1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - - - - - - - - - - - - - - x

3 CIGNA CORPORATION, ET AL., :

4 Petitioners :

5 v. : No. 09-804

6 JANICE C. AMARA, ET AL., :

7 INDIVIDUALLY AND ON BEHALF OF ALL :

8 OTHERS SIMILARLY SITUATED :

9 - - - - - - - - - - - - - - - - - - x

10 Washington, D.C.

11 Tuesday, November 30, 2010

12

13 The above-entitled matter came on for oral

14 argument before the Supreme Court of the United States

15 at 10:07 a.m.

16 APPEARANCES:

17 THEODORE B. OLSON, ESQ., Washington, D.C.; on behalf of

18 Petitioners.

19 STEPHEN R. BRUCE, ESQ., Washington, D.C.; on behalf of

20 Respondents.

21 EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,

22 Department of Justice, Washington, D.C.; on

23 behalf of the United States, as amicus curiae,

24 supporting Respondents.

25

1 C O N T E N T S

2 ORAL ARGUMENT OF PAGE

3 THEODORE B. OLSON, ESQ.

4 On behalf of the Petitioners 3

5 ORAL ARGUMENT OF

6 STEPHEN R. BRUCE, ESQ.

7 On behalf of the Respondents 25

8 ORAL ARGUMENT OF

9 EDWIN S. KNEEDLER, ESQ.

10 On behalf of the United States, as

11 amicus curiae, supporting Respondents 40

12 REBUTTAL ARGUMENT OF

13 THEODORE B. OLSON, ESQ.

14 On behalf of the Petitioners 52

15

16

17

18

19

20

21

22

23

24

25

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

2 (10:07 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument

4 first this morning in Case 09-804, Cigna

5 Corporation v. Amara.

6 Mr. Olson.

7 ORAL ARGUMENT OF THEODORE B. OLSON

8 ON BEHALF OF THE PETITIONERS

9 MR. OLSON: Mr. Chief Justice, and may it

10 please the Court:

11 Congress crafted a carefully balanced ERISA

12 enforcement scheme that enables plan participants to

13 recover plan benefits under section 502(a)(1)(B) and

14 equitable remedies for ERISA violations under section

15 502(a)(3).

16 In this case, Respondents are seeking a

17 remedy for misleading plan summaries that violated

18 ERISA. Their remedy, if they were harmed by defective

19 plan summaries, is under 502(a)(3), equitable remedies,

20 not for plan benefits under 502(a)(1)(B). The section

21 that governs the relief that is sought is a necessary

22 antecedent to any of the other questions in this case,

23 and ERISA carefully structures, and this Court has

24 repeatedly said the Court is not interested and does

25 not -- is not willing to alter the structure that

1 Congress carefully crafted and carefully developed over
2 the years to provide remedies with respect to ERISA
3 programs.
4 And the scheme is such that, if there is a
5 participant to the plan who is seeking benefits under
6 that plan, section (a)(1)(B) of -- subsection (a)(1)(B)
7 of section 502 provides for relief under the plan. If
8 there are other violations of ERISA, section 502(a)(3)
9 provides for equitable relief. That is the scheme
10 carefully developed by Congress.
11 Now, in this case what happened is that
12 Cigna changed its pension program, its ERISA plan, from
13 a defined benefit plan to a cash benefit plan, a cash
14 value plan. And it put out, as required by ERISA,
15 summaries of the new plan that the district court found,
16 and the court of appeals affirmed, were misleading in --
17 in the sense that they did not provide all of the
18 information necessary for plan participants to evaluate
19 what was happening.
20 Now, the changes to the plan were lawful.
21 ERISA permitted and does permit these kind of changes to
22 an ERISA plan. There was nothing unlawful about the
23 plan and the plan change. And the beneficiaries, the
24 participants to the plan, did not have any choice.
25 Cigna had the right to change the plan. It did change

1 the plan.

2 It did have an obligation under ERISA to

3 provide accurate summaries, and the district court and

4 the court of appeals found that those summaries were not

5 inaccurate. In other words -- they were not accurate.

6 In other words --

7 JUSTICE GINSBURG: Mr. Olson, when you say

8 the employees had no choice, but the district court

9 found, didn't it, that the reason for this plan summary

10 being misleading was that the employer, Cigna, feared

11 that there might be a backlash on the part of the

12 employees if they found out, if they were told the truth

13 about this plan; that is, that it was less favorable,

14 that they would not have the same benefits that they had

15 under the prior plan?

16 MR. OLSON: That is correct, Justice

17 Ginsburg. They had no choice in the sense that Cigna

18 could adopt a change in the plan, as it did. That was

19 permitted under ERISA, but it was required to give

20 accurate summaries.

21 The choice that you're suggesting and the

22 district court was concerned about is that an individual

23 could have left the employ of Cigna if he or she was

24 unhappy with the change in the plan, or the district

25 court said there could have been some sort of a protest.

1 What we're saying is that the remedy --
2 what was -- what was the violation is the summary
3 itself. And we're not -- we're not challenging that
4 here. That's a finding below. The summary was
5 misleading, but that makes it a violation of ERISA. The
6 summary is not the plan. And --
7 JUSTICE KAGAN: Well, Mr. Olson, we have
8 several times referred to the plan as having a range of
9 documents associated with it, not as having just a
10 single written instrument, but we referred to documents
11 and instruments governing the plan. We did that in
12 Curtiss-Wright, which is the case that you pin so much
13 on. We did that in Kennedy.
14 And the statute itself talks about that on
15 numerous occasions, that there are documents and
16 instruments, in the plural. And one would think that
17 the SPD is -- is one of those documents and instruments
18 that govern the plan.
19 MR. OLSON: It's quite clear from the
20 structure of the statute that is correct, as you
21 suggest, that there may be multiple instruments or
22 documents that are the -- create the plan itself. But
23 the summary plan document, the SPD, is not a part of the
24 plan. It is a separate document. It is a summary. It
25 is a succinct statement of what might be in the plan,

1 and it must be accurate, and it must be written in
2 comprehensible English.
3 But I would refer the Court to section 1024
4 (b)(2) and (4), which are on pages 3a, 4a, and 5a of the
5 blue brief. That describes the obligations that are
6 required with respect to the summary plan document. And
7 it describes the instruments of both the summary plan
8 document and the instruments that constitute the plan
9 itself in the following sentence -- and this is a
10 similar sentence in subsection (4), but I'm reading from
11 subsection (2), which is on 4a of the blue brief.
12 It says: "Summary plan" -- it refers to "a
13 summary plan description and the latest annual report
14 and" -- or other -- "and the bargaining agreement, trust
15 agreement, contract, or other instruments under which
16 the plan was established."
17 The construction of that sentence has to be
18 that the summary plan description is a separate
19 document. It is not one of those latter category of
20 documents under which the plan was established. And the
21 proof of that, if -- if English doesn't teach it to us,
22 which I think it does, is the reference to the annual
23 report. No one would say and no one would contend that
24 the annual report is a part of the instruments creating
25 the plan.

1 JUSTICE KAGAN: Well, I was struck by
2 something else, Mr. Olson. I was struck by the fact
3 that the -- that the statute saying what is in the
4 summary plan description is packed with information that
5 needs to be in the summary plan description. By
6 contrast, the written instrument, which you equate to
7 the plan, the written instrument says barely anything
8 about what has to be in it. It just says the name of
9 the fiduciaries has to be in the written instrument.
10 So it seems clear that this statute is set
11 up so that everything that is important, everything that
12 the employee needs to know and needs to rely upon, is
13 supposed to be in the SPD, not necessarily in the
14 written instrument.
15 MR. OLSON: Well, the written instruments,
16 as these things turn out, are long, complex documents.
17 They may be 90, 100 pages long. The summary, as you
18 suggest, Congress said, yes, there is a separate
19 document that must state in intelligible English that
20 plan participants can understand the following things,
21 and they must be furnished to plan participants, but
22 they are not the plan document. The way that ERISA is
23 structured, it --
24 JUSTICE SCALIA: Am -- are we missing
25 something? They -- they cannot be in the SPD unless

1 they are in the plan; isn't that right?

2 MR. OLSON: Well -- if the -- if the --

3 JUSTICE SCALIA: So -- so the one cannot be

4 more detailed than the other, can it?

5 MR. OLSON: The plan can be more detailed

6 than the SPD.

7 JUSTICE SCALIA: Right. But what --

8 JUSTICE KAGAN: But can't the SPD --

9 JUSTICE SCALIA: Whatever is in the SPD must

10 be in the plan; isn't that right?

11 MR. OLSON: Well, if the plan is -- if the

12 SPD complies with ERISA, yes. It has to be --

13 JUSTICE SCALIA: Yes. That's what I'm

14 talking about, of course.

15 MR. OLSON: Yes. Yes, exactly. But not

16 everything that is in the plan, or the plan -- as the

17 statute says, the documents that constitute the plan

18 need not necessarily be in the summary. The words

19 "summary plan" --

20 JUSTICE KAGAN: But, Mr. Olson, what about

21 the opposite? Because the statute seems to be written

22 so that things are in the SPD which don't need to be in

23 the written instrument. And together, they all somehow

24 constitute the plan.

25 MR. OLSON: Well, I -- I submit that that is

1 not the way the statute is written, and subsections (2)
2 and (4) of the provision that I was referring to make
3 that clear if the word "summary" itself did not make
4 that clear. But the Curtiss-Wright case to which you
5 referred to in your earlier question also proves that.
6 Curtiss-Wright case talked about a summary
7 plan description and said it can't modify the plan --
8 using "plan," "summary plan description," in different
9 terms -- it cannot modify the plan, which is what the
10 district court here held, unless the plan specifically
11 says that it may be modified in a certain way and that
12 the summary is an appropriate amendment to the plan. So
13 the Court -- and this was a unanimous decision of this
14 Court -- was referring to the summary as something that
15 was separate, that might modify the plan if the plan
16 itself allows for it to be modified in that fashion.
17 Now, the Government says that the summary
18 plan description is a part of the plan and so do
19 Respondents. And that's what the court below -- the
20 court below didn't actually find that the SPD was a part
21 of the plan. The court found, on the latter pages of
22 its opinion, that it was a modification, it was an
23 amendment to the plan. That's inconsistent with the
24 Curtiss-Wright case because in this case the plan itself
25 specifically says that it cannot -- does not say that it

1 can be amended by the SPD.

2 JUSTICE GINSBURG: I thought that what the

3 district court said was that they would treat the plan

4 as containing what the summary said, not that -- that it

5 was part of the plan itself, not an amendment,

6 amendment. I thought that was what the district court

7 said.

8 MR. OLSON: I think in the -- on page of

9 the -- this is of -- this is the summary to the cert

10 petition, page 218, which is the district court's -- the

11 conclusions of the district court's decision. Under

12 Roman numeral VIII, the district court specifically said

13 that the terms of Part B have been correspondingly

14 modified by the SPDs.

15 The court was saying -- I think you were

16 referring, Justice Ginsburg, to the relief that the

17 court ordered, but the court was ordering that relief on

18 the theory that the SPDs modified the plan. And the

19 plan itself, under Curtiss-Wright, doesn't provide for

20 it to be amended in that way. And the SPDs --

21 JUSTICE SCALIA: It can't be part of the

22 plan without modifying the plan, can it?

23 MR. OLSON: That's --

24 JUSTICE SCALIA: Because it contradicts

25 other provisions.

1 MR. OLSON: That's correct. And the SPDs,
2 the two SPDs themselves, on page 922a and 938a of the
3 Joint Appendix, specifically say that if there's any
4 discrepancy between the SPD and the plan, the plan
5 governs. The language is at the bottom of, for example,
6 at the bottom of 922a. So --
7 JUSTICE KAGAN: But the SPD can't negate the
8 force of ERISA, and if ERISA says that the summary has
9 to be consistent with the plan documents, nothing in the
10 SPD can negate that requirement.
11 MR. OLSON: That's correct. No one -- but
12 Congress did consider prohibiting a provision like that
13 in SPDs, that they could not disclaim, they could not
14 say that if there's any inconsistency, the plan
15 governed, and Congress did not adopt such a provision.
16 This is a perfectly legal provision, to tell
17 someone that if there's any discrepancy -- and there's
18 bound to be discrepancies, the -- as I said, the plans
19 themselves can be 90, 100 pages, very long and very
20 complex. That's why there is an SPD that can't contain
21 everything in the plan.
22 And one of the things that would be the
23 outcome of what the Government and Respondents are
24 urging here is that plan creators, these companies that
25 create these plans, either will be discouraged from

1 doing it, or they will start preparing summaries that
2 are 90 and 100 pages long so they --
3 JUSTICE GINSBURG: But they can't do that
4 because the statute requires the summary to be
5 understandable and not prolix.
6 MR. OLSON: That's Catch 22, because if
7 there's a -- if there's a discrepancy because they have
8 to be short, summary, and intelligible, then we have --
9 we're faced with the proposition that someone's going to
10 say, well, I read the SPD and it didn't say what was in
11 the plan. If the SPD is as long and as detailed as the
12 plan, then there's a violation of ERISA.
13 My point I guess in this is that, yes,
14 Justice Kagan, the statute requires the SPD to contain
15 certain information. We accept the fact of the
16 conclusions of the court below in this case that they
17 did not do so. There are two SPDs. They failed to live
18 up to the -- to the requirements of ERISA. There is a
19 remedy for that. It is a violation of ERISA, and it
20 specifically says in 502(a)(3) that for violations of
21 ERISA, equitable remedies are available. And that is
22 what Congress decided. It is -- unless it's a part of
23 the plan, you must go under (a)(3).
24 JUSTICE KAGAN: But the very question here
25 is if there is an SPD that is inconsistent in some way

1 with the written instrument, what happens? Is the
2 written instrument modified or, instead, is the
3 provision in the SPD given operative effect? And that
4 question is one about your benefits under the plan.
5 MR. OLSON: I would submit that it can't
6 modify the plan unless the plan permits that. That's
7 Curtiss-Wright. That's a unanimous decision of this
8 Court.
9 JUSTICE KAGAN: I do think you're
10 over-reading Curtiss-Wright. Curtiss-Wright talked
11 about whether a particular provision satisfied the
12 requirement that a plan have an amendment provision. It
13 didn't say anything at all about whether there are
14 provisions that can have operative effect regardless of
15 whether they pass through a formal amendment procedure.
16 MR. OLSON: It seems to me -- I think we
17 might disagree about that, respectfully. I think that
18 the sense of the opinion in Curtiss-Wright was that if
19 you're going to say that this SPD modifies the plan, it
20 can only do so if the plan permits the SPD to modify the
21 plan. Then the Court sent it back to a lower court to
22 determine whether in fact the employees that were
23 involved in creating the SPD there had the authority
24 under the plan to modify the plan -- was it done --
25 JUSTICE BREYER: So far we're just

1 discussing, I take it, whether under (1) the other side
2 is entitled to their benefits even if they weren't hurt,
3 on a contract theory.
4 MR. OLSON: That --
5 JUSTICE BREYER: All right. But I thought
6 we took the case to decide a different issue.
7 MR. OLSON: Yes.
8 JUSTICE BREYER: And that is -- I'll assume
9 you're right -- it should have come under (3). But I
10 don't know if that's harmful, whether it was (3) or (1).
11 And the question I thought we were to decide was, if
12 you're under (3), say, where equity is at issue, now
13 equity is at issue and the district court says: Here we
14 have 27,000 people, and now here's how I'm going to go
15 about this. I'm going to look at this provision mistake
16 here, and the mistake it seems to me was likely to cause
17 them harm. And once that's shown -- and they showed it,
18 it's likely to cause it harm; we can't be sure, but it's
19 likely -- then it's up to your client to refute case by
20 case that these guys were not -- or women were not
21 really harmed. Okay?
22 Now, that seems very sensible to me. And --
23 and if that's the issue we're going to decide, I'd like
24 to hear you explain why that isn't sensible. It's an
25 equitable matter. This is simply a way of going about

1 it. What's wrong with that?

2 MR. OLSON: Well, in the first place, it is

3 important which section that --

4 JUSTICE BREYER: I agree, but I don't

5 understand -- I'm with you on this one so far.

6 MR. OLSON: Okay. Okay. Because it's a

7 different defendant. The plan is the defendant versus

8 the plan administrator is the defendant. So that's

9 important.

10 Secondly, (a)(3) provides only for remedies

11 that are available in equity. Then the point that you

12 -- that you're making with respect to what provision of

13 equity, what is the -- what is the action that's brought

14 and what is the remedy sought, as this Court talked

15 about in the Varity case, and so therefore those are

16 those questions.

17 Now, the Second Circuit said "likely

18 harmed." The fact is, as I pointed out at the very

19 beginning, this was a lawful change in a plan and it's a

20 plan where 27,000 people that were employees were

21 participants in this plan and they would have had to do,

22 as Justice Ginsburg suggested, either leave the company

23 and suffer some harm or engage in some --

24 JUSTICE BREYER: You're sounding to me as if

25 you're saying there wasn't likely harm. Okay.

1 MR. OLSON: Except --

2 JUSTICE BREYER: Are you conceding that the

3 standard that they used, that the standard was -- the

4 question that you raised at the beginning, whether --

5 whether the showing of likely harm is sufficient in the

6 absence of a rebuttal?

7 MR. OLSON: Absolutely we are not, and so --

8 JUSTICE BREYER: All right. That's what I

9 want to hear: What's the argument against that

10 standard?

11 MR. OLSON: Six circuit courts of appeals

12 have held that -- that detrimental reliance is required.

13 If -- if this is an action under (a)(3) under equity,

14 neither the Government nor the Respondents dispute the

15 fact that detrimental reliance would be required if

16 you're proceeding in equity under (a)(3).

17 JUSTICE BREYER: All right. And does

18 "likely harm" capture that idea?

19 MR. OLSON: "Likely harm" is not a

20 demonstration of prejudicial reliance.

21 JUSTICE BREYER: Why not? Why not?

22 MR. OLSON: That's the --

23 JUSTICE BREYER: That's the kind of harm

24 they mean. What they mean --

25 MR. OLSON: Because --

1 JUSTICE BREYER: -- by harm is they were
2 hurt, brought about by reliance.
3 MR. OLSON: Well, in the first place, it
4 comes out of the blue, "likely harm," as I suggested,
5 since this was a legal, lawful change. People were
6 going to retain their employment. They didn't have a
7 right to opt for one or the other. If they could prove
8 that they were -- this is --
9 JUSTICE BREYER: You object to this decision
10 saying the following: Of course, the lower court said
11 likely harm is necessary. As we understand it, given
12 the context of equity, what that means here is that
13 there was reason to believe -- reason to believe -- it
14 was probable that, or some words like that, that there
15 would have been harm caused by reliance on the -- the
16 misstatement.
17 MR. OLSON: I -- that would not be justified
18 at all. I mean, under equity, as this Court said in the
19 Lyng v. Payne case, which is cited in the briefs, this
20 is like an estoppel action. An essential element of an
21 estoppel action is detrimental reliance on the adverse
22 party's misrepresentation.
23 What the district court below did was, by
24 coming up with this "likely harm" harm thing, is throw
25 the burden over to the plan or the plan administrator

1 and saying: Demonstrate that any one of your -- all of
2 your 27,000 members of this purported class somehow were
3 hurt by a change in a plan over which they had no
4 control, over which they had no discretion, unless they
5 were going to leave the --
6 JUSTICE GINSBURG: But wasn't the -- wasn't
7 the meaning of "likely harm" simply that they were
8 promised one thing in the plan document, and so what
9 likely harm is, is we have to do away with what they
10 call, what is it, "the wear-away effect"? So that's the
11 harm, the wear-away effect, and we have to remedy that.
12 And the way to remedy it is to treat this as, what is
13 it, instead of (a) or (b), (a) plus (b)?
14 MR. OLSON: And that would be an action to
15 seek benefits under the plan, which would be an
16 (a)(1)(B) action against the plan itself.
17 JUSTICE GINSBURG: Yes.
18 MR. OLSON: Against the plan. The record
19 suggests in various parts -- I can't remember exactly
20 which page to refer to -- that $70 million would be the
21 consequence of this against the plan, on which some
22 people, depending upon how long they were with the
23 company, when they left the company, whether they were
24 about to retire, whether they stayed longer and the
25 interest rates fluctuated, there can be all --

1 innumerable permutations of the effect upon persons --
2 CHIEF JUSTICE ROBERTS: Then you can't --
3 JUSTICE KENNEDY: Excuse me, Chief Justice.
4 CHIEF JUSTICE ROBERTS: Then you can't
5 require, it seems to me, each individual to make a
6 calculation about whether they have actually been
7 harmed, whether there's detrimental reliance. The whole
8 point of these plans is to give people some comfort and
9 assurance when they are age whatever, that: Don't
10 worry; retirement is taken care, or at least I can rely
11 on that.
12 And your formulation would sort of put that
13 up in the air and say: We don't know if you're going to
14 be harmed or not; wait until you're 65 and we will see.
15 MR. OLSON: Well, Chief Justice --
16 Mr. Chief Justice, that is the statute. The statute
17 gives you relief with respect to a misleading plan
18 summary under the laws of equity. The laws of equity
19 would require that the person say -- demonstrate in some
20 way that they were harmed. The petition -- the
21 Respondents in this case, the named members of the
22 class, claim that they were out 30-some thousand dollars
23 each. They would have an incentive to bring an action
24 by themselves.
25 JUSTICE GINSBURG: But it couldn't be --

1 MR. OLSON: Under the rules --
2 JUSTICE GINSBURG: But it couldn't be
3 brought as a class action, and isn't that a large piece
4 of this picture, that proceeding as they did they can
5 proceed as a class? Proceeding under detrimental
6 reliance, it would be hard to get a class because it
7 would be an individual case of detrimental reliance.
8 MR. OLSON: The Rules Enabling Act provides
9 that a class mechanism cannot change the substantive
10 provisions of law. And so, it cannot be that, because
11 this is brought as a class action, the rules of equity
12 somehow change.
13 JUSTICE GINSBURG: Then the question is,
14 under the -- under the section that the district court
15 proceeded under, not the one that you say is proper, a
16 class action would be appropriate.
17 MR. OLSON: A class action might be
18 appropriate, but it would not change the detrimental
19 reliance requirement. Again, this --
20 JUSTICE KENNEDY: Well, turning to (a)(3), I
21 have two questions. One is, as you -- and this is
22 probably for your friends on the other side more than
23 you. But as you understand the "likely harm" standard
24 that prevails in the Second Circuit, is it likely harm
25 to a majority of the members of the class, all of the

1 members of the class? Do you know? Has the Second
2 Circuit told us what that means?
3 MR. OLSON: Yes, well, the Second Circuit
4 suggested, and the Government and Respondents,
5 particularly the Respondents, say if there's a material
6 difference, likely harm is presumed. And the Government
7 itself says --
8 JUSTICE SCALIA: Likely harm to whom? I
9 think that's the question --
10 MR. OLSON: That is the question.
11 JUSTICE SCALIA: -- that Justice Kennedy is
12 asking, and I have the same question. Does it mean
13 likely -- is it likely that the class as a whole has
14 been harmed, or that each -- is it likely that each
15 individual member of the class has been harmed?
16 JUSTICE KENNEDY: Or -- or a significant
17 number?
18 JUSTICE SCALIA: Or a majority? Or
19 whatever?
20 MR. OLSON: Yes, I --
21 JUSTICE SCALIA: What does "likely harm"
22 mean? Do we know that?
23 MR. OLSON: And I -- I totally agree with
24 the import of those questions. You can't describe that,
25 in this Court --

1 JUSTICE KENNEDY: My question had no import.
2 I really wanted to know the answer to that.
3 (Laughter.)
4 MR. OLSON: Well, the answer -- the answer
5 is what the district court ordered and the Government
6 seeks and the Respondents seek, is they're all harmed by
7 this, that there's any material disparity, then
8 everybody --
9 JUSTICE BREYER: Maybe it wouldn't be too
10 hard. They're -- they're joined as members of the class
11 in light of a certain set of characteristics, and the
12 judge would find that, other things being equal,
13 individuals who have that set of characteristics which
14 in this circumstance make them members of the class
15 would be harmed in all likelihood, okay? Done.
16 Now, it's up to -- it's up to the -- the
17 defendant then to show that in a particular case this
18 individual wasn't harmed.
19 MR. OLSON: It defies reality --
20 JUSTICE BREYER: Why?
21 MR. OLSON: -- Justice Breyer, to suggest
22 that the 27,000 people -- each one occupy a different
23 position in terms of the length of their employment,
24 when they might be retiring, what their benefits might
25 be, whether they might take a lump sum or an annuity.

1 All of those thing are different. And the only way they
2 can --
3 JUSTICE BREYER: Well, it depends on the
4 facts. Maybe they have a union or --
5 MR. OLSON: The only way they could have
6 been harmed, Justice Breyer, is if they had otherwise
7 decided to leave the employ of the company and go
8 someplace else. They could demonstrate that.
9 If I could save my time --
10 JUSTICE KENNEDY: Your white light is --
11 just one more thing. If you proceed under (a)(3),
12 doesn't Mertens bar the award of -- of monetary damages?
13 MR. OLSON: I think it would. I mean, this
14 Court --
15 JUSTICE KENNEDY: Well, then -- then you're
16 not offering us much. You say: Oh, please go under
17 (a)(3), but then you go back and say: Oh, well, you
18 can't get monetary damages.
19 MR. OLSON: In the first place, that's
20 Congress's choice. It's an equitable remedy that would
21 be required. Congress made that decision. This Court
22 has said it's not going to reconstruct what Congress
23 carefully did.
24 The thing is that it would have to balance
25 people wanting to create these plans and go into these

1 plans and the solvency and stability of the plan; what
2 Justice Breyer is suggesting, and the Second Circuit
3 suggested, is that you would expose plans to enormous
4 liability because someone might think that someone might
5 have left the employ of the -- of the company and taken
6 a different job. That's not realistic. And -- and
7 that's why it just came out of -- out of thin air.
8 If I may --
9 CHIEF JUSTICE ROBERTS: Thank you,
10 Mr. Olson.
11 Mr. Bruce.
12 ORAL ARGUMENT OF STEPHEN R. BRUCE
13 ON BEHALF OF THE RESPONDENTS
14 MR. BRUCE: Mr. Chief Justice, and may it
15 please the Court:
16 Our position is that detrimental reliance is
17 not found in section 102 of ERISA, which establishes the
18 summary plan description requirement. It's not found in
19 section 404(a)(1)(D) of ERISA, which establishes the
20 fiduciary duty that's in accordance with the plan
21 documents and instruments, plural, insofar as consistent
22 with the provisions of this title.
23 It's also not consistent with any language
24 in section 502(a), either in 502(a)(1)(B) or 502(a)(3).
25 The reference to equitable relief is to appropriate

1 equitable relief to redress a violation of Title I or a
2 violation of the terms of the plan.
3 JUSTICE KENNEDY: Well, that seems to me
4 like just a roundabout, complex way of saying that you
5 must recover under the plan, because if reliance is not
6 required then there must be some basis on which you must
7 recover, and that recovery must be under the plan. So
8 it's -- it's --
9 MR. BRUCE: Well, the -- the --
10 JUSTICE KENNEDY: I mean, if you say -- if
11 you say injury is not required, then -- then I don't see
12 how the SPD can give you recovery, unless the SPD is the
13 plan, which brings us right back to the argument, which
14 is your argument, under the first -- under the first
15 section, under (a) --
16 MR. BRUCE: Under either (a) --
17 JUSTICE KENNEDY: -- (a)(1), (a)(1).
18 MR. BRUCE: Under -- our understanding is
19 that under either (a)(1)(B) or (a)(3), that the court is
20 effectively providing an injunction in a case like this,
21 where -- where an action violates the statute. And here
22 a plan provision which had a very detrimental effect on
23 people was not disclosed to them, and so the effect of
24 the statute is to make that unfavorable provision
25 ineffective. And so --

1 JUSTICE ALITO: If the -- if the SPD is part
2 of the plan, then where does the "likely harm" standard
3 come from?
4 MR. BRUCE: I think, as we've said in our
5 brief, we think that the likely harm, possible
6 prejudice, and the material conflict that -- that is
7 used in the Third Circuit in Burstein, we think that all
8 of those standards are very similar, that they are
9 really looking at whether it --
10 JUSTICE ALITO: No, but why is there any
11 requirement whatsoever, other than the fact that it's in
12 the plan? If the SPD is the plan and the SPD says you
13 get certain benefits that you wouldn't get under the
14 written document, then -- the previously executed
15 written document, then you get the benefits under the
16 SPD, period. It doesn't matter whether there's likely
17 harm or reliance or anything else, right?
18 MR. BRUCE: Well, I think, Justice Alito, we
19 see this more as a nondisclosure issue, that the
20 unfavorable provisions in the plan were not disclosed,
21 and that the effect of the statute is to make those
22 unfavorable plan provisions ineffective. But because
23 the statute refers to, for example, material
24 modifications and being sufficiently comprehensive and
25 reasonably apprising, that there are enough

1 qualifications in there where the court can look and
2 see, is this really -- was this conflict, was it really
3 about something that was significant to people that
4 might have an impact on their decision making and
5 whether the terms of their employment are satisfactory,
6 whether they might want to seek another job, they might
7 just go into the office and say: We need more benefits.
8 CHIEF JUSTICE ROBERTS: It seems to me that
9 it's a very tough argument to say -- to make a
10 nondisclosure claim on the theory that the summary is
11 part of the plan, because the whole point of a summary
12 is not to disclose everything. If it disclosed
13 everything, it wouldn't be a summary. And if you can
14 claim something because it didn't disclose it, it seems
15 to me that's in tension with the idea that it's not
16 supposed to be just a repetition of the plan.
17 MR. BRUCE: Our position is that the SPD is
18 one of the documents or instruments governing the plan.
19 And by statute it's required to have certain -- to meet
20 certain requirements, and therefore it becomes a
21 document governing the plan. It is -- in response to
22 Mr. Olson, it is referred to as a document in section
23 1024(a)(6) of the statute, and of course this Court has
24 repeatedly referred to it as a plan document and to
25 "plan documents" plural. So, what --

1 JUSTICE GINSBURG: But there's -- I think
2 the brief -- the Petitioners' brief pointed out, it
3 governs the plan only when it's more favorable to the
4 participants, because you wouldn't say, if the plan were
5 more favorable and the summary would show fewer
6 benefits, that the summary would then govern.
7 MR. BRUCE: I think the -- the
8 favorable/unfavorable is that the way -- the way I see
9 it is that an unfavorable plan term, when you look at
10 Curtiss-Wright, an unfavorable plan term must be validly
11 adopted and it must be disclosed in accordance with
12 ERISA in order to be effective.
13 And so, in the Frommert v. Conkright case,
14 that was specifically what the Second Circuit held, was
15 that the summary plan description did not disclose the
16 phantom offset, and therefore the phantom offset was
17 ineffective. Here the summary plan description did not
18 disclose the wear-away provisions. People's normal
19 expectation is that if they are under a pension plan and
20 they are continuing to work, that they are continuing to
21 earn pension benefits. So that the SPD was not
22 apprising them that there were unfavorable provisions in
23 the plan, which were validly adopted, but which were
24 secret as far as they were concerned.
25 JUSTICE KENNEDY: So there's a -- there's a

1 presumption that everything in the plan is favorable? I
2 still don't see how you get it both ways. If it -- if
3 it understates the benefits, that doesn't count?
4 MR. BRUCE: The -- the Congress in ERISA is
5 concerned with unfavorable effects on participants.
6 It's about protecting employee rights. So the focus is
7 on losses of benefits, and there is a specific provision
8 in the regulations and in the statute about disclosing
9 all the circumstances that can result in a loss of
10 benefits. So there was a plan provision here which
11 caused the loss of benefits that was never disclosed to
12 people. And it was -- there was no baseline where
13 people knew, well, the plan document may have a
14 wear-away provision, and the SPD doesn't mention it and
15 therefore there is no wear-away.
16 They didn't know what wear-away was. They
17 don't know what wear-away is today, because it has never
18 been disclosed to them that there's a way to -- to rig
19 up a pension plan where you can have a period of years,
20 unbeknownst to you, where you're not earning any an
21 additional benefits.
22 JUSTICE BREYER: Okay. Are you finished
23 with that?
24 MR. BRUCE: Yes. Sorry.
25 JUSTICE BREYER: If you're finished. As I

1 understand what you have been saying and written, you
2 don't mean that the SPD, the summary, is a contract? I
3 mean, one thing would be to say it's a part of the plan
4 and moreover it's a contract, so therefore we enforce it
5 according to terms. That's one view.
6 But if you took that view, you get into
7 problems such as were mentioned. The employer would
8 write 10,000 pages because he knows it's an enforceable
9 contract. Nobody would understand it. You'd have to
10 worry about the time when it was less favorable than the
11 written document. So call it a plan if you want, as
12 long as you don't mean it's an enforceable contract.
13 Now, there's a provision that deals with it,
14 saying just what you said in response to Justice Alito.
15 And what I don't understand is why wouldn't that
16 provision govern? I take it there's a provision,
17 1054(g)(1), that says a plan cannot reduce the rate of
18 accrual of future benefits unless there's written notice
19 in a manner calculated to be understood by the average
20 plan participant.
21 So I would have thought, I read that, I get
22 what you've said in your brief. The summary was
23 inadequate. It wouldn't have been understood, and,
24 therefore, according to this particular provision, those
25 provisions in the plan that reduce benefits are void.

1 So now we enforce the plan with the -- in the absence of
2 those particular void provisions, and you get what you
3 want. Now, I thought that makes a lot of sense to me,
4 except I don't see that anywhere in this case.
5 MR. BRUCE: Now --
6 JUSTICE BREYER: So there's some reason it
7 doesn't seem to appear in the opinions. It doesn't
8 appear in the briefs. It doesn't appear anywhere until
9 you just mentioned it in response to Justice Alito, or
10 seemed to.
11 MR. BRUCE: No, it is in the opinion.
12 JUSTICE BREYER: It is?
13 MR. BRUCE: The district court found a
14 violation. It's 1024(h) -- it's 204(h) of ERISA, that
15 that provision -- the district court found a violation
16 of that provision, which if the court had provided
17 relief would have resulted in the class receiving much
18 more relief than the court ultimately ordered; that it
19 would have resulted in the class receiving four or five
20 times as much relief, because they would have just been
21 put back under the old pension formula.
22 JUSTICE SCALIA: What is that provision?
23 JUSTICE BREYER: (h). He's right, it's (h).
24 JUSTICE SCALIA: Does it appear anywhere in
25 -- in the briefs? 1024(h), does it appear anywhere in

1 the briefs?

2 MR. BRUCE: It appears in our petition for

3 certiorari, because after the district court found a

4 violation of it, the district court declined to provide

5 relief because there had been an intermediate interim

6 amendment that might have --

7 JUSTICE BREYER: I understand that. So

8 suppose we can't reach that, which would seem to be the

9 logical thing to govern this, but we can't, okay? Then

10 we only have two choices. The first choice is (1)(b),

11 which seems to -- you want to use that by treating the

12 summary as a contract, or we go to (3), in which case

13 we're under equity.

14 Now, between those two, the first one gets

15 all the problems that we just were talking about. The

16 second one would seem to be you're free and clear as

17 long as you show some kind of reliance and harm, and

18 then we're back to what I thought we granted this for,

19 which is why not say if harm is likely, then the burden

20 shifts?

21 JUSTICE SCALIA: Why not?

22 MR. BRUCE: That's -- that's -- that's one

23 way that it would be -- that was the way it's approached

24 under the Securities Act, where there is an express

25 reliance requirement.

1 JUSTICE BREYER: What happens in a trust law
2 where, let's say, there are 10 or 50,000 beneficiaries
3 in a trust, and -- and the trustee has indeed made an
4 error. And now they can recover money only if, only if
5 there really has been harm. Now, how do the -- how does
6 trust law work that out? This can't be the first time
7 this ever arose in history. We have a big class, and --
8 MR. BRUCE: Well, I -- we didn't go based on
9 a trust law case involving a big class, but we based it
10 on Bogert and on section 173 in the Restatement of
11 Trusts, that when there is a breach of the duty to
12 disclose all of the material information that the
13 beneficiary needs to know in interacting with a third
14 party, which in this case would be Cigna with respect to
15 their employment, that then there is no requirement of
16 proving reliance; that the trustee can prove -- as the
17 Second Circuit set up, that the trustee can try and
18 prove that the beneficiaries have all the information
19 that they needed.
20 JUSTICE KENNEDY: So you say under standard
21 trust law once you show there's a breach, the burden
22 shifts to the trustee to show that there's no harm?
23 MR. BRUCE: For a breach of the duties to
24 the --
25 JUSTICE KENNEDY: I mean, I understand that

1 to be the Second Circuit rule, but I didn't understand
2 that to be the rule generally in the law of trusts, and
3 I quarrel with the Government's brief on that. I think
4 the Government's brief is quite wrong to suggest that
5 this is part of the law of trusts.
6 MR. BRUCE: Now, I --
7 JUSTICE KENNEDY: Now, it could be the law
8 of ERISA under the Second Circuit, but that's something
9 quite different.
10 MR. BRUCE: My understanding is -- I mean,
11 that's the law that's been -- that this Court has
12 adopted in securities cases where we have nondisclosures
13 to broad classes, is that there's a presumption of
14 reliance, which -- because it's unrealistic for
15 thousands of people to prove reliance in -- in --
16 JUSTICE KENNEDY: But that's not under
17 trust -- trust law, or correct me if I'm wrong.
18 MR. BRUCE: Well, that's -- that's what I'm
19 saying, that there's a commonality between the
20 securities cases, trust law as stated in the -- in the
21 comment to section 173 and in Bogert, and what the
22 Second Circuit is doing.
23 CHIEF JUSTICE ROBERTS: Could I just stop --
24 the securities cases, does that involve stock traded in
25 a market, in which case the inference of harm would be

1 much more obvious and follow more logically than in the
2 trust context?
3 MR. BRUCE: Well, one -- one of this Court's
4 very first ERISA cases was Teamsters v. Daniel, in which
5 the Securities and Exchange Commission had considered
6 pension plans to be a security. And -- and the case
7 actually involved break-in-service rules, and this Court
8 concluded that whatever protections the securities laws
9 offered, potentially offered, to participants were now
10 offered in more concrete form under ERISA.
11 But the -- the point that I want to get back
12 to on reliance is that my reading of this Court's
13 decision in Bridge and in Lyng v. Payne is that this
14 Court does not look for the closest analogy to a
15 statutory provision. The question is: What did
16 Congress do in enacting this statutory provision?
17 JUSTICE ALITO: Could I ask you this: If
18 this were an individual action and it -- and it were
19 under (a)(3), what would either the plaintiff or the
20 defendant have to show, depending on what the burden --
21 who has the burden, on the issue of likely harm?
22 What would "likely harm" mean in that
23 context? The person was likely to have left the
24 employment of the company, or what? What else?
25 MR. BRUCE: "Likely harm" can include

1 that the -- that if the person knew about the provision,
2 they might have asked for the provision to be changed.
3 They might have asked for a different compensation
4 package. They might have asked -- they might have taken
5 personal kind of self-help steps to protect themselves
6 so that they might have -- have, you know, decided to
7 have their wife work longer. They might have decided to
8 work longer themselves. They could have saved and saved
9 differently.
10 There's both the -- the steps that you can
11 take in relation to your employment and the steps that
12 you can take on a personal basis.
13 JUSTICE BREYER: Could they here have
14 gone -- could they also have said to the company: Look,
15 why are you doing this? If interest rates fall, we're
16 going to lose money. But interest rates might rise, and
17 if interest rates rise, you'll lose money. So we're
18 risk-averse, so what we would like to do is just make
19 sure we get the same pension that we would under Plan A,
20 and then if there's more on Plan B, add it in, and we'll
21 risk the fact that interest rates might have gone up.
22 MR. BRUCE: The district court --
23 JUSTICE BREYER: So they could -- they might
24 have talked the company into it.
25 MR. BRUCE: Well, the district court found

1 that there was a real prospect of employee backlash if
2 the employees knew about these benefit reductions. It's
3 well-established in behavioral economics that people are
4 very averse to losses. So if a -- if the statute and
5 the regulations are requiring the loss to be disclosed,
6 it isn't going out on a limb to say that there's going
7 to be a reaction to that.
8 And here, Cigna knew that there was a
9 reaction to that, and they had examples from the press
10 of with Deloitte & Touche had had a similar situation
11 where they had to roll back the cash balance changes
12 because employees were so upset.
13 I think, in response to Justice Alito's
14 question, the -- I don't think that the individual has
15 to -- that if the individual has to prove possible
16 prejudice, then I think that, as -- as our district
17 court ruled here, then I think the standard inevitably
18 becomes very close to actual prejudice. And so I think
19 that the possible prejudice is really to the employee
20 group. It's to the -- the statute is in terms of the
21 average plan participant. It's all based on objective
22 standards.
23 JUSTICE KENNEDY: Under your proposal, I
24 assume, if you prevail, under your position, the -- the
25 summaries will now become part of the plan. So that

1 even if there's no intent to mislead, there can be a
2 class action if the -- if the SPD is in anyhow at
3 variance with the plan --
4 MR. BRUCE: Well, as we --
5 JUSTICE KENNEDY: -- and to the -- to the
6 detriment of the employee.
7 MR. BRUCE: Well, as we said in the brief,
8 there are already cases that -- that recognize
9 exceptions to liability here, and one of them is for
10 prompt correction of any problem. So if you have the
11 unintentional error in that unintentionally the
12 wear-away provisions weren't disclosed, well, then the
13 issue is: Why wasn't that corrected at any point in
14 time? We're now 12 years out, and Cigna has never
15 disclosed those wear-aways to anyone.
16 JUSTICE ALITO: If an administrator -- if an
17 administrator issues a summary plan description that is
18 100 pages long and is basically the same thing as the
19 written instrument, and that's a violation of the
20 requirement in ERISA that it be a summary and that it be
21 intelligible to ordinary readers, what remedy is
22 available to a beneficiary?
23 MR. BRUCE: I think -- I think that that's
24 -- obviously, injunctive relief in terms of an order to
25 correct that would be available. I think in terms of --

1 of affecting the benefit offers, of saying, well, is
2 a -- if the SPD is identical to the plan document, is
3 there any -- there are no undisclosed plan provisions,
4 then. So it becomes -- it becomes more difficult in
5 terms of relief, but obviously there would be relief for
6 the understandability requirement.
7 JUSTICE ALITO: Well, doesn't that put
8 the -- think of the incentives for the administrator in
9 that situation or for the plan sponsor. If you issue a
10 succinct SPD, you risk misleading the recipients as to
11 the contents of the plan, and you may have financial
12 liability.
13 If, on the other hand, you issue -- you err
14 on the side of issuing an SPD that is comprehensive,
15 well, the worst that can happen, according to what you
16 just said, is you can be faced with an injunction to
17 provide a more concise and comprehensible statement.
18 MR. BRUCE: Well, intentional errors should
19 not be countenanced, and here Cigna was deliberately
20 misleading employees. If it's an unintentional error,
21 then it should be promptly corrected.
22 CHIEF JUSTICE ROBERTS: Thank you, counsel.
23 MR. BRUCE: Thank you.
24 CHIEF JUSTICE ROBERTS: Mr. Kneedler.
25 ORAL ARGUMENT OF EDWIN S. KNEEDLER

1 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
2 SUPPORTING RESPONDENTS
3 MR. KNEEDLER: Mr. Chief Justice, and may it
4 please the Court:
5 The pension benefits an employee accrues
6 while she works are a major component of her
7 compensation for working, just as her wages are. The
8 employee is entitled to receive those benefits and to
9 recover them if they are withheld without any
10 particularized showing of detrimental reliance, just as
11 she is entitled to recover the wages that were promised
12 to her.
13 JUSTICE KAGAN: Well, Mr. Kneedler, do you
14 view this as essentially a contract case, as that just
15 suggested, or instead a trust case?
16 MR. KNEEDLER: We view it as basically a
17 contract case. In Firestone, the Court referred to
18 contractually -- contractually guaranteed benefits,
19 those under the plan. And the reason we think that
20 here, in this case the district court found that the SPD
21 basically promised, represented to employees, that after
22 the conversion they would receive pension benefits in
23 the form of A plus B, the old benefits plus the new
24 benefits, accruing right away.
25 ERISA -- the scheme of ERISA is that the SPD

1 is often -- typically the only document that the
2 employee receives to inform him or her about the
3 contents of the plan.
4 JUSTICE ALITO: If this is a contract case,
5 then where does the "likely harm" standard come from?
6 If I'm owed something under a contract, I'm entitled to
7 get that under the contract. I don't need to show that
8 I was likely harmed by, that I relied in any -- in any
9 way on anything.
10 MR. KNEEDLER: Right. We do not think
11 detrimental reliance -- and I think it works out --
12 JUSTICE ALITO: Do you think likely harm is
13 required?
14 MR. KNEEDLER: In this sense: If the -- if
15 the SPD contains these sorts of representations such
16 that the employee could reasonably be expected to rely
17 upon them in defining her benefits, then that controls.
18 The likely harm is not being told, or being told
19 something different from what the underlying plan says.
20 JUSTICE SCALIA: But the likely harm --
21 MR. KNEEDLER: That could be rebutted --
22 JUSTICE SCALIA: That's not the likely harm.
23 That's the breach. That's the offense.
24 MR. KNEEDLER: But the --
25 JUSTICE SCALIA: You're saying once you make

1 the offense, you have to cough up what you stated in the
2 -- in the summary.
3 MR. KNEEDLER: Unless the participant
4 actually knew or couldn't reasonably depend upon it.
5 Actually knew -- for example, this was the case in the
6 Govoni case in the First Circuit, that -- whose
7 formulation is the one that other courts typically
8 follow. That was the situation where the employee found
9 out before she retired what the true facts were, and,
10 therefore, there could have been no claim of harm or --
11 or that the --
12 JUSTICE SCALIA: Well, then it's not
13 contract.
14 JUSTICE KENNEDY: The minute you get away
15 from contract --
16 JUSTICE SCALIA: Is it contract or not
17 contract?
18 MR. KNEEDLER: No, it is contract,
19 because -- because in that -- it -- it -- the question
20 is: What is the contract? To the employee, typically
21 the SPD is the only thing that is the contract that --
22 JUSTICE BREYER: But the SPD is written by
23 the fiduciary.
24 MR. KNEEDLER: Yes.
25 JUSTICE BREYER: And the other is written by

1 the -- by the person who is giving the money, the
2 employer. So now you're saying that it's a contract,
3 even though it wasn't written by the employer and even
4 though it could differ in dozens of ways from the actual
5 -- from the actual plan document. Sometimes they'd be
6 favorable to the employee, sometimes they'd be
7 unfavorable, sometimes they'd be different but neutral.
8 So what's the judge supposed to do? Forget about the
9 basic document and just enforce this thing written by
10 the fiduciary?
11 MR. KNEEDLER: Well, but the underlying
12 formal document is -- is what controls, unless the SP --
13 unless there's a conflict. This case --
14 JUSTICE BREYER: Well, I said that there can
15 be conflicts, sometimes favorable to the employee,
16 sometimes unfavorable, sometimes neutral. So what we
17 have is a document that's, by the way, supposed to be
18 short, but I guess if we took your view it wouldn't be
19 short anymore. And -- and it -- it could differ in any
20 one of three ways; and I could think of seven other
21 ways.
22 So -- and we'll find seven others. So, what
23 -- how is a judge supposed to react? Is he supposed to
24 say that this two-page document is the contract, is the
25 contract, and there are all kinds of conflicts -- what's

1 supposed to happen?

2 MR. KNEEDLER: It forms -- it forms part of

3 the contract. And cases of conflicts between the SPD

4 and the -- and the formal plan document are not common,

5 and they shouldn't be, because the SPD -- the

6 administrator or the employer has an obligation to

7 make sure --

8 JUSTICE BREYER: That isn't my question. My

9 question is: One, why should a document written by a

10 different person, the fiduciary, govern over the actual

11 plan? Second, what happens when you have a favorable

12 conflict? What happens when you have an unfavorable

13 conflict? What happens when you have a neutral

14 conflict?

15 MR. KNEEDLER: As to --

16 JUSTICE BREYER: How should it be worked

17 out?

18 MR. KNEEDLER: As to the first point, it is

19 -- it is common, and it was critically true here, that

20 the -- that the employer, the plan sponsor, is involved

21 in -- in drafting the SPD. This was an SPD that was

22 issued in conjunction with the plan amendment, and the

23 SPD and the plan amendment --

24 JUSTICE BREYER: I think the fact that this

25 individual in this case happened to be the same group or

1 person is beside the point of my question.

2 MR. KNEEDLER: Okay. And -- and so the --

3 the second point is, I -- I think it would be useful for

4 the Court to look to the experience of certificates of

5 insurance under group insurance plans. That is the most

6 directly analogous circumstance in our view. It is the

7 prevailing position in the courts, and it has been for

8 some time, that where an employee -- or employee under a

9 group health plan or pension plan receives a certificate

10 of insurance that sets forth certain elements, essential

11 elements of the plan, and the -- an underlying insurance

12 policy is in conflict with that, that the certificate of

13 insurance governs, for the same reason that the SPD

14 governs --

15 JUSTICE SCALIA: Is this governed by ERISA

16 or are these things governed by ERISA?

17 MR. KNEEDLER: Some of them may be and some

18 of them may not be. I mean, it --

19 JUSTICE GINSBURG: So where does the rule

20 come from, then?

21 MR. KNEEDLER: The -- the rule is a common

22 insurance rule that in -- in the group insurance

23 situation, where you have an underlying policy that the

24 individual insured is not going to see.

25 JUSTICE SCALIA: But we have a statute here

1 which says that it is the plan that governs. I mean,
2 that -- that's -- don't you think that's a crucial
3 difference?
4 MR. KNEEDLER: Well, but there's -- it's
5 also a statute that, as this Court said in
6 Curtiss-Wright, that the SPD is designed to -- to
7 furnish the employee the essential information under the
8 plan.
9 JUSTICE BREYER: Is that true of the
10 certificate of insurance? Is a certificate of insurance
11 a simple document that any consumer is able to
12 understand or -- or is supposed to be?
13 MR. KNEEDLER: That's what -- that is what
14 it's supposed to be. And importantly in that --
15 JUSTICE BREYER: Is there an example I could
16 look at? Find one, on line --
17 MR. KNEEDLER: I'm not sure. There's not in
18 the record in this case, but -- but we cite some
19 insurance treatises. And a further point I want to
20 make, that --
21 JUSTICE SCALIA: Do they use a likely harm
22 standard? Is that where the likely harm standard comes
23 from?
24 MR. KNEEDLER: No, the likely harm standard
25 was a formulation of the -- of the Second Circuit. I --

1 JUSTICE SCALIA: That's nice. Where did
2 they get it from?
3 (Laughter.)
4 JUSTICE SCALIA: They just made it up?
5 MR. KNEEDLER: Well, I -- I think it was --
6 it was an effort to judge whether the -- whether the
7 particular statements in the SPD were of the sort
8 that -- I think it really gets at materiality, whether
9 the statement's material.
10 JUSTICE KAGAN: Mr. Kneedler, I -- I think
11 it's a hard question here as to whether to think of this
12 as more like a contract dispute or more like a -- a
13 trust issue.
14 If we were to look at it as a trust issue,
15 what would be the result of that? What kind of test
16 would we use?
17 MR. KNEEDLER: I think it would be -- I
18 think it would be the same thing where you -- where you
19 have a -- either in this case an affirmative
20 representation of what the -- of what benefits will be
21 due, or you could have a situation where there was a --
22 a failure to disclose.
23 JUSTICE KENNEDY: Well, if it's a contract
24 case as you're submitting, then the burden-shifting
25 rules, it seems to me, that apply in trusts don't apply.

1 MR. KNEEDLER: Well, the burden-shifting
2 rule would apply to the extent of enabling the
3 administrator of the plan or the employer to demonstrate
4 that the employee actually knew or that there were other
5 documents that would have informed the employee so that
6 he would not have been misled by the statements in the
7 -- in the SPD.
8 JUSTICE KENNEDY: Well, and in all of
9 that --
10 MR. KNEEDLER: You have brochures --
11 JUSTICE KENNEDY: -- I think, under trust
12 law, there has to be a showing of breach and harm before
13 there is -- the burden shifts on causation. And your
14 brief left out the -- you indicate the burden shifts
15 just so long as you show that there is a misstatement.
16 MR. KNEEDLER: Well, there is harm, because
17 the employee was not told of what the -- of what the
18 terms of his -- of his deal were.
19 JUSTICE GINSBURG: Mr. Kneedler --
20 MR. KNEEDLER: He goes to work every day
21 expecting to earn his wages and expecting to earn the --
22 the benefits set forth in the SPD. And in --
23 JUSTICE GINSBURG: Do you put -- do you put
24 any weight on Congress insisting that the summary, that
25 each -- each participant get a copy of that summary, but

1 there's no such requirement with respect to the plan?

2 MR. KNEEDLER: That's -- that is critical to

3 our position. And, again, the insurance/certificate of

4 insurance analogy, it's all the same reasons that we say

5 under ERISA, that that's the only document that is

6 given, it's given for the obvious purpose of -- of

7 telling the employee the essential aspects of the deal

8 that he's going to get, and ERISA identifies, itemizes

9 what they are and requires that the plan administrator

10 not -- not minimize what they are.

11 JUSTICE SCALIA: So it can't -- it can't

12 amend the plan, contrary to what we've said.

13 MR. KNEEDLER: It's not -- it's not an

14 amendment to the plan.

15 JUSTICE SCALIA: It's not an amendment?

16 MR. KNEEDLER: The SPD -- the SPD is part of

17 the plan, and as far as the --

18 JUSTICE SCALIA: Well, wait -- wait. It's

19 part of the plan, but the other part of the plan

20 contradicts this part of it. And -- and you say it is

21 this part, the SPD, that governs, which means it amends

22 the prior part, right?

23 MR. KNEEDLER: It -- it controls. I -- it

24 doesn't formally -- it doesn't formally --

25 JUSTICE SCALIA: Oh, all right, okay. We'll

1 say it controls. Does that make you feel better about
2 it?
3 MR. KNEEDLER: Well, that -- that's the
4 explanation --
5 JUSTICE BREYER: Does it control when it's
6 less favorable?
7 MR. KNEEDLER: It does not. The --
8 JUSTICE BREYER: Oh. It only controls when
9 it's more favorable, but not when it's less favorable.
10 MR. KNEEDLER: Because --
11 JUSTICE BREYER: What theory of contract law
12 gets you to that conclusion?
13 MR. KNEEDLER: Because you have two
14 different documents that may be part of the contract.
15 It's an effort to find out what the deal is. Under the
16 insurance cases that I mentioned, what the courts
17 says -- what the courts say is the certificate becomes
18 part of the contract, but those cases also say when
19 the -- when the plan is more favorable, that the plan
20 governs because that -- under ERISA, that is the
21 operative plan document that the administrator is
22 supposed to operate under day to day.
23 CHIEF JUSTICE ROBERTS: Thank you,
24 Mr. Kneedler.
25 Mr. Olson, you have 4 minutes remaining.

1 REBUTTAL ARGUMENT OF THEODORE B. OLSON
2 ON BEHALF OF THE PETITIONERS
3 MR. OLSON: Thank you, Mr. Chief Justice.
4 I'd like refer first of all to what
5 Respondents said in -- in response to a question from
6 you, Justice Breyer, about section 204(g). And you --
7 JUSTICE BREYER: (j).
8 MR. OLSON: Well, (g), I'm talking about.
9 That's what they -- I refer you to page 212 of the cert
10 petition appendix under Roman numeral VI, where the
11 district court specifically said: Plaintiffs also seek
12 to assert their claim under ERISA's anti-cutback
13 provision, 204(g). That claim has been rejected in the
14 liability decision. That claim was raised; it was
15 rejected in the liability decision. It's not here
16 anymore.
17 Section -- the real section that the Court
18 should refer to in 204, is 204(h) -- (h)(6)(A) of ERISA,
19 and I can't point to the portion of the appendix, but
20 that was an addition by Congress in 2001 to deal with
21 egregiously inaccurate notices of change. That -- and
22 Congress amended ERISA in 2001, added that provision,
23 and said, if there's an egregious violation of that
24 provision, then you get all the benefits that you should
25 have gotten.

1 That's what Congress can do if it wishes to
2 do. That's what's being sought in this case. Congress
3 can take care of this if it wishes, but Congress enacted
4 a carefully reticulated scheme; you're either suing for
5 benefits under the plan or you're suing for violations
6 of ERISA.
7 JUSTICE SCALIA: Why didn't that (h) apply
8 here? Was it not egregious enough? Is that -- is that
9 why it didn't apply? Or they just forgot about it or
10 what?
11 MR. OLSON: I -- I don't think that the --
12 the notice that was involved was referring to the SPD.
13 The SPD, to the extent that it violates ERISA, there is
14 a remedy that still exists; Congress hasn't changed.
15 It's in (a)(3). It must be an equitable remedy. You
16 can seek an injunction.
17 And to the extent the Court is concerned
18 that that's an empty remedy, that that's not a
19 sufficient remedy, that's what Congress decided; and we
20 referred in footnote 3 of our reply brief of a number of
21 cases that -- that circuit courts have handled
22 demonstrating detrimental reliance and providing for
23 remedies.
24 JUSTICE BREYER: Yes, but I still have the
25 same question Justice Scalia had, which is -- which is

1 why didn't this (h) thing apply here, because they
2 didn't have -- their claim, the notice wasn't good, and
3 if the notice wasn't good, then -- the plan didn't
4 change, and if the plan didn't change, they should have
5 gotten the money. Why didn't it -- why?
6 MR. OLSON: That provision doesn't apply to
7 the SPD, and they did not bring that case. I don't
8 know --
9 JUSTICE SCALIA: Why doesn't it apply to the
10 SPD? Isn't that a notice?
11 MR. OLSON: I think it's a different type of
12 notice that -- under that provision.
13 JUSTICE SCALIA: I thought it says --
14 JUSTICE ALITO: Well, there was a -- there
15 was notice, wasn't there?
16 MR. OLSON: There was a notice.
17 JUSTICE ALITO: And is the claim based on
18 that, or is it based on the SPD?
19 MR. OLSON: The claim is based upon the SPD,
20 and the district court decided that the SPD had amended
21 the plan. And that's inconsistent with what the statute
22 provides.
23 JUSTICE KAGAN: Mr. Olson, on your view of
24 showing detrimental reliance, I take it you would
25 require each employee to come forward and say yes, I

1 read this SPD; is that correct?

2 MR. OLSON: Yes. And trust law --

3 JUSTICE KAGAN: And doesn't that really

4 misunderstand the realities of the workplace? Very few

5 people read their SPDs, but you only need one person to

6 read the SPD to come in and say, by the way, folks,

7 21,000 of us are not getting our retirement benefits for

8 the next few years. And within a day, every employee in

9 the workplace is going to know about that. So doesn't

10 this give an incredible windfall to your client, Cigna,

11 or to other companies that commit this kind of

12 intentional misconduct if you hold them to this

13 detrimental reliance standard?

14 MR. OLSON: The -- I refer to what

15 Justice Kennedy was referring to. To the extent that

16 we're talking about trust law, we're talking about the

17 requirement of a loss. I would say that a person would

18 not necessarily have to have read the SPD but have been

19 aware of it and taken some steps in connection with it.

20 And that's the evidence that would have to be

21 established, and there's no -- and every court has said

22 that under (a)(3) equity requires detrimental reliance.

23 CHIEF JUSTICE ROBERTS: Thank you,

24 Mr. Olson.

25 The case is submitted.

1 (Whereupon, at 11:08 a.m., the case in the
2 above-entitled matter was submitted.)
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A

able 47:11
above-entitled 1:13 56:2
absence 17:6 32:1
Absolutely 17:7
accept 13:15
accrual 31:18
accrues 41:5
accruing 41:24
accurate 5:3,5 5:20 7:1
Act 21:8 33:24
action 16:13 17:13 18:20,21 19:14,16 20:23 21:3,11,16,17 26:21 36:18 39:2
actual 38:18 44:4 44:5 45:10
add 37:20
added 52:22
addition 52:20
additional 30:21
administrator 16:8 18:25 39:16,17 40:8 45:6 49:3 50:9 51:21
adopt 5:18 12:15
adopted 29:11 29:23 35:12
adverse 18:21
affirmative 48:19
affirmed 4:16
age 20:9
agree 16:4 22:23
agreement 7:14 7:15
air 20:13 25:7
AL 1:3,6
Alito 27:1,10,18 31:14 32:9 36:17 39:16 40:7 42:4,12 54:14,17
Alito's 38:13
allows 10:16
alter 3:25
Amara 1:6 3:5
amend 50:12
amended 11:1,20 52:22 54:20
amendment 10:12,23 11:5,6 14:12,15 33:6 45:22,23 50:14 50:15
amends 50:21
amicus 1:23 2:11 41:1
analogous 46:6
analogy 36:14 50:4
annual 7:13,22 7:24
annuity 23:25
answer 23:2,4,4
antecedent 3:22
anti-cutback 52:12
anymore 44:19 52:16
appeals 4:16 5:4 17:11
appear 32:7,8,8 32:24,25
APPEARANC... 1:16
appears 33:2
appendix 12:3 52:10,19
apply 48:25,25 49:2 53:7,9 54:1,6,9
apprising 27:25 29:22
approached 33:23
appropriate 10:12 21:16,18 25:25
argument 1:14 2:2,5,8,12 3:3,7 17:9 25:12 26:13,14 28:9 40:25 52:1
arose 34:7
asked 37:2,3,4
asking 22:12
aspects 50:7
assert 52:12
associated 6:9
assume 15:8 38:24
assurance 20:9
authority 14:23
available 13:21 16:11 39:22,25
average 31:19 38:21
averse 38:4
award 24:12
aware 55:19
a.m 1:15 3:2 56:1

B

b 1:17 2:3,13 3:7 4:6,6 7:4 11:13 19:13,13,16 26:19 33:10 37:20 41:23 52:1
back 14:21 24:17 26:13 32:21 33:18 36:11 38:11
backlash 5:11 38:1
balance 24:24 38:11
balanced 3:11
bar 24:12
barely 8:7
bargaining 7:14
based 34:8,9 38:21 54:17,18 54:19
baseline 30:12
basic 44:9
basically 39:18 41:16,21
basis 26:6 37:12
beginning 16:19 17:4
behalf 1:7,17,19 1:23 2:4,7,10 2:14 3:8 25:13 41:1 52:2
behavioral 38:3
believe 18:13,13
beneficiaries 4:23 34:2,18
beneficiary 34:13 39:22
benefit 4:13,13 38:2 40:1
benefits 3:13,20 4:5 5:14 14:4 15:2 19:15 23:24 27:13,15 28:7 29:6,21 30:3,7,10,11 30:21 31:18,25 41:5,8,18,22 41:23,24 42:17 48:20 49:22 52:24 53:5 55:7
better 51:1
big 34:7,9
blue 7:5,11 18:4
Bogert 34:10 35:21
bottom 12:5,6
bound 12:18
breach 34:11,21 34:23 42:23 49:12
break-in-service 36:7
Breyer 14:25 15:5,8 16:4,24 17:2,8,17,21 17:23 18:1,9 23:9,20,21 24:3 24:6 25:2 30:22 30:25 32:6,12 32:23 33:7 34:1 37:13,23 43:22 43:25 44:14 45:8,16,24 47:9 47:15 51:5,8,11 52:6,7 53:24
Bridge 36:13
brief 7:5,11 27:5 29:2,2 31:22 35:3,4 39:7 49:14 53:20
briefs 18:19 32:8 32:25 33:1
bring 20:23 54:7
brings 26:13
broad 35:13
brochures 49:10
brought 16:13 18:2 21:3,11
Bruce 1:19 2:6 25:11,12,14 26:9,16,18 27:4 27:18 28:17 29:7 30:4,24 32:5,11,13 33:2 33:22 34:8,23 35:6,10,18 36:3 36:25 37:22,25 39:4,7,23 40:18 40:23
burden 18:25 33:19 34:21 36:20,21 49:13 49:14
burden-shifting

48:24 49:1
Burstein 27:7

C

C 1:6 2:1 3:1
calculated 31:19
calculation 20:6
call 19:10 31:11
capture 17:18
care 20:10 53:3
carefully 3:11,23 4:1,1,10 24:23 53:4
case 3:4,16,22 4:11 6:12 10:4 10:6,24,24 13:16 15:6,19 15:20 16:15 18:19 20:21 21:7 23:17 26:20 29:13 32:4 33:12 34:9 34:14 35:25 36:6 41:14,15 41:17,20 42:4 43:5,6 44:13 45:25 47:18 48:19,24 53:2 54:7 55:25 56:1
cases 35:12,20 35:24 36:4 39:8 45:3 51:16,18 53:21
cash 4:13,13 38:11
Catch 13:6
category 7:19
causation 49:13
cause 15:16,18
caused 18:15 30:11
cert 11:9 52:9
certain 10:11 13:15 23:11 27:13 28:19,20 46:10
certificate 46:9 46:12 47:10,10 51:17
certificates 46:4
certiorari 33:3
challenging 6:3
change 4:23,25 4:25 5:18,24 16:19 18:5 19:3 21:9,12,18 52:21 54:4,4
changed 4:12 37:2 53:14
changes 4:20,21 38:11
characteristics 23:11,13
Chief 3:3,9 20:2 20:3,4,15,16 25:9,14 28:8 35:23 40:22,24 41:3 51:23 52:3 55:23
choice 4:24 5:8 5:17,21 24:20 33:10
choices 33:10
Cigna 1:3 3:4 4:12,25 5:10,17 5:23 34:14 38:8 39:14 40:19 55:10
circuit 16:17 17:11 21:24 22:2,3 25:2 27:7 29:14 34:17 35:1,8,22 43:6 47:25 53:21
circumstance 23:14 46:6
circumstances 30:9
cite 47:18
cited 18:19
claim 20:22 28:10,14 43:10 52:12,13,14 54:2,17,19
class 19:2 20:22 21:3,5,6,9,11 21:16,17,25 22:1,13,15 23:10,14 32:17 32:19 34:7,9 39:2
classes 35:13
clear 6:19 8:10 10:3,4 33:16
client 15:19 55:10
close 38:18
closest 36:14
come 15:9 27:3 42:5 46:20 54:25 55:6
comes 18:4 47:22
comfort 20:8
coming 18:24
comment 35:21
Commission 36:5
commit 55:11
common 45:4,19 46:21
commonality 35:19
companies 12:24 55:11
company 16:22 19:23,23 24:7 25:5 36:24 37:14,24
compensation 37:3 41:7
complex 8:16 12:20 26:4
complies 9:12
component 41:6
comprehensible 7:2 40:17
comprehensive 27:24 40:14
conceding 17:2
concerned 5:22 29:24 30:5 53:17
concise 40:17
concluded 36:8
conclusion 51:12
conclusions 11:11 13:16
concrete 36:10
conflict 27:6 28:2 44:13 45:12,13 45:14 46:12
conflicts 44:15 44:25 45:3
Congress 3:11 4:1,10 8:18 12:12,15 13:22 24:21,22 30:4 36:16 49:24 52:20,22 53:1,2 53:3,14,19
Congress's 24:20
conjunction 45:22
Conkright 29:13
connection 55:19
consequence 19:21
consider 12:12
considered 36:5
consistent 12:9 25:21,23
constitute 7:8 9:17,24
construction 7:17
consumer 47:11
contain 12:20 13:14
containing 11:4
contains 42:15
contend 7:23
contents 40:11 42:3
context 18:12 36:2,23
continuing 29:20 29:20
contract 7:15 15:3 31:2,4,9 31:12 33:12 41:14,17 42:4,6 42:7 43:13,15 43:16,17,18,20 43:21 44:2,24 44:25 45:3 48:12,23 51:11 51:14,18
contractually 41:18,18
contradicts 11:24 50:20
contrary 50:12
contrast 8:6
control 19:4 51:5
controls 42:17 44:12 50:23 51:1,8
conversion 41:22
copy 49:25
Corporation 1:3 3:5
correct 5:16 6:20 12:1,11 35:17 39:25 55:1
corrected 39:13 40:21
correction 39:10
correspondingly 11:13
cough 43:1
counsel 40:22
count 30:3

countenanced 40:19
course 9:14 18:10 28:23
court 1:1,14 3:10 3:23,24 4:15,16 5:3,4,8,22,25 7:3 10:10,13,14 10:19,20,21 11:3,6,12,15 11:17,17 13:16 14:8,21,21 15:13 16:14 18:10,18,23 21:14 22:25 23:5 24:14,21 25:15 26:19 28:1,23 32:13 32:15,16,18 33:3,4 35:11 36:7,14 37:22 37:25 38:17 41:4,17,20 46:4 47:5 52:11,17 53:17 54:20 55:21
courts 17:11 43:7 46:7 51:16,17 53:21
court's 11:10,11 36:3,12
crafted 3:11 4:1
create 6:22 12:25 24:25
creating 7:24 14:23
creators 12:24
critical 50:2
critically 45:19
crucial 47:2
curiae 1:23 2:11 41:1
Curtiss-Wright 6:12 10:4,6,24 11:19 14:7,10 14:10,18 29:10 47:6

D

D 3:1
damages 24:12 24:18
Daniel 36:4
day 49:20 51:22 51:22 55:8
deal 49:18 50:7 51:15 52:20
deals 31:13
decide 15:6,11 15:23
decided 13:22 24:7 37:6,7 53:19 54:20
decision 10:13 11:11 14:7 18:9 24:21 28:4 36:13 52:14,15
declined 33:4
defective 3:18
defendant 16:7,7 16:8 23:17 36:20
defies 23:19
defined 4:13
defining 42:17
deliberately 40:19
Deloitte 38:10
demonstrate 19:1 20:19 24:8 49:3
demonstrating 53:22
demonstration 17:20
Department 1:22
depend 43:4
depending 19:22 36:20
depends 24:3
Deputy 1:21
describe 22:24
describes 7:5,7
description 7:13 7:18 8:4,5 10:7 10:8,18 25:18 29:15,17 39:17
designed 47:6
detailed 9:4,5 13:11
determine 14:22
detriment 39:6
detrimental 17:12,15 18:21 20:7 21:5,7,18 25:16 26:22 41:10 42:11 53:22 54:24 55:13,22
developed 4:1,10
differ 44:4,19
difference 22:6 47:3
different 10:8 15:6 16:7 23:22 24:1 25:6 35:9 37:3 42:19 44:7 45:10 51:14 54:11
differently 37:9
difficult 40:4
directly 46:6
disagree 14:17
disclaim 12:13
disclose 28:12 28:14 29:15,18 34:12 48:22
disclosed 26:23 27:20 28:12 29:11 30:11,18 38:5 39:12,15
disclosing 30:8
discouraged 12:25
discrepancies 12:18
discrepancy 12:4 12:17 13:7
discretion 19:4
discussing 15:1
disparity 23:7
dispute 17:14 48:12
district 4:15 5:3 5:8,22,24 10:10 11:3,6,10,11 11:12 15:13 18:23 21:14 23:5 32:13,15 33:3,4 37:22,25 38:16 41:20 52:11 54:20
document 6:23 6:24 7:6,8,19 8:19,22 19:8 27:14,15 28:21 28:22,24 30:13 31:11 40:2 42:1 44:5,9,12,17 44:24 45:4,9 47:11 50:5 51:21
documents 6:9 6:10,15,17,22 7:20 8:16 9:17 12:9 25:21 28:18,25 49:5 51:14
doing 13:1 35:22 37:15
dollars 20:22
dozens 44:4
drafting 45:21
due 48:21
duties 34:23
duty 25:20 34:11
D.C 1:10,17,19 1:22

E

E 2:1 3:1,1
earlier 10:5
earn 29:21 49:21 49:21
earning 30:20
economics 38:3
EDWIN 1:21 2:9 40:25
effect 14:3,14 19:10,11 20:1 26:22,23 27:21
effective 29:12
effectively 26:20
effects 30:5
effort 48:6 51:15
egregious 52:23 53:8
egregiously 52:21
either 12:25 16:22 25:24 26:16,19 36:19 48:19 53:4
element 18:20
elements 46:10 46:11
employ 5:23 24:7 25:5
employee 8:12 30:6 38:1,19 39:6 41:5,8 42:2,16 43:8,20 44:6,15 46:8,8 47:7 49:4,5,17 50:7 54:25 55:8
employees 5:8 5:12 14:22 16:20 38:2,12 40:20 41:21
employer 5:10 31:7 44:2,3 45:6,20 49:3
employment 18:6 23:23 28:5 34:15 36:24

37:11
empty 53:18
enables 3:12
enabling 21:8 49:2
enacted 53:3
enacting 36:16
enforce 31:4 32:1 44:9
enforceable 31:8 31:12
enforcement 3:12
engage 16:23
English 7:2,21 8:19
enormous 25:3
entitled 15:2 41:8,11 42:6
equal 23:12
equate 8:6
equitable 3:14 3:19 4:9 13:21 15:25 24:20 25:25 26:1 53:15
equity 15:12,13 16:11,13 17:13 17:16 18:12,18 20:18,18 21:11 33:13 55:22
ERISA 3:11,14 3:18,23 4:2,8 4:12,14,21,22 5:2,19 6:5 8:22 9:12 12:8,8 13:12,18,19,21 25:17,19 29:12 30:4 32:14 35:8 36:4,10 39:20 41:25,25 46:15 46:16 50:5,8 51:20 52:18,22 53:6,13
ERISA's 52:12
err 40:13
error 34:4 39:11 40:20
errors 40:18
ESQ 1:17,19,21 2:3,6,9,13
essential 18:20 46:10 47:7 50:7
essentially 41:14
established 7:16 7:20 55:21
establishes 25:17,19
estoppel 18:20 18:21
ET 1:3,6
evaluate 4:18
everybody 23:8
evidence 55:20
exactly 9:15 19:19
example 12:5 27:23 43:5 47:15
examples 38:9
exceptions 39:9
Exchange 36:5
Excuse 20:3
executed 27:14
exists 53:14
expectation 29:19
expected 42:16
expecting 49:21 49:21
experience 46:4
explain 15:24
explanation 51:4
expose 25:3
express 33:24
extent 49:2 53:13,17 55:15

F

faced 13:9 40:16
fact 8:2 13:15 14:22 16:18 17:15 27:11 37:21 45:24
facts 24:4 43:9
failed 13:17
failure 48:22
fall 37:15
far 14:25 16:5 29:24 50:17
fashion 10:16
favorable 5:13 29:3,5 30:1 31:10 44:6,15 45:11 51:6,9,9 51:19
favorable/unfa... 29:8
feared 5:10
feel 51:1
fewer 29:5
fiduciaries 8:9
fiduciary 25:20 43:23 44:10 45:10
financial 40:11
find 10:20 23:12 44:22 47:16 51:15
finding 6:4
finished 30:22,25
Firestone 41:17
first 3:4 16:2 18:3 24:19 26:14,14 33:10 33:14 34:6 36:4 43:6 45:18 52:4
five 32:19
fluctuated 19:25
focus 30:6
folks 55:6
follow 36:1 43:8
following 7:9 8:20 18:10
footnote 53:20
force 12:8
Forget 44:8
forgot 53:9
form 36:10 41:23
formal 14:15 44:12 45:4
formally 50:24 50:24
forms 45:2,2
formula 32:21
formulation 20:12 43:7 47:25
forth 46:10 49:22
forward 54:25
found 4:15 5:4,9 5:12 10:21 25:17,18 32:13 32:15 33:3 37:25 41:20 43:8
four 32:19
free 33:16
friends 21:22
Frommert 29:13
furnish 47:7
furnished 8:21
further 47:19
future 31:18

G

g 3:1 52:8
General 1:21
generally 35:2
getting 55:7
Ginsburg 5:7,17 11:2,16 13:3 16:22 19:6,17 20:25 21:2,13 29:1 46:19 49:19,23
give 5:19 20:8 26:12 55:10
given 14:3 18:11 50:6,6
gives 20:17
giving 44:1
go 13:23 15:14 24:7,16,17,25 28:7 33:12 34:8
goes 49:20
going 13:9 14:19 15:14,15,23,25 18:6 19:5 20:13 24:22 37:16 38:6,6 46:24 50:8 55:9
good 54:2,3
gotten 52:25 54:5
govern 6:18 29:6 31:16 33:9 45:10
governed 12:15 46:15,16
governing 6:11 28:18,21
Government 10:17 12:23 17:14 22:4,6 23:5
Government's 35:3,4
governs 3:21 12:5 29:3 46:13 46:14 47:1 50:21 51:20
Govoni 43:6
granted 33:18
group 38:20 45:25 46:5,9,22
guaranteed 41:18
guess 13:13 44:18
guys 15:20

H

h 32:23,23 52:18 53:7 54:1

hand 40:13
handled 53:21
happen 40:15 45:1
happened 4:11 45:25
happening 4:19
happens 14:1 34:1 45:11,12 45:13
hard 21:6 23:10 48:11
harm 15:17,18 16:23,25 17:5 17:18,19,23 18:1,4,11,15 18:24,24 19:7,9 19:11 21:23,24 22:6,8,21 27:2 27:5,17 33:17 33:19 34:5,22 35:25 36:21,22 36:25 42:5,12 42:18,20,22 43:10 47:21,22 47:24 49:12,16
harmed 3:18 15:21 16:18 20:7,14,20 22:14,15 23:6 23:15,18 24:6 42:8
harmful 15:10
health 46:9
hear 3:3 15:24 17:9
held 10:10 17:12 29:14
history 34:7
hold 55:12
hurt 15:2 18:2 19:3

I

idea 17:18 28:15
identical 40:2
identifies 50:8
impact 28:4
import 22:24 23:1
important 8:11 16:3,9
importantly 47:14
inaccurate 5:5 52:21
inadequate 31:23
incentive 20:23
incentives 40:8
include 36:25
inconsistency 12:14
inconsistent 10:23 13:25 54:21
incredible 55:10
indicate 49:14
individual 5:22 20:5 21:7 22:15 23:18 36:18 38:14,15 45:25 46:24
INDIVIDUAL... 1:7
individuals 23:13
ineffective 26:25 27:22 29:17
inevitably 38:17
inference 35:25
inform 42:2
information 4:18 8:4 13:15 34:12 34:18 47:7
informed 49:5
injunction 26:20 40:16 53:16
injunctive 39:24
injury 26:11
innumerable 20:1
insisting 49:24
insofar 25:21
instrument 6:10 8:6,7,9,14 9:23 14:1,2 39:19
instruments 6:11 6:16,17,21 7:7 7:8,15,24 8:15 25:21 28:18
insurance 46:5,5 46:10,11,13,22 46:22 47:10,10 47:19 50:4 51:16
insurance/certi... 50:3
insured 46:24
intelligible 8:19 13:8 39:21
intent 39:1
intentional 40:18 55:12
interacting 34:13
interest 19:25 37:15,16,17,21
interested 3:24
interim 33:5
intermediate 33:5
involve 35:24
involved 14:23 36:7 45:20 53:12
involving 34:9
issue 15:6,12,13 15:23 27:19 36:21 39:13 40:9,13 48:13 48:14
issued 45:22
issues 39:17
issuing 40:14
itemizes 50:8

J

j 52:7
JANICE 1:6
job 25:6 28:6
joined 23:10
Joint 12:3
judge 23:12 44:8 44:23 48:6
Justice 1:22 3:3 3:9 5:7,16 6:7 8:1,24 9:3,7,8,9 9:13,20 11:2,16 11:21,24 12:7 13:3,14,24 14:9 14:25 15:5,8 16:4,22,24 17:2 17:8,17,21,23 18:1,9 19:6,17 20:2,3,3,4,15 20:16,25 21:2 21:13,20 22:8 22:11,11,16,18 22:21 23:1,9,20 23:21 24:3,6,10 24:15 25:2,9,14 26:3,10,17 27:1 27:10,18 28:8 29:1,25 30:22 30:25 31:14 32:6,9,12,22 32:23,24 33:7 33:21 34:1,20 34:25 35:7,16 35:23 36:17 37:13,23 38:13 38:23 39:5,16 40:7,22,24 41:3 41:13 42:4,12 42:20,22,25 43:12,14,16,22 43:25 44:14 45:8,16,24 46:15,19,25 47:9,15,21 48:1 48:4,10,23 49:8 49:11,19,23 50:11,15,18,25 51:5,8,11,23 52:3,6,7 53:7 53:24,25 54:9 54:13,14,17,23 55:3,15,23
justified 18:17

K

Kagan 6:7 8:1 9:8,20 12:7 13:14,24 14:9 41:13 48:10 54:23 55:3
Kennedy 6:13 20:3 21:20 22:11,16 23:1 24:10,15 26:3 26:10,17 29:25 34:20,25 35:7 35:16 38:23 39:5 43:14 48:23 49:8,11 55:15
kind 4:21 17:23 33:17 37:5 48:15 55:11
kinds 44:25
Kneedler 1:21 2:9 40:24,25 41:3,13,16 42:10,14,21,24 43:3,18,24 44:11 45:2,15 45:18 46:2,17 46:21 47:4,13 47:17,24 48:5 48:10,17 49:1 49:10,16,19,20 50:2,13,16,23 51:3,7,10,13 51:24
knew 30:13 37:1 38:2,8 43:4,5

49:4
know 8:12 15:10 20:13 22:1,22 23:2 30:16,17 34:13 37:6 54:8 55:9
knows 31:8

L

language 12:5 25:23
large 21:3
latest 7:13
Laughter 23:3 48:3
law 21:10 34:1,6 34:9,21 35:2,5 35:7,11,17,20 49:12 51:11 55:2,16
lawful 4:20 16:19 18:5
laws 20:18,18 36:8
leave 16:22 19:5 24:7
left 5:23 19:23 25:5 36:23 49:14
legal 12:16 18:5
length 23:23
let's 34:2
liability 25:4 39:9 40:12 52:14,15
light 23:11 24:10
likelihood 23:15
limb 38:6
line 47:16
live 13:17
logical 33:9
logically 36:1
long 8:16,17 12:19 13:2,11 19:22 31:12 33:17 39:18 49:15
longer 19:24 37:7,8
look 15:15 28:1 29:9 36:14 37:14 46:4 47:16 48:14
looking 27:9
lose 37:16,17
loss 30:9,11 38:5 55:17
losses 30:7 38:4
lot 32:3
lower 14:21 18:10
lump 23:25
Lyng 18:19 36:13

M

major 41:6
majority 21:25 22:18
making 16:12 28:4
manner 31:19
market 35:25
material 22:5 23:7 27:6,23 34:12 48:9
materiality 48:8
matter 1:13 15:25 27:16 56:2
mean 17:24,24 18:18 22:12,22 24:13 26:10 31:2,3,12 34:25 35:10 36:22 46:18 47:1
meaning 19:7
means 18:12 22:2 50:21
mechanism 21:9
meet 28:19
member 22:15
members 19:2 20:21 21:25 22:1 23:10,14
mention 30:14
mentioned 31:7 32:9 51:16
Mertens 24:12
million 19:20
minimize 50:10
minute 43:14
minutes 51:25
misconduct 55:12
mislead 39:1
misleading 3:17 4:16 5:10 6:5 20:17 40:10,20
misled 49:6
misrepresenta... 18:22
missing 8:24
misstatement 18:16 49:15
mistake 15:15 15:16
misunderstand 55:4
modification 10:22
modifications 27:24
modified 10:11 10:16 11:14,18 14:2
modifies 14:19
modify 10:7,9,15 14:6,20,24
modifying 11:22
monetary 24:12 24:18
money 34:4 37:16,17 44:1 54:5
morning 3:4
multiple 6:21

N

N 2:1,1 3:1
name 8:8
named 20:21
necessarily 8:13 9:18 55:18
necessary 3:21 4:18 18:11
need 9:18,22 28:7 42:7 55:5
needed 34:19
needs 8:5,12,12 34:13
negate 12:7,10
neither 17:14
neutral 44:7,16 45:13
never 30:11,17 39:14
new 4:15 41:23
nice 48:1
nondisclosure 27:19 28:10
nondisclosures 35:12
normal 29:18
notice 31:18 53:12 54:2,3,10 54:12,15,16
notices 52:21
November 1:11
number 22:17 53:20
numeral 11:12 52:10
numerous 6:15

O

O 2:1 3:1
object 18:9
objective 38:21
obligation 5:2 45:6
obligations 7:5
obvious 36:1 50:6
obviously 39:24 40:5
occasions 6:15
occupy 23:22
offense 42:23 43:1
offered 36:9,9,10
offering 24:16
offers 40:1
office 28:7
offset 29:16,16
Oh 24:16,17 50:25 51:8
okay 15:21 16:6 16:6,25 23:15 30:22 33:9 46:2 50:25
old 32:21 41:23
Olson 1:17 2:3 2:13 3:6,7,9 5:7 5:16 6:7,19 8:2 8:15 9:2,5,11 9:15,20,25 11:8 11:23 12:1,11 13:6 14:5,16 15:4,7 16:2,6 17:1,7,11,19 17:22,25 18:3 18:17 19:14,18 20:15 21:1,8,17 22:3,10,20,23 23:4,19,21 24:5 24:13,19 25:10 28:22 51:25 52:1,3,8 53:11 54:6,11,16,19 54:23 55:2,14 55:24
once 15:17 34:21 42:25
operate 51:22
operative 14:3

14:14 51:21
opinion 10:22 14:18 32:11
opinions 32:7
opposite 9:21
opt 18:7
oral 1:13 2:2,5,8 3:7 25:12 40:25
order 29:12 39:24
ordered 11:17 23:5 32:18
ordering 11:17
ordinary 39:21
outcome 12:23
over-reading 14:10
owed 42:6

P

P 3:1
package 37:4
packed 8:4
page 2:2 11:8,10 12:2 19:20 52:9
pages 7:4 8:17 10:21 12:19 13:2 31:8 39:18
part 5:11 6:23 7:24 10:18,20 11:5,13,21 13:22 27:1 28:11 31:3 35:5 38:25 45:2 50:16,19,19,20 50:21,22 51:14 51:18
participant 4:5 31:20 38:21 43:3 49:25
participants 3:12 4:18,24 8:20,21 16:21 29:4 30:5 36:9
particular 14:11 23:17 31:24 32:2 48:7
particularized 41:10
particularly 22:5
parts 19:19
party 34:14
party's 18:22
pass 14:15
Payne 18:19 36:13
pension 4:12 29:19,21 30:19 32:21 36:6 37:19 41:5,22 46:9
people 15:14 16:20 18:5 19:22 20:8 23:22 24:25 26:23 28:3 30:12,13 35:15 38:3 55:5
People's 29:18
perfectly 12:16
period 27:16 30:19
permit 4:21
permits 14:6,20
permitted 4:21 5:19
permutations 20:1
person 20:19 36:23 37:1 44:1 45:10 46:1 55:5 55:17
personal 37:5,12
persons 20:1
petition 11:10 20:20 33:2 52:10
Petitioners 1:4 1:18 2:4,14 3:8 29:2 52:2
phantom 29:16 29:16
picture 21:4
piece 21:3
pin 6:12
place 16:2 18:3 24:19
plaintiff 36:19
Plaintiffs 52:11
plan 3:12,13,17 3:19,20 4:5,6,7 4:12,13,13,14 4:15,18,20,22 4:23,23,24,25 5:1,9,13,15,18 5:24 6:6,8,11 6:18,22,23,24 6:25 7:6,7,8,12 7:13,16,18,20 7:25 8:4,5,7,20 8:21,22 9:1,5 9:10,11,16,16 9:17,19,24 10:7 10:7,8,8,9,10 10:12,15,15,18 10:18,21,23,24 11:3,5,18,19 11:22,22 12:4,4 12:9,14,21,24 13:11,12,23 14:4,6,6,12,19 14:20,21,24,24 16:7,8,19,20 16:21 18:25,25 19:3,8,15,16 19:18,21 20:17 25:1,18,20 26:2 26:5,7,13,22 27:2,12,12,20 27:22 28:11,16 28:18,21,24,25 29:3,4,9,10,15 29:17,19,23 30:1,10,13,19 31:3,11,17,20 31:25 32:1 37:19,20 38:21 38:25 39:3,17 40:2,3,9,11 41:19 42:3,19 44:5 45:4,11,20 45:22,23 46:9,9 46:11 47:1,8 49:3 50:1,9,12 50:14,17,19,19 51:19,19,21 53:5 54:3,4,21
plans 12:18,25 20:8 24:25 25:1 25:3 36:6 46:5
please 3:10 24:16 25:15 41:4
plural 6:16 25:21 28:25
plus 19:13 41:23 41:23
point 13:13 16:11 20:8 28:11 36:11 39:13 45:18 46:1,3 47:19 52:19
pointed 16:18 29:2
policy 46:12,23
portion 52:19
position 23:23 25:16 28:17 38:24 46:7 50:3
possible 27:5 38:15,19
potentially 36:9
prejudice 27:6 38:16,18,19
prejudicial 17:20
preparing 13:1
press 38:9
presumed 22:6
presumption 30:1 35:13
prevail 38:24
prevailing 46:7
prevails 21:24
previously 27:14
prior 5:15 50:22
probable 18:14
probably 21:22
problem 39:10
problems 31:7 33:15
procedure 14:15
proceed 21:5 24:11
proceeded 21:15
proceeding 17:16 21:4,5
program 4:12
programs 4:3
prohibiting 12:12
prolix 13:5
promised 19:8 41:11,21
prompt 39:10
promptly 40:21
proof 7:21
proper 21:15
proposal 38:23
proposition 13:9
prospect 38:1
protect 37:5
protecting 30:6
protections 36:8
protest 5:25
prove 18:7 34:16 34:18 35:15 38:15
proves 10:5
provide 4:2,17 5:3 11:19 33:4 40:17
provided 32:16
provides 4:7,9 16:10 21:8 54:22
providing 26:20

53:22
proving 34:16
provision 10:2 12:12,15,16 14:3,11,12 15:15 16:12 26:22,24 30:7 30:10,14 31:13 31:16,16,24 32:15,16,22 36:15,16 37:1,2 52:13,22,24 54:6,12
provisions 11:25 14:14 21:10 25:22 27:20,22 29:18,22 31:25 32:2 39:12 40:3
purported 19:2
purpose 50:6
put 4:14 20:12 32:21 40:7 49:23,23

Q

qualifications 28:1
quarrel 35:3
question 10:5 13:24 14:4 15:11 17:4 21:13 22:9,10 22:12 23:1 36:15 38:14 43:19 45:8,9 46:1 48:11 52:5 53:25
questions 3:22 16:16 21:21 22:24
quite 6:19 35:4,9

R

R 1:19 2:6 3:1 25:12
raised 17:4 52:14
range 6:8
rate 31:17
rates 19:25 37:15,16,17,21
reach 33:8
react 44:23
reaction 38:7,9
read 13:10 31:21 55:1,5,6,18
readers 39:21
reading 7:10 36:12
real 38:1 52:17
realistic 25:6
realities 55:4
reality 23:19
really 15:21 23:2 27:9 28:2,2 34:5 38:19 48:8 55:3
reason 5:9 18:13 18:13 32:6 41:19 46:13
reasonably 27:25 42:16 43:4
reasons 50:4
rebuttal 2:12 17:6 52:1
rebutted 42:21
receive 41:8,22
receives 42:2 46:9
receiving 32:17 32:19
recipients 40:10
recognize 39:8
reconstruct 24:22
record 19:18 47:18
recover 3:13 26:5,7 34:4 41:9,11
recovery 26:7,12
redress 26:1
reduce 31:17,25
reductions 38:2
refer 7:3 19:20 52:4,9,18 55:14
reference 7:22 25:25
referred 6:8,10 10:5 28:22,24 41:17 53:20
referring 10:2,14 11:16 53:12 55:15
refers 7:12 27:23
refute 15:19
regardless 14:14
regulations 30:8 38:5
rejected 52:13 52:15
relation 37:11
reliance 17:12 17:15,20 18:2 18:15,21 20:7 21:6,7,19 25:16 26:5 27:17 33:17,25 34:16 35:14,15 36:12 41:10 42:11 53:22 54:24 55:13,22
relied 42:8
relief 3:21 4:7,9 11:16,17 20:17 25:25 26:1 32:17,18,20 33:5 39:24 40:5 40:5
rely 8:12 20:10 42:16
remaining 51:25
remedies 3:14 3:19 4:2 13:21 16:10 53:23
remedy 3:17,18 6:1 13:19 16:14 19:11,12 24:20 39:21 53:14,15 53:18,19
remember 19:19
repeatedly 3:24 28:24
repetition 28:16
reply 53:20
report 7:13,23 7:24
representation 48:20
representations 42:15
represented 41:21
require 20:5,19 54:25
required 4:14 5:19 7:6 17:12 17:15 24:21 26:6,11 28:19 42:13
requirement 12:10 14:12 21:19 25:18 27:11 33:25 34:15 39:20 40:6 50:1 55:17
requirements 13:18 28:20
requires 13:4,14 50:9 55:22
requiring 38:5
respect 4:2 7:6 16:12 20:17 34:14 50:1
respectfully 14:17
Respondents 1:20,24 2:7,11 3:16 10:19 12:23 17:14 20:21 22:4,5 23:6 25:13 41:2 52:5
response 28:21 31:14 32:9 38:13 52:5
Restatement 34:10
result 30:9 48:15
resulted 32:17 32:19
retain 18:6
reticulated 53:4
retire 19:24
retired 43:9
retirement 20:10 55:7
retiring 23:24
rig 30:18
right 4:25 9:1,7 9:10 15:5,9 17:8,17 18:7 26:13 27:17 32:23 41:24 42:10 50:22,25
rights 30:6
rise 37:16,17
risk 37:21 40:10
risk-averse 37:18
ROBERTS 3:3 20:2,4 25:9 28:8 35:23 40:22,24 51:23 55:23
roll 38:11
Roman 11:12 52:10
roundabout 26:4
rule 35:1,2 46:19 46:21,22 49:2
ruled 38:17
rules 21:1,8,11 36:7 48:25

S

S 1:21 2:1,9 3:1 40:25
satisfactory 28:5
satisfied 14:11
save 24:9
saved 37:8,8
saying 6:1 8:3 11:15 16:25 18:10 19:1 26:4 31:1,14 35:19 40:1 42:25 44:2
says 7:12 8:7,8 9:17 10:11,17 10:25 12:8 13:20 15:13 22:7 27:12 31:17 42:19 47:1 51:17 54:13
Scalia 8:24 9:3,7 9:9,13 11:21,24 22:8,11,18,21 32:22,24 33:21 42:20,22,25 43:12,16 46:15 46:25 47:21 48:1,4 50:11,15 50:18,25 53:7 53:25 54:9,13
scheme 3:12 4:4 4:9 41:25 53:4
second 16:17 21:24 22:1,3 25:2 29:14 33:16 34:17 35:1,8,22 45:11 46:3 47:25
Secondly 16:10
secret 29:24
section 3:13,14 3:20 4:6,7,8 7:3 16:3 21:14 25:17,19,24 26:15 28:22 34:10 35:21 52:6,17,17
securities 33:24 35:12,20,24 36:5,8
security 36:6
see 20:14 26:11 27:19 28:2 29:8 30:2 32:4 46:24
seek 19:15 23:6 28:6 52:11 53:16
seeking 3:16 4:5
seeks 23:6
self-help 37:5
sense 4:17 5:17 14:18 32:3 42:14
sensible 15:22 15:24
sent 14:21
sentence 7:9,10 7:17
separate 6:24 7:18 8:18 10:15
set 8:10 23:11,13 34:17 49:22
sets 46:10
seven 44:20,22
shifts 33:20 34:22 49:13,14
short 13:8 44:18 44:19
show 23:17 29:5 33:17 34:21,22 36:20 42:7 49:15
showed 15:17
showing 17:5 41:10 49:12 54:24
shown 15:17
side 15:1 21:22 40:14
significant 22:16 28:3
similar 7:10 27:8 38:10
SIMILARLY 1:8
simple 47:11
simply 15:25 19:7
single 6:10
SITUATED 1:8
situation 38:10 40:9 43:8 46:23 48:21
Six 17:11
Solicitor 1:21
solvency 25:1
someone's 13:9
someplace 24:8
Sorry 30:24
sort 5:25 20:12 48:7
sorts 42:15
sought 3:21 16:14 53:2
sounding 16:24
SP 44:12
SPD 6:17,23 8:13,25 9:6,8,9 9:12,22 10:20 11:1 12:4,7,10 12:20 13:10,11 13:14,25 14:3 14:19,20,23 26:12,12 27:1 27:12,12,16 28:17 29:21 30:14 31:2 39:2 40:2,10,14 41:20,25 42:15 43:21,22 45:3,5 45:21,21,23 46:13 47:6 48:7 49:7,22 50:16 50:16,21 53:12 53:13 54:7,10 54:18,19,20 55:1,6,18
SPDs 11:14,18 11:20 12:1,2,13 13:17 55:5
specific 30:7
specifically 10:10,25 11:12 12:3 13:20 29:14 52:11
sponsor 40:9 45:20
stability 25:1
standard 17:3,3 17:10 21:23 27:2 34:20 38:17 42:5 47:22,22,24 55:13
standards 27:8 38:22
start 13:1
state 8:19
stated 35:20 43:1
statement 6:25 40:17
statements 48:7 49:6
statement's 48:9
States 1:1,14,23 2:10 41:1
statute 6:14,20 8:3,10 9:17,21 10:1 13:4,14 20:16,16 26:21 26:24 27:21,23 28:19,23 30:8 38:4,20 46:25 47:5 54:21
statutory 36:15 36:16
stayed 19:24
STEPHEN 1:19 2:6 25:12
steps 37:5,10,11 55:19
stock 35:24
stop 35:23
struck 8:1,2
structure 3:25 6:20
structured 8:23
structures 3:23
submit 9:25 14:5
submitted 55:25 56:2
submitting 48:24
subsection 4:6 7:10,11
subsections 10:1
substantive 21:9
succinct 6:25 40:10
suffer 16:23
sufficient 17:5 53:19
sufficiently 27:24
suggest 6:21 8:18 23:21 35:4
suggested 16:22 18:4 22:4 25:3 41:15
suggesting 5:21 25:2
suggests 19:19
suing 53:4,5
sum 23:25
summaries 3:17 3:19 4:15 5:3,4 5:20 13:1 38:25
summary 5:9 6:2 6:4,6,23,24 7:6 7:7,12,13,18 8:4,5,17 9:18 9:19 10:3,6,8 10:12,14,17 11:4,9 12:8 13:4,8 20:18 25:18 28:10,11

28:13 29:5,6,15 29:17 31:2,22 33:12 39:17,20 43:2 49:24,25
supporting 1:24 2:11 41:2
suppose 33:8
supposed 8:13 28:16 44:8,17 44:23,23 45:1 47:12,14 51:22
Supreme 1:1,14
sure 15:18 37:19 45:7 47:17

T

T 2:1,1
take 15:1 23:25 31:16 37:11,12 53:3 54:24
taken 20:10 25:5 37:4 55:19
talked 10:6 14:10 16:14 37:24
talking 9:14 33:15 52:8 55:16,16
talks 6:14
teach 7:21
Teamsters 36:4
tell 12:16
telling 50:7
tension 28:15
term 29:9,10
terms 10:9 11:13 23:23 26:2 28:5 31:5 38:20 39:24,25 40:5 49:18
test 48:15
Thank 25:9 40:22,23 51:23 52:3 55:23
THEODORE 1:17 2:3,13 3:7 52:1
theory 11:18 15:3 28:10 51:11
they'd 44:5,6,7
thin 25:7
thing 18:24 19:8 24:1,11,24 31:3 33:9 39:18 43:21 44:9 48:18 54:1
things 8:16,20 9:22 12:22 23:12 46:16
think 6:16 7:22 11:8,15 14:9,16 14:17 22:9 24:13 25:4 27:4 27:5,7,18 29:1 29:7 35:3 38:13 38:14,16,17,18 39:23,23,25 40:8 41:19 42:10,11,12 44:20 45:24 46:3 47:2 48:5 48:8,10,11,17 48:18 49:11 53:11 54:11
third 27:7 34:13
thought 11:2,6 15:5,11 31:21 32:3 33:18 54:13
thousand 20:22
thousands 35:15
three 44:20
throw 18:24
time 24:9 31:10 34:6 39:14 46:8
times 6:8 32:20
title 25:22 26:1
today 30:17
told 5:12 22:2 42:18,18 49:17
totally 22:23
Touche 38:10
tough 28:9
traded 35:24
treat 11:3 19:12
treating 33:11
treatises 47:19
true 43:9 45:19 47:9
trust 7:14 34:1,3 34:6,9,21 35:17 35:17,20 36:2 41:15 48:13,14 49:11 55:2,16
trustee 34:3,16 34:17,22
trusts 34:11 35:2 35:5 48:25
truth 5:12
try 34:17
Tuesday 1:11
turn 8:16
turning 21:20
two 12:2 13:17 21:21 33:10,14 51:13
two-page 44:24
type 54:11
typically 42:1 43:7,20

U

ultimately 32:18
unanimous 10:13 14:7
unbeknownst 30:20
underlying 42:19 44:11 46:11,23
understand 8:20 16:5 18:11 21:23 31:1,9,15 33:7 34:25 35:1 47:12
understandabil... 40:6
understandable 13:5
understanding 26:18 35:10
understates 30:3
understood 31:19,23
undisclosed 40:3
unfavorable 26:24 27:20,22 29:9,10,22 30:5 44:7,16 45:12
unhappy 5:24
unintentional 39:11 40:20
unintentionally 39:11
union 24:4
United 1:1,14,23 2:10 41:1
unlawful 4:22
unrealistic 35:14
upset 38:12
urging 12:24
use 33:11 47:21 48:16
useful 46:3

V

v 1:5 3:5 18:19 29:13 36:4,13
validly 29:10,23
value 4:14
variance 39:3
various 19:19
Varity 16:15
versus 16:7
VI 52:10
view 31:5,6 41:14,16 44:18 46:6 54:23
VIII 11:12
violated 3:17
violates 26:21 53:13
violation 6:2,5 13:12,19 26:1,2 32:14,15 33:4 39:19 52:23
violations 3:14 4:8 13:20 53:5
void 31:25 32:2

W

wages 41:7,11 49:21
wait 20:14 50:18 50:18
want 17:9 28:6 31:11 32:3 33:11 36:11 47:19
wanted 23:2
wanting 24:25
Washington 1:10 1:17,19,22
wasn't 16:25 19:6,6 23:18 39:13 44:3 54:2 54:3,15
way 8:22 10:1,11 11:20 13:25 15:25 19:12 20:20 24:1,5 26:4 29:8,8 30:18 33:23,23 42:9 44:17 55:6
ways 30:2 44:4 44:20,21
wear-away 19:10 19:11 29:18 30:14,15,16,17 39:12
wear-aways 39:15
weight 49:24
well-established 38:3

weren't 15:2 39:12
we'll 3:3 37:20 44:22 50:25
we're 6:1,3,3 13:9 14:25 15:23 33:13,18 37:15,17 39:14 55:16,16
we've 27:4 50:12
whatsoever 27:11
white 24:10
wife 37:7
willing 3:25
windfall 55:10
wishes 53:1,3
withheld 41:9
women 15:20
word 10:3
words 5:5,6 9:18 18:14
work 29:20 34:6 37:7,8 49:20
worked 45:16
working 41:7
workplace 55:4,9
works 41:6 42:11
worry 20:10 31:10
worst 40:15
wouldn't 23:9 27:13 28:13 29:4 31:15,23 44:18
write 31:8
written 6:10 7:1 8:6,7,9,14,15 9:21,23 10:1 14:1,2 27:14,15 31:1,11,18 39:19 43:22,25 44:3,9 45:9
wrong 16:1 35:4 35:17

X

x 1:2,9

Y

years 4:2 30:19 39:14 55:8

$

$70 19:20

0

09-804 1:5 3:4

1

1 4:6,6 15:1,10 19:16 26:17,17 26:19 33:10
10 34:2
10,000 31:8
10:07 1:15 3:2
100 8:17 12:19 13:2 39:18
102 25:17
1024 7:3
1024(a)(6) 28:23
1024(h) 32:14,25
1054(g)(1) 31:17
11:08 56:1
12 39:14
173 34:10 35:21

2

2 7:4,11 10:1
2001 52:20,22
2010 1:11
204 52:18
204(g) 52:6,13
204(h) 32:14 52:18
21,000 55:7
212 52:9
218 11:10
22 13:6
25 2:7
27,000 15:14 16:20 19:2 23:22

3

3 2:4 13:23 15:9 15:10,12 16:10 17:13,16 21:20 24:11,17 26:19 33:12 36:19 53:15,20 55:22
3a 7:4
30 1:11
30-some 20:22

4

4 7:4,10 10:2 51:25
4a 7:4,11
40 2:11
404(a)(1)(D) 25:19

5

5a 7:4
50,000 34:2
502 4:7
502(a) 25:24
502(a)(1)(B) 3:13,20 25:24
502(a)(3) 3:15,19 4:8 13:20 25:24
52 2:14

6

6 52:18
65 20:14

9

90 8:17 12:19 13:2
922a 12:2,6
938a 12:2