

1                   IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - -X

3   HOWARD DELIVERY SERVICE, INC., :

4   ET AL., :

5                   Petitioners :

6           v. : No. 05-128

7   ZURICH AMERICAN INSURANCE CO. :

8   - - - - -X

9                                   Washington, D.C.

10                                  Tuesday, March 21, 2006

11                   The above-entitled matter came on for oral

12   argument before the Supreme Court of the United States

13   at 10:13 a.m.

14   APPEARANCES:

15   PAUL F. STRAIN, ESQ., Baltimore, Maryland; on behalf of

16   the Petitioners.

17   DONALD B. VERRILLI, JR., ESQ., Washington, D.C.; on

18   behalf of the Respondent.

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P R O C E E D I N G S

(10:13 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first today in 05-128, Howard Delivery Service v. Zurich American Insurance Company.

Mr. Strain.

ORAL ARGUMENT OF PAUL F. STRAIN

ON BEHALF OF THE PETITIONERS

MR. STRAIN: Mr. Chief Justice, and may it please the Court:

We are here about a bankruptcy priority, and bankruptcy priorities must be clearly granted by statute or they are not granted at all. That's the first principle of bankruptcy law that this Court has laid down, that equal priority, that equal distribution is the first principle, and every priority is a deviation from that first principle, and therefore, they must be clearly set out in the statute. This Court has been very clear over and over on those bedrock principles.

Applying them here, Zurich must demonstrate that its workers' comp insurance policy receivables are clearly included within the statutory phrase of 507(a)(4), contributions to an employee benefit plan arising from services rendered within 180 days. Judge

1 Niemeyer -- Judge Niemeyer followed those principles,  
2 those bedrock principles of this Court. The two  
3 concurring opinions below did not follow nor even  
4 mention those principles, and that led them to err, we  
5 -- we submit.

6 CHIEF JUSTICE ROBERTS: Can I get you to step  
7 back just -- the presumption that you began with. What  
8 -- what's your strongest authority for that? The first  
9 thing you cite in your brief is a dissenting opinion of  
10 two justices.

11 MR. STRAIN: The strongest authority for  
12 that, Your Honor, is the opinion in Kothe, K-o-t-h-e, a  
13 1930 opinion, followed by Nathanson, followed by  
14 Embassy Restaurant, and it is the --

15 CHIEF JUSTICE ROBERTS: Nathanson is the --  
16 you cite the dissenting opinion for this proposition?

17 MR. STRAIN: No. It is -- Nathanson -- the  
18 -- the citation, the page citation, is to the majority  
19 -- is to the majority opinion. The principle is laid  
20 out in the majority opinion, Mr. Chief Justice. And  
21 Nathanson majority opinion relied on Kothe, and  
22 Nathanson majority opinion was followed in 1959 by this  
23 Court in Embassy Restaurants, and followed in 1968 by  
24 this Court in Joint Industries Board also dealing with  
25 bankruptcy priorities. That is the bedrock principles

1 in the -- of the majority decisions of -- of this case  
2 -- of this Court.

3 And what we have here, Your Honor and members  
4 of the Court, is that a -- an insurance policy -- what  
5 we're talking about here is an insurance policy, and  
6 the statutory language refers to an employee benefit  
7 plan. We don't even have a plan here. We have a  
8 policy.

9 There's a citation in the Zurich brief at  
10 page 20 to this Court's opinion in Pegram v. Herdrich,  
11 which I think drives that point home. It is an  
12 incomplete citation. The omitted language from the  
13 Zurich brief is as follows. From page --

14 JUSTICE SCALIA: Where -- where is the  
15 unomitted language? What -- what page of the brief are  
16 you quoting from?

17 MR. STRAIN: It's on page 20, Your Honor, of  
18 Zurich.

19 Citing to page 223 from this Court's opinion  
20 in Pegram, the omitted language, which comes in the  
21 middle of the quotation given at page 20, is as  
22 follows. Thus, when employers contract with an HMO to  
23 provide benefits to employees subject to ERISA, the  
24 provisions of documents that set up the HMO are not, as  
25 such, an ERISA plan.

1           Now, that is what our case is, an insurance  
2   policy that incorporates a duty to pay benefits subject  
3   to workers' comp laws of the different States. So even  
4   under the citation in -- the full citation in Pegram,  
5   it is seriously questionable whether this insurance  
6   policy is a plan at all. The statute requires an  
7   employee benefit plan. The -- this Court requires that  
8   it be clear from the statute that this insurance policy  
9   is itself a plan.

10           JUSTICE SCALIA: Now, ERISA -- ERISA makes it  
11   very clear that -- that a plan to pay insurance for  
12   employee benefits, whether it's disability or  
13   retirement or whatever else, is an employee benefit  
14   plan and -- and explicitly excludes workmen's comp  
15   because otherwise it would fall within that definition  
16   of an employee benefit plan.

17           MR. STRAIN: I believe that is -- is correct,  
18   Justice Scalia.

19           JUSTICE SCALIA: I know that's a different  
20   statute. I'm not saying that the -- that the  
21   definitions of that statute have to apply here, but the  
22   definitions of that statute at least demonstrate that  
23   it is a permissible use of the -- of -- of the term  
24   employee benefit plan.

25           MR. STRAIN: I disagree with you, Justice

1     Scalia --

2                   JUSTICE SCALIA: All right. Tell me why.

3                   MR. STRAIN: -- to this -- to this extent.

4     The definition of employee benefit plan under ERISA is  
5     in two parts: a section (a), which is a -- which is a  
6     listing; and a section (b), which is incorporation of  
7     provisions of the Taft-Hartley law. And it's under the  
8     section (b), the incorporation of provisions of the  
9     Taft-Hartley law, that workers' compensation comes in.

10    And, of course it is then excluded by -- by ERISA.

11                   But a -- the ERISA definition does not  
12    demonstrate that a -- an insurance policy is a plan.  
13    This Court has dealt with the issue under ERISA of  
14    whether everything scheduled in ERISA is a plan or not.

15    In the Massachusetts v. Morash decision, this Court  
16    determined whether a vacation -- unpaid vacation policy  
17    was a plan under the definition of ERISA, and this  
18    Court held that it was not. So it is clear from this  
19    Court's precedent that whether or not something is  
20    listed in ERISA, even if it applied -- in that case,  
21    ERISA applied; in this case it does not -- even if it  
22    applied, would not qualify as a plan.

23                   JUSTICE GINSBURG: Would it -- would it if  
24    the employer were self-insured? Can you be self-  
25    insured for workers' comp?

1           MR. STRAIN: The employer can be self-insured  
2 for workers' --

3           JUSTICE GINSBURG: Would that be a plan then?

4           MR. STRAIN: I think it would not, Your  
5 Honor, because the self-insurance for workers' comp, as  
6 I understand them, what they normally do is, just as  
7 the Court referred to in that omitted section of the  
8 Pegram opinion, is it simply is -- is an agreement that  
9 it will provide the necessary wherewithal and bonding  
10 to pay the benefits as specified, as they may change  
11 from time to time in a State statute. There is none of  
12 the other things, as I understand it, that the Court  
13 dealt with in Pegram which would make it a plan that  
14 are present in either a workers' compensation insurance  
15 policy or a self-insurance program, as is permitted and  
16 --

17           JUSTICE GINSBURG: So it would be an employee  
18 benefit program, but not a plan.

19           MR. STRAIN: It would be, Your Honor, or in  
20 the case of our case, an employee benefit policy.

21           And I would like to pick up on that, if I  
22 may, because it is not --

23           JUSTICE SCALIA: Before you -- before you go  
24 on, could you satisfy a curiosity of mine? Maybe Mr.  
25 Verrilli should be the one I should ask this, but you



1 must have your -- your version of it. How do you  
2 decide whether an insurance premium is for work that  
3 was done within the last 180 days? How -- how do you  
4 calculate it, whether that characteristic of the -- of  
5 the statute is complied with?

6 MR. STRAIN: Your Honor, I don't know that  
7 there is any good way to do that, and I think that's  
8 one of the anomalies in trying to superimpose an  
9 insurance policy under the rubric of an employee  
10 benefit plan.

11 Now, premiums -- premiums, of course, there  
12 is a -- there is a mechanism --

13 JUSTICE SCALIA: Oh, if it said premiums due  
14 within the last 180 days, I could understand it --

15 MR. STRAIN: And there is a mechanism in the  
16 policy to determine the payment of premiums.

17 JUSTICE SOUTER: But isn't -- doesn't the  
18 mechanism take into account the number of employees who  
19 are on the rolls at any given time?

20 MR. STRAIN: I believe it does, Your Honor.

21 JUSTICE SOUTER: Well, if that's the case,  
22 then -- then doesn't the premium that you're supposed  
23 to pay depend in -- in -- on the number of employees  
24 within the last 180 days, which in turn depends on  
25 their working in the last 180 days?

1           MR. STRAIN: It is not my understanding -- and I  
2    may be mistaken because this policy was not placed in  
3    the record by Zurich. It is not my understanding that  
4    that is how the policy premium calculations are made,  
5    Your Honor. Now --

6           JUSTICE SOUTER: Well, how -- maybe you just  
7    don't know the answer.

8           MR. STRAIN: -- certainly, Justice Souter,  
9    you may be right, but we've checked the proof of claim  
10   filed by Zurich which started this off, and they did  
11   not attach the workers' compensation insurance policy  
12   to it. So it is not in the record, and I simply don't  
13   know --

14          JUSTICE SOUTER: So that's -- that's really  
15   not an issue for us.

16          MR. STRAIN: Well, I -- I will not say that  
17   it's not an issue, Your Honor. It is -- it is an issue  
18   --

19          JUSTICE SOUTER: Well, if you want to make it  
20   an issue, you'd have to get the -- the predicate in the  
21   record to do it, and -- and we just don't have that.

22          MR. STRAIN: Well --

23          JUSTICE SOUTER: We -- we couldn't resolve  
24   that.

25          JUSTICE SCALIA: Or else establish that

1     there's no conceivable way that 180 days makes any  
2     sense.

3                 MR. STRAIN:  And -- and I -- I think that, as  
4     -- as I hope may blend the answers to both questions.  
5     I think that --

6                 JUSTICE SOUTER:  Consider us together, yes.

7                 JUSTICE SCALIA:  We're together on this.

8                 (Laughter.)

9                 MR. STRAIN:  I -- I think that is -- I think  
10    that is where we -- where we are.  We have a policy  
11    that was not placed in the record by the applicant for  
12    this priority.  We have our general knowledge of what  
13    workers' comp insurance policies are.  We have a  
14    statutory requirement which reads, a calculation with  
15    180 days, which I suggest is an anomaly when we compare  
16    it to the statutory language.

17                JUSTICE KENNEDY:  Is there anything in the  
18    statute which says how promptly the premiums have to be  
19    paid as it -- to -- to make it analogous, say, to  
20    withholding where you might have to pay every quarter  
21    on -- by a certain day?  Does -- does the statute  
22    regulate when and how promptly the premiums must be  
23    paid, or is that just all comprehended in the terms of  
24    the policy agreement?

25                MR. STRAIN:  Well -- well, certainly the

1 priority statute does not because the priority statute  
2 doesn't --

3 JUSTICE KENNEDY: No. I meant the State  
4 workmen's comp law.

5 MR. STRAIN: The State workers' -- workers'  
6 comp law. Your Honor, I -- I don't know the answer. I  
7 know that the State laws -- I know that the State laws  
8 vary, and we have 10 different workers' comp laws that  
9 allude to or mention workers' comp insurance policies  
10 present just in this case. So it may be that those  
11 statutes might provide some of the basis for an  
12 explanation, but I simply don't know the answer to  
13 that. I did want to --

14 JUSTICE BREYER: If you have an employer who  
15 says, I promise to give \$200 a month per worker to a  
16 fund, which money will go to pay their health costs  
17 when they're sick, that's plainly covered.

18 MR. STRAIN: Yes, it is, Your Honor.

19 JUSTICE BREYER: And now suppose it's exactly  
20 the same, but instead of his paying \$200 a month, he  
21 pays \$200 to an insurance company in return for a  
22 promise that they'll pay precisely the same amount to  
23 the employee if he gets sick. In your view, that's not  
24 covered.

25 MR. STRAIN: In our view -- in our view, Your

1 Honor -- I -- if -- if I may, I think that the  
2 hypothetical you pose is not quite our case.

3 JUSTICE BREYER: Of course. It's not meant  
4 to be.

5 MR. STRAIN: It -- it --

6 JUSTICE BREYER: I want to know how you are  
7 going to answer my hypothetical.

8 (Laughter.)

9 MR. STRAIN: Your Honor, I -- I think the --  
10 the focus of the answer should be on whether it is an  
11 employee benefit or not.

12 JUSTICE BREYER: I'm not -- I'm asking you --

13 MR. STRAIN: Yes.

14 JUSTICE BREYER: -- to answer my hypothetical  
15 please. If in fact -- you didn't want me to repeat it?

16 MR. STRAIN: No, no. No, I --

17 JUSTICE BREYER: Then what is the answer?

18 MR. STRAIN: -- I understand it, Your Honor.

19 JUSTICE BREYER: In your view, is my  
20 hypothetical covered or not?

21 MR. STRAIN: I -- I think it is not, Your  
22 Honor.

23 JUSTICE BREYER: It is not.

24 MR. STRAIN: I think --

25 JUSTICE BREYER: And therefore, if we accept

1 your interpretation, then all those employers who,  
2 instead of contributing directly to health funds,  
3 instead buy insurance policies to do the same thing,  
4 will discover they do not have the advantage of the  
5 fifth priority.

6 MR. STRAIN: All right. And now I see -- now  
7 I see, Justice Breyer, I did misunderstand --  
8 misunderstand the facts. Those facts clearly are  
9 covered. They're -- they're covered under --

10 JUSTICE BREYER: Now, if they are covered --  
11 if they are covered, as I thought, then what is the  
12 difference whether the employer buys a policy whereby  
13 the insurance companies pays for their health benefit  
14 when they're sick or pays for their accident benefit  
15 when they have an accident at work?

16 MR. STRAIN: Your Honor, I think the  
17 difference are -- are several. Number one is what the  
18 employer is doing here is insuring itself against a  
19 claim that would otherwise be against the insurer.  
20 That was not in your hypothetical, Your Honor. That  
21 makes what we have here a policy for an employer  
22 benefit. It is not an employee benefit.

23 Now, the -- the employer is the insured.

24 JUSTICE SCALIA: The -- the correlative  
25 hypothetical would be a plan such as Justice Breyer

1 describes in which the employer has contracted to pay  
2 his employees \$200 a month for when they're sick, and  
3 that's a contractual obligation of his, and then he  
4 buys insurance to cover that contractual obligation.

5 MR. STRAIN: And --

6 JUSTICE SCALIA: You say that would be this  
7 case.

8 MR. STRAIN: That would be this case, Your  
9 Honor.

10 JUSTICE SCALIA: And you say that wouldn't be  
11 covered.

12 MR. STRAIN: And that would not be covered,  
13 and that would not be covered in great part because it  
14 is an employer benefit, employer choice, employer  
15 benefit. And what we have in this case --

16 JUSTICE BREYER: Well, that's -- that's a  
17 better way to put it. If -- if that's right, then what  
18 you're saying, as I understand it, is in those cases  
19 where an employer goes to an insurance company, they  
20 give a contractual promise to pay the employee when he  
21 gets sick in return for a premium by the employer --  
22 and it's a health benefit or a vacation benefit, the  
23 most typical thing -- you're saying all those -- all  
24 those -- there's no fifth priority. They don't --  
25 can't take advantage of that.

1 MR. STRAIN: No. Your Honor, what -- what  
2 I'm saying is and what we have here, if what you're  
3 describing, if I understand it correctly, is a normal  
4 fringe benefit. That is, an employer agrees to take  
5 out a -- to contribute to a pension fund for the  
6 benefit of the employees. That is clearly covered.  
7 That was the kind of thing dealt with in Embassy  
8 Restaurant and the Joint Industries Board that (a) (4)  
9 was intended to supplant or overrule.

10 JUSTICE GINSBURG: And why did --

11 CHIEF JUSTICE ROBERTS: And that's clearly  
12 covered.

13 JUSTICE GINSBURG: -- why did you answer  
14 Justice Scalia's question as you did? That is also an  
15 employee benefit, that is, vacation, sickness.

16 MR. STRAIN: Your Honor, I answered that  
17 because, as Justice Scalia changed the hypothetical, it  
18 was not an employee benefit. It was the employer  
19 insuring itself, buying an annuity or, like we have  
20 here, insuring itself, so it -- so it could make the  
21 payments.

22 What we have here, Your Honor, is a situation  
23 where, as it is admitted in the record, the employees  
24 don't benefit at all. As Zurich has admitted in this  
25 record at page 17, the employees are in the same



1 position whether there is insurance or no insurance.  
2 In fact, the irony here is that if Zurich prevails, not  
3 only do the employees not benefit, they are harmed  
4 because there are in the (a) (4) -- the (a) (4) priority  
5 claimants are a total of 1.6 million, including the  
6 400,000 of Zurich. All the others are health and  
7 welfare funds such as Justice Breyer was -- was posing.  
8 Zurich is not.

9 But what happens -- and there's not enough  
10 money to pay everyone. What happens is if the Zurich  
11 Insurance Company receivable gets an equal priority  
12 with the health and welfare funds, then there is a  
13 dilution of the money going for the employees' health  
14 and welfare and pension, a 25 percent, in this case,  
15 dilution of that money because the employer chose to  
16 insure itself for its liability, potential liability,  
17 to the employees. The employer benefited from that  
18 insurance. In some States, it would be required to  
19 have the insurance. In most States, it has the option  
20 of having insurance or not.

21 JUSTICE ALITO: Would the same thing happen  
22 under multi-employer plans? Would not the employees  
23 typically receive the benefits even if their employer  
24 did not make the contributions that it was required to  
25 make?

1           MR. STRAIN: It would -- they would typically  
2   -- in a multi-employer plan, as many of our priority  
3   claimants are here, because the money is spread, the  
4   employees still get some money. But if we consider the  
5   greater whole, the money, the available res, the  
6   available pot, to pay those -- pay those employees is  
7   diminished. So --

8           JUSTICE GINSBURG: I thought there's also,  
9   isn't there, the Pension Benefit -- even if there's no  
10  money in the till for the plan, isn't there a  
11  Government fund so that the worker would receive the  
12  benefit in any event if -- I don't see the distinction  
13  that you're making based on whether the worker would  
14  get a benefit whether or not the employer made the  
15  contribution.

16          MR. STRAIN: Well, Your Honor, there  
17  certainly is -- there certainly are -- in most States  
18  at least, there certainly are funds that step in if a  
19  workers' comp insurer or an employer does not make --  
20  is not available to pay an award to a workers' comp  
21  injured -- a worker who was injured on the job.

22          On the other -- on the other hand, Your  
23  Honor, whether such funds exist to step in and supplant  
24  the payments not made to -- in the ordinary health and  
25  welfare and pension context, I think not, Your Honor.

1 JUSTICE KENNEDY: Well, I recognize there are  
2 different schemes. The only one I'm familiar with is  
3 my former State. But did I understand from your answer  
4 that in some or many of these States, the employer is  
5 free not to have insurance? He can be self-funded?

6 MR. STRAIN: Yes. Yes, that's correct, Your  
7 Honor, in -- in --

8 JUSTICE KENNEDY: And is there any  
9 requirement that there be an actual fund in place or is  
10 it just a general liability?

11 MR. STRAIN: Well, there is -- there is -- it  
12 is a -- a traditional self-insurance with the overlay.  
13 That is, there -- there must -- there must be a  
14 showing of the wherewithal, but with the additional  
15 overlay, in all or virtually every State which permits  
16 this, of the requirement of a bond. And that's --

17 JUSTICE KENNEDY: A bond.

18 MR. STRAIN: -- which is an interesting point  
19 because if Zurich prevails, we have the -- the camel's  
20 nose is under the tent because in all the self-  
21 insurance contexts, the bond issuer will have an  
22 equivalent claim to Zurich. Under their broad  
23 reasoning or broad interpretation of the statute that  
24 should be considered narrowly -- under the broad  
25 interpretation they want, that camel's nose would be

1 under the tent, and the bond issuer would have an  
2 equivalent claim to Zurich on its policy.

3 To extend that a little further, what Zurich  
4 did here -- was an insurance company -- it required  
5 letters of credit of Howard Delivery, the debtor, to  
6 issue its policies. It drew down those letters of  
7 credit \$1.1 million. F&M Bank, the letter of credit  
8 issuer, of course sought security from the debtor, but  
9 not enough. As is commonly the situation once the  
10 liquidation is finished, there wasn't enough security.

11 So F&M, which had facilitated Zurich's workers'  
12 compensation insurance by its letters -- letters of  
13 credit, would have an equivalent claim to Zurich as  
14 well. So more and more of the camel is going under the  
15 tent. This is a very broad interpretation with major  
16 implications that they seek and it is completely  
17 inappropriate under the bedrock principles of  
18 approaches to priorities under bankruptcy law.

19 JUSTICE KENNEDY: Well, if there were letters  
20 of credit, why is Zurich injured? Because the letters  
21 of credit were not large enough to cover the premium  
22 liability?

23 MR. STRAIN: They -- they were not, Your  
24 Honor. They were not.

25 JUSTICE SOUTER: See, what I don't understand --

1 JUSTICE GINSBURG: Mr. Strain --

2 JUSTICE SOUTER: Mr. Strain, you -- you  
3 mentioned --

4 JUSTICE GINSBURG: -- in -- in your brief,  
5 you seem to put considerable stress on something that I  
6 haven't heard you say one word about so far, and that  
7 is that these -- workers' compensation is State-  
8 mandated. They're not negotiated or even employer-  
9 determined benefits. They are whatever the law  
10 prescribes. And you haven't -- haven't mentioned that,  
11 so I'm wondering where that fits into your picture.

12 MR. STRAIN: It -- I haven't mentioned it.  
13 I'll take this opportunity to mention it, Justice  
14 Ginsburg, because it is a very important point.

15 We know that in the statute -- (a)(4) we're  
16 talking about -- section (a)(3) -- these are numberings  
17 before 2005 amendment to the act. The language stayed  
18 the same. The numbers were -- are different.

19 But there are two that work together. The  
20 (a)(3) priority for wages for the employees and the --

21 JUSTICE SCALIA: Where does (a)(3) appear?  
22 There -- there was that discussion in your brief, and  
23 I'm darned if I could find (a)(3).

24 MR. STRAIN: Section (a)(3), Your Honor.  
25 I'll refer you, if I may, to the brief of amicus at

1 page 11, and that's why I mentioned, Your Honor, that  
2 there is a new numbering because the numbering in the  
3 amicus brief is using the 2005 numbering in the revised  
4 statute. And what is listed there as (a)(4) is the  
5 wages priority, and at the next page, (a)(5) is the  
6 priority that we're talking about as -- as (a)(4).

7 JUSTICE SCALIA: Well, it would have been  
8 nice to have it in your brief --

9 MR. STRAIN: I agree.

10 JUSTICE SCALIA: -- and numbered -- numbered  
11 3 instead of 4. That would have helped a lot.

12 MR. STRAIN: I -- I certainly recognize that,  
13 Your Honor.

14 The -- the provision of (a)(3) and (a)(4) --  
15 they work in tandem to protect the workers. They share  
16 a cap. The more a worker benefits from a wage  
17 priority, the less the worker benefits from the -- from  
18 the employee benefit plan priority. And so they work  
19 together; they work in tandem, which gives meaning to  
20 (a)(4) under many of the canons of construction that --  
21 that we're familiar with.

22 It would not work -- it's an anomaly that an  
23 insurance company receivable would share the cap with  
24 the wages priority. That is simply an anomaly. And  
25 when we look to the legislative history, it is

1 absolutely clear, Your Honor, that the fact of the  
2 judicial -- the statutory mandate for workers'  
3 compensation insurance is very important because what  
4 is spoken about, as Judge Niemeyer pointed out in his  
5 dissent below -- what is spoken about in the  
6 legislative history over and over again is a wage  
7 substitute or a wage surrogate that employers do not  
8 give -- will lower the wages but provide fringe  
9 benefits. So the package remains the same. Now,  
10 that's not a workers' compensation insurance policy,  
11 but that is the wage surrogates that the Congress was  
12 looking at.

13 JUSTICE SOUTER: Let -- let me, if I may, ask  
14 you about other possible wage surrogates because what  
15 you're saying now seems to me to mesh with the  
16 argument, another legislative history argument, to the  
17 effect that the -- the current provision was meant to  
18 overrule two prior cases of this Court. And the -- the  
19 question I have turns on the fact that the -- the  
20 language is broader than what would merely have been  
21 necessary to overrule those cases.

22 So my question is if the broader language  
23 does not cover the premiums that we're concerned with  
24 here, what other items dealing with -- with wage  
25 substitutes would it pick up, would it include?

1           MR. STRAIN: Well, Your Honor, I -- I would  
2 answer from -- in part from the legislative history of  
3 some of the things discussed were joint apprentices and  
4 training programs, by way of example, as new forms of  
5 fringe benefits that some of the witnesses wished to  
6 see to ensure would be covered. I think that sort of  
7 thing could be covered under -- under this language as  
8 well.

9           We know from the legislative history -- we  
10 know from the legislative history that there was  
11 absolutely no intention to incorporate the definition  
12 of ERISA, and we know from this Court's teaching in the  
13 decision in United States v. C&F Fabrication just 10  
14 years ago that it is absolutely inappropriate to  
15 incorporate into the bankruptcy statute an ERISA  
16 definition where Congress does not provide. That's an  
17 absolute square holding of this Court that exactly  
18 should lead to rejection of the effort by Zurich to  
19 incorporate -- to ask the Court to engraft onto this  
20 statute a -- a definition from another statute.

21           If there are no questions at -- additional  
22 questions at this time, I would like to reserve my  
23 remaining time.

24           CHIEF JUSTICE ROBERTS: Thank you, Mr.  
25 Strain.



1           Mr. Verrilli.

2           ORAL ARGUMENT OF DONALD B. VERRILLI, JR.

3           ON BEHALF OF THE RESPONDENT

4           MR. VERRILLI: Thank you, Mr. Chief Justice,  
5 and may it please the Court:

6           I think it's important to focus at the outset  
7 on exactly what a workers' compensation plan provides.

8       A workers' compensation plan provides health insurance  
9 that pays for the medical costs of a workplace  
10 accident, disability insurance --

11          JUSTICE SCALIA: You're begging the question  
12 by calling it a plan. I mean, that -- that's -- that's  
13 one of the issues here. Why don't you tell us what  
14 workmen compensation laws require?

15          MR. VERRILLI: Well, I'd be happy to go right  
16 to the question of whether it's a plan, Justice Scalia,  
17 because I think it's indisputably a plan under this --  
18 under the dictionary definition, ordinary meaning of  
19 plan, this Court's interpretation of it in Pegram,  
20 under ERISA, under the Department of Labor's  
21 interpretation of it, and under plain common sense. A  
22 plan is an arrangement or program or scheme, as Pegram  
23 said, to -- established by an employer or an employee  
24 organization to secure the provision of benefits to an  
25 employee through insurance or otherwise.

1 JUSTICE GINSBURG: Mr. Verrilli, there's no  
2 employer or employee, for that matter, who's doing the  
3 planning. The planning is all done by the Government  
4 --

5 MR. VERRILLI: See, I -- I --

6 JUSTICE GINSBURG: -- because what's covered  
7 is prescribed by law.

8 MR. VERRILLI: I think there is a plan for  
9 this reason, Justice Ginsburg. The -- what the law  
10 prescribes is that which the employer must provide to  
11 the employees. But it's not a self-executing law.  
12 The -- the employer has got to make arrangements to  
13 ensure that the benefits are provided, and under the  
14 laws of the vast majority of the States, the employer  
15 has options for doing that. The employer can contract  
16 with an insurance company to do it. The employer can  
17 self-insure to do it. And by the way, Justice Kennedy,  
18 there are quite stringent requirements for fiscal  
19 solvency and there is a surety bond that needs to be  
20 posted in order to -- in order to self-insure.

21 JUSTICE GINSBURG: But the it is not  
22 negotiable. We think of a health plan, a retirement  
23 plan. That doesn't have to be any set coverage. It's  
24 negotiated or the employer, if it's not a collective  
25 bargaining situation, determines what the benefits will

1 be. Here, the law determines what the benefits will  
2 be.

3 MR. VERRILLI: I agree that that aspect of  
4 the arrangement is not negotiated, but there is  
5 nonetheless an arrangement that secures and guarantees  
6 the provisions of the benefits, and that's the plan.  
7 There are steps that the employer has to take to secure  
8 the provision of the benefits, here through the  
9 purchase of insurance, and that is the plan. The plan  
10 is the arrangement to secure the provision of benefits.

11 Certainly they are --

12 CHIEF JUSTICE ROBERTS: So that if an  
13 employer decides to -- because his employees have had a  
14 good year, he's going to put in a new parking lot for  
15 them -- he -- his plan is to have a contract with a  
16 paving company to pave the parking lot. Are the  
17 payments under that contract's contributions to an  
18 employee benefit plan?

19 MR. VERRILLI: I don't think the answer to  
20 that question is yes, Mr. Chief Justice. I think the  
21 answer is no. I mean, I suppose you could say that  
22 those are -- that's a benefit provided to employees,  
23 but --

24 CHIEF JUSTICE ROBERTS: It seems like the  
25 consequence of your theory though --

1           MR. VERRILLI: I don't think so. I think  
2   there's a limiting principle here and I think the  
3   limiting principle is to look to ERISA. ERISA has a  
4   set of -- it defines what employee benefits are for  
5   ERISA purposes, and it's not -- and it's not these  
6   benefits and similar things. It's an exhaustive list  
7   of benefits. The parking lot isn't on the list.  
8   Similarly, a break room wouldn't be on the list. None  
9   of those things are on the list, and therefore, I think  
10  by reference to ERISA, one can relatively easily  
11  exclude those --

12           CHIEF JUSTICE ROBERTS: But -- but providing  
13  for workers' compensation through insurance, rather  
14  than through self-insurance, is also not on the list.

15           MR. VERRILLI: Well, I think both of them are  
16  on the list actually, Mr. Chief Justice, because both  
17  of those are programs or arrangements to secure the  
18  provision of benefits, and one is through insurance and  
19  the other through self-insurance. So I think they're  
20  plans in both instances.

21           JUSTICE SCALIA: What's your answer to the  
22  180 days question I answered -- I asked? You know,  
23  the provision provides contributions. It doesn't say  
24  just contributions to an employee benefit plan. It  
25  says contributions to an employee benefit plan arising

1 from services rendered, and then it goes on to say, but  
2 -- but the services have to be within the last 180  
3 days.

4 MR. VERRILLI: Right.

5 JUSTICE SCALIA: How do you square that with  
6 -- with the purchase of block insurance like this?

7 MR. VERRILLI: Well, because the amounts that  
8 Zurich is seeking in premiums are the amounts that were  
9 due for providing coverage during the 180 days before  
10 Howard ceased operations, and the reason that arises  
11 from -- it seems to me there are two ways in which that  
12 could arise from services rendered. It can arise from  
13 services rendered to the employees in the following  
14 sense. Howard has the obligation to provide those  
15 benefits by virtue of the fact that the employees are  
16 working for it during that period of time. That's what  
17 Judge King said in his opinion in the Fourth Circuit,  
18 and that seems to me exactly right. Alternatively --  
19 alternatively, as other courts have suggested, the --  
20 the services rendered --

21 JUSTICE SCALIA: But each of those insurance  
22 premiums that's paid by the employer doesn't just cover  
23 workers who've worked for the last 180 days. Each premium  
24 is divided among all the workers who've been working  
25 there for years. Some of the premiums are going to go

1 to -- to allow the insurance company to pay in the  
2 future people who have been there for 20 years.

3 MR. VERRILLI: Well --

4 JUSTICE SCALIA: I mean, it just seems to me  
5 it's a square peg in a round hole. I -- I don't see  
6 how you make sense out of that 180 --

7 MR. VERRILLI: I appreciate that, Justice  
8 Scalia, but I do think the -- the obligation on the  
9 part of the employer to keep paying the premiums  
10 during that period arises from the fact that the  
11 employees are continuing to work during that period.  
12 And what the -- and what the insurance company is  
13 seeking to recover is merely the cost of providing the  
14 insurance during that period of 180 days which arises  
15 --

16 JUSTICE SOUTER: If -- if they don't pay the  
17 premium with respect to the 180 days, if there's an  
18 accident during the 180 days, the insurance doesn't  
19 cover the accident.

20 MR. VERRILLI: That's an important point,  
21 Justice Souter, and I would like to focus on that and I  
22 -- I hope correct something that the Petitioners said.

23 With respect -- it all depends on when the  
24 insurance policy cancels. If there's nonpayment of  
25 premiums, then the insurance company has the right to

1 cancel the policy, and there has -- there's a notice  
2 provision, 10 days in some jurisdictions, up to 30 days  
3 in others. But they have a right to cancel the policy.

4 If an injury occurs before cancellation, that  
5 injury is covered and it's covered for all time, even  
6 if the policy subsequently cancels.

7 But the key thing here, I think, the critical  
8 point is that without the priority, the -- the  
9 insurance company is going to look at the situation and  
10 say, we have very little prospect of recovering if this  
11 company actually goes down the tubes and into  
12 bankruptcy as a general unsecured creditor. Therefore,  
13 we need to get out of this situation fast. And they --  
14 at that point, they're going to cancel the policy.  
15 There's going to be much more of a hair-trigger sense  
16 of the need to cancel policies. When they cancel  
17 policies, the immediate consequence, of course, is that  
18 the -- that the employees are no longer covered.

19 And then, the -- it seems to me, the  
20 secondary consequence, which is also quite important --

21 JUSTICE SCALIA: You really think that --  
22 that they cut it that fine? They say, oh, yes, this  
23 guy is going to go into bankruptcy. We're pretty sure  
24 about that, but don't worry. We'll have priority.

25 MR. VERRILLI: It's absolutely --

1 JUSTICE SCALIA: I think as soon as they  
2 smell bankruptcy, they're going to pull the plug  
3 anyway.

4 MR. VERRILLI: That -- I -- I disagree with  
5 that, Justice Scalia. I think in -- in the real common  
6 practice here, the amount that they can recover and the  
7 amount that they think they have a prospect of  
8 recovering is a very important determinant in their  
9 decision on whether to hang in and how long to hang in  
10 until they get to the chapter 11 process where the  
11 debtor can then husband its assets and can pay the  
12 workers' compensation premiums as an administrative  
13 claim. So I think it's a -- it's a significant  
14 determinant.

15 Without the priority, there's going to be a  
16 hair trigger, which means coverage is terminated  
17 sooner, and it's going to mean for many employers that  
18 they're going to have to go out of business because you  
19 can't operate without --

20 JUSTICE BREYER: There -- there are two parts  
21 in my mind to this. The question is what is the  
22 difference between a workmen's -- worker compensation  
23 and health benefits. I agree with you, so far  
24 tentatively, that that difference can't lie in the  
25 nature of the contract providing the benefit. Now, I



1 know they'll want to argue the contrary, but put that  
2 to the side.

3 If it doesn't depend on that, it depends on  
4 the difference between workers' compensation and health  
5 benefits. And you want to say there isn't enough of a  
6 difference there, though they argued the mandate makes  
7 a difference. Of course, you could mandate health  
8 benefits too, and I don't think that would matter.

9 But if you're right, what about a -- a long-  
10 term contract for bottled water for the workers?

11 MR. VERRILLI: I think my answer would be the  
12 same as to the Chief Justice that in some sense, I  
13 suppose you could say it's an employee benefit; in some  
14 sense, I suppose you could say that there's a contract  
15 to provide it. But I think you can set the outer  
16 bounds here by reference to the employee benefits that  
17 ERISA defines as employee benefits.

18 But in any event --

19 JUSTICE BREYER: Well, actually -- this is --  
20 to me anyway, this is an important point because at  
21 some point you have to draw the line between the things  
22 of a kind that workers might bargain for and things  
23 not. Now, if that's where we're getting there, the  
24 history of workers' compensation may cut the other way.

25 MR. VERRILLI: Well, I don't -- I don't think

1 so, Justice Breyer --

2 JUSTICE BREYER: Because? What's -- what's  
3 the principle I'm going to use?

4 MR. VERRILLI: Well, first, if I can make a  
5 prefatory point, that the bottled water example doesn't  
6 distinguish the Petitioners' position from our  
7 position. The Petitioners' position is that if it's a  
8 -- if it's a negotiated-for, bargained-for benefit,  
9 it's in. So I don't think that's a -- it provides a  
10 limiting principle. And it seems to me, wherever the  
11 line is --

12 CHIEF JUSTICE ROBERTS: Well, sure, if they  
13 have a contract, as part of their -- part of their  
14 contract, they get the bottled water, that's -- that's  
15 easy to see why that's covered. But the -- the  
16 question is when it's not. It's just something that  
17 the employer does in the course of his business that  
18 has -- that benefits both his business and his workers.

19 MR. VERRILLI: Right, but --

20 JUSTICE SCALIA: It has to be arising from  
21 services rendered. I mean, it -- it really has to be  
22 part of the contract with the employer --

23 MR. VERRILLI: Well, I -- I don't think  
24 that's right. For example, in the -- in the case of  
25 most voluntarily provided health insurance, the vast

1 majority of employees in this country -- it's not  
2 bargained for. It's something an employer provides  
3 unilaterally --

4 JUSTICE GINSBURG: But there's one feature of  
5 this that is -- does make it different, at least one,  
6 and that is this is a benefit to the employer in the  
7 way that the others are not. The employer -- there's a  
8 tradeoff in workers' compensation. It's not just I'm  
9 going to pay benefits when the person is injured, but  
10 I'm going to get off the hook for the tort liability  
11 that I might otherwise have. And in the other cases of  
12 the other benefits, there is no -- no such tradeoff.

13 MR. VERRILLI: Well, the fact that there may  
14 be a benefit to the employer doesn't make it any less  
15 of an employee benefit. The question is whether there  
16 is a plan that provides employee benefits, and the  
17 insurance coverage provided by workers' compensation  
18 are clearly employee benefits. I also -- and -- and,  
19 of course, the with -- with respect to that tradeoff,  
20 that's -- that tradeoff is an employee benefit too,  
21 Justice Ginsburg, because the -- the employee has no-  
22 fault liability, gets paid promptly rather than have to  
23 sue and wait years, doesn't lose his or her job as a  
24 result of the injury or as a result of bringing the  
25 lawsuit. So I don't think you can make the judgment

1     that it's not an employee benefit plan on the basis of  
2     that fact.  And of course, voluntarily provided  
3     benefits also benefit the employer by making it a more  
4     attractive place to work and -- and --

5             JUSTICE STEVENS:  May I ask this question,  
6     Mr. Verrilli?

7             MR. VERRILLI:  -- better morale.

8             JUSTICE STEVENS:  Can I -- can I ask you --  
9     it goes back to the first point your opponent made.  
10    What is the purpose of granting the priority?  It seems  
11    to me the purpose of the priority is to increase the  
12    likelihood that the wage claims will be paid.  And if  
13    you -- if you win, it won't affect it one way or  
14    another, as you acknowledge in your brief.  But it  
15    seems to me the priority should serve the purpose of  
16    increasing the likelihood that the benefits would  
17    actually flow to the employee benefit plan.

18            MR. VERRILLI:  I think there are four things  
19    I'd like to say in response to that, Justice Stevens.

20            First, there isn't a textual hook for -- for  
21    that being a determinant, and it -- and it --

22            JUSTICE STEVENS:  Well, it talks about  
23    contributions to an employee benefit plan which one  
24    would not normally think of as paying insurance  
25    premiums.

1           MR. VERRILLI: And the second thing -- well,  
2 I think to the contrary, Justice Stevens. I think in  
3 the overwhelming majority of instances, the  
4 contributions employers make to employee benefit plans  
5 is the payment of insurance premiums to secure the  
6 benefits. Collectively bargained benefits provided by  
7 union trusts are a small minority of the benefits that  
8 are provided to workers in this country.

9           But -- but going back to the specific  
10 question, of course, as Justice Alito's question  
11 earlier suggested, in a multi-employer pension plan  
12 situation, the plan is obligated by law to provide all  
13 vested pension benefits whether or not the employee's  
14 employer has defaulted on its payments into the fund.  
15 So it's in exactly the same position as the insurance  
16 company is with respect to that set of benefits, and  
17 therefore, the argument doesn't draw a distinction  
18 between the two.

19           JUSTICE SCALIA: Mr. Verrilli, what -- what  
20 is your response to Mr. Strain's assertion that if you  
21 get a priority, so should the secondary insurer, that  
22 is, the -- the bank that gave letters of credit?  
23 They're just insuring -- that -- that's part of the  
24 plan too. They couldn't have gotten the insurance from  
25 you unless they got the letters of -- of credit from

1 the bank, which is a kind of secondary insurance.

2 And also in the case of self-insurance, which  
3 is something of a plan -- I -- I guess you'd call it a  
4 plan -- what about the -- the person who puts up the  
5 bond? That person is a kind of insurer, just as you  
6 are. Do all of these people now -- now get bumped up  
7 to the head of the line?

8 MR. VERRILLI: The answer is no. The statute  
9 expressly covers this. The last provision of section  
10 507 says no subrogation, and those would be subrogation  
11 situations. So the statute just expressly covers it.  
12 They aren't -- they don't get bumped up in the line,  
13 period. I don't think there's any dispute about that.

14 If I could, though, return to a -- a point  
15 that --

16 JUSTICE SCALIA: Where -- where does that  
17 appear?

18 MR. VERRILLI: I'm sorry. I can't direct you  
19 to where it is --

20 JUSTICE SCALIA: Yes, because it's not in the  
21 briefs --

22 MR. VERRILLI: I'm sorry, Justice Scalia.

23 JUSTICE SCALIA: -- just -- just as the  
24 contract isn't before us.

25 MR. VERRILLI: It should be in the briefs.

1 It's not, but that is what the last section of section 507  
2 says, that those who are subrogated to the rights of  
3 someone with a priority don't get the priority. So  
4 that's just taken care of by the statute.

5 JUSTICE STEVENS: But if the payment of the  
6 premiums doesn't increase the likelihood that the  
7 employees will get the benefits, why should you get  
8 priority?

9 MR. VERRILLI: It does increase the  
10 likelihood, and it goes back to the example I was -- I  
11 was discussing with Justice Souter earlier. And -- and  
12 what -- it will not affect employees who are injured  
13 before cancellation, but it will accelerate  
14 cancellation. And as a result of accelerating  
15 cancellation, employers who are injured after  
16 cancellation will not get the benefits. And so it will  
17 --

18 JUSTICE KENNEDY: What -- what about the --  
19 the example we discussed, payment of a bond premium if  
20 you're self-insured?

21 MR. VERRILLI: No. I think that -- I think,  
22 again, that last section of 507 takes care of that.

23 JUSTICE SCALIA: How do we know what you've  
24 just told us? Is that in the record? You're just  
25 assuring us what the content of the insurance contract

1 is. Right? But we don't have the insurance contract.

2 MR. VERRILLI: The insurance contract is not  
3 in the record. That's right, but the --

4 JUSTICE SCALIA: So we -- we have your  
5 assurance that that's what happens here.

6 MR. VERRILLI: As a systematic matter -- it  
7 seems to me as a systematic matter, this is what  
8 insurance companies will do. I don't think that's  
9 dependent actually, Justice Scalia, on -- on the  
10 particular terms of this contract. I'm saying as a  
11 systematic matter insurance companies --

12 JUSTICE SCALIA: Well, it has to be that way?  
13 I could write a contract differently.

14 MR. VERRILLI: Well -- well, sure, but the  
15 contracts comply with State law. State law sets notice  
16 periods for cancellation, 10 days minimum, up to 30  
17 days. We've cited those in our briefs. And so in most  
18 States and in many States here, within as few as 10  
19 days after nonpayment, you can cancel.

20 JUSTICE SCALIA: That's a --

21 JUSTICE GINSBURG: Mr. Verrilli, before --

22 JUSTICE KENNEDY: But I was -- can -- can I  
23 -- I still don't quite understand the answer to the  
24 bond premium question.

25 MR. VERRILLI: Well, that -- there would be



1 no priority there because that would be -- that would  
2 be a subrogated claim, and the last section of section  
3 of -- the last provision of section 507 says if you're  
4 subrogated to a --

5 JUSTICE KENNEDY: No. No, it wouldn't be  
6 subrogated. The bond premium -- the bonding company  
7 says we're entitled to priority.

8 MR. VERRILLI: Well, I don't think --

9 JUSTICE KENNEDY: And it files the claim  
10 directly with the bankruptcy.

11 MR. VERRILLI: -- I don't think that would be  
12 a claim for contribution to the plan, Your Honor, in  
13 the same sense that we're talking about here. The --  
14 if I -- if I could --

15 CHIEF JUSTICE ROBERTS: You couldn't have the  
16 plan without the bond, just as here you wouldn't have a  
17 plan without the insurance policy. It's just a  
18 different way of paying for the same thing.

19 MR. VERRILLI: Well, I'm -- I think there's  
20 an order of -- there's another order of degree of  
21 removal, and it would make it a harder question, I  
22 suppose, as to whether there would be a -- whether  
23 there would be a claim for priority in that context.

24 But I think, if I could, Mr. Chief Justice,  
25 I'd like to return to the question of narrow

1 construction where we started the argument.

2 JUSTICE GINSBURG: May I detract you just for  
3 a moment? On -- on a question of the statutory  
4 history, correct me if I'm wrong, but originally, 1934,  
5 the kind of claim that you have would be a seventh  
6 priority claim. And then in '38, Congress said no  
7 priority at all covering workers' compensation. And  
8 then when Congress restored a priority, it ratcheted it  
9 up to four or five, depending upon which version of the  
10 statute we use. Is there any explanation why, when  
11 Congress originally assigned first a very low priority  
12 and then no priority, suddenly it gets up to be on a  
13 par with the fringe benefits?

14 MR. VERRILLI: Yes. I think there are two  
15 significant points there, Justice Ginsburg, in terms of  
16 the history. First, in 1934 what Congress said was  
17 that workers' compensation could be a provable claim.  
18 It then said it's -- it gets the -- the seventh  
19 priority, but the seventh priority was not a priority  
20 specific to workers' compensation. It was a priority  
21 that's -- it was a provision that said you get a  
22 priority if State law provides the priority. In 1938,  
23 what Congress did was wipe out that provision for all  
24 State law granted priorities, not for workers' comp in  
25 specific. So it doesn't seem to me it was a specific

1 judgment about workers' comp and its place in the  
2 priority system.

3 And, of course, you didn't have the well-  
4 developed system of employee benefit plans in the  
5 1930's that you have now. And what Congress did, when  
6 it enacted this provision in 1978, following closely  
7 after ERISA, was to use language which is identical to  
8 ERISA in providing a priority for employee benefit  
9 plans which, as ERISA on its face, I think, makes  
10 clear, would encompass workers' compensation plans.

11 CHIEF JUSTICE ROBERTS: Mr. Verrilli, your --  
12 your friend's argument about the interrelation between  
13 (a)(3) and (a)(4) seems like a compelling one. What is  
14 your answer to that?

15 MR. VERRILLI: I think the complete  
16 explanation for the relationship between (a)(3) and  
17 (a)(4) was that Congress was trying to expand the scope  
18 of the priority here without doing damage either to the  
19 wage priority above it, which -- and -- and there would  
20 have been damage to the wage priority above it if wages  
21 were simply redefined to include the broader set of  
22 employee benefits -- or to the priorities below.  
23 Congress just took the aggregate amount. It seems to  
24 me just an elegant solution that protects the wage  
25 priority above, creates a new priority, and doesn't

1     disadvantage any of the -- any of the priority-holders  
2     below. And I really do think that's the complete  
3     explanation for the relationship between the two. You  
4     really can't infer anything more than that.

5             But if I could just address the so-called  
6     rule of narrow construction. Certainly there is a  
7     sentence or two in Nathanson and Embassy Restaurant,  
8     but those were such clear cases of statutory  
9     construction that -- that the rule of narrow  
10    construction, I submit, played no role there.

11            In many, many more cases in which this Court  
12    has interpreted the priority provisions of the act and  
13    the code, the Court has not mentioned this idea that  
14    there's a rule of narrow construction or that the  
15    principle of equality of distribution to creditors  
16    should trump everything else. We've cited four in our  
17    brief: Lewis, Shropshire, Ricketts, and SBA v.  
18    McClellan, which by the way, expressly cut back on  
19    Nathanson.

20            But there are many more cases. There's a  
21    whole line of tax priority cases culminating in the  
22    Reorganized CF&I Fabricators decision in which the  
23    courts adjudicated the question of -- of the scope of  
24    the tax priority. Most of the time, they find  
25    priority. Occasionally they find no priority. But in

1 none of those cases is this so-called rule of  
2 construction ever mentioned or the supposed primacy of  
3 the rule of equality of -- of the principle of equality  
4 of distribution ever mentioned.

5 CHIEF JUSTICE ROBERTS: Counsel, much of your  
6 case hinges on the assumption that Congress  
7 incorporated the ERISA definition into the bankruptcy  
8 code. What -- what is your strongest evidence for  
9 that?

10 MR. VERRILLI: Well, I think the fact that  
11 the phrase is identical to the phrase that appears in  
12 ERISA, employee benefit plan, is significant. ERISA  
13 was one of the most substantial legislative  
14 accomplishments of that decade of the 1970s. And so I  
15 think the mere fact that the exact same language  
16 appears in both places, importantly, however, with --  
17 without the limiting qualification in section 507(a)(4)  
18 that exists in ERISA itself with respect to workers'  
19 compensation plans.

20 I also think that if the Court does look at  
21 the legislative history, what -- what one learns from  
22 the legislative history is that when the bill was  
23 originally introduced to -- to create this priority, it  
24 created a priority for -- proposed to create a priority  
25 for pensions, insurance, and similar employee benefit

1 plans. The union representatives came in to Congress  
2 and said that's too narrow. We need something  
3 significantly broader to ensure that the full range of  
4 employee benefits is protected and granted this  
5 priority. What the union representatives all urged  
6 Congress to do was to adopt the ERISA definition  
7 wholesale.

8 Now, we don't have anything in the -- in the  
9 House or Senate report saying that's what we did. In  
10 other words, we intended to adopted ERISA wholesale,  
11 but we do know that is what, in fact, they did. They  
12 used exactly the language from ERISA and they moved it  
13 into the priority in section 507.

14 JUSTICE STEVENS: To follow up on the earlier  
15 question of the Chief Justice, by whom do you  
16 understand the services have to be rendered within the  
17 meaning of the act?

18 MR. VERRILLI: Well, I think that the -- I  
19 think that the statute could be read --

20 JUSTICE STEVENS: Does it refer to the -- the  
21 bankrupt's employees or your employees?

22 MR. VERRILLI: It could be the -- it could be  
23 either, it seems to me, Justice Stevens.

24 JUSTICE STEVENS: You think it could be  
25 either.

1           MR. VERRILLI: And I -- but I don't think it  
2 matters in this case because you get to the same answer  
3 either way. If it's the services rendered of the  
4 employees, the -- the claim is for contributions to --  
5 for the cost of providing insurance to those employees  
6 during the 180 days. If it's the services rendered at  
7 Zurich it's the provision of services during the 180 days --

8           JUSTICE SCALIA: But it's not just to those.  
9 It's to a lot of other people. I mean, that's --

10          MR. VERRILLI: But it -- but it arises from.  
11 The -- had -- I think it arises from in this sense,  
12 Justice Scalia. Had Howard shut down on a certain day  
13 and didn't have employees anymore, it wouldn't have any  
14 continuing obligation to or need to pay workers'  
15 compensation premiums because there would be no workers  
16 to cover. And so it arises from --

17          JUSTICE SCALIA: Well, except the workers who  
18 had already been injured in the past --

19          MR. VERRILLI: Right, but you don't need --

20          JUSTICE SCALIA: -- and -- and whom you  
21 continue to pay. Right?

22          MR. VERRILLI: But -- yes. But not -- but --  
23 but we -- let's see. I think that maybe this will  
24 clear up the confusion. We continue to pay for them  
25 even after the policy is over --

1 JUSTICE SCALIA: Right.

2 MR. VERRILLI: -- and -- but -- and so --

3 JUSTICE SCALIA: And I assume that each of  
4 your premiums takes into account the fact that you're  
5 not only going to be paying for people, you know, who  
6 were injured between the last premium and now, but that  
7 you're also going to be paying for people who were  
8 injured a long time ago.

9 MR. VERRILLI: Well, depending on the kind of  
10 policy, that may be true to some extent. Sometimes  
11 policies are loss-sensitive policies in which the  
12 amounts owed are calculated very carefully with respect  
13 to the amounts actually of loss incurred during the  
14 period. That is, in fact, the case here. If you have  
15 an understanding of insurance, you can infer that from  
16 the charts that are included in the joint appendix,  
17 although I acknowledge it's very difficult to do so.

18 So I do think -- I do think on any common  
19 sense understanding of the -- of the phrase, arising  
20 from, which is a capacious phrase, it really does arise  
21 from.

22 But in terms of -- I think, Justice Stevens,  
23 with respect to your question, to get to the same  
24 answer, in terms of calculating the amount of the  
25 claim, whichever one you pick here, there's actually a



1 division of authority in the lower courts. There's a  
2 Fourth Circuit opinion by Judge Luttig, saying it's  
3 services rendered by the insurance company. Other  
4 courts say services rendered by the employees. Since it  
5 doesn't make a difference in this case, I would  
6 respectfully suggest probably it ought not to be  
7 decided in this case because you get to the same place  
8 either way.

9 I do -- I do think that it's important also  
10 -- I'm sorry. Excuse me. If I may just go back to the  
11 narrow construction rule.

12 The -- the point of this idea of primacy of  
13 equality of distribution. Equality of distribution is  
14 an important policy under the bankruptcy code, but it's  
15 only one important policy under the bankruptcy code.  
16 Rehabilitation of the debtor is an important policy  
17 under the code. The maximizing the value of the estate  
18 is an important policy under the code, and specific  
19 code provisions advance other specific policies as  
20 well. So in any given case, as here, all of those co-  
21 policies aren't going to align and point in the same  
22 direction. Sometimes they're going to be at cross  
23 purposes.

24 And what -- what the Court said in Union  
25 Bank, in I think a closely analogous context

1 interpreting the ordinary course exemption from -- from  
2 the preference rule, was that we don't put a thumb on  
3 the scale either way here. We don't assume that one of  
4 these policies is more important than the other. What  
5 we assume is that Congress struck the balance between  
6 the potentially competing policies, that the balance is  
7 reflected in the text of the statute that Congress  
8 enacted, and that we should interpret the text as it's  
9 written without -- without a presumption in either  
10 direction. I really think Union Bank is highly  
11 instructive on that, and it's just -- it's just right  
12 and plain common sense. And that's why I think in the  
13 vast majority of cases, there is no rule of narrow  
14 construction.

15 JUSTICE GINSBURG: What is -- what is  
16 unemployment compensation? Those two I think of as  
17 those are law-mandated coverage that every employer  
18 must have: workers' comp and unemployment. So  
19 what's unemployment, is that a plan too?

20 MR. VERRILLI: No, because the employer  
21 doesn't have the obligation to provide unemployment  
22 compensation. That's a State-run system in which the  
23 State has the obligation to provide the benefit, and  
24 the State does in fact provide the benefit. It's  
25 usually funded through a tax. The key difference is

1 this is an employer obligation to provide these  
2 benefits, and I think that's why this is an employee  
3 benefit plan. The employer is obligated to provide it  
4 to employees by virtue of the fact that the employees  
5 are working for the employer. Not true about  
6 unemployment compensation.

7 In conclusion, if I could just focus on the  
8 -- the point that it really is the case that enforcing  
9 this priority, as it is written, will advance the  
10 purposes for which Congress included it in the code.  
11 It will protect the interests of workers, millions of  
12 whom have no employee benefit plan other than workers'  
13 compensation, because it will increase the prospects  
14 that that money is there to pay workers' compensation  
15 claims.

16 It will also advance the code's purpose of  
17 better rehabilitation because it will give insurance  
18 companies a reason not to pull the hair trigger, to  
19 hang in there with these companies, and to allow them  
20 to have a chance to rehabilitate rather than forcing them  
21 into liquidation by canceling coverage which the law  
22 allows.

23 Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you, Mr.

25 Verrilli.

1 Mr. Strain, you have 4 minutes remaining.

2 REBUTTAL ARGUMENT OF PAUL F. STRAIN

3 ON BEHALF OF THE PETITIONERS

4 MR. STRAIN: Thank you, Mr. Chief Justice.

5 This Court 10 years ago in United States v.  
6 Reorganized CF&I provided that -- I suggest, that the  
7 engrafting of the ERISA definition into this bankruptcy  
8 statute was improper. Almost word for word what we're  
9 asking the Court to find about this engrafting of the  
10 ERISA definition into the bankruptcy statute is dealt with  
11 in plain language in this Supreme Court decision. It is  
12 simply improper to do that, and yet, that is the answer  
13 given by Zurich to the many probing hypotheticals about  
14 parking lots and bottled water and the rest.

15 JUSTICE BREYER: Well, they're doing that to  
16 get a standard.

17 MR. STRAIN: I'm sorry, Your Honor?

18 JUSTICE BREYER: And I'd like to know what  
19 your -- they're trying to use that as a basis for  
20 separating the bottled water from the workmen's comp  
21 from the health benefit. And they're saying here's an  
22 example of where Congress put the workers' comp on the  
23 same side as the health benefit. Now, that's their  
24 approach.

25 What's your approach to the standard? What

1 rule or system would you use from deciding which  
2 insured-for or paid-for benefits count as the plan and  
3 which ones don't?

4 MR. STRAIN: What we look to, Justice Breyer,  
5 first of all, is whether it is a true wage substitute  
6 rather than a policy to take care of a non-negotiable  
7 statutory requirement that's --

8 JUSTICE BREYER: So if, in fact -- if, in  
9 fact, the State legislature mandates certain health  
10 benefits, then the plan that provides those benefits  
11 would no longer qualify.

12 MR. STRAIN: That would be one significant  
13 factor to consider, Your Honor. There are certainly  
14 others, but that would be one significant factor to  
15 consider. That is true.

16 And I -- I suggest to the Court that when we  
17 look to the legislative history, as the questions were  
18 asked about the legislative history, it is devoid of  
19 any reference to the commission that recommended the  
20 law, the House report or the Senate report, or even one  
21 stray Congressperson suggesting that workers' comp  
22 insurance policies should get a priority. Not one.  
23 The industry didn't even put up a representative to  
24 make that suggestion at a hearing. It is devoid of any  
25 support for putting this nose under the tent in the way

1    they suggest, and it truly is a broadening.  It is not  
2    subrogation.  The bondholder would not have a  
3    subrogated claim.  F&M Bank would not have a subrogated  
4    claim.  They would have a claim, a direct claim, just  
5    as Zurich does here.

6                   And I think that the issue we come back to --  
7    and I'm glad my brothers ended with that as well because  
8    that's where we began.  The issue is what is the  
9    Court's proper approach to this attempt to enlarge the  
10   priority under subsection (a)(4).  It is not correct  
11   that this Court departs from the idea that priorities  
12   are a deviation from the bedrock principle of equality  
13   of -- equality of distribution.  That remains good law,  
14   cited by this Court a number of times.

15                   The cases they purportedly cite to the  
16   contrary were plain language cases, were Embassy  
17   Restaurant and Joint Industries Board.  This Court  
18   didn't even feel necessary to cite that principle  
19   because of the -- because of the plain language.  Where  
20   is the plain language establishing clearly, as this  
21   Court requires, that this is a plan?  Where is the  
22   plain language establishing clearly that this is an  
23   employee benefit?  The insurance policy.  That's what  
24   we're talking about.  Not the workers' compensation  
25   statute.  The insurance policy may benefit the

1     employer.   The statute may benefit the employee.   But  
2     we are talking about contributions to an employee  
3     benefit plan.   Zurich's insurance policy is neither.

4                 Unless there are further questions, Mr. Chief  
5     Justice, that concludes my argument.

6                 CHIEF JUSTICE ROBERTS:   Thank you, Mr.  
7     Strain.

8                 MR. STRAIN:   Thank you.

9                 CHIEF JUSTICE ROBERTS:   The case is  
10    submitted.

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

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