SUPREME COURT OF THE UNITED STATES

No. 91–1513

UNITED STATES DEPARTMENT OF THE TREASURY AND MITCHELL A. LEVINE, ASSISTANT COMMISSIONER, PETITIONERS *v.* GEORGE FABE, SUPERINTENDENT OF INSURANCE OF OHIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 11, 1993]

JUSTICE KENNEDY, with whom JUSTICE SCALIA, JUSTICE SOUTER and JUSTICE THOMAS join, dissenting.

With respect, and full recognition that the statutory question the majority considers with care is difficult, I dissent from the opinion and judgment of the Court.

We consider two conflicting statutes, both attempting to establish priority for claims of the United States in proceedings to liquidate an insolvent insurance company. The first is the federal priority statute, 31 U. S. C. §3713, which requires a debtor's obligations to the United States to be given first priority in insolvency proceedings. The second, Ohio's insurance company liquidation statute, Ohio Rev. Code Ann. §3903.42 (1989), provides that claims of the Federal Government are to be given fifth priority in proceedings to liquidate an insolvent insurer. Under usual principles of pre-emption, the federal priority statute trumps the inconsistent state law. See *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963). The question is whether the McCarran-Ferguson Act, which provides an exemption from pre-emption for certain State laws "enacted . . . for the purpose of regulating the business of insurance," 59 Stat. 34, as amended, 15 U. S. C. §1012(b), alters this result.

Relying primarily on our decision in *S.E.C.* v. *National Securities, Inc.*, 393 U. S. 453 (1969), the majority concludes that portions of Ohio's priority statute are saved from pre-emption by the McCarran-Ferguson Act. I agree that *National Securities* is the right place to begin the analysis. As the Court points out, *National Securities* is the one case in which we have considered the precise statutory provision that is controlling here to determine whether a state law applicable to insurance companies was a law enacted for the purpose of regulating the business of insurance. I disagree, however, with the Court's interpretation of that precedent.

The key to our analysis in *National Securities* was the construction of the term "business of insurance." In *National Securities* we said that statutes designed to protect or regulate the relationship between an insurance company and its policyholder, whether this end is accomplished in a direct or an indirect way, are laws regulating the business of insurance. 393 U. S., at 460. While noting that the exact scope of the McCarran-Ferguson Act was unclear, we observed that in passing the Act, "Congress was concerned with the type of state regulation that centers around the contract of insurance." *Ibid.* There is general agreement that the primary concerns of an insurance contract are the spreading and the underwriting of risk, see 1 G. Couch, Cyclopedia of Insurance Law §1.3 (2d ed. 1984), R. Keeton, Insurance Law §1.2(a) (1971), and we have often recognized this central principle. See *Union Labor Life Ins. Co.* v. *Pireno*, 458 U. S. 119, 127, and n.7 (1982); *Group Life & Health Ins. Co,* v. *Royal Drug Co.*, 440 U. S. 205, 211–212 (1979).

When the majority applies the holding of *National Securities* to the case at bar, it concludes that the Ohio statute is not pre-empted to the extent it regulates the "performance of an insurance contract," *ante*, at 13, by ensuring that "policyholders

ultimately will receive payment on their claims," *ante*, at 14. Under the majority's reasoning, see *ante*, at 1, 16, any law which redounds to the benefit of policyholders is, *ipso facto*, a law enacted to regulate the business of insurance. States attempting to discern the scope of powers reserved for them under the McCarran-Ferguson Act will find it difficult, as do I, to reconcile our precedents in this area with the decision the Court reaches today. The majority's broad holding is not a logical extension of our decision in *National Securities* and indeed is at odds with it.

The function of the Ohio statute before us is to regulate the priority of competing creditor claims in proceedings to liquidate an insolvent insurance company. On its face, the statute's exclusive concentration is not policyholder protection, but creditor priority. The Ohio statute states that its comprehensive purpose is "the protection of the interests of insureds, claimants, creditors, and the public generally, with minimum interference with the normal prerogatives of the owners and managers of insurers." Ohio Rev. Code Ann. §3903.02(D) (1989). It can be said that Ohio's insolvency scheme furthers the interests of policyholders to the extent the statute gives policyholder claims priority over the claims of the defunct insurer's other creditors. But until today that result alone would not have qualified Ohio's liquidation statute as a law enacted for the purpose of regulating the business of insurance. The Ohio law does not regulate or implicate the "true underwriting of risks, the one earmark of insurance." *S.E.C.* v. *Variable Annuity Life Ins. Co. of America*, 359 U. S. 65, 73 (1959) (footnote omitted). To be sure, the Ohio priority statute increases the probability that an insured's claim will be paid in the event of insurer insolvency. But such laws, while they may "furthe[r] the interests of policyholders," *ante*, at 10, have little to do with the relationship between an insurer and its

insured, *National Securities*, 393 U. S., at 460, and as such are not laws regulating the business of insurance under the McCarran-Ferguson Act. The State's priority statute does not speak to the transfer of risk embodied in the contract of insurance between the parties. Granting policyholders priority of payment over other creditors does not involve the transfer of risk from insured to insurer, the type of risk spreading that is the essence of the contract of insurance.

Further, insurer insolvency is not an activity of insurance companies that "relate[s] so closely to their status as reliable insurers," *ibid.*, as to qualify liquidation as an activity constituting the "core of the `business of insurance.'" *Ibid.* Respondent maintains, and the majority apparently agrees, that nothing is more central to the reliability of an insurer than facilitating the payment of policyholder claims in the event of insurer insolvency. This assertion has a certain intuitive appeal, because certainly the payment of claims is of primary concern to policyholders, and policyholders have a vital interest in the financial strength and solvency of their insurers. But state insolvency laws requiring policyholder claims to be paid ahead of the claims of the rest of the insurer's creditors do not increase the reliability or the solvency of the insurer; they operate, by definition, too late in the day for that. Instead they operate as a state-imposed safety net for the benefit of those insured. In my view, the majority too easily dismisses the fact that the policyholder has become a creditor and the insurer a debtor by reason of the insurance company's demise. *Ante*, at 14. Whereas we said in *National Securities* that the focus of the McCarran-Ferguson Act is the relationship between insurer and insured, 393 U. S., at 460, the Ohio statute before us regulates a different relationship: the relationship between the policyholder and the other competing creditors. This is not the regulation of the business of

insurance, but the regulation of creditors' rights in an insolvency proceeding.

I do not share the view of the majority that it is fair to characterize the effect of Ohio's liquidation scheme as "empower[ing] the liquidator to continue to operate the [insolvent] insurance company in all ways but one—the issuance of new policies." *Ante*, at 2. The change accomplished by the Ohio statute is not just a cosmetic change in management. Once the Ohio Court of Common Pleas directs the Superintendent of Insurance to liquidate an insolvent insurance company, the process of winding up the activities of the insolvent insurance company begins. No new policies issue, and existing policies are recalled and settled. See §3903.19. The Ohio priority statute does not regulate the ongoing business of insurance; it facilitates disbursement of a defunct insurance business' assets in a way the Ohio Legislature deems equitable. As we were careful to note in *National Securities*, the McCarran-Ferguson Act "did not purport to make the States supreme in regulating all the activities of insurance companies." 393 U. S., at 459 (emphasis omitted). The McCarran-Ferguson Act does not displace the standard pre-emption analysis for the state regulation of insurance companies; it does so for the state regulation of the business of insurance. *Ibid.* That the Ohio statute is within the class of state laws applicable to insurance companies does not mean the law regulates an integral aspect of the contractual insurance transaction.

In my view, one need look no further than our opinion in *National Securities* to conclude that the Ohio insolvency statute is not a law "enacted . . . for the purpose of regulating the business of insurance." Even so, our decisions in *Pireno* and *Royal Drug* further undercut the Court's holding, despite the majority's attempt to distinguish them. My disagreement with the Court on this point turns on a

close interpretation of §1012(b) of the McCarran-Ferguson Act, which states as follows:

> "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance: *Provided*, That . . . [the federal antitrust statutes] shall be applicable to the business of insurance to the extent that such business is not regulated by State Law." §1012(b).

The phrase "business of insurance" is used three times and in two different clauses of the Act. The first clause of §1012(b) is directed to the States, and provides that state laws enacted for the purpose of regulating the business of insurance are saved from pre-emption if there is no conflicting federal law which relates specifically to the business of insurance. The second clause of §1012(b) is directed at insurers, and allows insurers an exemption from the federal antitrust laws for activities regulated by state law which qualify as the business of insurance. Respondent has argued that cases such as *Royal Drug* and *Pireno*, which addressed whether certain activities of insurers constituted the "business of insurance" under the second clause of §1012(b), do not control cases in which the first clause of §1012(b) is at issue. On the way to accepting respondent's suggestion, the majority observes, *ante*, at 12, that the phrase "business of insurance" in the first clause of §1012(b) is "not so narrowly circumscribed" as the identical phrase in the second clause.

It is true that laws enacted for the purpose of regulating the business of insurance are something different from activities of insurers constituting the business of insurance, *ante*, at 12, but in my mind this distinction does not compel a conclusion that cases such as *Royal Drug* and *Pireno* have no application here. As an initial matter, it would be

unusual to conclude that the meaning of the phrase "business of insurance" is transformed from one clause to the next. Such a conclusion runs counter to the basic rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning. *Sullivan* v. *Stroop*, 496 U. S. 478, 484 (1990); *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 433 (1932). While maxims of statutory construction admit of exceptions, there are other obstacles to adopting the view that cases such as *Royal Drug* and *Pireno* apply only in the antitrust realm. First, nothing in *Royal Drug* or *Pireno* discloses a purpose to limit their reach in this way. Indeed while we have had numerous opportunities to examine and to apply the McCarran-Ferguson Act in different contexts, we have never hinted that the meaning of the phrase "business of insurance" changed whether we addressed laws "enacted for the purpose of regulating the business of insurance" or activities of insurers constituting the "business of insurance." Further, the suggestion that *Pireno*'s three-tier test has application only in antitrust cases is discredited by our decisions citing the *Pireno* test in contexts unrelated to antitrust. For instance, we have employed the *Pireno* test to determine whether certain state laws fall within the pre-emption saving clause of the Employee Retirement Income Security Act. See *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 48–49 (1987); *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724, 742–743 (1985).

Royal Drug and *Pireno* are best viewed as refinements of this Court's analysis in *National Securities*, tailored to address activities of insurance companies that would implicate the federal antitrust laws were it not for the McCarran-Ferguson Act. Although these cases were decided in accordance with the rule that exemptions from the antitrust laws are to be construed narrowly, see *Pireno*, 458 U. S., at

126; *Royal Drug*, 440 U. S., at 231, I see no reason that general principles derived from them are not applicable to any case involving the scope of the term "business of insurance" under the McCarran-Ferguson Act.

An examination of *Pireno* and *Royal Drug* reveals that those decisions merely expand upon the statements we made about the business of insurance in *National Securities*. In *National Securities*, we determined that the essence of the business of insurance involves those activities central to the relationship between the insurer and the insured. 393 U. S., at 460. *Pireno* reiterates that principle and identifies three factors which shed light on the task of determining whether a particular activity has the requisite connection to the policyholder and insurance company relationship as to constitute the business of insurance. *Pireno* considers: "*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry." 458 U. S., at 129.

The Ohio statute here does not qualify as regulating the business of insurance under *Pireno*'s tripartite test for the same reason that it fails to do so under *National Securities*: it regulates an activity which is too removed from the contractual relationship between the policyholder and the insurance company. First, the risk of insurer insolvency addressed by the statute is distinct from the risk the policyholder seeks to transfer in an insurance contract. The transfer of risk from insured to insurer is effected "by means of the contract between the parties—the insurance policy—and that transfer is complete at the time that the contract is entered." *Id.*, at 130. As to the second prong, the Ohio statute does not regulate the relationship between the insured and the insurer, but

instead addresses the relationship among all creditors the insurer has left in the lurch. Finally, it is plain that the statute is not limited to entities within the insurance industry. The statute governs the rights of all creditors of insolvent insurance companies, including employees, general creditors, and stockholders, as well as government entities.

Quite apart from my disagreement with the majority over which of our precedents have relevance to the issue before us, I think the most serious flaw of its analytic approach
is disclosed in the compromise holding it reaches.
The Court comes to the conclusion that the Ohio insolvency statute is a regulation of the business of insurance only to the extent that policyholder claims (as well as administrative expenses necessary to facilitate the payment of those claims) are given priority ahead of the claims of the Federal Government. At one level the majority opinion may seem rather satisfying, for it gives something to Ohio's regulatory scheme (policyholder claims displace the federal priority) and something to the federal scheme (the Federal Government's priority displaces all other claimants). The equitable result is attractive enough given the conflicting interests here. But I should have thought that a law enacted to determine the priority of creditor claims in proceedings to liquidate an insolvent insurance company either is the regulation of the business of insurance or is not. Of course a single state statutory scheme may regulate many aspects of insurance businesses, some of which may, and some of which may not, constitute the ``business of insurance'' under our precedents. For instance in *National Securities* we held that an Arizona law authorizing a State official to approve mergers of insurance companies was a law regulating the business of insurance to the extent the official acted to ensure that the merger did not ``substantially reduce the

security of and service to be rendered to policyholders,'' 393 U. S., at 462, but not when the official acted to ensure that the merger was not ``[i]nequitable to the stockholders of any insurer.'' *Id.*, at 457. But the subject of the regulation in the case before us is quite different from the portion of the Arizona statute held to be the business of insurance in *National Securities*. The Arizona law regulated the business of insurance because by allowing a State official to ensure that the merger of two insurance companies did not reduce the ``security of and service to be rendered policyholders,'' *id.*, at 462, the State law functioned to preserve the reliability of an ongoing insurance business. In contrast, as explained, *supra*, at 4, the Ohio liquidation statute before us does not increase the reliability or solvency of the insurer. Instead it operates to allocate the assets of a defunct insurer. This is so whether the claims of policyholders are ranked first under the state law or dead last. The inquiry under McCarran-Ferguson is whether a law regulating the priority of creditor claims regulates the business of insurance. If so, the order in which Ohio chooses to rank creditor (and policyholder) priority is beyond the concern of the Act.

Even though Ohio's insurance liquidation statute is not a law enacted for the purpose of regulating the business of insurance, I underscore that no provision of federal law precludes Ohio from establishing procedures to address the liquidation of insolvent insurance companies. The State's prerogative to do so, however, does not emanate from its recognized power to enact laws regulating the business of insurance under the McCarran-Ferguson Act, but from the long-standing decision of Congress to exempt insurance companies from the federal bankruptcy code. 11 U. S. C. §§109 (b)(2), (d). The States are not free to enact legislation inconsistent with the federal priority statute, and in my view the majority

errs in applying the McCarran-Ferguson Act to displace the traditional principles of pre-emption that should apply. I would reverse the judgment of the Court of Appeals.