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IN THE SUPREME COURT OF THE UNITED STATES

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RUSH PRUDENTIAL HMO, INC., :
Petitioner :
v. : No. 00-1021
DEBORAH C. MORAN :
- - - - -X

Washington, D.C.
Wednesday, January 16, 2002

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:07 a.m.

APPEARANCES:
JOHN G. ROBERTS, JR., ESQ., Washington, D.C.; on behalf of
the Petitioner.
DANIEL P. ALBERS, ESQ., on behalf of the Respondent.
EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; on behalf of
the United States, as amicus curiae.

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

2 (10:07 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in Number 00-1021, Rush Prudential HMO,
5 Inc. v. Deborah C. Moran.

6 Mr. Roberts.

7 ORAL ARGUMENT OF JOHN G. ROBERTS, JR.

8 ON BEHALF OF THE PETITIONER

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

11 ERISA preemption cases can be exceedingly
12 complicated, but our submission this morning is
13 straightforward. This Court held in Pilot Life that
14 ERISA's civil enforcement provisions were the exclusive
15 remedy for improper processing of a claim for benefits
16 under an ERISA-regulated plan. The Illinois independent
17 external review law at issue in this case affords a
18 different remedy for a beneficiary dissatisfied with an
19 HMO's denial of benefits. The Illinois law is therefore
20 preempted.

21 Just last week, in Great West Life, this Court
22 began its analysis by noting that it was especially
23 reluctant to tamper with ERISA's enforcement scheme, and
24 by quoting prior precedent for the proposition that that
25 enforcement scheme indicated that Congress did not intend

1 to authorize other remedies that it forgot to incorporate
2 expressly. That same language, quoted in Great West Life,
3 was quoted 15 years ago in Pilot Life. ERISA's remedies
4 are exclusive, whether we're talking about additional
5 Federal remedies or additional State remedies.

6 QUESTION: Mr. Roberts, could you help me with
7 one part of the facts I'm a little puzzled about? Your
8 opponents argue there's a difference between the plan and
9 the HMO, and that he claims that you -- what you say would
10 apply to a suit against the plan, but this is a suit
11 against the HMO, and I have been unable to find the plan
12 in the papers. Is the plan in the record?

13 MR. ROBERTS: The respondent alleged in the
14 complaint, joint appendix page 32 and 38, that the
15 certificate of coverage was the plan, and that is in the
16 record. It is Exhibit A to the complaint.

17 QUESTION: The certificate of coverage -- who
18 are the parties to the certificate of coverage?

19 MR. ROBERTS: The certificate of coverage is an
20 agreement between the HMO and the employer that extends to
21 particular employees the benefits that are set forth
22 there.

23 QUESTION: And in your view, you say -- are they
24 just hooked by their allegation, or do you think it's
25 clear that that is the correct -- that is the plan?

1 MR. ROBERTS: I think they're first bound by
2 their allegation, but second of all, even if other
3 documents also contribute terms to the plan, certainly the
4 certificate of coverage indicates elements of the plan.
5 There may be other documents that set forth other terms of
6 the plan.

7 QUESTION: You see, they say that's an insurance
8 policy that is purchased by the plan, in effect.
9 That's -- and that therefore there's a distinction between
10 the plan and the insurance policy, and I know you
11 disagree. You say the HMO is not an insurance policy, but
12 is there -- explain to me why that's totally wrong.

13 MR. ROBERTS: Well, it's totally wrong because
14 the question is not how the State law operates to grant a
15 new remedy to a beneficiary. We think it's irrelevant
16 whether it operates on the insurance policy or whether it
17 operates on the plan. The point is, however it operates,
18 it provides beneficiaries, under an ERISA-regulated plan,
19 with a new remedy, and that remedy is one that's not
20 granted by Congress in ERISA, and the Court in Pilot Life
21 said only the remedies that are granted are available.

22 QUESTION: Of course, one could also say it's
23 not really a new remedy, it's a new protection, sort of
24 like the -- see, the question is whether Pilot Life
25 controls or the Massachusetts case controls. It's an

1 interesting -- whether it's something like a compelled
2 benefit or a compelled protection of some kind --

3 MR. ROBERTS: Right.

4 QUESTION: -- that the insurance company
5 provides.

6 MR. ROBERTS: Yes, and I think the difference
7 is, between mandated benefits laws like Massachusetts,
8 those laws provide, as this Court said in UNUM, a rule of
9 decision that is to be applied by whoever the decision-
10 maker is in reviewing a denial of benefits.

11 Here, it's not a new rule of decision, it's a
12 new decision-maker, and that decision-maker isn't looking
13 to State law to say, well, they've given you mental health
14 coverage and so that has to be provided, he's deciding
15 what -- whether the denial of benefits was proper or not,
16 and that can only be characterized as a remedy, whether
17 it's --

18 QUESTION: Well -- no, I didn't mean to
19 interrupt.

20 Isn't the problem that he's doing two things?
21 The decision that he makes is necessarily going to have
22 its consequence on whether the benefit denial was correct
23 or not, but he's also making a medical kind of decision,
24 is, in fact, this reasonable medical practice, and so he's
25 not merely in the position which a court is in when a

1 court says, does the evidence show this is reasonable
2 medical practice. He's in the decision of, in effect,
3 making a kind of practice decision which doctors, as
4 doctors, make, so it's somewhere in between.

5 MR. ROBERTS: We don't think that's a correct
6 characterization. There is no element of a treatment
7 component in this decision. The only thing that is at
8 issue in this independent external review is coverage, for
9 a number of reasons. First of all, the treatment had
10 already taken place. There was no question of treatment.
11 But coverage is all that Rush HMO has undertaken to
12 provide. It does not provide health care. It doesn't
13 provide -- it agrees to pay for health care.

14 QUESTION: Well, this particular -- I'm assuming
15 in answer to your -- from your answer to Justice Stevens,
16 I'm assuming that in this case it is so, but their
17 argument is, you can have HMO's that have nothing to do
18 with ERISA plans, and you can have ERISA plans that don't
19 employ HMO's to provide welfare benefits, and therefore
20 it's appropriate to think of this as a medical decision or
21 as a regulation of medical practice in a particular form,
22 rather than insurance, so once again there's -- the
23 problem is that the facts do not place this in a clear
24 category.

25 MR. ROBERTS: Well, I -- with respect, I think

1 the facts do place this in a very clear category, because
2 there's no question of treatment at issue. Even if the
3 State is purporting to articulate its definition of
4 medical necessity, that's not the question. The question
5 is, is this beneficiary entitled to benefits under this
6 plan, and the judgment about what is medically necessary
7 is something that is addressed in the plan. The plan
8 provides the broadest possible discretion to the HMO to
9 interpret the plan terms, including medical necessity.

10 QUESTION: Well, but what if the State law in
11 effect tinkered with how you interpret the plan, and
12 spelled out that in determining what's medically necessary
13 the plan will make use of an independent medical
14 consultant.

15 MR. ROBERTS: Well, the State law can define
16 medical necessity. I think that's just like a mandated
17 benefit, saying you have to --

18 QUESTION: And can it not say, and furthermore,
19 if there's any dispute you will use an independent medical
20 consultant?

21 MR. ROBERTS: That it cannot do consistent with
22 Pilot Life, because that is a remedy for a denial of
23 benefits, and Pilot Life indicated --

24 QUESTION: Well, not necessarily. It may be
25 more a definition in the plan, or a provision of the

1 insurance plan itself, and then that in turn is
2 enforceable under section 502.

3 MR. ROBERTS: Well, that's --

4 QUESTION: I mean, that's the argument, and I
5 can understand that that, you could view it through that
6 lens, could you not?

7 MR. ROBERTS: And I think, as Judge Posner
8 pointed out in his dissent, if you do that, then all bets
9 are off. If you say that this is incorporated by State
10 law into your plan, and so when you enforce that remedy,
11 all you're doing is enforcing a term of the plan --

12 QUESTION: Well, is that so surprising, in light
13 of the fact that the ERISA law itself excludes regulations
14 of insurance? The law itself took that out of ERISA
15 coverage, in effect.

16 MR. ROBERTS: Well, now that was the specific
17 question addressed in Pilot Life. That was -- the heavy
18 lifting in the Pilot Life opinion was reconciling the
19 exclusivity of the civil remedies and the Savings Clause.
20 You can look at it one of two ways. If you give the
21 Savings Clause full force, then the remedies aren't going
22 to be exclusive in a case involving an insurer. If you
23 give the exclusivity of ERISA's remedies full force, then
24 the Savings Clause is relegated to a lower status, and --

25 QUESTION: Well, we had a case, U-N-U-M v. Ward,

1 and held that any statute that effectively creates a
2 mandatory contract term and regulates only insurance
3 companies is an insurance law under the Savings Clause.

4 MR. ROBERTS: UNUM did not involve a remedy. It
5 said, the question under Pilot Life and 502 was, quote,
6 not implicated, because it wasn't a State remedy that they
7 were trying to save under the insurance Savings Clause.
8 It was a rule of decision. This is not a rule of
9 decision. It's a different decision-maker, and if this
10 type of State law remedy is allowed, then there's nothing
11 left --

12 QUESTION: But UNUM --

13 QUESTION: But Mr. Roberts, can --

14 QUESTION: -- wasn't a procedural ruling. UNUM
15 was a question of how late could you file, and the State
16 law said you could file late, and --

17 MR. ROBERTS: The law --

18 QUESTION: -- why should that be treated
19 differently? The State is making something timely, giving
20 the beneficiary a chance to collect that the plan itself
21 would not have given.

22 MR. ROBERTS: I think that's correct. I -- the
23 line is not -- and this is what UNUM taught. The line is
24 not between substance and procedure when you're talking
25 about mandated coverage. That's not the line we're

1 advocating. The line we're advocating is between mandated
2 coverage, what does term, what does the plan have to
3 provide, and UNUM said, one thing it has to provide,
4 whatever the coverage is, coverage for those claims that
5 are filed in a timely manner, or, if not, that did not
6 prejudice the insurer.

7 This is different. This is not a new term of
8 coverage. It's a remedy. If you don't like what the HMO
9 has done with your benefits claim, you get to go to a
10 State law, independent external reviewer, and get it
11 overturned, and --

12 QUESTION: But it's a different kind of remedy
13 than saying, for example, punitive damages. It's --

14 MR. ROBERTS: It --

15 QUESTION: And I thought that's what Pilot Life
16 was about.

17 MR. ROBERTS: The argument is made that this is
18 okay because all you get are the benefits that you're
19 entitled to under the plan. We think that the Taylor
20 decision, decided the same day as Pilot Life, rejects that
21 argument. It says that one of the claims in that case was
22 for the benefits due under the plan, not punitive damages,
23 not emotional distress, the plan benefits, and the Court
24 said, that's not only preemptive, that's completely
25 preemptive.

1 ERISA preempts not only different remedies, but
2 alternative, additional remedies.

3 QUESTION: Well, under your theory there could
4 be no private arbitration agreement by an HMO plan and
5 people covered by the plan?

6 MR. ROBERTS: No. I think that's certainly an
7 open question. The issue there would be --

8 QUESTION: I don't see how it's open under your
9 view.

10 MR. ROBERTS: Arbitration -- it's the difference
11 between a voluntary agreement between parties, which is
12 what ERISA seeks to enforce, and something that's
13 compelled by State law. The analogy that the Solicitor
14 General draws to the collective bargaining --

15 QUESTION: But under your rationale, 502
16 controls. It's a remedy. So how could a private agreement
17 to arbitrate survive under your theory?

18 MR. ROBERTS: Well, it would survive because it
19 would be regarded as an internal plan procedure, not --

20 QUESTION: But wouldn't it also conflict --
21 wouldn't it also conflict with the statutory provision?

22 MR. ROBERTS: No. No. I mean, the -- ERISA
23 allows internal remedies, appeals within the plan, and
24 again it's an open question, but we don't dispute that the
25 arbitration would be allowed.

1 The problem with the analogy to the arbitration
2 cases is that the Solicitor General stops too early. Yes,
3 you can have voluntary arbitration, even where remedies
4 are preempted, but surely a State law that directed that
5 parties to a collective bargaining agreement must
6 arbitrate, and here's how they must arbitrate, would be
7 preempted by the Labor Management Relations Act.

8 If you pursue the analogy to a situation that's
9 comparable to this case, the conclusion that there's
10 preemption seems to follow inexorably, and the idea that
11 everything is all right because at the end of the day you
12 have to enforce this in a section 502 action really makes
13 a hollow shell out of Pilot Life. You have to sometimes
14 enforce arbitration in court, but we still think of
15 arbitration as a different remedy. We don't say, that's a
16 judicial remedy because it has to be enforced.

17 QUESTION: Yes, but there's another difference
18 with Pilot Life, and that, the only question is whether it
19 related to the insurance. Here, you have -- you admit
20 it's related, but then you get onto the second ball game
21 of whether it's a change in the insurance coverage, and
22 one can look at this, I think -- I just need -- I want you
23 to comment on this -- as not changing a term of the plan,
24 but, rather, changing a term of the insurance policy
25 purchased by the plan.

1 MR. ROBERTS: And we actually go on to the third
2 game which is, if it conflicts with the substantive term
3 of ERISA, and this is what Pilot Life held, it is
4 preempted, and this conflicts with the exclusivity of the
5 remedies.

6 We don't believe, when you go through the usual
7 insurance Savings Clause factors, that this is the
8 regulation of insurance, but what Pilot Life held, and
9 this was the important part of the decision, which was
10 unanimous, is that when you look at the Savings Clause you
11 have to be informed by an understanding of what Congress
12 was trying to do with the exclusive remedies, that the
13 most important -- quote, most important consideration in
14 deciding whether that remedy in that case is covered by
15 the Savings Clause was that Congress said that all the
16 remedies were exclusive. If you allow them back into this
17 back door of the Savings Clause, then that exclusivity is
18 going to be completely undermined. That's the issue
19 that's here before the Court.

20 QUESTION: That is -- I'd like to expand just a
21 little, because I'm actually trying to work out what's the
22 framework within which we think of this, and I had thought
23 that that part of Pilot Life was really part of the reason
24 for interpreting the Savings Clause as it was there
25 interpreted, that normally what you do is ask the first

1 question, is this preempted in the first place, and it is
2 if there's field preemption, if there's conflict
3 preemption, and maybe, with ERISA, if there's something
4 more, and ordinarily, if there is such a conflict, the
5 Federal side wins, but the whole point of the Savings
6 Clause is to say, if there's a conflict in respect to
7 insurance, the State wins. Stop right there.

8 But then maybe Pilot Life adds something else,
9 which says, but it couldn't just say if there's a conflict
10 that brought you into preemption in the first place, well,
11 the Federal Government wins, because that would be to
12 eviscerate the meaning of the Savings Clause. Now, that's
13 the framework in my mind, and I'd appreciate anything you
14 could help with that.

15 MR. ROBERTS: And again, that poses sort of a
16 conflict between what the Court in Pilot Life said were
17 the exclusive remedies and the Savings Clause. That is
18 what this Court unanimously decided 15 years ago in Pilot
19 Life when it said, when we look at the Savings Clause, the
20 most important thing -- most important thing -- is to keep
21 in mind the remedies are supposed to be exclusive, so that
22 if this is a remedy, it is a regulation of ERISA, it is
23 not the regulation of insurance, and the Court reaffirmed
24 that approach in the John Hancock case where it said, and
25 I'll just quote one sentence, no decision of this Court

1 has applied the Savings Clause to supersede the provision
2 in ERISA itself.

3 If you apply the Savings Clause to allow this
4 State law remedy to be applied, that would be superseding
5 what this Court said section 502 of ERISA meant in Pilot
6 Life, which was that these remedies are exclusive. That
7 question was addressed. That was -- and I'll say it
8 again, that was the hard part of the opinion in Pilot
9 Life, and that was reaffirmed in John Hancock, and --

10 QUESTION: I see that. Then I'd think what
11 you're saying, I take it, is at least where the conflict
12 is particularly severe, it's perhaps not -- the State
13 doesn't necessarily win, and you think this is a
14 particularly bad one.

15 MR. ROBERTS: Well, I do think it's particularly
16 bad, but I don't think it has to be. I think if the State
17 law stands as an obstacle to the accomplishment of the
18 Federal objectives, it is preempted. The Federal
19 objective requires exclusivity with respect to remedies.
20 This obviously stands as an obstacle to that objective and
21 so is preempted.

22 Now, they say it's saved because the last stop
23 in this State law remedy is a quick dash into Federal
24 court to get a stamp that says, enforce. The State law
25 says, if the reviewer says you've got to provide this, the

1 HMO has to provide it, and they say, well, that's okay,
2 because we run into Federal court, we make this a 502
3 action.

4 Well, that makes Pilot Life ridiculous, because
5 it says every type of remedy is okay so long as the last
6 stop is a quick visit to the Federal courthouse. It also
7 raises very serious Article III concerns, because Federal
8 courts are not supposed to be looking at decisions made
9 by -- made under State law that they have no authority to
10 review and simply rubber-stamping them, and it gives rise
11 to the bizarre results that the respondent and the
12 Solicitor General support in this case that an action to
13 enforce section 4-10 is completely preempted so that
14 there's jurisdiction, but then it turns out section 4-10
15 is not preempted at all. That's a very curious result,
16 but they have to maintain --

17 QUESTION: What is section 4-10, Mr. Roberts?

18 MR. ROBERTS: 4-10 is the State law, of the
19 Illinois HMO act. I've been referring to it as the
20 independent external review law. But they have to
21 maintain that facade.

22 QUESTION: Would you state the absurd positions
23 again?

24 (Laughter.)

25 QUESTION: It didn't strike me as that absurd,

1 but --

2 MR. ROBERTS: What is absurd is that they have
3 to maintain that this can only be enforced under a 502
4 action, that the State law claim -- keep in mind this
5 began, of course, as a State law claim in State court.
6 502 wasn't mentioned at all. It was recharacterized as a
7 502 action, they said because it's completely preempted,
8 but the underlying remedy that's being enforced isn't
9 preempted at all.

10 Now, those are two different questions,
11 jurisdiction and substance, but it does seem odd that if
12 you're going in and all you're doing is getting a rubber
13 stamp from the Federal courthouse saying, enforced, that
14 that's completely preempted, when the law isn't preempted
15 at all.

16 QUESTION: Well, what they're -- it's not
17 absurd, in their view, anyway, because they're saying they
18 have a human being over here called an arbitrator and this
19 human being tells you what the benefit is, and what your
20 clients are really objecting to, frankly, is not this
21 remedy. They couldn't care less.

22 What they're worried about is that that human
23 being called the arbitrator is going to say that this
24 woman has to have a certain treatment that otherwise in
25 their view she wouldn't have to have. I mean, just

1 imagine the statute that said, instead of what it says,
2 that you have to provide medical treatment whenever
3 there's a 25-percent chance of improvement. No arbitrator
4 at all in that one, and they'll be even more excited, and
5 indeed, it doesn't take away the Federal remedy in my
6 hypothetical, nor does it in this one. It just turns out
7 that we know who's going to win.

8 MR. ROBERTS: Well, that's because there's a
9 different decision-maker making the decision on your claim
10 for the denial of benefits, and that's what makes it clear
11 that what's involved is a different remedy.

12 It's also a remedy that changes dramatically
13 what the plan actually provides, and it does that by
14 taking away from the plan fiduciary the deference that the
15 fiduciary --

16 QUESTION: Is that fiduciary, a definition of
17 his powers of review and so forth, in the record anywhere?

18 MR. ROBERTS: I'm sorry, the --

19 QUESTION: The -- you two or three times refer
20 to the fact that the plan gives the fiduciary this
21 standard of review. Is that in the record?

22 MR. ROBERTS: No. The only elements of the plan
23 that are in the record is the certificate of coverage,
24 which --

25 QUESTION: So for all we know the plan might

1 actually say, whatever Illinois law requires the decision-
2 maker to do shall be done.

3 MR. ROBERTS: Well, that's what the law
4 provides.

5 QUESTION: I mean, maybe the plan says that,
6 too, for all I know.

7 MR. ROBERTS: No, because the elements of the
8 plan that are in the record, the certificate of coverage,
9 notes that the HMO has the broadest possible discretion to
10 interpret the terms of the plan in deciding coverage and,
11 under this Court's decision in Firestone --

12 QUESTION: It says that in the certificate?

13 MR. ROBERTS: Yes, and -- pages 7 and pages 8.
14 It's Exhibit A to the complaint -- and under this Court's
15 decision in Firestone, that means that that decision is
16 subject to a deferential review.

17 The State law changes that, and the State law
18 gives the decision to the independent external reviewer,
19 who makes his decision apparently de novo, so that the
20 precise thing that the plan participants, parties
21 contracted against, the recognition that this medical
22 necessity is a question of judgment, some people are going
23 to view it differently, we want to make clear that it's
24 our discretion that controls, and that gives us
25 entitlement to deferential review --

1 QUESTION: Mr. Roberts, some close to 40 States
2 have laws like this?

3 MR. ROBERTS: Yes.

4 QUESTION: And there's legislation introduced,
5 at least in Congress, to accomplish what?

6 MR. ROBERTS: My understanding of many of the
7 pending bills is that they have an external review
8 provision but, of course, it's a Federal one, and that is
9 consistent with ERISA's goal of uniformity in claims
10 processing and administration.

11 QUESTION: Do you know anything about the status
12 of that pending legislation?

13 MR. ROBERTS: No.

14 QUESTION: No.

15 MR. ROBERTS: Other than at various times
16 passage is imminent, and then it falls apart, but again
17 it's a very different thing to say, this is the uniform
18 Federal remedy, and to have, as Your Honor points out, 40
19 different remedies, if you're running a company that has a
20 health care plan with operations in different States, the
21 health plan can't be uniformly --

22 QUESTION: Are most of the State law provisions
23 similar to the one in Illinois?

24 MR. ROBERTS: They all have differences. For
25 example, in some States the independent external reviewer

1 is an administrative board. In Michigan, it consists of
2 seven people in certain places. In some places it's not
3 just one person, it's more than one person. Some places
4 it consists of employee representatives as well as
5 physicians, but it does change what the parties contracted
6 for, and --

7 QUESTION: Why is that a more disturbing change
8 than changes in what is the minimum required coverage?

9 MR. ROBERTS: Well, I don't know that it's more
10 disturbing. It's different, yes. The impact on an HMO
11 can be greater if the State law says, you must provide
12 mental health coverage, this, this, and this, but then at
13 least the employer looking at it knows what's at stake,
14 and he knows that the remedy is going to be the remedy
15 that is provided under Federal law, which is that they're
16 going to enforce what I have agreed to provide under this
17 plan, even if what I've agreed to provide is compelled by
18 State law.

19 You know that you're not going to face all sorts
20 of different remedies and in particular, here, if you
21 contract for the broadest possible discretion, you know
22 that when the review is undertaken your fiduciary decision
23 will be reviewed with appropriate deference. That is
24 taken away here. It's taken away by giving the
25 independent external reviewer the authority to make a de

1 novo decision, so that what is set up are two very
2 different remedial regimes.

3 The Federal regime, the fiduciary makes a
4 decision with the broadest possible discretion. His
5 obligation is to be faithful to the terms of the plan.
6 That is reviewed in Federal court.

7 QUESTION: But it's not the fiduciary's
8 decision, as I understand it. It's the insurance policy's
9 decision.

10 MR. ROBERTS: Or someone to whom that discretion
11 has been delegated under ERISA, and there's a provision in
12 ERISA that allows them to say, this is the entity that is
13 going to make the final decision. Under 503, that is a
14 fiduciary decision, the final denial or grant of benefits.
15 That's the Federal remedy.

16 The State remedy is, the independent external
17 reviewer makes his or her decision, and that decision is
18 binding and final. Those are two very different remedies,
19 ERISA's remedies are supposed to be exclusive, and the
20 decision below undermining that exclusivity should be
21 reversed.

22 QUESTION: Mr. Roberts, before you sit down,
23 would you just give me a moment of your views on whether
24 or not it's appropriate to regard the HMO as an insurance
25 company?

1 MR. ROBERTS: The HMO is properly regarded as an
2 insurance company when it is engaged in the business of
3 insurance. Just because it's an insurance company doesn't
4 mean that all of its activities, including claims
5 processing, for example, are necessarily the business of
6 insurance.

7 QUESTION: Very well, Mr. Roberts.

8 Mr. Albers, we'll hear from you.

9 ORAL ARGUMENT OF DANIEL P. ALBERS

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

12 Illinois section 4-10 is an insurance law that
13 does not conflict with ERISA section 502 or this Court's
14 decision in Pilot Life, and therefore it is enforceable to
15 protect the interests of Illinois Insureds like Deborah
16 Moran.

17 QUESTION: Does the Illinois law provide for
18 review in Illinois State courts?

19 MR. ALBERS: The Illinois law does not provide
20 one way or the other. Section 4-10 does not say that.
21 This case was reviewed and was enforced by the Seventh
22 Circuit as a 502 action.

23 QUESTION: But the action was originally brought
24 in State court, was it not?

25 MR. ALBERS: I originally brought the action in

1 State court to enforce the independent review because the
2 insurer was refusing to provide any independent review at
3 all, and the two parts of the statute, the requirement
4 that there be medical necessity, this review and then the
5 actual enforcement of the decision, were parsed at the
6 district court level and in the Seventh Circuit. Judge
7 Conlon initially remanded the case after it was removed,
8 finding that the medical necessity portion of the statute
9 did not offend Pilot Life or section 502.

10 Back in State court, Judge Kinnaird in Chancery
11 found that medical necessity did not offend 502 and
12 ordered a medical necessity review. The medical necessity
13 review determined that the procedure was medically
14 necessary. It was then -- I then sought payment of the
15 benefit, and that was removed to Federal court and Judge
16 Conlon found that was a 502 action.

17 QUESTION: If the Seventh Circuit view is upheld
18 by this Court, in the future would actions lie in State
19 court to enforce this, or just under 502?

20 MR. ALBERS: I think consistent with the Court's
21 502 ruling in Pilot Life, it would be a 502 action to seek
22 benefits. I think there's a different question with
23 respect to whether it was just the enforcement of the
24 statute which requires medical necessity. I don't think
25 that then you're seeking the benefit, and I submit that it

1 was perfectly appropriate to send this case back to State
2 court for that determination and that ruling, but
3 ultimately, to get the benefit, I would suggest that that
4 would have to come under 502, under the Court's reasoning
5 in Pilot Life.

6 This case does not conflict with Pilot Life, as
7 petitioner suggests. In addressing the conflict issue
8 which has been raised, which I think is central to the
9 decision the Court needs to make, I think the Court should
10 consider the burdens that petitioner must meet to show
11 that conflict. ERISA preemption is a defense.

12 QUESTION: Could the State provide for
13 liquidated damages, do you think --

14 MR. ALBERS: You mean, damages other than the
15 benefit itself?

16 QUESTION: -- under the reinsurance regulation
17 exception?

18 MR. ALBERS: You mean, other than the benefit
19 itself, Your Honor?

20 QUESTION: Uh-huh.

21 MR. ALBERS: I would submit, under your -- the
22 Court's ruling which you wrote in Pilot Life, that it
23 would probably be inappropriate to go beyond the specific
24 damages that are permitted in ERISA, which is recovery of
25 the benefit, and I think then under the statute you're

1 permitted to recover interest and attorneys's fees, and
2 that is all Deborah Moran has ever sought in this case was
3 the benefit that she was entitled to under the Illinois
4 statute for what was determined to be a medically
5 necessary procedure, which also saved her right arm.

6 QUESTION: How --

7 QUESTION: That's true, but the question is, who
8 is to decide she has gotten what she was supposed to get,
9 and the claim here is that that was supposed to be decided
10 pursuant to one system of review, and the State has
11 substituted a totally different --

12 MR. ALBERS: And under 514(b), the Savings
13 Clause, the State has the right to do that. That does not
14 offend ERISA in any way. Section 503 --

15 QUESTION: Isn't that what Pilot Life was all
16 about?

17 MR. ALBERS: Pilot Life did not talk about who
18 the decision-maker would be. Pilot Life talked about the
19 enforcement of the benefit had to be in Federal court
20 under 502. Pilot Life was a State common law cause of
21 action which was not an insurance law in bad faith and in
22 contract which sought compensatory and punitive damages
23 beyond the benefit. The Court said, you can't do that,
24 because that offends 502 and, by the way, all --

25 QUESTION: I see, so you think all it meant was

1 the last shot has to be in Federal court.

2 MR. ALBERS: I think it --

3 QUESTION: I assume the State could provide that
4 all of these contract claims would be first reviewed in
5 State court so long as it further provides that the
6 ultimate judgment of the State court would only be
7 enforceable by suit in Federal court. Would that be okay?

8 MR. ALBERS: I think that's -- if the State law
9 provided for a judicial review in State court, I think
10 that would offend 502. The State law does not provide for
11 that.

12 QUESTION: Arbitration is not another means of
13 review? I mean, I --

14 MR. ALBERS: No, I don't think arbitration is --
15

16 QUESTION: You don't think you change the
17 remedy --

18 MR. ALBERS: No.

19 QUESTION: -- if you say the remedy is not a
20 lawsuit but arbitration? I --

21 MR. ALBERS: The remedy --

22 QUESTION: I find that a startling proposition.
23 Sure, arbitration has to be enforced in court, but I've
24 always thought that that's a separate remedy. You ask,
25 what's your remedy, is it a lawsuit or arbitration?

1 MR. ALBERS: And this gets down to the issue of
2 what a remedy is, and I looked up remedy in Black's Law
3 Dictionary, and it has two elements. It has the process,
4 some courts have found, and it also has the result of the
5 process, the enforcement, and I think in Pilot Life the
6 Court was talking about the enforcement, not the means of
7 reaching it.

8 QUESTION: Okay, consistent with that, in a
9 shorthand kind of way we refer to this as an arbitration,
10 or as an arbitration decision. Is the independent
11 reviewer acting really as an arbitrator in the classic
12 sense? I'm assuming that an arbitrator in the classic
13 sense listens to evidence in arguments and decides which
14 of those evidence and arguments is the better according to
15 some legal standard.

16 I have assumed, contrast, that what the
17 independent review here is doing is not only listening to
18 other people, but making a medical judgment himself, as a
19 physician. If the latter is true, then it doesn't seem to
20 me that it is a classic example of arbitration, but I may
21 be wrong on that, and I don't want to lead you in the
22 direction of an analysis that ultimately will not pan out.
23 Am I right in distinguishing true arbitration from this,
24 or should we regard this as true arbitration imposed by
25 State law?

1 MR. ALBERS: I think this is not -- I think
2 you're right, and I think this is not true arbitration as
3 imposed by State law. I think the Court found in Pegram
4 that medical necessity decisions contain both elements of
5 coverage determination and elements of a medical --

6 QUESTION: What is --

7 QUESTION: May I just ask one -- they did in
8 that case, but my concern is, is that true here? In
9 other words, what can you tell me about the terms under
10 which the reviewer acts that says this is, and in part at
11 least, or ultimately, an independent decision by the
12 reviewer about medical necessity as opposed to an
13 adjudication of which side has the better claim, which an
14 arbitrator might make?

15 MR. ALBERS: The statute itself, 4-10, requires
16 an independent review by a physician in the relevant
17 specialty. The statute doesn't provide any further
18 guidance with respect to how that review is going to be
19 done. In this case, it was done de novo. It was done by
20 supplying the relevant definition of medical necessity to
21 a reviewer from the insurance contract certificate, and
22 providing all the relevant medical records.

23 QUESTION: Does it matter under Illinois, under
24 the Illinois law, whether there's an adequate treatment
25 that's less expensive?

1 MR. ALBERS: No. It's de novo review by the
2 independent reviewer.

3 QUESTION: And there's no element in it of
4 determining whether there's a slightly less effective
5 remedy, but with fewer risks and less costly? That's
6 irrelevant?

7 MR. ALBERS: The statute doesn't address that.
8 I think that if that was a part of the definition of
9 medical necessity that was in the insurance contract
10 document, that would be relevant to the reviewer's
11 decision.

12 QUESTION: It can be in the insurance contract,
13 those provisions? It wouldn't conflict with Illinois law?

14 MR. ALBERS: Illinois law does not define
15 medical necessity, and so for our analysis we've assumed
16 the only place that the reviewer could go would be to the
17 plan documents and the plan document here is -- there is
18 no plan document, but the relevant portion of the plan
19 document is the insurance contract which defined medical
20 necessity, and that's what the reviewer used, and that's
21 my understanding of what they intended.

22 QUESTION: And how did they define it? What was
23 the definition?

24 MR. ALBERS: There were a variety of factors to
25 consider. What are the available treatments? Are they

1 accepted generally in the medical practice?

2 QUESTION: But wouldn't the --

3 MR. ALBERS: What are the risks?

4 QUESTION: I mean, the word necessity sounds
5 like it means you have to have this, and if you had
6 something that would be equally effective and less
7 expensive, then it wouldn't be a medical necessity. Is
8 this the general understanding of what necessity is, or --
9 you seemed to be saying earlier that it was something
10 different.

11 MR. ALBERS: I'm not sure I understand.

12 QUESTION: I thought that --

13 MR. ALBERS: I'm sorry, Your Honor. I'm trying
14 to --

15 QUESTION: You asked whether, suppose -- I think
16 Justice O'Connor asked you, suppose there was effective
17 treatment that was less expensive, would this particular
18 treatment still be a medical necessity, and I thought you
19 answered yes to that question.

20 MR. ALBERS: I think that's up to the judgment
21 of the independent reviewing physician. He certainly can
22 take into account whether there's an equally efficacious
23 treatment available that's less expensive, and then reach
24 his judgment as to which one he or she believes is
25 medically necessary in that circumstance.

1 QUESTION: Could I come back to your colloquy
2 with Justice Souter? The conclusion that you drew is that
3 this is not really arbitration because it's a doctor.
4 What would it take to make it a remedy of arbitration?
5 Why isn't it arbitration? Suppose a lawyer -- suppose the
6 Illinois law read just the way it reads now, except it
7 wouldn't be a medical doctor who possesses on this but,
8 rather, a lawyer who would hear medical testimony from
9 both sides. Would that, putting a lawyer in the shoes,
10 convert it to arbitration?

11 MR. ALBERS: My understanding of what Justice
12 Souter asked me was that it had the traditional elements
13 of what we consider an arbitration, which is, you review
14 the evidence from both sides, they have an opportunity to
15 argue, and then you make a decision, and that's what I
16 meant when I said it's not classic arbitration. It is
17 like arbitration, in that you give it to a neutral third
18 party who then makes their review.

19 QUESTION: There are no submissions to the
20 doctor in this situation?

21 MR. ALBERS: The Illinois law does not
22 provide -- and actually what -- for the specifics of that,
23 what it does say is that the HMO must set up the
24 independent review mechanism, and there is no authority in
25 Illinois on what that must contain or not contain.

1 QUESTION: What does it contain? I would find
2 it surprising if both sides didn't press upon the doctor
3 there their view of the case. You mean, he just sort of
4 walks in blind and --

5 MR. ALBERS: All I can tell you is what happened
6 in this case, Your Honor. In this case, the HMO submitted
7 a series of questions to the doctor, one of which was --
8 and it included a lot of the elements that Justice
9 Ginsburg asked about and Justice Souter asked about with
10 respect to, what are the available treatments, are they
11 less expensive treatments, what are the risks, and so on,
12 and then he was given all of the relevant medical records
13 and given the definition of medical necessity, and he made
14 a determination that this particular surgery was medically
15 necessary.

16 QUESTION: And what about your client? Did you
17 put any questions to the doctor?

18 MR. ALBERS: We did not, because they covered
19 all the questions we thought were relevant.

20 QUESTION: You mean, you don't actually want to
21 know how the system works in Illinois? I mean, I'm also
22 quite surprised that in the Illinois system, which has
23 been running for sometime, the patient wouldn't have an
24 opportunity to say to the arbitrator, this is my side of
25 it, and I would be equally surprised if the doctors who

1 think the other way don't have an opportunity to tell the
2 arbitrator what their position is.

3 MR. ALBERS: There's --

4 QUESTION: Maybe I'm always surprised in a lot
5 of things --

6 (Laughter.)

7 QUESTION: So tell me I should be surprised.

8 QUESTION: May I go back to Justice --

9 QUESTION: What is the answer, though? What is
10 the answer? Do you not -- are you not familiar with the
11 system in Illinois?

12 MR. ALBERS: Your Honor, I'm probably as
13 familiar as any lawyer in Illinois.

14 QUESTION: Fine, if you're as familiar as
15 anyone, and it's an ongoing system, and I think the --

16 MR. ALBERS: This is the only case.

17 QUESTION: This is the only case Illinois has
18 ever had?

19 MR. ALBERS: This is the only legal case that's
20 ever been brought under the medical necessity statute.

21 QUESTION: No, is this the only case in which
22 the arbitration system has ever worked in Illinois?

23 MR. ALBERS: I have no data on that, and the
24 State doesn't keep data on that. I did ask --

25 QUESTION: Do you accept that this is an

1 arbitration system, then? Do I understand that in your
2 response to these questions? You think it is an
3 arbitration system?

4 MR. ALBERS: I think it is an arbitration, and
5 then it goes to a neutral third party --

6 QUESTION: Well, I would be amazed if people --
7 I mean, am I right to be amazed that you have a system
8 where people can't make arguments --

9 MR. ALBERS: I --

10 QUESTION: -- or can't present their point of
11 view to the arbitrator? I've never come across such a
12 thing, and I take it --

13 MR. ALBERS: There's nothing in the law that
14 precludes either one of the parties from --

15 QUESTION: Could I ask you a slightly different
16 question, which is the thing that -- I'd very much
17 appreciate, before your time expires, if you could just
18 address for at least a minute or so what I think is a
19 difficult aspect of the case. Why is this insurance?

20 That is, what I'm thinking is that, after all,
21 every company that sells a product with a warranty is to
22 that extent an insurer. Every credit card that says you
23 can return defective merchandise is to that extent an
24 insurer. Every manufacturer, even without a warranty, who
25 accepts a product back because it's defective is an

1 insurer.

2 Yet Congress couldn't have meant in this Savings
3 Clause to allow States to win conflicts that broadly, so
4 why does this fall within the kind of insurer that must
5 fall within this Savings Clause?

6 MR. ALBERS: I think the Court in Pegram -- and
7 it wasn't the issue before the Court in Pegram, but said
8 that HMO's act like insurers and transfer risks like
9 insurers, and the Illinois statute defines an HMO as an
10 entity that bears risk.

11 QUESTION: That's why I gave my example, because
12 I wanted you to see that virtually every manufacturer of
13 the United States is a insurer in that sense, and so is
14 this the kind of thing that Illinois has traditionally
15 regulated? Is it the kind of thing that other insurance
16 commissioners have tended to regulate? What makes this an
17 insurer different from General Motors?

18 MR. ALBERS: Yes to both those questions. The
19 HMO Insurance Act is part of the Illinois Insurance Code,
20 and I think that insurance law meets all the factors the
21 Court has set forth in its prior decisions with respect to
22 what constitutes an insurer.

23 QUESTION: What about a law firm that handles
24 all of the client's legal business, just as an HMO handles
25 all of the client's medical business, for a flat fee, and

1 there are firms that do this, especially in the labor
2 field. Many unions just hire a firm to handle all of the
3 union members' legal business for the whole year. Is that
4 law firm, like this HMO, an insurer?

5 MR. ALBERS: I don't think so. That's -- it's
6 not a --

7 QUESTION: What's the difference?

8 MR. ALBERS: They're not a traditional insurer.

9 QUESTION: One is providing legal services, and
10 they don't know how much it's going to come to for the
11 year, and the other one is providing medical services and
12 they don't know how much it's going to come to for the
13 year.

14 MR. ALBERS: Well, laws regulating them would
15 not be directed to them as acting as insurers. They're
16 not traditional insurers. They don't meet the common
17 sense definition of what an insurer --

18 QUESTION: I don't think an HMO does, either.
19 I --

20 MR. ALBERS: This law is limited to the
21 insurance industry. It's limited to HMO's when they bear
22 risk. It does transfer risk by the very operation of the
23 statute. The Seventh Circuit and the Fifth Circuit agree
24 that this is a statute which regulates insurance, and
25 under this Court's precedents set forth in UNUM, the Court

1 doesn't ordinarily disturb that determination of State
2 law, so I would -- I respectfully submit that it is an
3 insurance company for purposes of what regulates insurance
4 under 514(b).

5 QUESTION: Well, I think the question of what's
6 insurance under ERISA is a Federal question, not a State.

7 MR. ALBERS: Yes, that's -- for purposes of
8 514(b), but you look at those factors, and one relevant
9 factor is whether it -- whether the State considers it to
10 be an insurer or whether it regulates it as an insurer,
11 and in both situations it does here.

12 In conclusion, I would suggest, in response to
13 Justice Souter's question to petitioner, that this case
14 falls squarely between the Court's two precedents in
15 Massachusetts, Metropolitan Life in Massachusetts and
16 UNUM. It contains a procedural element of medical
17 necessity, which is the relevant rule decision, just as
18 the UNUM case determined that the notice prejudice rule
19 was the relevant rule of decision, and it contains a
20 substantive element, which is a mandated benefit term.
21 Once the medical necessity determination is made, that is
22 a mandated benefit, and I submit to accept petitioner's
23 argument this Court would have to reverse its decisions in
24 UNUM, in Metropolitan, and in FMC.

25 The effect -- I think Justice O'Connor raises

1 this issue, what would be the effect of such a ruling on
2 voluntary agreements, and I agree with the proposition
3 that if there's a conflict between independent review and
4 502, then the parties couldn't even agree to provide
5 independent review, which would change the practice across
6 the country, because it is being provided by self-insured
7 plans and by HMO's.

8 Under 514(b), I submit that this is a State
9 insurance law which looked to harmonize the effect of that
10 law and affirmed the States can regulate insurance and can
11 regulate insurers' medical necessity decisions by leaving
12 those medical decisions to doctors, who should be making
13 them.

14 If there's no other questions --

15 QUESTION: May I just ask, on the question of
16 whether it's an insurance company, does the State
17 insurance agency regulate the -- you, in fact, would say
18 the contract between the employer, the sort of unnamed
19 employer that Ray talks about, and the HMO, is an
20 insurance policy?

21 MR. ALBERS: Yes.

22 QUESTION: Does the Illinois Insurance
23 Commission regulate the terms of that policy in any
24 respect, other than this 510 -- this 4-10(c) provision?

25 MR. ALBERS: Yes. There's an entire statute

1 which regulates the terms, and there are, for example,
2 minimum benefit requirements for breast cancer treatments,
3 for mental health coverage, there are requirements for
4 minimum funding, for reserves, and so on, so there's all
5 the traditional --

6 QUESTION: Is the policy that this HMO issued to
7 this employer the same form policy it issues to many other
8 purchasers of HMO services from it?

9 MR. ALBERS: I can only assume it is. I have no
10 evidence on that, Your Honor.

11 QUESTION: Very well, Mr. Albers.

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

13 ORAL ARGUMENT OF EDWIN S. KNEEDLER

14 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAEMR.

15 KNEEDLER: Mr. Chief Justice, and may it please the Court:

16 The claim is made here that the section 4-10 of
17 the Illinois HMO act conflicts with section 502(a). In
18 considering that claim, it's important to focus on the
19 language of exactly what 502(a) addresses, and it is set
20 out on page 2 of the petition. 502(a) is empowered --

21 QUESTION: 502 of the petition?

22 MR. KNEEDLER: Of the petition, yes. It's
23 entitled, "Persons Empowered to Bring a Civil Action," and
24 then it itemizes -- it then continues, a civil action may
25 be brought by various persons, and then it goes on to

1 describe the judicial relief that may be granted, awarded
2 in a suit under section 502(a). In other words, the
3 preemptive scope of section 502(a) has to do with causes
4 of action, civil suits in court, and the judicial relief
5 that may be awarded in court, and that is precisely the
6 formulation that the Court used in Pilot Life itself.

7 At the conclusion of the Court's opinion in
8 Pilot Life, the Court said in distinguishing Metropolitan
9 Life, the Court said the Court in Metropolitan Life had no
10 occasion to consider the question presented in this case,
11 whether Congress might clearly express through 502(a) an
12 intention that Federal, the Federal remedy provided by
13 that provision displaced State causes of action, and
14 that's what the question was about in UNUM.

15 Here, section 4 -- excuse me, in Pilot Life.

16 Here, section 4-10 of the Illinois HMO statute
17 does not provide a State cause of action in court, and it
18 does not provide any remedy or relief beyond what's
19 available under the plan itself.

20 QUESTION: Well, you could look at it that way,
21 or you could look at it that it provides, the State law
22 provides a cause of action before this arbitrator.

23 MR. KNEEDLER: I don't think that's the way
24 it --

25 QUESTION: You have a claim before the

1 arbitrator that you haven't gotten what is medically
2 necessary, and the arbitrator shall resolve that cause of
3 action just as, under ERISA, the court would have resolved
4 what the contract said.

5 MR. KNEEDLER: I don't think that's the ordinary
6 understanding of what a cause of action is. A cause of
7 action is ordinarily regarded as something that you would
8 enforce directly in court.

9 QUESTION: So the only remedies that you can't
10 displace ERISA with are judicial remedies. You can
11 provide for any other kind of relief?

12 MR. KNEEDLER: Well, I -- my point is, that's
13 what section 502(a) addresses, and the analysis in Pilot
14 Life was, what does 502(a) displace, and it's -- another
15 important feature of Pilot Life is, the Court went through
16 the various remedies that section 502(a) provides, and
17 tellingly discussed this Court's decision in Russell in
18 which the Court held that punitive damages were not
19 available in a suit against a fiduciary based on claims
20 processing, and the Court said it was not going to allow a
21 State cause of action to displace Congress' judgment about
22 damage remedies to allow and not to allow, or have --

23 QUESTION: Well, Mr. Kneedler, supposing the
24 State provided for a very elaborate arbitration procedure,
25 you know, with right to counsel, specified the way the

1 hearing should be conducted and so forth, but didn't say
2 what would happen. It just said the view of the
3 arbitrator would be final. That would not be preempted,
4 in your view, by 502 because it doesn't contemplate
5 judicial enforcement?

6 MR. KNEEDLER: Yes, and if it also did not
7 provide for relief beyond that was available in the plan
8 itself.

9 QUESTION: Well, supposing that after that you
10 could just simply bring an action under 502?

11 MR. KNEEDLER: I think that would not be
12 preempted. In fact, most States -- in this case, Illinois
13 has not tightly regulated the form in which the
14 independent review will occur, and that's consistent with
15 the fact that these are highly judgmental medical
16 judgments that medical professionals are looking at.

17 QUESTION: That may be, but I want to go back to
18 the Chief Justice's question for a minute. Just assume
19 the absurd example in which the State provided that there
20 are going to be sort of 10 steps of arbitration and review
21 between the initial denial by the plan fiduciary and the
22 right to sue, so that someone would be tied up for months
23 or years before the person could get into court.

24 In each instance, I'm assuming that it would not
25 be a provision by the State of a cause of action in the

1 sense that you have been using it, and yet wouldn't you
2 concede in that case that the State scheme was keeping
3 people out of Federal court for enforcement so long that
4 it would, in fact, be in conflict and would be preempted.

5 MR. KNEEDLER: I think the analysis there would
6 be one of exhaustion of remedies under the plan, including
7 those required --

8 QUESTION: And if the exhaustion was exhausting,
9 wouldn't you say that the --

10 MR. KNEEDLER: Yes, it could be excused, and the
11 Department of Labor's regulations, and they --

12 QUESTION: No, but there would be a preemption
13 in that case.

14 MR. KNEEDLER: There would be a preemption, but
15 the Department of Labor has addressed that under its
16 claims processing regulations. Section 503 provides for a
17 fair administrative processing of claims, and a
18 separate --

19 QUESTION: Okay, but doesn't that mean, then,
20 that your answers to the several questions on this should
21 be, it ultimately is a question of degree, this
22 requirement of one step in a review process doesn't reach
23 the point, in effect, of excluding the Federal remedy?

24 MR. KNEEDLER: Right. It does not stand as an
25 obstacle.

1 Another point that the Court stressed in Pilot
2 Life was that the Congress struck a balance between the
3 prompt and fair processing of claims and suits in court.
4 Well, but arbitration and independent review, measures
5 adopted by State insurance laws of this sort, are
6 precisely designed to facilitate the prompt and fair and
7 expeditious processing of claims without having to go to
8 court, so it --

9 QUESTION: Mr. Kneedler, doesn't it give you a
10 very different remedy -- I mean, to say that it isn't just
11 a matter of delay, that isn't the problem here. The
12 problem here is that under the plan, the plan manager's
13 determination was to be given deference by the Federal
14 court in deciding whether the plan had been complied with,
15 whereas under the scheme set up by the State, his
16 determination is not to be given deference. It's this
17 third party who's been brought in who will have the last
18 word, and unless that's arbitrary, the court will enforce
19 what he says. How can that possibly be regarded as the
20 same remedy that ERISA provided?

21 MR. KNEEDLER: Nothing in section 502 -- and
22 this Court made this clear in Firestone -- specifies the
23 standard of review. The Court therefore looked to
24 background principles of law there, in trust law. The
25 Court here might look to background principles of

1 arbitration law, and also to the terms of the plan.

2 State law, as Justice O'Connor pointed out,
3 might well be able to say that that sort of provision for
4 deference to the plan administrator's interpretation of
5 the plan should not be given. That would be a classic
6 regulation of State insurance law.

7 I want to mention one other point about the
8 characterization of Pilot Life, and that is this Court's
9 decision in UNUM. The Court there said, whatever the
10 merits of UNUM's view of section 502(a)'s preemptive
11 force, the issue is not implicated here. The Court then
12 went on to say why, because Ward sued under 502(a)(1)(B)
13 itself to recover benefits it was not a displacement of
14 the Federal remedy, it was an invocation of the Federal
15 remedy to recover benefits, and the Court said in that
16 cause of action, the notice prejudice rule of California
17 insurance law supplied the rule of decision.

18 So, too, here, in the cause of action under
19 section 502(a)(1)(B) the State Illinois HMO law supplies
20 the rule of decision, a procedure for an independent
21 reviewer to give a quick, prompt review of the claim, and
22 that independent reviewer's decision is -- then supplies
23 the rule of decision that the HMO must comply with, and
24 that is then subject to review in Federal court.

25 The claimant's right to go to court is not

1 frustrated. He can seek review of the arbitrator's
2 decision, or, as we point out in our brief, he can bypass
3 this procedure altogether and can go directly to court,
4 and so 502(a)(1)(B) confers rights on claimants, not on
5 plans. Nothing in the HMO act stands as an obstacle to
6 the claimant's ability to go directly to court.

7 Another important point about UNUM is, the Court
8 made clear that the processing of claims under an
9 insurance policy, it is an integral part of that insurance
10 policy, but at the same time States may regulate the
11 process by which claims are adjudicated, and that is
12 precisely what the State has done in this case. It has
13 provided a familiar mechanism. 40 States now have
14 provided for this external sort of review, and it is
15 common in insurance and medical practice to provide by
16 second opinions by physicians, so what has been provided
17 here is a very familiar sort of approach.

18 One other point about section 502, it's
19 patterned after section 301 of the LMRA, an arbitration
20 preceding judicial review is a very familiar aspect of
21 judicial review under section 301. Section 301 itself
22 does not provide for any particular standard of review.
23 You can have de novo breach of contract suits, as in the
24 Bowen v. Postal Service case we mentioned in our brief, or
25 highly deferential standards of review where the

1 particular issue has been committed to an arbitrable
2 process.

3 502 has the same flexibility. It can have a
4 direct de novo cause of action, as the Court contemplated
5 in Firestone, or, where the parties' underlying agreement
6 or contract provides for a separate resolution process,
7 there is deference to that process under section 502.

8 QUESTION: Thank you, Mr. Kneedler.

9 Mr. Roberts, you have 4 minutes remaining.

10 REBUTTAL ARGUMENT OF JOHN G. ROBERTS, JR.

11 ON BEHALF OF THE PETITIONER

12 MR. ROBERTS: Thank you, Mr. Chief Justice.

13 My friend Mr. Kneedler again drew the analogy to
14 the Labor Management Relations Act, and we are on common
15 ground. That's a good analogy. He again stopped one step
16 short. A State law that compelled the parties to a
17 collective bargaining agreement to resolve their disputes
18 in a particular manner, even arbitration, would surely be
19 preempted under the Labor Management Relations Act and, to
20 the extent this remedy is similar to arbitration, that
21 same conclusion applies.

22 We heard that there's no interference with 502
23 because beneficiaries have the option. They can use the
24 Federal remedy, or they can use the State remedy. The
25 existence of an alternative remedy is, in fact, an

1 interference with section 502, and that test is that
2 option with the beneficiary is peculiarly inappropriate
3 when you're talking about preemption.

4 Preemption often is the result of a quid pro
5 quo. We're going to give, say, employees a Federal
6 remedy, but for the employers we're going to make it
7 exclusive. To say that additional remedies are okay so
8 long as the employee can still resort to the Federal
9 remedy seems to ignore the typical dynamic of preemption.

10 And as far as the arbitration analogy goes, the
11 fact that the plans may or may not be able to voluntarily
12 adopt such a remedy doesn't mean the State can compel it.
13 Nothing prevented the plan in Egelhoff from voluntarily
14 opting the beneficiary designation rule at issue there.
15 that didn't keep this Court from ruling that it was
16 preempted. Nothing preempted the plan in Greater
17 Washington Board of Trade from saying, we're going to
18 provide the same level of benefit to people on Worker's
19 Comp as to others, and yet a rule mandating that was
20 preempted.

21 We're dealing here with a compelled alternative
22 State law remedy that changes completely the standard of
23 review available under the Federal remedy. It's not
24 surprising the results under the two remedies came out
25 differently. That additional remedy is preempted.

1 Thank you, Your Honor.

2 CHIEF JUSTICE REHNQUIST: Thank you,
3 Mr. Roberts. The case is submitted.

4 (Whereupon, at 11:05 a.m., the case in the
5 above-entitled matter was submitted.)

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