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COURT OF APPEALS

STATE OF NEW YORK

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NADKOS, INC.,  
Appellant,

-against-

PREFERRED CONTRACTORS INSURANCE                      No. 37  
COMPANY RISK RETENTION GROUP LLC,  
et al.,

Respondents.

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20 Eagle Street  
Albany, New York  
April 30, 2019

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on this  
2 afternoon's calendar is appeal number 37, Nadkos v.  
3 Preferred Contractors Insurance.

4 One moment, counsel.

5 Good afternoon, counsel.

6 MR. STEPHENS: Good afternoon, Your Honors. May  
7 it please the court. My name is Dwight Stevens. I'm  
8 appearing on behalf of plaintiff/appellant, Nadkos, Inc.  
9 And with the court's permission, I'd like to request two  
10 minutes for rebuttal.

11 CHIEF JUDGE DIFIORE: You may have two minutes.

12 MR. STEPHENS: I apologize for my laryngitis.

13 JUDGE FAHEY: Are you all right?

14 MR. STEPHENS: Yes.

15 JUDGE FAHEY: Do you want a drink of water?

16 MR. STEPHENS: No, I'm fine. That won't help,  
17 Your Honor.

18 JUDGE FAHEY: Okay.

19 MR. STEPHENS: I appreciate it, though.

20 The course that PCIC charted in this case from  
21 the beginning was: See Wadsworth; we win. It answered  
22 without asserting any affirmative defenses, it produced its  
23 policy, and then it moved for summary judgment based on  
24 Wadcase. And Wadcase is a good case. We relied on it when  
25 we represented a risk retention group in the Garcia case in



1 the Eastern District of New York. But it's not applicable  
2 here.

3 In Wadsworth, the case made clear that the  
4 plaintiff was not seeking to come within one of the  
5 exemptions to the Liability Risk Retention Act. They were  
6 trying to say that the very broad direct or indirect  
7 regulation language did not apply to it, which was the  
8 direct action language in Insurance Law 3420(a)(2).

9 When it comes to the exemption provisions, they  
10 are separate. The - - - the Act makes that clear.  
11 Wadsworth also supports that. The exemptions A through I,  
12 A, the first one, a nondomiciliary state can regulate a  
13 risk retention group with respect to its unfair claim  
14 settlement practices.

15 JUDGE STEIN: So the issue here is whether  
16 subdivision (d)(2) is a - - - is an unfair claims  
17 settlement practice, right?

18 MR. STEPHENS: That's correct, Your Honor.

19 JUDGE STEIN: Okay. And we have defined what we  
20 consider to be an unfair settlement practice or, at least  
21 in 2601(a), we called it a failure to comply with the  
22 disclosure requirements of 3420(d), right?

23 MR. STEPHENS: Correct, Your Honor.

24 JUDGE STEIN: Okay. So why would the legislature  
25 use the language "disclosure requirements" if it was



1 referring to both subdivisions?

2 MR. STEPHENS: Paragraph (d) (1) and (d) (2)?

3 JUDGE STEIN: That's right.

4 MR. STEPHENS: Because they both required  
5 disclosure.

6 JUDGE STEIN: Okay. So - - -

7 MR. STEPHENS: So - - -

8 JUDGE STEIN: - - - do you not agree that there's  
9 a difference between confirming and specifying coverage  
10 versus disclaiming coverage? You don't see any difference  
11 in that?

12 MR. STEPHENS: They're flip sides of one another,  
13 Your Honor. Paragraph (d) (1) requires an insurer to  
14 promptly - - - to promptly confirm the existence of  
15 coverage with respect to certain personal liability  
16 policies. Paragraph (d) (2) requires insurers to promptly  
17 deny coverage in all liability policies for policies issued  
18 or delivered in New York State.

19 JUDGE STEIN: So how is that disclosing coverage  
20 if you're denying it?

21 MR. STEPHENS: Well, the dictionary definition of  
22 "disclose" means to make known or reveal. If somebody asks  
23 you for coverage, and you have an obligation to - - - to  
24 deny coverage, that's - - - that's a disclosure  
25 requirement. They're just flip sides of one another.



1 JUDGE GARCIA: But doesn't the statutory history,  
2 and I'm not really talking about the legislative history  
3 here, but the history of the statute itself, undermine that  
4 argument? Because originally it was just "disclaim", and  
5 2601 didn't cross-reference this. And then they added the  
6 disclosure language as a separate subparagraph, and then  
7 the disclosure cross reference was added in 2601. Doesn't  
8 that really undermine that argument?

9 MR. STEPHENS: It doesn't, Your Honor. I think  
10 that they - - - they put the - - - when they referenced - -  
11 - first of all, with respect to a "plain meaning" argument,  
12 we'd argue that (d) means (d) (1) and (d) (2) unless you can  
13 say that - - - that one of them doesn't have a disclosure  
14 requirement.

15 JUDGE GARCIA: But let's say you've got that  
16 argument, which is a valid argument, but you've got the  
17 argue - - - the point that Judge Stein was just making on  
18 "disclose". So let's say that creates some ambiguity. And  
19 we look at that statutory history; let's call it the  
20 enactment history. Why doesn't that clear it up? Because  
21 when it was only disclaimer, it wasn't an unfair practice,  
22 and when they added - - - they added "disclose" to it, it  
23 became one. And the cross-reference to "disclose" was  
24 added to 2601.

25 MR. STEPHENS: Well, Your Honor, if you look at



1 the - - - the executive legislative history in this case -  
2 - - and that would be what was cited by Judge Wilson in the  
3 Carlson case in - - - with respect to the issue or  
4 delivered language under Insurance Law 3428(2), it's part  
5 of a much broader amended package.

6 JUDGE GARCIA: That's the case I dissented in,  
7 right?

8 MR. STEPHENS: You did, Your Honor, yes. That  
9 was four-three. There aren't too many of those, especially  
10 in statutory cases. So you may remember that, the issue of  
11 delivered language and that legislative history.

12 I looked at it again in connection with preparing  
13 for this argument, and there I think you'll see, first of  
14 all - - - the light went on - - - this is part of a much  
15 broader amendment package. They didn't just add (d) to  
16 3420 and add it to the Unfair Claim Practices Act. It was  
17 part of the statute which tried to get - - - tried to get  
18 away from the "late notice, no prejudice" rule in New York.  
19 That was a big thing.

20 And so in connection with that the legislature  
21 amended that - - - amended that to say that parties could -  
22 - - that injured parties could commence declaratory  
23 judgment actions against the defendant's insurers and they  
24 also made it so that you had to have prejudice.

25 So in connection with that legislative history,



1 the insurance industry came in and they said - - - they  
2 recognized that New York State was out of the mainstream  
3 when it came to having a late notice, no prejudice rule.  
4 The other states didn't have that. It was a thing; they  
5 wanted to get back in the mainstream.

6 But the insurance industry said, but while you're  
7 at it, we oppose the bill because it doesn't also change  
8 3420(d)(2) which is also unfair. They believed that the  
9 "late notice, no prejudice" rule was unfair because it was  
10 an unfair technicality because it barred coverage based  
11 solely on the passage of time. The late notice disclaimer  
12 rule which is - - - bars - - - invalidates an otherwise  
13 valid disclaimer, based solely on the passage of time, was  
14 also unfair.

15 JUDGE STEIN: And you seem to minimize the  
16 difference between the consequences of violating (d)(1) and  
17 (d)(2).

18 MR. STEPHENS: Correct, Your Honor.

19 JUDGE STEIN: Why is - - - why aren't those  
20 consequences relevant in determining whether - - - whether  
21 it was intended to fit within an exemption from the  
22 preemption, right?

23 MR. STEPHENS: Correct, Your Honor.

24 JUDGE STEIN: And which we know that the  
25 preemption was entitle - - - it was intended to be broad.



1 MR. STEPHENS: Yes.

2 JUDGE STEIN: You agree with that, correct?

3 MR. STEPHENS: Yes.

4 JUDGE STEIN: So why - - -

5 MR. STEPHENS: There's nothing - - -

6 JUDGE STEIN: Why isn't that a relevant  
7 consideration?

8 MR. STEPHENS: First of all, there's nothing in  
9 the statute that says that there's this broad preemption  
10 and that that broad preemption can trump the exceptions in  
11 some circumstances.

12 JUDGE FAHEY: Well, even further, I mean, the  
13 legislature, if they wanted to, could have said it was  
14 specifically referring to (d) (1) and not to (d) (2), and  
15 they didn't do that.

16 MR. STEPHENS: Right.

17 JUDGE FAHEY: Right.

18 MR. STEPHENS: That's our - - -

19 JUDGE FAHEY: I - - -

20 MR. STEPHENS: That's our main argument.

21 JUDGE FAHEY: I don't know if it's a winning  
22 argument, but it is a point in your favor.

23 MR. STEPHENS: Right, and the - - -

24 JUDGE RIVERA: Well, but we're back to disclose  
25 coverage because the point is that 2601(a) (6) is



1 specifically referring to only the - - - the part of  
2 subsection (d) and (f) that refers to disclosure of  
3 coverage.

4 MR. STEPHENS: A big part of it - - -

5 JUDGE RIVERA: So I don't think the fact that  
6 it's (1) or (2) is the point. The point is let's look for  
7 that language or that part of the statute that deals with -  
8 - - or these sections that deal with disclosure. And so  
9 we're back to where Judge Stein first asked you about how  
10 we can make these - - -

11 MR. STEPHENS: And that's a big part of it.

12 JUDGE RIVERA: - - - distinctions.

13 MR. STEPHENS: That's a big part of it, whether  
14 or not you believe that paragraph (d)(2) is a disclosure  
15 requirement.

16 One thing I would add is that - - - and what I  
17 was trying to get to with respect to the legislative  
18 history part is that - - -

19 JUDGE RIVERA: Well, your argument seems to me to  
20 be any revelation - - - any revelation regarding the policy  
21 and the - - - and the coverage is covered as opposed to  
22 something that is specific regarding coverage. So that's  
23 why you say a disclaimer would fit.

24 MR. STEPHENS: Well, I guess the - - -

25 JUDGE RIVERA: Any bit of information that's



1 provided. And that strikes me as counter to the choice of  
2 particular language here because otherwise this would just  
3 say "information".

4 MR. STEPHENS: No, but the point I want to make,  
5 and it's a big point, is that 3420(d)(2) is an extremely  
6 important provision in New York State, has an enormous  
7 public policy significance as demonstrated by all the cases  
8 construing it, including this case - - - this court's cases  
9 in First - - - State v. Financial - - -

10 JUDGE STEIN: But that begs the question of  
11 whether it can apply to a nondomiciliary risk retention  
12 group which the federal government has said we want to  
13 protect those groups; we don't want them subject to all  
14 these important policies of so many different states so  
15 that it makes it difficult for them to operate. So the  
16 importance to New York, it seems to me, is secondary.

17 MR. STEPHENS: Not when it comes to one of the  
18 exceptions which is claim settlement practices, and  
19 3420(d)(2) is an extremely important claim settlement  
20 practice in New York. When they put it in the Unfair Claim  
21 Practices Act as paragraph (d), part of that is to confirm  
22 its public policy significance.

23 CHIEF JUDGE DIFIORE: Judge Garcia has the last  
24 question.

25 JUDGE GARCIA: Thank you, Chief.



1           You raise an interesting point. On 2601, the  
2           unfair claim settlement, what's the purpose of that statute  
3           outside of, yes, we look to it for preemption for these  
4           purposes. But generally, what's the reason things get  
5           listed under 2601?

6           MR. STEPHENS: I think it's to indicate what's of  
7           public policy importance to the state.

8           JUDGE GARCIA: But it also - - -

9           MR. STEPHENS: I mean, it has - - -

10          JUDGE GARCIA: It provides for penalties, right?

11          MR. STEPHENS: It does, but that's not a - - -  
12          that's not a very big deal.

13          JUDGE GARCIA: But who enforces 2601; outside of  
14          the context we're talking about, who enforces these unfair  
15          claim settlement practices?

16          MR. STEPHENS: I think the Insurance Department.

17          JUDGE GARCIA: And do you have any indication  
18          that they've ever enforced that disclaimer provision as an  
19          unfair claim settlement under 2601? Have they ever  
20          penalized an insurance company for that?

21          MR. STEPHENS: No, Your Honor, and they don't  
22          have to. And that's one of the ironies here because  
23          3420(d)(2) speaks for itself. Nobody is going to do that,  
24          and nobody is going to violate it, as a general business  
25          practice, because you're going to have an invalid



1 disclaimer if you do. But that doesn't mean that the  
2 legislature didn't intend - - -

3 JUDGE GARCIA: So they've never enforced any of  
4 the provisions? They've never enforced (d) (1) or (d) (2) in  
5 terms of penalizing companies under 2601?

6 MR. STEPHENS: I don't know whether they have or  
7 not, Your Honor, but I'm just saying that I could - - - I  
8 would think that they would not have to penalize anybody  
9 for 3420(d) (2) because it has such a serious consequence.

10 JUDGE GARCIA: Then why list it? What's the  
11 effect of 2601 if you have - - -

12 MR. STEPHENS: Just to confirm that it's of  
13 public policy importance. I recognize you don't  
14 necessarily need it. First Financial's been cited this  
15 morning over 1,300 times.

16 CHIEF JUDGE DIFIORE: Thank you, counsel.

17 MR. STEPHENS: Yes, Your Honor.

18 CHIEF JUDGE DIFIORE: Counsel?

19 MS. BUCCI: Good afternoon, Your Honors. Diane  
20 Bucci - - - may it please the court. Diane Bucci for  
21 Preferred Contractors Insurance Company.

22 Counsel's point is very well taken. Why add it  
23 to the unfair claims practices section when (d) (2) does  
24 speak for itself, and there would be no reas - - - there is  
25 no benefit to be gained by including 3420(d) among those



1 practices that - - -

2 JUDGE GARCIA: Well, what's the benefit of  
3 including (d) (1) then?

4 MS. BUCCI: Well, the benefit of including (d) (1)  
5 is that (d) (1) has no other enforcement mechanism. But the  
6 superintendent of insurance can address to the recalcitrant  
7 insurer - - - the recalcitrant insurer that it's not doing  
8 what it's supposed to be doing and it's - - -

9 JUDGE GARCIA: And to your knowledge - - -

10 MS. BUCCI: - - - subject to a fine.

11 JUDGE GARCIA: - - - has that happened?

12 MS. BUCCI: I have no idea if that happened,  
13 yeah.

14 Also I - - - I just want to point out that this  
15 court and many others have separated the concept of  
16 coverage qua coverage from the concept of exclusions and  
17 conditions. And in this case we're talking about  
18 disclosing coverage. So what does disclosing coverage  
19 mean? Does it mean denying based on exclusion and  
20 conditions, or does it mean specify limits and provide the  
21 fact that a policy exists? And I think that - - -

22 JUDGE FAHEY: Go ahead. You finish.

23 MS. BUCCI: And I think that to - - - to answer  
24 that question, we look at the section that's included with  
25 (a) (6) which is 3420(f) (2) (a) which specify you have to



1 disclose coverage, and that section specifies that the  
2 disclosure of coverage means the disclosure of limits and  
3 the existence of a policy.

4 JUDGE FAHEY: I think it's fair to grant that  
5 there's a difference between disclosure and disclaim.  
6 That's been the insurance company practice and the case law  
7 in New York forever. But what I'm wondering about is if  
8 this wasn't - - - PCIC wasn't a foreign corporation, would  
9 this be considered an unfair claim settlement practice if  
10 it was purely a New York company.

11 MS. BUCCI: No. However, if it were a New York -  
12 - -

13 JUDGE FAHEY: Wasn't the seventy - - - let me  
14 just finish here. It's seventy-seven days on the  
15 notification, right? You're saying that that wouldn't be  
16 an unfair claim settlement practice?

17 MS. BUCCI: No. It would be a - - -

18 JUDGE FAHEY: Okay.

19 MS. BUCCI: - - - disclaimer under 3420(d)(2).

20 JUDGE FAHEY: So the exclusion wouldn't apply?

21 MS. BUCCI: The exclusion would not apply. It  
22 would - - -

23 JUDGE FAHEY: So it would be - - -

24 MS. BUCCI: Right.

25 JUDGE FAHEY: - - - a disclaimer - - - an



1 exclusion - - -

2 MS. BUCCI: A New York insurer - - -

3 JUDGE FAHEY: Let me just finish.

4 MS. BUCCI: I'm sorry.

5 JUDGE FAHEY: It would be an exclusion. The  
6 disclaimer wouldn't apply, but you're saying but the policy  
7 itself would still be in effect and there - - - right.

8 MS. BUCCI: Right.

9 JUDGE FAHEY: Because it wasn't a question of  
10 disclosure, it was a question of disclaiming as to an  
11 exclusion.

12 MS. BUCCI: Right. And the risk retention group  
13 mandates, if you will, are set forth in New York in 5901,  
14 et seq. 5903 explains that New York insurers have to  
15 comply with all of New York statutes, laws, and just like  
16 any admitted insurer. But that's different from exactly  
17 what the LRAA - - - LA - - - LRRA is attempting to do which  
18 is to stop the provisions of nondomiciliary states from  
19 governing a nondomiciliary foreign risk retention group.

20 JUDGE FAHEY: Thank you.

21 JUDGE RIVERA: So let's say we conclude that  
22 3420(d)(2) does not come within 2601(a)(6). Say we agree  
23 with that. Is that where our inquiry stops? Do we then  
24 have to decide whether or not it's preempted?

25 MS. BUCCI: Right, well, I - - - I'm - - - I



1 would say yes, normally. However, I don't think that issue  
2 is appealed to this court. I think the issue appealed to  
3 the court was a question of whether 3420 - - - I'm sorry,  
4 2601 included 3420(d), both (1) and (2).

5 JUDGE RIVERA: But isn't the only reason you're  
6 asking that question because - - -

7 MS. BUCCI: Because - - -

8 JUDGE RIVERA: - - - of the preemption issue?

9 MS. BUCCI: - - - of the preemption issue.

10 JUDGE RIVERA: Otherwise, why would - - - why  
11 would anyone - - -

12 MS. BUCCI: Right.

13 JUDGE RIVERA: - - - care?

14 MS. BUCCI: That's right. And I think that  
15 Wadsworth is very clear on preemption and the purposes  
16 behind preemption and the importance of it. And in the  
17 papers, counsel speaks to this terrible horrible litany of  
18 horrors that would occur if we allowed risk retention  
19 groups to operate the way that congress intended. But  
20 first of all, that's what congress intended.

21 JUDGE RIVERA: Well, the only question is about  
22 3420(d)(2), right, just that. That's the only one you're  
23 trying to argue - - - that's the only one, your position  
24 is, is preempted, correct?

25 MS. BUCCI: That's the only one, my position is,



1 is not an unfair claim settlement practice.

2 JUDGE RIVERA: To fall within an exception. My  
3 point is - - -

4 MS. BUCCI: Of preemption.

5 JUDGE RIVERA: - - - why are we concerned about  
6 the exception if it's not - - - if it's not something that  
7 would be preempted in the first instance?

8 MS. BUCCI: Right, and I'm - - -

9 JUDGE RIVERA: So your position is, right, it's  
10 preempted, correct?

11 MS. BUCCI: It's absolutely preempted.

12 JUDGE RIVERA: Okay. All right.

13 MS. BUCCI: My position is that Wadsworth makes  
14 clear the public policy purposes beyond - - - behind  
15 preemption.

16 JUDGE RIVERA: Um-hum.

17 MS. BUCCI: And also the - - - in this particular  
18 case, counsel speaks a lot about illusory coverage here.  
19 But we're talking about an exclusion that would apply, that  
20 there's no question New York State has applied, ad nauseam,  
21 these employer liability exclusions. This is an employee  
22 of the named insured, and the exclusion would apply but for  
23 3420(d)(2). So it can't be catastrophic for it to apply.  
24 It would normally apply. And there is also the issue of  
25 the general practice.



1 JUDGE WILSON: That's not preserved, is it?

2 MS. BUCCI: I'm sorry?

3 JUDGE WILSON: That argument is not preserved in  
4 the court of instance?

5 JUDGE RIVERA: Did you raise it before Supreme  
6 Court?

7 MS. BUCCI: Yeah.

8 JUDGE WILSON: You did?

9 JUDGE RIVERA: Is it in the papers?

10 MS. BUCCI: I believe it was raised before the  
11 Supreme Court, yes.

12 JUDGE RIVERA: They've argued it was only raised  
13 at - - -

14 MS. BUCCI: Well, actually - - -

15 JUDGE RIVERA: - - - the Appellate Division at  
16 oral argument. Where is it in the papers?

17 MS. BUCCI: Right. No, well, the Supreme Court  
18 raised it sua sponte.

19 JUDGE WILSON: And where would we find that?

20 MS. BUCCI: Record - - -

21 (Pause)

22 MS. BUCCI: Okay. So record page 25. "Just one  
23 untimely notice does not arise to the level of an unfair  
24 claim settlement practice."

25 So to - - - may I continue?



1 CHIEF JUDGE DIFIORE: Yes, please.

2 MS. BUCCI: Okay. So coverage in this case is  
3 not illusory; it's a normal standard coverage exclusion.  
4 There's no problem with it applying. It applies generally.  
5 If PCI - - - now PCIC did disclaim coverage timely to its  
6 named insured, which was my general practice point, is to  
7 show that we don't have a general practice of doing this.  
8 And I believe that foreign risk retention groups would  
9 attempt to comply with 3420(d)(2) if - - - because we try  
10 to be prompt in every state.

11 JUDGE STEIN: Let me ask the question that was  
12 previously asked a little bit differently. Assuming - - -  
13 and I don't have the record in front of me right now - - -  
14 that, as you say, the Supreme Court raised this issue sua  
15 sponte, was there - - - is there any evidence in the record  
16 in the trial court regarding whether this was or was not a  
17 general practice - - -

18 MS. BUCCI: There - - -

19 JUDGE STEIN: - - - other than just attorney's  
20 arguments on the - - - on the point?

21 MS. BUCCI: There is absolutely no evidence to  
22 show that it was a general practice.

23 JUDGE STEIN: Okay. So wouldn't that prevent us  
24 from making a finding of fact on that point? Are you  
25 saying that if we - - - if - - - if it was a material



1 issue, if it wasn't academic, we would need to send it back  
2 to the - - - to the trial court to make - - - to make that  
3 determination?

4 MS. BUCCI: Well, I think that the court made the  
5 finding of fact.

6 JUDGE RIVERA: You're saying - - - in this  
7 reference to the record you're saying that's a finding of  
8 fact that there was only one incident - - -

9 MS. BUCCI: No.

10 JUDGE RIVERA: - - - as opposed to simply - - -

11 MS. BUCCI: No, there were - - -

12 JUDGE RIVERA: - - - stating a point of law?

13 MS. BUCCI: There were a couple of incidents, not  
14 one incident. There - - - there is the case that's been  
15 cited by counsel, Arimdun where PCIC was late in  
16 disclaiming coverage, and we won at the trial court level  
17 in that case.

18 JUDGE STEIN: And so you're saying that if that's  
19 their proof of a general practice, that's not enough?

20 MS. BUCCI: Right. Right.

21 CHIEF JUDGE DIFIORE: Thank you, counsel.  
22 Counsel?

23 MR. STEPHENS: With respect to the general  
24 practice point, it was never briefed below in the motion  
25 papers. We went through the whole oral argument, and it



1 was never raised by counsel or the court. The court took a  
2 half-hour break, went out, looked at the Arimdun case and  
3 came back and came up with a bunch of reasons from Arimdun,  
4 including the fact that one incident of a violation would  
5 not constitute general practice. That had never come up at  
6 any time before that and it wasn't briefed again.

7 We believed that they had decided to abandon that  
8 argument, because it's not a winning argument for them,  
9 because you can't have a situation where a company is  
10 taking the corporate position that this does not apply to  
11 us and we don't have to follow it in a legal proceeding,  
12 they're taking that corporation position. Our argument is  
13 that that's evidence, in the form of a court filing, of an  
14 admission of a general business practice. You've got the  
15 corporation coming in and saying we're not going to - - -  
16 we're not going to abide by 3420(d)(2). You don't need to  
17 do discovery and so on.

18 JUDGE STEIN: Before your time is up, I just want  
19 to clarify a point, and I think Judge Rivera raised this.  
20 Do you concede that if - - - if we conclude that this was  
21 not an unfair - - -

22 MR. STEPHENS: Yes, Your Honor, it's preempted.

23 JUDGE STEIN: - - - claim settlement, it is  
24 preempted?

25 MR. STEPHENS: Yes.



1 JUDGE STEIN: Okay.

2 MR. STEPHENS: That's as far as you need to go.

3 JUDGE STEIN: Thank you.

4 JUDGE RIVERA: But wait a minute; when you say  
5 that's as far as you need to go, you mean all we need to do  
6 is decide - - -

7 MR. STEPHENS: Well - - -

8 JUDGE RIVERA: - - - whether or not 3420(d)(2) is  
9 encompassed under 2601(a)(6), and we don't then need to  
10 also say or initially say that 3420(d)(2) would be  
11 preempted unless it falls within an exception?

12 MR. STEPHENS: No, I think you need to - - - I  
13 guess it's more complicated than I realize. You need to  
14 figure out whether or not the reference in paragraph 6 - -  
15 -

16 JUDGE RIVERA: Yes.

17 MR. STEPHENS: - - - of the Unfair Claim  
18 Practices Act, which references paragraph (d) of Insurance  
19 Law 3420 - - -

20 JUDGE RIVERA: Yes.

21 MR. STEPHENS: - - - encompasses 3420(d)(2).

22 JUDGE RIVERA: Yes.

23 MR. STEPHENS: And if so, then it is a claim  
24 settlement practice and can be regulated by the state as a  
25 nondomiciliary.



1 JUDGE WILSON: But for the purposes of this  
2 appeal, if we find that it is not an unfair claim practice,  
3 the parties have stipulated that it is preempted; is that  
4 right?

5 MR. STEPHENS: We haven't stipulated, but that's  
6 the fact.

7 JUDGE WILSON: Well, you haven't - - - okay,  
8 you're not disputing that?

9 MR. STEPHENS: I'm not disputing that, yes.  
10 Well, I mean, if it's preempted the case is over.

11 JUDGE RIVERA: I'm not understanding this  
12 position. Why would one be looking at an exception if you  
13 had not been arguing that it is or is not preempted? One  
14 does not look for the exception unless it falls within the  
15 general preemption rule.

16 MR. STEPHENS: So first you look at whether or  
17 not it is an exception. The exception is the regulation of  
18 claim settlement practices. Then you look at the unfair  
19 claim settlement practices, 2601(a), in this case paragraph  
20 (6). And it references Insurance Law 3420 paragraph (d).  
21 So then you look and decide whether or not (d) includes  
22 (d) (1) and (d) (2).

23 JUDGE RIVERA: No, I understand that. You've  
24 explained - - - yes, we understand your argument there. I  
25 - - - I'm not understanding your response to Judge Wilson

1           who was asking, I think, are you conceding the preemption,  
2           or did you always take the position that it - - - it is  
3           preempted because that's the state of the law, and so you  
4           don't dispute it that way.

5                         MR. STEPHENS: I'm not sure I'm understanding.

6                         JUDGE RIVERA: Is there any argument that you can  
7           see for why it would not be preempted other than this  
8           exception?

9                         MR. STEPHENS: No.

10                        JUDGE RIVERA: And you've never made such an  
11           argument?

12                        MR. STEPHENS: No.

13                        JUDGE RIVERA: Okay. Thanks.

14                        MR. STEPHENS: Yes.

15                        CHIEF JUDGE DIFIORE: Thank you, counsel.

16                        MR. STEPHENS: Thank you, Your Honor.

17                        CHIEF JUDGE DIFIORE: Thank you.

18                        (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Nadkos, Inc. v. Preferred Contractors Insurance Company Risk Retention Group, No. 37 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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