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

2 (11:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument next in Case 12-729, Heimeshoff v. Hartford  
5 Life & Accident Insurance.

6 Mr. Wessler.

7 ORAL ARGUMENT OF MATTHEW W.H. WESSLER

8 ON BEHALF OF THE PETITIONER

9 MR. WESSLER: Thank you.

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

12 This case involves an accrual provision in  
13 an ERISA plan that starts the clock running on a Federal  
14 denial of benefits claim near the beginning of ERISA's  
15 mandatory internal claims process before the Federal  
16 claim ever exists or could be filed in court.

17 This provision directly conflicts with  
18 ERISA's two-tiered remedial structure, which is designed  
19 to maximize the number of claims that are resolved  
20 internally without lawyers in courts. The Respondent's  
21 provision undermines this goal by making it impossible  
22 for anyone to know in advance how much time will be left  
23 on the limitations clock after the internal process is  
24 complete.

25 JUSTICE GINSBURG: How much time was left in

1 this case?

2 MR. WESSLER: There was approximately one  
3 year, Your Honor.

4 JUSTICE GINSBURG: And you -- and if there  
5 were a one-year limitation running from the final  
6 administrative review, you would be out?

7 MR. WESSLER: Well, I don't think we would  
8 be out in this case, Your Honor, because the provision  
9 in this case was a three year from final denial. Going  
10 forward, if, in fact, ERISA plans had a one-year clock  
11 running from final denial, everyone would know that they  
12 would need to file their claim within one year from time  
13 of final denial.

14 JUSTICE GINSBURG: Yes, but if there were  
15 such a rule, one year from the final administrative  
16 decision, this claim would become too late.

17 MR. WESSLER: If, in fact, the provision in  
18 this plan --

19 JUSTICE GINSBURG: Yes. Yes.

20 MR. WESSLER: -- said one year from final  
21 denial, that's correct, Your Honor.

22 JUSTICE GINSBURG: What accounts for the  
23 delay? When the -- the clock was running and more than  
24 a year went by before this suit was instituted, why was  
25 that -- why did that happen?

1           MR. WESSLER:           Well, I think this gets us,  
2   Your Honor, to one of the core problems with this  
3   provision, which is that it's confusing. It is unclear.  
4   One of the key questions with these provisions, when  
5   they're coupled with the mandatory exhaustion  
6   requirement, that is -- that is actually quite uncertain  
7   when proof of loss is due.

8           And so below, one -- one of the key  
9   questions, which actually still remains unresolved, is  
10  when the clock actually started ticking. But I think  
11  there's a -- there's a more fundamental problem --

12          JUSTICE SOTOMAYOR:        I'm sorry. I thought  
13  the court below said that that was irrelevant to the  
14  resolution of this case, that even if they accepted your  
15  date for when the proof of loss started, that you would  
16  still lose.

17          MR. WESSLER:           In this case, Your Honor,  
18  that's true; however, the problem with these proof of  
19  loss dates coupled with this mandatory exhaustion  
20  requirement is that it is unclear from the outset  
21  when -- when the clock -- how much time after final  
22  denial would be left when you're in the middle of the  
23  process. And on this question of proof of loss --

24          JUSTICE SOTOMAYOR:        I'm a little confused  
25  because it would be the same no matter what rule we

1     instituted.

2             MR. WESSLER:             Well, I -- I don't think  
3     that's right, Your Honor.

4             JUSTICE SOTOMAYOR:             Meaning, you would never  
5     know when the administrative -- you really never know  
6     when the administration process is final, just like  
7     you're arguing you don't know when the proof of loss  
8     date is final. But at least the advantage of proof of  
9     loss, you know you got three years from at least the  
10    beginning of the process.

11            MR. WESSLER:            Right, although I -- there's  
12    actually quite a bit of disagreement among the lower  
13    courts about how you measure proof of loss, when that  
14    date actually triggers the limitations clock.

15            So for instance, in the Seventh Circuit, the  
16    court has held that proof of loss starts the clock  
17    ticking the first time proof of loss is due under the  
18    plan, which is the first set of documents that a  
19    claimant actually provides to her plan supporting her  
20    claim for disability.

21            The plan, however, through this internal  
22    process, can come back and ask for more documents, more  
23    evidence supporting the disability. And if the claimant  
24    then provides those additional documents, that could  
25    conceivably reset the limitations clock under this proof

1 of loss requirement.

2 JUSTICE SOTOMAYOR: That can only help you.  
3 That can only help you. It gives you more time, but it  
4 doesn't take time away from you.

5 MR. WESSLER: That's true, Your Honor.

6 JUSTICE SOTOMAYOR: You have three  
7 years, no matter what. From the first date, you have  
8 three years.

9 MR. WESSLER: Well, in fact --

10 JUSTICE SOTOMAYOR: If you need more time,  
11 you have a potential out.

12 MR. WESSLER: Well, in fact, you don't have  
13 necessarily three years from when proof of loss starts  
14 because courts, as respondents themselves acknowledge,  
15 are necessarily going to have to evaluate these -- these  
16 provisions on a case-by-case basis. So it's --

17 JUSTICE SCALIA: Well, you know, I guess  
18 there are answers to these -- to these legal questions,  
19 whether it's the first filing or if supplemental  
20 documents are required, it's the second filing. There's  
21 an answer, you know? Some court will provide the  
22 answer.

23 The mere fact that -- that provisions in a  
24 contract are subject to various interpretations doesn't  
25 make the provision invalid. It means something. We

1 just don't know right now what it means until -- until a  
2 court provides the answer. But, wow, that's not  
3 different from any contract.

4 MR. WESSLER: Well, except, Your Honor, that  
5 in ERISA, one of the core goals of this statute is to  
6 provide predictability, certainty, and efficiency in the  
7 administration of benefits.

8 And so to have courts being placed in the  
9 center of what should be a straightforward and  
10 streamlined process undermines the way Congress intended  
11 this benefits administration process to proceed. And if  
12 you -- if you place courts exactly in the middle of  
13 this, where they're going to necessarily be policing the  
14 enforceability of a -- of a limitations provision before  
15 they ever get to the question of were the benefits  
16 properly denied, you're undermining the nature of what  
17 this private process is supposed to be.

18 It was supposed to be intended to allow the  
19 parties to privately resolve their benefit claims  
20 without --

21 JUSTICE GINSBURG: But ERISA itself contains  
22 no statute of limitations, and it's generally assumed  
23 that, therefore, this State statute of limitations would  
24 govern, and if a State has the position that parties can  
25 contract the statute of limitations -- I mean, ERISA



1 does have -- does have a statute of limitations for  
2 breach of fiduciary claims, right?

3 MR. WESSLER: That's -- that's correct, Your  
4 Honor.

5 JUSTICE GINSBURG: And it has none for this  
6 kind of claim.

7 MR. WESSLER: That's correct, Your Honor.  
8 And I think it was reasonable for Congress to expect  
9 that the -- that -- that for these denial of benefit  
10 claims, we would look to State law to determine the  
11 length of the period.

12 But when that period starts running -- and  
13 that's -- that's what's at stake here, is when the  
14 limitations clock starts running -- was not a question  
15 that we would look to State law for; rather, it's a  
16 question of Federal law. When does the claim actually  
17 become ripe? When can you file it in court?

18 And -- and what -- what we have here is a  
19 limitations provision that includes an accrual date that  
20 starts the clock running, not just before when you can  
21 file it in court, but before there's ever even been an  
22 injury.

23 JUSTICE ALITO: Well, ERISA doesn't have a  
24 statute of limitations, it doesn't specifically set out  
25 a statute of limitations for this type of claim. But it

1 does have a savings clause that says it doesn't preempt  
2 State laws that regulate insurance.

3 So what would happen in this situation?

4 Let's say that a State statute says essentially what the  
5 plan at issue says. It says that a claim for the  
6 incorrect denial of insurance benefits must be brought  
7 within three years after the proof of loss.

8 And now let's assume we agree with you, that  
9 under ERISA, any statute of limitations for the denial  
10 of benefits must begin not when the proof of loss must  
11 be filed, but upon the denial of benefits.

12 Does it follow, then, that the rule that  
13 you're advocating would mean that ERISA preempted the  
14 State law that regulated insurance in the way that I  
15 just specified?

16 MR. WESSLER: I -- I would think it would,  
17 because it -- because it would conflict with ERISA's  
18 remedial structure. I would stress here that in this  
19 case, we know that these State laws don't apply to  
20 Respondent's provision. They themselves have made that  
21 clear in their opposition brief.

22 Most State laws, however, actually include  
23 language to the effect of that insurers can use these  
24 kinds of proof of loss languages or something similar so  
25 far as it's not any less favorable.

1 JUSTICE ALITO: I think your answer to  
2 that question has to be yes; otherwise, the situation  
3 would be a mess.

4 MR. WESSLER: Yes. Yes.

5 JUSTICE ALITO: But I -- but in -- in what  
6 sense is the law that I hypothesize not a law that  
7 regulates insurance? So why wouldn't it fall within  
8 ERISA's savings clause?

9 MR. WESSLER: It might as a first step, Your  
10 Honor, but I think it would be impliedly conflicted  
11 because it conflicts with the Federal structure of  
12 ERISA. And the key point about these State law  
13 provisions, which is I think where this provision comes  
14 from in Respondent's plan, is that these State law  
15 insurance regimes do not require mandatory exhaustion of  
16 any internal claims process.

17 You -- your clock starts running at proof of  
18 loss and so long as you wait a 60-day waiting period,  
19 you can then file your claim in court regardless of  
20 whether the insurer has actually acted on your claim.

21 That is not true here. Claimants do not  
22 have the ability to file their claims in court until  
23 they have exhausted this mandatory process.

24 JUSTICE KENNEDY: Is there any evidence in  
25 other circuits that have this same rule that -- that the

1 approach the Respondents advocate has caused  
2 difficulties and disruption and unfairness?

3 MR. WESSLER: Well, I think we have seen  
4 courts struggling with a host of questions about how to  
5 resolve the enforceability of these provisions. As just  
6 an example, we know that courts are in the -- are having  
7 now to be in the business of asking whether the parties'  
8 conduct during this internal process has caused some  
9 waiver or estoppel of the limitations provision.

10 That kind of inquiry, an estoppel kind of  
11 inquiry, is a fact-based inquiry about whether the  
12 plan's conduct in the internal process was unduly  
13 reasonable --

14 JUSTICE KENNEDY: But in this case, as  
15 Justice Ginsburg indicated at the outset, there was a  
16 period of, I think, just over a year, in which it was  
17 very clear that the administrative process had ended and  
18 nothing happened. I don't see the unfairness in the  
19 application of the rule in this case.

20 MR. WESSLER: Yes, Your Honor, but I think  
21 the core problem here isn't so much one of unfairness as  
22 it is certainty and predictability of what employees'  
23 and plans' rights are under an ERISA plan.

24 JUSTICE KENNEDY: Well, but there is also  
25 certainty and fairness in processing the claim, and when

1 evidence is lost, especially in cases where employees  
2 who were key witnesses have likely departed, that's  
3 another very important consideration.

4 MR. WESSLER: Absolutely, Your Honor. But  
5 to be clear, there is nothing about Respondent's  
6 provision that advances any of those goals any more than  
7 running a limitations clock one year from final denial.

8 As this Court has said, the internal claims  
9 process itself provides notice to all the parties about  
10 the possibility for claims and, critically, preserves  
11 all of the evidence that --

12 JUSTICE BREYER: What happens -- what  
13 happens if you brought suit before the exhaustion, while  
14 it was still going on, before it ended, but you said to  
15 the judge, Judge, we're in the middle of exhausting, so  
16 don't -- we don't want to hear the case until that's  
17 finished, can you do that or not?

18 MR. WESSLER: I think that is a very open  
19 question. I do not know the answer.

20 JUSTICE BREYER: It's an open question.

21 So then if it were held that you could do  
22 it, you could file the lawsuit within the three years  
23 and if exhaustion had not taken place, well, just don't  
24 hear the case until the exhaustion does. That would  
25 solve your problem.

1           MR. WESSLER:           I think it would, but I also  
2 think --

3           JUSTICE BREYER:           I mean, it wouldn't solve  
4 your problem because you waited too long. But I mean  
5 that would solve the problem of other people in the  
6 future in your situation.

7           MR. WESSLER:           Correct. It would create a  
8 vehicle for protecting the claimant's rights and  
9 providing certainty --

10          JUSTICE BREYER:           What is it that stops that?  
11 I mean, on that ground you would say these clauses are  
12 valid. It's valid to say he has to -- you have to bring  
13 a lawsuit within three years. Nothing wrong with that.  
14 File a protective complaint.

15          MR. WESSLER:           Absolutely, Your Honor. But  
16 that gets lawyers and courts involved in a process that  
17 should be private. ERISA's internal benefits process,  
18 it processes millions of claims a year. If we have  
19 lawyers turning what should be a non-adversarial,  
20 private process into one that is adversarial and that  
21 allows for the possibility of filing protective actions  
22 in which we ask the Federal court to stay a potential  
23 Federal claim that may never exist while we are in this  
24 indeterminant, flexible process, the courts would be  
25 brought directly into a process that should be private.

1 JUSTICE SOTOMAYOR: Counsel, if we rule in  
2 your favor -- I'm sorry, against you -- and just say the  
3 plans can do this, do you see any reason why the  
4 government couldn't pass a regulation saying you've got  
5 to give people at least a year from the end of the  
6 administrative process to file?

7 MR. WESSLER: I can't speculate on what the  
8 government would do. I don't actually know if they  
9 would have the authority to do that.

10 JUSTICE SOTOMAYOR: I'm going to ask them  
11 that question.

12 MR. WESSLER: I'm sure you are.

13 JUSTICE SOTOMAYOR: But are you aware of  
14 anything that would stop them from doing that?

15 MR. WESSLER: I am not. Their regulations,  
16 what they have now addresses the internal claims  
17 process. It doesn't address the rights that exist when  
18 you get to Federal court.

19 JUSTICE SOTOMAYOR: If we rule in your  
20 favor, however, they would be estopped from passing a  
21 regulation requiring something different than what we  
22 say, correct?

23 MR. WESSLER: I would think that that's  
24 right. I mean, I think -- I think a rule of accrual  
25 that the limitations clock starts running at final

Official

1 denial is exactly the kind of uniform and clean rule  
2 that everyone can rely on ex ante, from the outset,  
3 across the board in every jurisdiction in the country.

4 JUSTICE KAGAN: Mr. Wessler, this just I  
5 think follows up on Justice Kennedy's question, but have  
6 you identified any cases in which this serves to prevent  
7 somebody from bringing a suit?

8 MR. WESSLER: We have not found any cases in  
9 which a claimant has actually lost the right to file a  
10 suit. The problem isn't so much in that possibility.  
11 The problem is in what we do see, which is where there  
12 are three or four or two or five months left after final  
13 denial on the clock, and courts are now in the business  
14 of having to evaluate, does that give enough time to the  
15 claimant to do all the things that she needs to do to  
16 file her claim?

17 JUSTICE KAGAN: But it seems as though those  
18 courts have been pretty liberal in saying, whenever it  
19 is necessary, no, take a little bit more time. So, this you know, it  
20 seems just a little bit like a solution in search of a  
21 problem.

22 MR. WESSLER: I think in fact it's just the  
23 opposite. Running the clock during the internal process  
24 ex ante, no one knows where they will be at the end.  
25 This process is indeterminate. We want the parties to



1 take all the time they need to work it out.

2 JUSTICE GINSBURG: I didn't understand your  
3 response to Justice Breyer's question, Mr. Wessler. I  
4 don't see how a Federal court that simply stays its --  
5 stays its hand, abides the termination of the  
6 administrative proceeding, is in any way engaging in any  
7 kind of adversary process.

8 MR. WESSLER: With respect, Your Honor, it's  
9 not the court that is engaging in the adversarial  
10 process. It's the private internal claims process that  
11 is supposed to be non-adversarial that has now become  
12 adversarial because there is now a lawyer involved who  
13 has advised her client that she must file a protective  
14 action to avoid the possibility that she will lose her  
15 claim. We don't --

16 JUSTICE GINSBURG: Yes, many people in the  
17 administrative process aren't represented, but some are,  
18 right?

19 MR. WESSLER: That's right, but we think  
20 that this provision would incentivize more lawyers  
21 getting involved because if you are uncertain about how  
22 much time you'll have you will be in a position where  
23 you will want advice. This provision breeds confusion, and  
24 when we are confused we look for help, and the help that  
25 is going to come into this process are lawyers who are

1 going to take those kinds of strategic action that  
2 Justice Breyer suggested and involve the courts in what  
3 should be a private process.

4 That in and of itself drastically undermines  
5 the point of this internal benefit administration and  
6 just amplifies and magnifies the litigation costs  
7 associated with it.

8 If I could reserve the rest of my time.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 Ms. Anders.

11 ORAL ARGUMENT OF GINGER D. ANDERS,

12 FOR THE UNITED STATES, AS AMICUS CURIAE,

13 SUPPORTING THE PETITIONER

14 MS. ANDERS: Mr. Chief Justice, and may it  
15 please the Court:

16 The limitations provision in Respondent's  
17 plan deviates from bedrock Federal limitations  
18 principles in a way that undermines ERISA's two-tiered  
19 remedial framework. Congress enacted that remedial  
20 structure, which requires mandatory exhaustion before  
21 judicial review, against the established limitations  
22 principle that the limitations period begins to run only  
23 when the cause of action accrues, in other words, here,  
24 when exhaustion is complete and the plan has rendered  
25 its final decision.

1           JUSTICE ALITO:           I find it very hard to  
2   answer the question that is presented here without  
3   knowing the answer to the preemption question that I  
4   asked Mr. Wessler. And I know you refer to it in a  
5   footnote in your brief and you say that this -- the type  
6   of State statute to which I referred would likely be  
7   preempted. And I can understand why you wouldn't want  
8   to go further than that on that question in a case where  
9   that question isn't squarely presented.

10          But if it's not presented, then I think we  
11   would be creating an incredible mess that Congress would  
12   not have intended. So I really don't understand how I  
13   can answer the question here without knowing the answer  
14   to the question there.

15          MS. ANDERS:           I think that's -- I think  
16   that's right and I think State laws that require plans  
17   to have this sort of provision would be preempted. They  
18   may fall within the savings clause, but, as this Court  
19   has said, even statutes that are within the savings  
20   clause are still subject to ordinary contract preemption  
21   principles.

22          JUSTICE KENNEDY:       Those are general  
23   statutes, so they would be preempted just in this class  
24   of claims. So lawyers would have to know that this  
25   statute is still valid for many purposes, but not for

1 ERISA.

2 MS. ANDERS: Well, it may be valid for many  
3 State law purposes, but when a plan is regulated by  
4 ERISA, ERISA's remedial framework establishes the limits  
5 of what that plan --

6 JUSTICE KENNEDY: But then you have -- you  
7 have lack of uniformity within the State on when these  
8 claims must be brought under an insurance policy.

9 MS. ANDERS: I don't think there'd be more  
10 -- any more lack of uniformity than there is already.  
11 In fact, most of these State laws, they -- they actually  
12 require plans to provide substitute language that would  
13 be at least as favorable to the insureds.

14 So, for instance, you could have a plan -- a  
15 plan could easily remedy the problem we have here by  
16 saying our limitations period runs from 3 years from  
17 proof of loss or 6 months from the plan's final  
18 determination, whichever is -- is later. That would be  
19 an easy way for a plan to both be uniform and avoid the  
20 problem that we have here, which is undermining ERISA's  
21 remedial framework by setting the two --

22 JUSTICE SCALIA: But it hasn't undermined  
23 the framework. I mean, the Petitioner had a year. I mean,  
24 I can understand if -- finding that a particular case  
25 is -- is not filed too late when indeed there was --

1     there was no time to do it. But here they -- they had a  
2     year. Why -- why does that undermine the framework? If  
3     and when they don't have enough time, the court can say  
4     the -- this suit is not precluded.

5             MS. ANDERS:             Well, in this case we now know  
6     post hoc that -- that the Petitioner had about a year.  
7     But the problem with this framework is that it actually  
8     sets the required exhaustion procedure under 1133 and  
9     the required judicial review under 1132 against each  
10    other, because a claimant who is going through  
11    exhaustion is not going to know while she's going  
12    through the exhaustion process how much time she's going  
13    to have remaining.

14            JUSTICE SCALIA:            So what?

15            JUSTICE KAGAN:            What evidence do you have  
16    that any bad incentives -- you know, any bad effects are  
17    actually flowing from this? There's actually a big  
18    leeway in this statute, because it's 3 years. The  
19    administrative review process only takes about a year.  
20    Even if this is a -- it's a complicated case where  
21    there's some tolling, you know, maybe it gets you up to  
22    another year, you still have a year.

23            I mean, what -- how would people behave  
24    badly or behave in ways that you think would disrupt the  
25    statutory scheme, if we just let everything stay as it

1 is?

2 MS. ANDERS: Well, first, I think there is  
3 evidence that there have been -- that there have been  
4 problems created by this kind of scheme. There's an  
5 example of a case in which exhaustion took 4 years.  
6 This is an iterative process; the Department of Labor's  
7 regulations, of course, mean for mainstream cases to be  
8 resolved in about a year. But you can always have cases  
9 -- you know, these are situations in which you need  
10 medical exams, you need test results, you need written  
11 reports. Either side --

12 JUSTICE GINSBURG: Now -- in practice -- in  
13 practice, how often is that the case that the -- that  
14 the guidelines set by the Department of Labor are not --  
15 are not met?

16 MS. ANDERS: I don't have precise  
17 statistics, but the regulations are designed to be  
18 flexible, precisely because there will often be cases in  
19 which one or the other side will need an extension. And  
20 so there are many cases or at least there are some cases  
21 here where -- where if the limitations period is 3  
22 years, it takes -- it has taken over 2 1/2 years for  
23 exhaustion to occur, so the -- the plaintiff is left  
24 with about 5 months to sue. And then there's a question  
25 about whether that's reasonable or not which leads to

1 collateral litigation. There are some cases where the  
2 statute of limitations is only 1 or 2 years.

3 JUSTICE SOTOMAYOR: Counsel, I could be more  
4 troubled by this case if the proof of loss provision  
5 required a suit to be brought in a year because as I'm  
6 adding up the timeframe, it's about 15 months if no  
7 exceptions remain for the administrative process.

8 Could you answer my question on whether you  
9 see any impediment if we rule against you in this case,  
10 to the department saying something like, you've got to  
11 give at least a year, from the finality of the  
12 administrative process? Could you pass such a  
13 regulation later?

14 MS. ANDERS: I think the Department of Labor  
15 would have that authority to do that. I mean, we think the  
16 statute is clear right now that, you know, several  
17 provisions -- there are several concepts here that I  
18 think are very clear. One this mandatory exhaustion in  
19 the statute. Two, Congress enacted the statute against  
20 the traditional limitations rule, which means that the  
21 statute runs from the date of accrual, and deviating  
22 from that would undermine the structure by causing the  
23 limitations provision to work in a way that limitations  
24 provisions never do. Limitations provisions are  
25 designed to create certainty for both parties, so that

1     you know when you have to bring suit.

2             JUSTICE SCALIA:             Counsel --

3             JUSTICE GINSBURG:             But, Ms. Anders, the  
4     question is -- there is a division in the courts of  
5     appeals, and the question is: Could the Department of  
6     Labor, by regulation, resolve the matter one way or the  
7     other?

8             Does -- even if -- even if it thinks the  
9     statute is clear, the courts obviously don't because  
10    most go the other way. So given that most courts go the  
11    other way, does the Department of Labor have authority  
12    to adopt a -- a regulation that would adopt the accrual  
13    rule?

14            MS. ANDERS:             We do think it would have that  
15    authority and it has that authority because it has the  
16    authority to regulate the claims process and the  
17    procedures --

18            JUSTICE SCALIA:            Well, that's -- that's the  
19    internal claims. Do you know any other instance in  
20    which -- when a suit can be brought in -- in Federal  
21    court will be determined by an agency?

22            MS. ANDERS:             Well, we --

23            JUSTICE SCALIA:            An agency saying you've got  
24    to sue within 1 year, you've got to sue within 6 years.  
25    Offhand, I can't think of any, and -- and I think it



1 goes well beyond what -- what the Executive is  
2 authorized to prescribe.

3 MS. ANDERS: Well, we do think the agency  
4 would have the authority here because we think that the  
5 statute of limitations -- when the statute of  
6 limitations runs from is intertwined with the  
7 effectiveness about -- of the claims procedure. So  
8 because we think that the -- that having the limitations  
9 provision run from before exhaustion even starts  
10 undermines the efficacy of the claims procedure, the  
11 Department of Labor would have the authority to protect  
12 the efficacy of the claims procedure --

13 JUSTICE SCALIA: You know any other  
14 instances where -- where a Federal agency has, in  
15 effect, prescribed the running of the statute for the  
16 courts? Maybe there are some, but I don't know of any.

17 MS. ANDERS: I can't tell you right now.  
18 I'm not sure that there aren't any such provisions. But  
19 we do think the department would have the authority  
20 here.

21 JUSTICE KAGAN: I guess one question is, if  
22 you think that you do have authority and you think that  
23 the majority rule has been creating problems, why the  
24 Department of Labor hasn't done that?

25 MS. ANDERS: Well, the department's focus --

1 in 2000, the last time it regulated, it chose to focus  
2 on matters that were directly involved in the claims  
3 process itself. It hasn't regulated since then, but its  
4 position is that the statute does not permit plans to  
5 deviate from bedrock limitations principles like this  
6 and undermine the remedial scheme. So its position is  
7 reflected in our brief and we think it could regulate.

8 JUSTICE ALITO: If we agree with you, would  
9 a State legislature have the authority to pass a statute  
10 setting out a particular -- a specific statute of  
11 limitations for ERISA claims?

12 MS. ANDERS: I think it -- I think it might  
13 have the authority to do that so long as the statute  
14 were framed in a way that didn't undermine the -- the  
15 remedial framework here, yes.

16 JUSTICE GINSBURG: What is your position on  
17 Justice Breyer's suggestion that the trigger can be  
18 proof -- when you file proof of claim, but if it happens  
19 that beginning of suit at that point would -- while  
20 the -- while the administrative review process is  
21 underway, why not say you have to follow the time of  
22 filing, but if the administrative process -- in your  
23 case, the 4 years -- took 4 years -- just hold the suit  
24 in abeyance until the administrative process is  
25 complete?

1           MS. ANDERS:           I think that would be kind of a  
2   bizarre scheme that would turn the exhaustion process  
3   and the point of exhaustion on its head, and that  
4   essentially would require a rush to court by claimants  
5   who don't know yet whether the exhaustion process will  
6   be resolved in their favor. And the point of exhaustion  
7   is -- is to avoid unnecessary suits like that.

8           So I -- I think it has that problem.           It  
9   also is not clear that every claimant is going to know  
10   to -- to file a protective suit.

11          JUSTICE BREYER:           -- What about our saying that, and  
12   what about our saying to the courts as a judge-made  
13   doctrine, exhaustion has to conclude in enough time so  
14   that they have time left to file a lawsuit?

15          MS. ANDERS:           I'm sorry. If you were to rule  
16   that --

17          JUSTICE BREYER:           Yes. Because isn't --  
18   isn't exhaustion a judge-made doctrine?

19          MS. ANDERS:           It is a judge -- it is a  
20   judge-made doctrine, but I think --

21          JUSTICE BREYER:           It would be an unfair  
22   process that doesn't leave them a reasonable amount of  
23   time to file a lawsuit.

24          MS. ANDERS:           Well, I think in this case  
25   exhaustion is -- is established by statute, it's

1 required by statute and by the regulations. And so, you  
2 know, I think -- I think in this case the problem is  
3 that the statute of limitations starts running well  
4 before the exhaustion process is complete, and  
5 therefore, damages the efficacy of that process.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
7 Ms. Carroll.

8 ORAL ARGUMENT OF CATHERINE M.A. CARROLL  
9 ON BEHALF OF THE RESPONDENTS

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

12 Subject to State insurance law, ERISA gives  
13 employers broad leeway to choose the terms on which they  
14 agree to provide benefits, and a suit for benefits  
15 due under an ERISA plan can seek only to enforce those  
16 agreed-upon terms.

17 JUSTICE SCALIA: They don't have to provide  
18 benefits at all, do they?

19 MS. CARROLL: Exactly. But one of  
20 Congress's purposes --

21 JUSTICE SCALIA: And if they do, they do it  
22 on their own terms.

23 MS. CARROLL: That's correct,  
24 Justice Scalia. And that was one of Congress's  
25 overarching purposes in enacting the statute.

1 JUSTICE BREYER: I suppose the problem here  
2 is that we have found nine cases -- you know, we can do  
3 computer-assisted research, which my clerks are good  
4 at -- and -- and they found five cases in which the  
5 exhaustion period was actually longer than the 3-year  
6 statute of limitations. And then they found four others  
7 that were -- well, there was like 5 days left in one,  
8 and there was 5 months in another. And in most of  
9 -- almost all those cases, the judge got around the  
10 problem by saying the statute begins to run at the time  
11 the exhaustion is finished.

12 Now, I can think of other ways of solving  
13 the problem. One was, you get a reg. Another way was  
14 that we interpret the exhaustion doctrine to require  
15 leaving at least a year. But what's your way of solving  
16 the problem? Are you just going to let those nine  
17 people just -- they can't bring their lawsuit, or what?

18 MS. CARROLL: Well, I think when those  
19 situations arise -- and to be clear, we have 40, almost  
20 40 years of experience under ERISA of these provisions  
21 coexisting with the ERISA remedial framework. And in  
22 that time period, to come up with, I recall, was it five  
23 or nine cases --

24 JUSTICE BREYER: The question was, what do  
25 you want to do with those nine people? Now, I know

1     there are a lot of ERISA cases, but still there were  
2     nine people --

3             MS. CARROLL:             Of course.

4             JUSTICE BREYER:             -- who will have this  
5     problem. And my question is, what do you suggest we do  
6     about them?

7             MS. CARROLL:             In the highly unusual  
8     circumstances where those situations arise, and we don't  
9     have any reason to believe they are anything but highly  
10    unusual, we think courts are well equipped to apply the  
11    same equitable doctrines that courts have always applied  
12    to statutes of limitations when situations like that  
13    arise. I think my friend referred to --

14            JUSTICE BREYER:            My question was, what  
15    specific doctrine or -- I saw three routes. Now, you  
16    can name some others, and we do about those nine people  
17    precisely, not in some general terms, but we do what  
18    about them?

19            MS. CARROLL:            In the Lamantia case cited in  
20    the reply brief, the doctrine that was applied was  
21    equitable estoppel because in the facts of that case you  
22    couldn't get to a four-year point without a final  
23    decision without something having gone wrong. And in  
24    that case there was --

25            JUSTICE BREYER:            And now, I suppose -- so we

1     could use equitable estoppel, even though nobody has  
2     said anything, even though nobody held out anything as a  
3     basis for estoppel. But we could say use equitable  
4     estoppel. I'll think about that one.

5             Is there any other thing we could use?

6             MS. CARROLL:             There are many. I want to  
7     be clear. Estoppel applies where the facts support it,  
8     as do equitable tolling, as do the several provisions in  
9     the Department of Labor regulations that already account  
10    precisely for the interaction between the internal  
11    review process and --

12            JUSTICE SCALIA:            Why wouldn't equitable  
13    tolling apply if you don't have enough time to prepare  
14    the court suit? You have just a month, let's say, and  
15    it's not your fault because you pursued the  
16    administrative proceedings vigorously and promptly. Why  
17    wouldn't it be applicable?

18            MS. CARROLL:            I think it very well might,  
19    Your Honor. I don't see any reason why that is not a  
20    perfectly adequate solution.

21            JUSTICE SCALIA:            So these seven people, nine  
22    people -- how many were there? Over 40 years, they  
23    probably had a way out?

24            MS. CARROLL:            I think that's right. And I  
25    think --

1 CHIEF JUSTICE ROBERTS: So you're pushing  
2 this start to the statute of limitations period, and  
3 your answer to the problems is: Well, don't worry. If  
4 it ever turns into something that's going to be  
5 enforced, we won't enforce it, or it won't be  
6 enforceable without a judicial determination about  
7 equitable estoppel and all these other things that are  
8 very difficult to apply.

9 MS. CARROLL: Our position is that this  
10 limitation provision, like any limitation provision,  
11 whether contractual or statutory, is subject to  
12 equitable doctrines that might apply on the facts of a  
13 particular case. These are not novel doctrines that  
14 courts are unaccustomed to applying and we don't think  
15 that they are particularly difficult.

16 JUSTICE KAGAN: Ms. Carroll, what would you  
17 think if the State here just amended its statutes  
18 tomorrow and said not 3 years but 18 months? So for  
19 everybody, it's an 18-month period. It doesn't give  
20 people very long after the 12 or 13 months of the  
21 administrative review process is over. What should a  
22 court do then? Should a court strike the entire  
23 statute?

24 MS. CARROLL: Strike the -- strike the State  
25 statute?



1 JUSTICE KAGAN: Yes. Should the court say,  
2 that's unreasonable, that goes too far?

3 MS. CARROLL: I mean, I -- going back to the  
4 preemption analysis that Justice Alito referred to, I  
5 think that provision would clearly fall within the  
6 saving clause, and the thrust of this Court's ERISA  
7 implied conflict preemption cases has been to ask only  
8 whether the State law purports to supplement or displace  
9 the exclusive remedial scheme under ERISA. And I don't  
10 think that provision would.

11 Now, maybe there would be a new analysis we  
12 would have to ask, which is, does this provision provide  
13 a reasonable opportunity for full and fair review, and  
14 does it practically deprive claimants of the opportunity  
15 to obtain judicial review at the end of that period.  
16 And maybe we would have --

17 JUSTICE KAGAN: I'm sorry. You know what?  
18 Take it out of the statute context. Just say that the  
19 contract said 18 months rather -- so -- so that's really  
20 what I meant. What is -- what's a court to do with a  
21 contract that says that?

22 MS. CARROLL: I think -- I think we would  
23 apply that same analysis of asking, has there been a  
24 reasonable opportunity for full and fair review, and has  
25 the claimant been deprived of the opportunity to seek

1 judicial review?

2 JUSTICE KAGAN: Well, but in 18 months. I mean and  
3 so 18 -- the administrative review process takes about  
4 12 months in most cases.

5 MS. CARROLL: Yes.

6 JUSTICE KAGAN: Is 18 months enough?

7 MS. CARROLL: I think that would be a much  
8 harder case because I do think we -- I think our -- our  
9 experience with ERISA provisions generally does suggest  
10 that exhaustion can take, you know, usually about a  
11 year, maybe a little over a year. And so that would be  
12 a harder case.

13 It's not what the laws of the vast majority  
14 of States do require, though. And it's not the  
15 provision that's in this policy. And I think just as  
16 there can be line-drawing in that direction, there could  
17 be line-drawing questions asked of my friend, what if --

18 JUSTICE KAGAN: Well but, what's the rule of  
19 law -- what's the rule of law that allows us to get rid of  
20 a contract provision that's set at 14 months or  
21 15 months or 16 months and to leave this one?

22 MS. CARROLL: Well, I don't want to -- if  
23 I -- if I -- if I suggested that I wanted to completely  
24 concede that, I misspoke because I think it's a hard  
25 question. I'm not sure what the answer is. But I think

1 the applicable --

2 JUSTICE KAGAN: I was thinking that I would  
3 like to -- like, 14 months would just seem unreasonable  
4 to me.

5 MS. CARROLL: Okay. Well, I think that's --  
6 I mean, going back to the Riddlesbarger decision and  
7 Wolfe, this Court has long recognized the common law  
8 principle that contracting parties may agree to a  
9 limitations provision, it must be consistent with the  
10 statutory framework, and it must provide a period of  
11 time for suit that's not unreasonably short. And I  
12 think the Court could apply --

13 JUSTICE BREYER: There, your opponent is  
14 saying, I have a simpler answer. I mean, instead of  
15 having to worry whether 14 months is too long or  
16 7 months is too short or a year and a half is adequate  
17 time, instead of having to worry about that in difficult  
18 cases, I have a simpler idea. We will just run the  
19 three years from the time the -- the internal exhaustion  
20 is finished. Then you don't have to worry about it.  
21 You don't have to worry about equitable tolling, and you  
22 don't have to worry about all this other stuff. That's  
23 their point.

24 MS. CARROLL: Justice Breyer, the question  
25 before the Court is not what would be the best idea or

1 the best, most simple model if we were writing on a  
2 blank slate. The question is, is this term in an ERISA  
3 plan, in a suit from which the Petitioner's rights flow  
4 from that plan and her cause of action seeks to enforce  
5 the terms of that plan -- may that provision be excised  
6 from every plan in which it appears in all cases on a  
7 categorical basis because we can imagine the possibility  
8 of five or nine cases in which its operation had to be  
9 addressed through the application of traditional  
10 equitable doctrines.

11 JUSTICE ALITO: Why would -- why would  
12 employers with ERISA plans be hurt by the rule that the  
13 Petitioner is advocating going forward? Why wouldn't  
14 they just be then able to amend the plan, make the --  
15 the period for filing suit begin on the -- at the end of  
16 the review process, shorten the period, if -- so as to  
17 bring it in line with basically what happened before,  
18 when the period began upon the proof of loss, I don't  
19 quite understand why, going forward, that is -- is a  
20 disadvantage to -- to employers?

21 MS. CARROLL: I do think that the current  
22 wording of the provision has a lot to recommend it, and  
23 that's why you see it used as the typical model in  
24 insurance. And here are a couple of the things. One is  
25 that --

1 JUSTICE ALITO: The current model being the  
2 proof of loss?

3 MS. CARROLL: Being proof of loss. And that  
4 is --

5 JUSTICE ALITO: And why is that preferable?

6 MS. CARROLL: That is because, from the  
7 moment the claim is filed, we know at the outset that  
8 the claim -- the books can be closed on the claim for  
9 reserving purposes three years from the proof of loss  
10 date. Whereas, under a limitation period that does not  
11 commence until the conclusion of the administrative  
12 process, we won't know from the outset when the  
13 limitation period will run or not.

14 And so this provision provides some  
15 certainty that the other type of provision doesn't. I'm  
16 not saying --

17 JUSTICE GINSBURG: Isn't it true that in  
18 insurance contracts, generally, where there is this  
19 proof of loss as the trigger, there isn't a mandatory  
20 administrative -- most States don't have this mandatory  
21 administrative review.

22 MS. CARROLL: Justice Ginsburg, that's  
23 actually not correct, and we've provided some examples  
24 at pages 20 to 21 of the red brief that show how these  
25 provisions do commonly work in the traditional insurance

1 context. And what you commonly see is a limitation  
2 period, often about 12 months, that will run from the  
3 time of the insured loss, let's say the time of the fire  
4 in a fire insurance policy.

5 What subsequently must happen within that  
6 12 months is that the claimant must present proof of  
7 loss within the 12 months as the clock is ticking.  
8 Sometimes they must await the insurer's decision.  
9 Sometimes they simply have a waiting period. And then  
10 they have to file suit. And that was the -- that was  
11 the scheme that this Court discussed at some length in  
12 the Wolfe case.

13 And what that model is about is -- I mean, I  
14 think we're all very familiar with the kind of Federal  
15 administrative scheme where there are several steps of  
16 administrative review, followed by a judicial review  
17 step, where Congress writes a limitation period that's  
18 essentially a grant of time in which a claimant can  
19 proceed from one step to the next.

20 But that's not the only model, and it's not  
21 the model that characterizes the insurance practice.  
22 With that model -- the way that often works is there is  
23 a deadline out there in the future, and by that deadline  
24 a claimant must complete the pre-litigation steps  
25 necessary and file their claim. That's the type of

1 model that this court also considered in enforcing the  
2 McMahon case. And there's nothing in the law that says  
3 one model versus the other is the only way a limitation  
4 period can ever be written.

5 And in ERISA, Congress did not step in to  
6 decide what it thought the limitation period ought to be  
7 or how it thought it ought to work. It instead said,  
8 number one, we want to defer to State insurance  
9 regulators, even though these provisions had long been  
10 on the books already, we want to defer to State  
11 insurance regulators to govern the content of insured  
12 plans. And number two, we want to defer to employers'  
13 decisions about the terms on which they want to enter  
14 into the voluntary undertaking of providing benefits.

15 And it is a voluntary undertaking and  
16 Congress, speaking about concerns about uncertainty and  
17 so on, the primary uncertainty that Congress was worried  
18 about and that would be visited on employers and  
19 insurers if this Court were to -- were to rule for  
20 Ms. Heimeshoff, would be that we don't want to be in a  
21 legal regime where every term in an ERISA plan is  
22 potentially unenforceable because someone can imagine a  
23 handful of five or nine cases in which it's unfair.

24 CHIEF JUSTICE ROBERTS: Well, but there's  
25 no -- there's no employer who is going to have a plan

1 put together and say, well, I'm not going to do this  
2 unless the statute of limitations for claims runs from  
3 the proof of loss. And if you tell me it's got to run  
4 from the exhaustion of remedies, I'm just not going to  
5 give a benefit plan. That's an implausible scenario.

6 MS. CARROLL: I -- I think that it's a  
7 broader point, however, in terms of the uncertainty that  
8 this would raise. To -- to say that this provision  
9 should be excised from ERISA plans in all plans where it  
10 appears, for all cases because of speculation about what  
11 might happen in some cases but does not usually happen,  
12 to say that that can be a basis, absent any other anchor  
13 in the statute, for judicially rewriting or ignoring  
14 plan terms, would be a tectonic shift in the law of  
15 ERISA in terms of Congress's goal of making sure that  
16 plans would be enforced as written, particularly in a  
17 cause of action under Section (a)(1)(B), which is a suit  
18 not to defeat the plan terms, but to enforce the plan  
19 terms.

20 JUSTICE SOTOMAYOR: Well, what would your  
21 argument be if -- if this -- if ERISA said there is a  
22 minimum 3-year statute of limitations? Would your  
23 argument be identical today or would that be a clearer  
24 demonstration that Congress intended that the background  
25 principle that that starts from, the exhaustion of



1 administrative process, be incorporated?

2 MS. CARROLL: Under the -- under the  
3 principle this Court recognized in Riddlesbarger and  
4 Wolfe, parties to a contract may agree to a limitation  
5 period that differs from one in the governing scheme.  
6 So, for example --

7 JUSTICE SOTOMAYOR: So do you require an  
8 explicit agreement that the start is going to be  
9 different as well?

10 MS. CARROLL: An explicit agreement --

11 JUSTICE SOTOMAYOR: That you can shorten or  
12 lengthen a limitations period, but this is not about  
13 shortening or lengthening a limitations period. This is  
14 about changing a start time for the limitations period.

15 Do you require something explicit -- an  
16 explicit statement as to that as well?

17 MS. CARROLL: Your Honor, if I am  
18 understanding the question correctly, I think if you --  
19 if you begin from the premise, as I think all parties  
20 do, that -- that contracting parties may agree to the  
21 length of the limitation period --

22 JUSTICE SOTOMAYOR: Right.

23 MS. CARROLL: A limitation period -- a  
24 length of a limitation period can't be defined or  
25 expressed without reference to some starting point.

1 It's not the norm to say, oh, we're going to have a  
2 3-year period. You would say it's 3 years from some  
3 date. It's 3 years from proof of loss or 3 years from  
4 notice or 3 years from discovery or 3 years from my  
5 decision --

6 JUSTICE SOTOMAYOR: So you think Congress  
7 would only legislate in that way?

8 MS. CARROLL: I'm sorry?

9 JUSTICE SOTOMAYOR: You think Congress would  
10 only legislate that way? Do you have any examples of  
11 that, of Congress saying the limitations period starts  
12 at the end of the administrative process and is for 3  
13 years or 1 year?

14 MS. CARROLL: Well, typically, Congress  
15 writes limitations periods that run from the time the  
16 "cause of action," accrues, which is why this Court --

17 JUSTICE SOTOMAYOR: That's much better.

18 MS. CARROLL: -- usually has to decide when  
19 the cause of action accrued. But that's not always the  
20 case. So in the Dodd case, for instance, the limitation  
21 period in the Federal habeas statute is not drawn to  
22 anything having to do with accrual, but to a -- a menu  
23 of a series of particular events.

24 And the same thing is true under this  
25 provision where the parties, rather than defining the

1 limitation period by reference to the accrual of a cause  
2 of action, they have defined it by reference to a  
3 particular point in time, which is a model that is  
4 common in -- in the insurance practice and has been  
5 widely used in ERISA plans since ERISA's enactment.

6 JUSTICE SCALIA: Do you have any position on  
7 whether the executive can prescribe when -- when suit  
8 must be brought?

9 MS. CARROLL: I -- here's how the Department  
10 of Labor has threaded that needle, and that is in the  
11 provisions of the regulations that say things like, if  
12 an ERISA plan provides for additional voluntary appeals  
13 beyond the minimum that's necessary, then the plan must  
14 agree to -- not to assert any defense based on the  
15 statute of limitations or timeliness. And so I think  
16 that sort of approach is probably something that they  
17 could do. I mean, I think that probably avoids the  
18 question that Your Honor was asking earlier.

19 I think, you know, as far as the DOL's  
20 regulatory authority more generally, I think there is  
21 also the looming question about whether the Department  
22 has statutory authority to adopt a regulation that would  
23 have the effect of preempting State law.

24 But leaving those authority questions aside,  
25 I think the only other question is whether the

1 Department could compile a factual record that would  
2 provide a non-arbitrary basis for taking this action.  
3 I -- I'm not sure that they could, but it's certainly  
4 within their right to initiate notice and comment  
5 rulemaking to try to do that.

6 JUSTICE GINSBURG: Ms. Carroll, did I  
7 understand you before to be taking the position that  
8 even if Congress enacted a statute of limitations with  
9 an accrual rule, that that might not be effective as  
10 against a plan provision that provides for the trigger  
11 being proof of claim?

12 MS. CARROLL: I -- I think it would be a  
13 question of statutory interpretation there whether the  
14 inclusion of a particular statute of limitations was  
15 meant to limit contracting parties' ability to agree to  
16 a different one. And I think if you had a situation  
17 where, you know, let's say the Court in this case  
18 upholds the plan's provision and then Congress amends  
19 the statute to say, you know, we really think this  
20 doesn't make sense and we want to have a different rule,  
21 I think there would be a strong argument that that  
22 statute was intended to foreclose, as Congress may do,  
23 the right of -- of parties to contract around that rule.

24 JUSTICE SCALIA: They're not going to do  
25 this for a lobby of nine people, are they?

1 MS. CARROLL: I -- I wouldn't expect so.

2 JUSTICE BREYER: But if they do that, the  
3 question answers itself. The -- the --

4 (Laughter.)

5 JUSTICE BREYER: The -- the question I would  
6 like to know is if you know empirically, roughly, what  
7 are typical statutes of limitations in this area? The  
8 basic rule is State law unless contract, is that right?

9 MS. CARROLL: I -- I think that's right,  
10 yes.

11 JUSTICE BREYER: And how long on average?  
12 Do you have any idea of -- of how long people normally  
13 have to bring their action?

14 MS. CARROLL: Well, the 3 years from proof  
15 of loss is the standard provision. So that is typical.

16 JUSTICE BREYER: It's the standard provision  
17 in contracts?

18 MS. CARROLL: Yes. In -- in certain types  
19 of insurance contracts, yes.

20 JUSTICE BREYER: Well, I mean -- in certain  
21 types of insurance contracts. So ERISA is all over the  
22 place. I wouldn't even know where to start. Does the  
23 Department of Labor keep statistics on this or what?

24 MS. CARROLL: I -- I have -- I -- we have  
25 looked far and wide for empirical information about this

1 and the best I can do is to refer Your Honor to page 29  
2 of the amicus brief for the American Council of Life  
3 Insurers, which does collect a little bit of empirical  
4 information about the exceeding rarity with which this  
5 issue ever arises in ERISA cases and the typical length  
6 of time that's required to exhaust.

7 CHIEF JUSTICE ROBERTS: Well, it's hard to  
8 see what you mean by the exceeding rarity. I suspect  
9 there are more than nine cases where people are looking  
10 at the running of the statute of limitations and they're  
11 saying, well, I've got to sue if I don't get this and  
12 when do I have to hire a lawyer. And the last thing you  
13 want in this process is to get lawyers involved at the  
14 claim procedure. And they say, well, there's only 10  
15 months left, I'd better hire a lawyer, you know, and  
16 instead of the informal resolution, you've suddenly got  
17 lawyers involved. Why isn't that a legitimate concern?

18 On the other hand, if you wait until the  
19 claim is exhausted, you may -- you may not need the  
20 lawyer at all. But if you don't know when that period  
21 is going to run, you'd better get one early -- sooner  
22 rather than later.

23 MS. CARROLL: Well, of course in this case,  
24 the Petitioner did have counsel from relatively early on  
25 in the process.

1 CHIEF JUSTICE ROBERTS: Well, she was very  
2 prudent.

3 MS. CARROLL: So I'm not sure that --  
4 Pardon?

5 CHIEF JUSTICE ROBERTS: I mean, she didn't  
6 know when it was going to run, you'd better get somebody  
7 in there right away. The typical lay person who's got a  
8 claim for \$9,000 in disability benefits or whatever, you  
9 know, may not know. Better get a lawyer to tell her.  
10 It just seems to me that you keep it as an  
11 informal resolution -- inexpensive resolution process if  
12 you tell somebody look, you don't have to worry about  
13 getting a lawyer until we tell you whether we're going  
14 to deny your claims or not.

15 MS. CARROLL: And, Your Honor, that easy,  
16 inexpensive process is how it works in the vast majority  
17 of cases. I think something like 80 percent of  
18 disability claims are granted through the internal  
19 review process without there ever being any need to go  
20 to litigation. And I think the reason --

21 CHIEF JUSTICE ROBERTS: Well, that's my  
22 point. I'm not talking about the need to go to  
23 litigation. I think there are probably more than 9  
24 people who had to hire lawyers before they even had a  
25 decision.

1           MS. CARROLL:           Oh, I think that's right. I  
2   mean, this is not -- I think our best sense is that  
3   there's something around the order of about a quarter to  
4   a third of cases in which claimants are represented by  
5   counsel. But I think the question that Your Honor is --  
6   is posing, of the claimant who's approaching some point  
7   where they are wondering what to do, that's going to be  
8   a claimant who's looking at a deadline for filing suit  
9   that is probably still a year and a half or two years  
10   away in typical cases.

11           CHIEF JUSTICE ROBERTS:           Well, and it's  
12   probably a claimant that doesn't have all that much  
13   experience with the legal system and doesn't know well how long  
14   does it take, you know, to get a complaint ready and --  
15   I don't know. It just seems to me that the problem of a  
16   statute of limitations that runs before the claim even  
17   accrues requires people to worry about their legal  
18   rights in a way that -- the simple rule about when your  
19   benefits are denied, that's when the period starts  
20   running.

21           MS. CARROLL:           Well, I mean, granted all  
22   statutes of limitations do impose some obligation on  
23   would-be plaintiffs to take steps to protect themselves.  
24   That -- that is true of all limitations periods no  
25   matter how they are drawn.



1 JUSTICE KENNEDY: It's fair to say, in other  
2 words, that it's typical in the insurance industry that  
3 statute of limitations run from proof of loss?

4 MS. CARROLL: In the group -- in the group  
5 benefit plans of the type that are subject to ERISA,  
6 that is very common. That is the standard term. Going  
7 back to the older products like fire insurance, life  
8 insurance, and so on, it would often run before proof of  
9 loss, from the actual insured event.

10 JUSTICE KENNEDY: From occurrence?  
11 Occurrence --

12 MS. CARROLL: Exactly. Exactly. And with  
13 -- the reason why it's different in a long-term  
14 disability plan is that you have to make sure that the  
15 disability is actually a long-term disability. And so  
16 that's why you have these elimination periods followed  
17 by a proof of loss deadline because there has to be a  
18 sustained disability in that interim period. And so you  
19 don't run it from an earlier point because it's not  
20 clear that the insured event has occurred until you've  
21 come to that point.

22 JUSTICE ALITO: Well, you started to answer  
23 this question before, but I'm not sure I understand the  
24 answer, why this proof of loss model is -- is so  
25 attractive in the disability insurance field? You said

1     that it provides a clear date on which you know you can  
2     begin to count. But so does an accrual rule. So maybe  
3     you can explain a little bit more.

4           MS. CARROLL:            I -- I think what I meant by  
5     that was that under what I take Your Honor to mean by an  
6     accrual rule, meaning a limitation period that runs --

7           JUSTICE ALITO:           Right, right.

8           MS. CARROLL:            -- at the conclusion of the  
9     administrative process, we don't know at the time that  
10    the claim is initially presented when that's going to  
11    be. Is it going to be 6 months from now? A year from  
12    now? A year and a half from now? And so it's just simply  
13    for reserving purposes, it helps to have a greater sense  
14    of certainty about the timing of potential claims and  
15    when we can close the books. -

16          JUSTICE BREYER:          It's -- the doctrine of  
17    exhaustion is a judge-created doctrine.

18          MS. CARROLL:            Correct.

19          JUSTICE BREYER:          And therefore you cannot,  
20    in your contract, contract yourself around it. You  
21    can't get out of it.

22          MS. CARROLL:            No. And --

23          JUSTICE BREYER:          So what this would require  
24    would be to say that that judge-created doctrine  
25    requires exhaustion to take place before the accrual of

1 the statute of limitations, end of opinion. For the  
2 reason of certainty, for the reason of uniformity, for  
3 the reason of avoiding, through hiring lawyers, et  
4 cetera, an interference with the voluntary nature,  
5 simple nature, and hopefully pre-legal involvement  
6 nature of that exhaustion process, all right? Da, da,  
7 da.

8 Now, the reason -- what trouble would that  
9 cause?

10 MS. CARROLL: The --

11 JUSTICE BREYER: What trouble in the  
12 industry would that cause?

13 MS. CARROLL: The -- that trouble -- that  
14 would cause trouble for every employer, plan sponsor,  
15 insurer that has an ERISA plan. And here's why. Since  
16 ERISA's enactment, this Court has never held that in a  
17 suit to enforce the terms of an ERISA plan those terms  
18 can be thrown out the window because we worry that they  
19 might be unfair in some case that we can speculate  
20 about.

21 That would be a very significant shift in  
22 how this Court enforces ERISA plans, and it would  
23 undermine Congress's goal of wanting to assure employers  
24 and plan sponsors that the terms on which they agree to  
25 provide benefits will be respected.

1 JUSTICE SCALIA: I thought that this  
2 contract required exhaustion of administrative remedies  
3 before you can sue. Isn't that in the contract?

4 MS. CARROLL: It is.

5 JUSTICE SCALIA: So it's not a judge-created  
6 doctrine.

7 MS. CARROLL: It's --

8 JUSTICE SCALIA: I mean, we create it in  
9 other instances where -- where there are agency, you  
10 know, requirements to go through the agency, and we --  
11 we make it up. But here it's -- it's in the contract,  
12 isn't it?

13 MS. CARROLL: It is in the contract.

14 JUSTICE SCALIA: So we are not as entitled  
15 to fiddle with it as much as we are when it is our  
16 creation, I suppose.

17 MS. CARROLL: Well, but even when it is the  
18 Court's creation it is not without exceptions, it is not  
19 jurisdictional. We like exhaustion. We think -- we  
20 think that internal review is a very successful and  
21 workable scheme that resolves the vast majority of cases  
22 with mutual benefits to all sides.

23 JUSTICE KAGAN: Ms. Carroll, please tell me  
24 if I'm wrong. But even if a contract does not have an  
25 exhaustion requirement, courts have required exhaustion.

1           MS. CARROLL:           That's -- that's correct, for  
2   good reason, although with exceptions.

3           JUSTICE KAGAN:           And courts have required it  
4   even though the statute doesn't say so.

5           MS. CARROLL:           That's true.

6           JUSTICE KAGAN:           It's an extra-textual  
7   requirement the courts have made up, irrespective of  
8   what the contract provides.

9           MS. CARROLL:           That's true. But it is not  
10   one that required setting aside or defeating any term of  
11   an ERISA plan. And that's the key distinction.

12          CHIEF JUSTICE ROBERTS:           Did I --

13          MS. CARROLL:           And as the party that has come  
14   forward to say that even though I am trying to enforce  
15   this plan, I nevertheless want to jettison the plan  
16   terms, I think the Petitioner bears a burden to say  
17   there is some anchor in the statute or some basis in  
18   evidence or experience to say, not simply to speculate,  
19   that there is a potential clash with the remedial  
20   scheme, but that there is one.

21          JUSTICE KAGAN:           I think what Justice Breyer  
22   was suggesting, that maybe, given that we have this sort  
23   of judge-made rule of exhaustion, that the courts just  
24   did a sort of a half job of it, that they also should have  
25   put the statute of limitations that makes that

1 exhaustion requirement work, and that ensures that it  
2 doesn't produce unfair, bad outcomes.

3 MS. CARROLL: I think if there is a -- if  
4 there is a question as between a judge-made doctrine and  
5 the terms of a plan as to which should give way, I think  
6 Congress has made clear that it is the terms of the plan  
7 that ought to control, as has this Court made clear.

8 JUSTICE KAGAN: The Congress was dealing --  
9 you know, Congress passed ERISA before this exhaustion  
10 requirement came into play. So it's a little bit hard  
11 to read into anything, to read Congress's silence in the  
12 normal way here because Congress didn't think that there  
13 was going to be this exhaustion requirement --

14 MS. CARROLL: I --

15 JUSTICE KAGAN: -- and the courts put it on  
16 later.

17 MS. CARROLL: I'm not sure about that. I  
18 think the courts that found an exhaustion requirement  
19 did so in an act of statutory interpretation and found  
20 that to be consistent with Congress's intent in the  
21 statute.

22 CHIEF JUSTICE ROBERTS: Did I understand --  
23 did I understand you earlier to say we have not had a  
24 case where we have overridden plan terms in ERISA plans?

25 MS. CARROLL: In a -- in a suit under

1 section 1132(a)(1)(B) to enforce a plan term, there is  
2 no decision in which this Court has said we can simply  
3 ignore plan terms. Rather what,

4 CHIEF JUSTICE ROBERTS: Well, simply ignore.  
5 I mean, is there any in which we have overridden plan  
6 terms?

7 MS. CARROLL: No.

8 CHIEF JUSTICE ROBERTS: No.

9 MS. CARROLL: No. There are no -- there  
10 have been plenty of cases where people have asked to do  
11 so, and where this Court has had to say -- for example  
12 in the -- in the Amara case, in the McCutchen case, in  
13 the Kennedy case, where the Court had to consider  
14 situations where maybe we should come up with a  
15 judge-made sort of common law model that seems like a  
16 better rule. And the Court said, no, we are not going  
17 to do that because this is a situation. This is a  
18 context where Congress wanted plan terms to control.

19 Here the plan terms clearly bar the suit.  
20 There's no allegation that the -- the  
21 administrative regime here was --

22 JUSTICE BREYER: Look, you agree that we  
23 would overturn the plan term if the plan term was no  
24 exhaustion?

25 MS. CARROLL: I'm sorry?

1 JUSTICE BREYER: The courts would overturn a  
2 plan term which plan term said no exhaustion.

3 MS. CARROLL: I -- well, I doubt very much  
4 you would ever encounter a plan term like that.

5 JUSTICE BREYER: Of course not because what  
6 we are trying to do -- and employers are very  
7 cooperative and we are trying to work out a system with  
8 the exhaustion thing that will not destroy ERISA plans  
9 or something.

10 MS. CARROLL: Right.

11 JUSTICE BREYER: It -- it's which is the --  
12 and that's why I phrased it in terms of an explanation  
13 of the exhaustion requirement.

14 MS. CARROLL: Yes. I suppose if you had an  
15 intransigent plan that just said, no, we refuse to  
16 entertain your attempts to appeal, that is a situation  
17 where a court would apply one of the futility exceptions  
18 to exhaustion. So I -- I don't think that would --  
19 would present an issue.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 MS. CARROLL: Thank you.

22 REBUTTAL ARGUMENT OF MATTHEW W.H. WESSLER,

23 ON BEHALF OF THE PETITIONER

24 MR. WESSLER: Thank you. Just a few -- a  
25 few brief points.



1 CHIEF JUSTICE ROBERTS: I'm sorry, you have  
2 4 minutes left.

3 MR. WESSLER: Thank you.

4 First of all, this Court has in UNUM v. Ward  
5 refused to enforce a plan term that would have  
6 overridden a State law notice prejudice rule. But I  
7 think the bigger point here is that provisions that --

8 JUSTICE SOTOMAYOR: What case is that?

9 MR. WESSLER: UNUM v. Ward, Your Honor.

10 The bigger point here is that provisions  
11 that tamper with ERISA's enforcement scheme, as this  
12 provision does, are inconsistent with ERISA's remedial  
13 structure. By Respondent's own argument, this is not an  
14 enforce the contract provision.

15 This is a sometimes enforcing the contract  
16 provision, that is itself automatically subject to a  
17 reasonableness override, in which courts can and are  
18 expected to actually decline to enforce the plain  
19 language of the provision in cases in which it finds,  
20 under a host of fact-specific questions, the provision  
21 is either unreasonable or the plan is estopped  
22 from enforcing it or has waived it.

23 And that, we submit, Your Honor, is the key  
24 defect with this provision because it puts courts right  
25 in the center of policing what should be a private

1 process.

2           If plans are -- if Courts are able to look  
3 back and determine whether a plan's conduct in the  
4 internal process was -- was unreasonable, was dilatory,  
5 was unreasonably delayed, then all of a sudden the  
6 private benefit resolution process, which this Court has  
7 said, as have all of the lower courts that have looked  
8 at it, is designed to be non-adversarial, flexible, and  
9 private, turns into something that looks like none of  
10 those things.

11           It turns into a process in which lawyers get  
12 involved early, in which courts get involved early, and  
13 in which these plan terms are subject to revision or  
14 over -- overrides in a host of cases and in which both  
15 plans and claimants have no idea ex ante whether or when  
16 this provision will be enforced.

17           A rule running from final denial, which I  
18 should say is the consistent rule across the board in  
19 every Federal statutory regime, stated -- going back  
20 from -- to the beginning of the law that we have been  
21 able to find, runs the limitations clock from when you  
22 can file the claim in court.

23           JUSTICE ALITO:           Well, if we agree with you,  
24 would the Federal courts and maybe ultimately this Court  
25 in the end have to specify what the statute of

1 limitations is, the length of time? So we have a bunch  
2 of cases from different courts, and one circuit says 2  
3 years is -- is the -- that's the shortest you can have.  
4 Another one says, no, you can have a year. Another one  
5 says, well, you could have 9 months.

6 How would this ultimately happen? Wouldn't  
7 we be driven to that?

8 MR. WESSLER: I -- I think not. I think  
9 plans have absolute authority to -- to themselves  
10 specify the length of the period. We see this --

11 JUSTICE ALITO: They specify a lot of  
12 different lengths, and then they're all challenged --  
13 different ones are challenged in different courts, and  
14 the courts have to say what's reasonable. And there's  
15 no State statute of limitations that applies to this  
16 situation. So it all comes down just to a question of  
17 reasonableness.

18 MR. WESSLER: I think that -- I think two  
19 answers to that, Your Honor. First, I don't think  
20 that's actually correct. Most plans that run the length  
21 only do about a one year from -- from final denial.

22 As Respondents themselves have -- have  
23 explained, and we agree, courts across the board find  
24 one year in almost every context to be reasonable. And  
25 so it would automatically be enforced.

1           But the difference also is in the type of  
2   reasonableness inquiry that a court would have to apply  
3   in -- in the case that you're suggesting, which is not a  
4   fact-specific inquiry based on how long the parties took  
5   to pursue this internal process. It's simply an  
6   objective question. Is the amount of time on the  
7   limitations clock enough to allow a plaintiff to file  
8   her claim in court?

9           And one month -- excuse me.           One year from  
10   final denial would absolutely be enough time, would  
11   provide all parties under ERISA with the certainty that  
12   they have to -- to file their claim.

13          Thank you, Your Honor.

14          CHIEF JUSTICE ROBERTS:           Thank you, counsel.

15          The case is submitted.

16          (Whereupon, at 12:03 p.m., the case in the  
17   above-entitled matter was submitted.)

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