
16 Government's response was not entirely satisfactory.

17 The issue before this Court I believe boils down
18 to the question of whether, under McCarran-Ferguson, the
19 States must adopt such preambles. Is -- are the Federal
20 courts to look beyond what the State statute says and
21 second-guess the policymaking decision of the State
22 legislature to say that the State legislature didn't
23 really mean it when it only allowed for compensatory
24 damages under the State insurance law?

25 The counsel for respondents concluded his

1 argument with a reference to Judge Learned Hand. Let me
2 conclude mine with a reference to Judge Magruder of the
3 First Circuit in one of the follow-up cases to Erie.

4 And I am going to do this by memory, so I may
5 not get it entirely correct, but if the Federal courts can
6 sit in judgment of the State legislatures and decide
7 whether particular legislative enactments are or are not
8 important, then the ghost of Swift v. Tison still walks
9 the land, greatly reduced in size but still capable of
10 much mischief.

11 Thank you.

12 CHIEF JUSTICE REHNQUIST: Thank you,
13 Mr. Colbert.

14 The case is submitted.

15 (Whereupon, at 1:34 p.m., the case in the above-
16 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:

HUMAN, INC., ET AL., Petitioners v. MARY FORSYTH, ET AL.
CASE NO: 97-303

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

BY Donna Marie Fedirko

(REPORTER)