ORIGINAL

In the

Supreme Court of the United States

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

JOHN DANIEL,

Respondent.

No. 77-753

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and Louis F. Peick,

Petitioner,

v.

JOHN DANIEL,

Respondent

No. 77-754

Washington, D.C.
October 31, 1978

Pages 1 thru 71

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Washington, D. C.,

Tuesday, October 31, 1978.

The above-entitled matters came on for argument at 10:05 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Association Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

SHERMAN CARMELL, ESQ., Carmell & Charone, Ltd., 39 South LaSalle Street, Chicago, Illinois 60603; on behalf of Petitioner in No. 77-753.

SIDNEY DICKSTEIN, ESQ., Dickstein, Shapiro & Morin, 2101 L Street, N. W., Washington, D. C. 20037; on behalf of Petition in No. 77-753.

JACOB H. STILLMAN, ESQ., Principal Assistant General Counsel, Securities and Exchange Commission, Washington, D. C. 20549; on behalf of S.E.C. as amicus curiae.

LAWRENCE WALNER, ESQ., Lawrence Walner & Associates, Ltd., 200 East Randolph Drive, Suite 7205, Chicago, Illinois 60601; on behalf of the Respondent.

PETER J. BARACK, ESQ., 357 East Chicago Avenue, Chicago, Illinois 60611; on behalf of the Respondent.

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C O N T E N T S

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PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will hear first this morning Nos. 77-753 and the consolidated case, International Brotherhood of Teamsters against Daniel.

Mr. Carmell, you may proceed whenever you're ready.

ORAL ARGUMENT OF SHERMAN CARMELL, ESQ.,

ON BEHALF OF PETITIONER IN 77-754

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

In 1950 the respondent John Daniel began employment under the jurisdiction of Teamsters Local 705. Five years later, Local 705 negotiated a contract which provided, for the first time, for a pension fund, which is the Local 705 Pension Fund.

In addition to being structured in accordance with Section 302(c)(5) of the Labor-Management Relations Act of 1947, the basic features of the Local 705 Pension Fund were and are that it is a defined benefit plan, it is noncontributory, it is mandatory.

Between December of 1960 and July of 1961, the Fund records show no employment, covered employment, for Mr. Daniel.

In 1973, Mr. Daniel applied for a pension. After two hearings before the Boards of Trustees at which he appeared, the Trustees denied his application for a pension based upon the break in service between December of '60 and July of 1961 as not meeting the Fund's eligibility rule.

As a result, Mr. Daniel filed and then amended a six-count complaint in the District Court. Two of the counts, the first two which are before this Court, were posited upon the Securities laws. Two counts were based upon Section 302 of the LMRA, one count alleged a breach of the duty of fair representation under Section 9(a) of the NLRA, and one count was a pended jurisdiction claim for State common law fraud.

The Local 705 petitioners moved to dismiss all of the counts. The District Court denied the motion to dismiss all of the counts. The case proceeded up on Counts I and II, the Securities Act counts which are before this Court.

In this posture, may it please the Court, the case does not involve the merits of the Local 705 Pension Fund Service Rule. And although the respondent, in a discussion of ERISA at page 97 of his brief before this Court, states: "To allow ERISA to preempt the antifraud provision of the Federal Securities laws would be to deny Daniel any relief whatsoever."

The respondent told the District Court, at Appendix 152a, that "Even if the security counts should be challenged or reversed on appeal, I feel that the other counts would be viable."

The result of reversal in this case, then, would be that the proceedings would continue in the District Court under the two Section 302 counts, the breach of the duty of fair representation and State law common fraud.

If it please the Court, I wish to direct my arguments to the differences which may be found between the Securities Act and the labor statutes in the area of labor relations.

The labor statutes, as I refer to them, are the National Labor Relations Act, the LMRA, the Welfare Pension Plan Disclosure Act and ERISA.

And when using the term "labor relations", may it please the Court, I am not speaking only of union management or collectively bargained plans, I am talking of the full spectrum of employer-employee relations. That is, those pension plans which involve the relationship between an employer and an employee of which one is a collectively bargained pension plan.

The one consensus, which I believe can be found from the mass of briefs among the courts, the parties and the amici, is that the legislative history and the provisions of the Securities Act do not mention pension plans as such.

On the other hand -- and this is the point of our argument -- the labor statutes, beginning in 1935 and consistently through ERISA, have discussed, considered, made discreet cohesive and sometimes very detailed judgments as to the types of disclosure, as to the rights of actions of participants, if any, and as to the duties and obligations of plan trustees to the beneficiaries.

A review of the National Labor Relations Act, the Wagner Act, was undertaken by the National Labor Relations Board in its seminal decision in Inland Steel, which is at 77 NLRB. The Board, after reviewing both the 1935 statute and the 1947 amendments to that statute, which would have changed the term "other conditions of employment" to a more narrow term, "working conditions", stated that it was compelled to the conclusion. And we find that matters affecting tenure of employment, like the respondents, Inland Steel's retirement rule, are within the statutory scope of collective bargaining.

And the National Labor Relations Board found that the debates in 1947 over those proposed amendments were "compelling evidence", that reitrment plans were within the 1935 Act's intent.

The significant of this, may it please the Court, should not be lost because 1935 is the same chronological era that the 1933 and 1934 Securities Acts were being put into law. So in 1935, whereas the Securities Act said nothing, Congress was speaking distinctly to the issue under the National Labor Relations Act.

QUESTION: Of course, Mr. Carmell, not every retirement plan is a product of collective bargaining. We had one before us last term on Allied Structural Steel, which was not at all the product of collective bargaining, and therefore it wouldn't have involved any of the rights or liabilities under the National Labor Relations Act or the Labor-Management Relations Act of 1947; isn't that correct?

MR. CARMELL: It is correct to the extent, Your Honor, that they all were not necessarily bargained for. But, in due respect, it is not correct, to the extent that all pension plans were subjects for collective bargaining. That is, 8(5) of the old Act, the 1935 Act, and 8(a)(5) of the present Act, only refers to those -- only encompasses mandatory subjects for bargaining.

QUESTION: Yes, but sometimes there's not even a collective bargaining agent. I mean, if it's a non-unionized plant, such as I guess Allied Structural Steel was, the plaintiffs wouldn't have had three out of these other four causes of action, would they? Couldn't have had.

MR. CARMELL: They would not have had cause of action under Section 302. That is correct. There was no cause of action under the WPPDA, there was no private cause of action under the NLRA or the LMRA. That is correct, Your Honor.

But, as I would hope to explain, that was Congress's deliberate choice, and is most fully canvassed in this Court's decision in Malone as to the specific choices that Congress made.

But I would like to address once more your specific point. I am not saying that the NLRA covered only collectively bargained plans, I am saying that Congress considered retirement plans, and the Inland Steel plan has been in existence for a long period of time before that, as being a subject for collective bargaining.

So, whereas the Court of Appeals said that the reason why Congress, in the Securities Act, did not consider pension plans or mention them was that they were rather innocuous in number. The same Congress relatively was considering them to be of sufficient importance to be considered within mandatory subjects of bargaining, as opposed to permissive subjects of bargaining.

1947, as Your Honors have already pointed out, saw Congress enact Section 302(c)(5), and I think the significance of Section 302, Your Honors, is that Congress made a deliberate choice. It chose only to regulate collectively bargained pension plans, as Mr. Justice Stewart stated, although it had before it considerations of other issues. And it chose then to only regulate the structure of the plan and certain of the extents and the purposes for which the Fund could be used; a very, very limited regulation by Congress. But a very deliberate regulation, as this Court discussed in Arroyo vs. United States.

But the Welfare and Pension Plan Disclosure Act, the proceedings from 1954 on, which were fully canvassed in this Court's decision in Malone, are really the most significant, I believe. Because Malone stated that Congress entered "a nearly unregulated pension field". And Congress heard from numerous witnesses, beginning in 1955, including the Securities and Exchange Commission. And Commissioner Goodwin agreed with Senator Allott, in 1955, that "the Securities and Exchange Commission would come into this particular field only by accident, so to speak, by virtue of the fact that, for example, in some of these plans stock is offered".

After Congress heard all of the witnesses, including the Commission, it issued a Senate Report which is quoted, and I won't go through it all, at pages 29 and 30 of our brief, stating that they just didn't think there was any federal regulation of these plans, but chose not to regulate it substantively, but, as this Court noted, just to allow filings.

By 1972, Your Honors well know, as this discussion in Manhart indicates, Congress had completely changed its mind and had completely, made a complete turnaround as far as the priorities, and it therefore, under ERISA, detailed the timing, nature and disclosure that was to be made to plan participants and for the first time, under Section 502(a), granted a limited right of suit by a plan participant, and granted a conjunctive right to sue with the Secretary of Labor.

The 1958 Welfare and Pension Plans Disclosure Act's failure to include a private right of action was not an accident, Your Honor, because, as our brief has shown, it rejected proposals by Professors Meltzer and Cox that would have established anagolous right of action.

ERISA's design was careful, complex, discreet, and fraught with a great number of problems. But in the end the Court of Appeals was not satisfied with Congress's action in this field. It felt the plan paricipants deserved more. It made value judgments. Judgments which the Congress is entrusted to make and which the Congress specifically did not make.

Under those circumstances, this case, I believe, and the courts below, stand for the proposition that a court can expand through the problems of the Securities Act to enact that type of legislation which, for almost 37 years, the Congress deliberately reviewed to enact, to give protection to plan participants that Congress would not give, and to posit causes of action which Congress disclaimed.

QUESTION: Well, wouldn't you agree that Judge Tone's concurring opinion is evidence of anything but a value judgment, that he instinctely -- his sense of values or his instinctive sense would have led him the other way, but he thought he was driven to this conclusion by the language of the statute. Isn't that about what he said?

MR. CARMELL: I don't believe it was -- by the breadth of the stutues and by the fact that this Court has not spoken particularly to the issue, I believe was another factor.

I don't know why Judge Tone's opinion did not end with "I dissent", because I believe it was written up to that point so it sounded that way.

So I cannot divine that, Your Honor. But I don't believe that full consideration was given to the labor statutes, the line, the cohesive line from the labor statutes on one side and the absence of anything definitive on the other side.

As I said, Your Honors, the reversal of this case does not end the case. It will leave Mr. Daniel and his class, the plaintiffs, with four causes of action under the federal labor statutes and under State common law fraud.

QUESTION: Mr. Carmell, before you sit down, does the record tell us what significance, if any, there is to the fact that Danial took a withdrawal card. Is that critical to his ineligibility?

MR. CARMELL: I don't believe that the issue, as framed now, that question is critical. I believe that the Appendix does show only a -- or the brief does show a statement that was contained in one of the plan booklets that "your benefits terminate if you take a withdrawal card".

For the purposes of this case, Justice Stevens, we are accepting the fact that he had a break in service which was involuntary and by a layoff, and will accept for the premise that it should have only run four months. I don't believe that the question of the application of the break in service rule is relevant to the Securities Act count, because if it's an arbitrary structural violation, under Section 302(c)(5) there is a remedy, or at least there appears -- the District Court has said that there is a remedy.

QUESTION: I see. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Dickstein.

ORAL ARGUMENT OF SIDNEY DICKSTEIN, ESQ.,

ON BEHALF OF PETITIONER IN NO. 77-753

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

As Mr. Carmell has indicated, there is no dispute that in the extensive legislative history that preceded the enactment of the Securities Acts of 1933 and 1934, and in the statutes themselves initially enacted, there was no mention whatever of pension plans.

Certainly the reason for not mentioning pension plans could not have been, as the court below suggested, that they were such a rare bird that Congress simply ignored them or overlooked them. At the time of the enactment of the Securities laws, three and a half to four million united American employees, employed by hundreds of large industrial corporations, were covered by pension plans.

Moreover, the Congress was legislating with respect to pensions in the Revenue Acts of 1926, '28, '32 and '34, in the Railroad Retirement Act of 1934, and, as Mr. Carmell has indicated, they played a role in the legislative history of the National Labor Relations Act.

It is not our point that this was a subject for special legislative concern in the collective bargaining area. It is rather our point that whenever Congress turned to the subject of pension, it was functioning in the employer-employee area, of which collective bargaining is of course just one factor.

We believe the reason why one finds no mention whatever of pensions in the Securities laws is that, as this Court said in Forman, the Congress's focus in enacting those laws was to deal with the capital markets of the enterprise system and to regulate the sale of securities, to raise capital for profit-making purposes.

When we speak of pensions upon retirement from employment, we are not dealing with the capital market, we are dealing with the labor market. Nor are we talking about the raising of capital for profit-making purposes.

Certainly pensions are not included within the types of arrangements that, again to quote the Court in Forman, "in our commercial world fall within the ordinary concept of a security."

This short, straightforward analysis, which occupied eight pages of our opening brief, is, we believe, the answer here. The transaction under which someone goes to work for an employer and is thereby covered by a noncontributory pension plan as an incident of his employment is, like the transaction in Forman, simply not a purchase of securities, within the contemplation of federal securities laws.

There is one type of pension plan which is unarguably covered by the securities laws. This is a type of voluntary contributory plan where employee contributions are used to purchase the employer's stock -- to put it another way, to add capital to the employer's coffers for profit-making purposes.

But this is not covered because it is a pension plan, but rather because it is an employee stock purchase plan. And the fact that it has pension or retirement features does not alter that basic fact.

The SEC has consistently treated such plans as subject to the Securities Act, has advised Congress to that effect, and no one seriously quarrels with that proposition.

QUESTION: And in that case the security is the stock of the employer corporation, rather than the participation in the pension plan?

MR. DICKSTEIN: Your Honor, the Securities and Exchange Commission's position is that in that transaction there are two securities involved. One is the interest in the plan under which the stock is purchased, and the other is the stock of the employer as well.

QUESTION: Well, if one is the interest of the plan, then why isn't this a security?

MR. DICKSTEIN: The interest of the plan in the special circumstance in which employer stock is bought with employee money is indivisible with the arrangement, the entire arrangement under which that stock is purchased.

Here we are not talking about the purchase of employer stock at all, in the noncontributory --

QUESTION: But we are talking about a participating interest in a retirement plan.

MR. DICKSTEIN: We are talking about a participating interest in --

QUESTION: And if it's a security in one case, why isn't it in the other?

Quite apart from the employer's stock.

MR. DICKSTEIN: There are several reasons for that, Your Honor. One reason, of course, is that in the type of plan that the SEC has always considered to represent a security, the employee's money is being used to capitalize the employer. The employer is selling securities to the employee and the vehicle, the plan by which he does it, is simply the wraparound.

In the type of plan that's involved here, that is, the noncontributory, mandatory plan -- and for that matter I would add the voluntary contributory plan in which there is no investment in employer stock of employee dollars. This is not used to fund the employer's enterprise. And we think in that case --

QUESTION: I understand that. And I understand that you concede that that one special kind of retirement plan is subject to SEC jurisdiction under the securities laws, and I understand the factual difference. But I don't understand if the participatory interest in the retirement plan itself is a security in one case, why isn't it in the other?

MR. DICKSTEIN: Your Honor, the answer again is that in the instance where the employee's money is buying employer stock, that has always been treated as a transaction covered by the securities laws.

QUESTION: I understand that.

MR. DICKSTEIN: And if one wraps that basic transaction around the retirement plan in which the stock which is purchased is kept in a fund that is ultimately given to the employee on retirement, or ultimately sold in order to fund his retirement, that does not change that basic reality. It is still --

QUESTION: Well, in this case the funds for the plan are used to buy what are concededly securities, is it not?

MR. DICKSTEIN: No, Your Honor, we do not.

QUESTION : Not?

MR. DICKSTEIN: Not only do we not concede it to be securities in this case, we believe that Congress has not considered it to be securities, and the SEC, and until quite recently --

QUESTION: But the funds of many retirement plans are used to buy --

MR. DICKSTEIN: -- the SEC did not maintain that.

QUESTION: Well, what are the funds, how are the funds invested in this plan? Not in securities? In no securities at all?

MR. DICKSTEIN: They -- no, Your Honor, of course they are invested in securities.

QUESTION: Well, that was my question. That was my question.

MR. DICKSTEIN: Oh, yes. But they are not -- in this instance, of course, they are not invested in employer securities.

QUESTION: But they are invested in securities.

MR. DICKSTEIN: But even -- but they are invested in securities. Unquestionably. And it is quite clear that because the investment of pension funds in a portfolio of securities, that is, the securities that are purchased with those funds, does involve the Securities Act; nobody has ever challenged that. That's quite clear.

And quite consistent with ERISA, as a matter of fact. Because in ERISA when the Congress -- in ERISA there is a definition of the term "security" which utilizes the definition in the Securities Act of 1933. And when you read the Act throughout, every time that term is used in connection with the purchase of securities for the portfolio of the pension fund, it is not used in connection with the interest of the participants in that fund; for that Congress chooses quite different words.

But the fact of the coverage of one, that is the portfolio securities, under the Securities Act, does not by any means mean that the participating interest of the employee is thereby a security.

As a matter of fact, in the early --

QUESTION: And yet you concede that it is in the one case.

MR. DICKSTEIN: Your Honor, yes, I do, because it is clearly a security. The SEC has taken the position that it is from the very outset. It has advised Congress that that is the circumstance, the only circumstance, which involves the Securities Act; that is the circumstances pertaining to pension plans. And Congress has proceeded on that perception.

QUESTION: Mr. Dickstein, are you -- I take it you're making the argument that even if there were no labor laws at all, no federal labor statutes, and only the securities laws, that this would not be a security.

MR. DICKSTEIN: Yes, Your Honor, we are.

QUESTION: Are you also arguing that even if it otherwise would be a security, the federal labor laws in effect make an exception to the securities laws, or not?

MR. DICKSTEIN: No, Your Honor, we are not arguing exception, but what we are arguing --

QUESTION: You are not arguing that the labor laws require a different construction of the securities laws than otherwise would be true?

MR. DICKSTEIN: Oh, yes. Oh, yes. And the reason why we say that is because we are dealing here with a question of congressional intent, and Congress, it is Congress which has acted in the pension area, it has acted expressly with respect to Securities Act disclosures, and that of course is what we are talking about here, in the WPPDA of 1958, and in ERISA in 1974.

QUESTION: So you say the impact of the labor laws is equivalent to their being an exception in the securities laws; is that your argument or not?

MR. DICKSTEIN: An exception, an interdiction, an inhibition of that construction, whichever way -- I think one can fairly put it that way.

QUESTION: I understood that the principal thrust of your argument -- not that you don't make the one suggested in your answer to my brother White, but the principal thrust of your argument with respect to the labor laws and WPPDA and ERISA is that they reflect congressional understanding that pension plans are simply not covered by the securities laws.

MR. DICKSTEIN: They reflected both congressional understandings and actions based upon --

QUESTION: Based upon that understanding. Right.

MR. DICKSTEIN: -- those understandings. Quite correct.

And this is an understanding to which the SEC as a matter of fact made the major contribution. And we think that Congress, having acted in that fashion, even if it were once possible to construe the securities laws in a fashion that would cover this type of arrangement, that is no longer possible, because again we are dealing with a matter of congressional intent.

QUESTION: Of course there's a basic question that I always wonder about. The congressional intent we're really concerned about is back in 1935, isn't it? Or '33, rather; or '33 and '34. And all this stuff comes later.

MR. DICKSTEIN: That is certainly true.

And if we deal with congressional intent back in 1933 and '34 and interdict it at that point, cut it off at that point, what would the congressional perception have been?

That's really a question --

QUESTION: Well, it's clear they used some broad language that encompassed some situations they did not specifically contemplate at that time. That much I think you have to concede.

MR. DICKSTEIN: Oh, yes. Oh, yes. But in dealing with pensions we are not dealing with some new device, we're not dealing with some recent invention. We're dealing with something which existed then, existed as a significant force in American labor relations. And it is Congress's perception, as it then existed, as to whether or not pension funds were covered by the securities laws, which is of course the significant aspect.

QUESTION: The Court of Appeals was apparently influenced by the fact that pension money is a huge percentage of the total capital market of today, and was a very small percentage in '33.

MR. DICKSTEIN: No question about it. It was -- as a matter of fact, it was because of the growth in pensions in the mid-Fifties that Congress turned to the expressed concern with the absence of disclosure to pension plan participants, and conducted its studies very, very carefully and inquired into the subject over a long period of time, and enacted the Welfare and Pension Plan Disclosure Act as an expression of concern.

As pension funds became more important, Congress revisited the subject of pension plans and provided for a further disclosure; disclosures, which, as one reads ERISA, you have to conclude are detailed, comprehensive and all-embracing. In addition to which it enacted substantive regulations with respect to pension plans which, up until that time, had not been a matter of federal concern.

And so it was the congressional reaction to this economic reality of the growing importance of pension funds that we're dealing with here.

QUESTION: Of course if you go back to 1934, there is no private right of action at all under 10(b) of the '34 Act. You can win your case on that basis.

[Laughter.]

MR. DICKSTEIN: That little acorn may have grown into too much of an oak for that, Your Honor.

Although I would say that in the context of this case, and certainly it is in our question presented, that in determining whether or not there is an implied private right of action under the antifraud provisions of the securities laws, one can well consider -- the Court has on occasion considered it -- what the subject matter is, and how far one is prepared to go.

But whether there's an implied right of action under other circumstances, of course I would be prepared, I suppose, to accept, at least arguendo, for purposes of this case, that such right of action exists.

There are several observations to make about the SEC's present position. One is that when it says, "Oh, we all along knew that these noncontributory pension plans were covered by the Securities Act, we were only talking, when we said that there was no sale and hence they were not covered, we were only talking about the registration provisions and not about the antifraud provisions."

Suffice it to say, if there were one incident in the extensive legislative history of Commission stations, of Commission reports, of Commission analysis, in which the SEC had taken the affirmative position before the Congress -- or, for that matter, anywhere else, -- that the antifraud laws are applicable to interests in noncontributory pension plans, SEC counsel would be trumpeting it here; but he will not, because there is none.

And so the SEC really is a fallback position; it says, "Well, we've rethought it, 45 years have made a great deal of difference in the world of pensions, and we now think that when an employee goes to work for an employer and has in mind the pension plan and is influenced in going to work for that employer by the existence of the pension plan, he has purchased a security within the meaning of the securities laws."

"What's more", says the SEC, "when he goes to work each day, again so long as he has the pension plan in mind as an inducement, he is continuing to purchase that security."

QUESTION: And when he quits work, he sells it, I suppose?

MR. DICKSTEIN: Well, that is precisely one of the points which of course differentiates what we have here from what we have in a conventional security in the commercial sense, or even a nonconventional security in a congressional sense. The employee has no interest to sell. He has the right, under certain circumstances, upon the fulfillment of employment requirements, to receive a retirement pension. And that fact alone, I think, is the significant differential.

At this point I would like to save the balance of my time for rebuttal.

QUESTION: Just one question, counsel. There's been some comment in the questions to you about the difference between the situation that existed 40-odd years ago and today, in terms of the amount of investment in pension funds that are within the range of collective bargaining.

I suppose you would concede that if Congress wanted to re-examine the situation today, or in the next Session, that those changes would be a major factor in their approach to the problem, and might lead to a different result from what you're arguing now. You might say that these are securities, in other words.

MR. DICKSTEIN: No. I think we have the best evidence of that in what Congress has in fact done, Your Honor. Because --

QUESTION: But -- you mean they can't change them -- can't change their views on the matter?

MR. DICKSTEIN: Oh, of course they can change their views.

QUESTION: That's all I'm asking.

MR. DICKSTEIN: But they have already acted at least twice, based upon the new evidence of the mounting importance of pensions in this country. And when they have done so, they have acted in a manner which is inconsistent with the notion that an interest in a noncontributory pension plan is the security, and that disclosures are required under the securities laws to supplement ERISA.

Your Honor, you simply cannot read ERISA, and particularly the statements of policies in Section 1 and the disclosure provisions in Sections 101 through 111, without coming away with the strongest of beliefs that Congress thought that in the disclosure area on pensions it was writing on a blank slate, and it wrote on that slate what it wished to have there. And that, of course, is the point.

The legislative history of ERISA totally confirms that, and that which the SEC said to the Congress totally confirms that belief.

QUESTION: Mr. Dickstein, before you sit down, let me ask one question. I think I understand, but I'm not sure.

The benefits under this plan are subject to change by the Trustees at all times, are they? The plan --

MR. DICKSTEIN: Yes. This is a -- this of course is a defined benefit plan. The Trustees may alter the level of benefits.

QUESTION: Without the consent of the union and the employers?

MR. DICKSTEIN: It would be an act which would be participated in by the Trustees, who would be equally designated by the employers and the Trustees.

QUESTION: Thank you.

QUESTION: What kind of a benefit plan? Fine?

MR. DICKSTEIN: Defined --

QUESTION: Defined.

MR. DICKSTEIN: Defined benefit plan.

QUESTION: I didn't understand that.

MR. CHIEF JUSTICE BURGER: Mr. Stillman.

ORAL ARGUMENT OF JACOB H. STILLMAN, ESQ.,

ON BEHALF OF S.E.C. AS AMICUS CURIAE

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

The Solicitor General has requested me to state at the outset that although the Securities and Exchange Commission is participating in this case on a motion made jointly by the

Commission and the Solicitor General, I am expressing the views only of the Commission and not of the Solicitor General, who takes a different view of the case.

This is a securities case, and the issue before this Court is the interpretation of terms in the securities laws. Specifically the terms "security" and "sale". And it is to that question, those legal issues under the securities laws, that the Commission, as amicus curiae, is addressing its views, because the Commission believes that the resolution of those issues is important to investors.

Of the two issues, "security" and "sale", we believe that the resolution of the security question has a much greater potential impact on investors and, for that reason, I would like to address that issue first.

QUESTION: Going back to what you said at the outset, the Solicitor General does agree with you on the sale issue, does he not?

MR. STILLMAN: Yes, Your Honor, on that issue he does agree.

In considering whether this is a security, Mr. Daniel, for more than 22 years, worked for employers who, in return for his labor, made contributions to his union's pension fund. I think a very vivid description of why this is a security is contained in the union's own literature that it distributed to its members. If I may quote two sentences from page 70a 14 of the Appendix, in one of the brochures that the union distributed it contains this description of the pension fund, and of the member's contribution -- of the contributions that are made on behalf of the members.

It says, "the contributions earn income by being invested. Consequently, the money originally contributed grows. Without this income growth the Fund could not accumulate enough money to pay the $250.00 monthly pensions provided by the Plan."

That, in a nutshell, is what an investment contract is.

Outside of the employment context, it is clear that a participation in a fund of this sort, which invests its assets and returns more money at a later date, is a security. And through a series of six decisions of this Court, beginning with the Joiner case in 1943 and continuing most recently through the Forman decision in 1975, this Court has construed the term "investment contract."

And those decisions demonstrate that so long as there is present the type of relationship found in this case, a relationship in which the investor participates in a common venture with the expectation of profits to be derived from the managerial efforts of others, there is a security. All the requisite features are present here.

The employee makes an investment by giving value in the form of his labor. The purpose of the fund is to provide employees with more return than the amounts contributed: profits.

QUESTION: Mr. Stillman, is there any other case in which an investment in the form of labor has been a way of deciding that it's a security?

MR. STILLMAN: Not that I'm aware of in deciding that it's a security. In terms of it constituting value for purposes of a sale, yes, Your Honor. But that involved something which was a security independent of --

QUESTION: Isn't it true that different employees can contribute different amounts of labor and have the same amount be contributed to the pension fund? Isn't it so many dollars per employee, without regard to their salary level, number of hours worked, and so forth?

MR. STILLMAN: I believe that is so, Your Honor, but that does not affect the basic relationship which this Court has recognized in a series of six decisions, going back many years as giving rise to an investment contract. And it is that relationship which is the significant thing, because that relationship contains the elements that provide the need for the kind of protections that the securities laws afford.

QUESTION: When did the SEC, Mr. Stillman, first take the position that an agreement such as this was an investment contract for purposes of the Securities Act?

MR. STILLMAN: It is important to differentiate, as I think you're doing, the question of security versus the question of sale.

On the question of whether it is a security, the Commission took the position as far back as 1941, in the testimony that Commissioner Purcell gave, that interest in pension plans are securities.

The defendants dispute the scope of what Commissioner Purcell was referring to. They say that he was only referring to interests in voluntary contributory plans.

I think an examination of what he said will show that it was not so limited. Because, when he talked about the no-sale rationale as being applicable to the type of plan involved here, an involuntary noncontributory plan, that was the very same type of plan that he also had in mind as involving a security.

QUESTION: Well, in the intervening 37 years, why wasn't the Commission out seeking injunctions against one or another of these plans that, presumably, just by the law of averages, would have proved fraudulent or failure to disclose?

MR. STILLMAN: Your Honor, the question of why at any given point in time, or over the period of years, certain types of activity does not give rise to proceedings, whether it be a Commission proceeding or even private proceedings, is something that's very difficult to answer.

QUESTION: Yes, but why isn't a simple answer that it wasn't until recently that they considered this to be a sale?

MR. STILLMAN: The focus of the statements over the years about --

QUESTION: Well, what about the sale, what about the sale issue?

MR. STILLMAN: That's what I was getting to, Your Honor. The focus of the Commission's statements over the years as to whether it was a sale, the focus was in the context of registration, and indeed Judge Tone, in his concurring opinion -- who, as you know, was critical of the Commission -- acknowledged that the focus was really in the context of registration.

Now, it's true the Commission did not come out and affirmatively say, "We are only talking about registration, and the no-sale rationale does not apply for fraud purposes." But it was clearly in that context.

Now, as to why the Commission did not, over the years, take enforcement action in the fraud area, with respect to pension plans: First of all, there is no indication that even in the case of the voluntary contributory that the Commission took enforcement action, based upon the theory that the interest was a security and that there was a sale.

QUESTION: Well, is the Commission's position that it is a sale now for the purpose of registration?

MR. STILLMAN: No, Your Honor. That goes back to the fact that --

QUESTION: Well, when did the Commission first assert that acquiring an interest in a pension plan is a sale? Affirmatively said it was.

MR. STILLMAN: For purposes of involuntary non-contributory plans of the sort involved in this case?

QUESTION: Yes.

MR. STILLMAN: The Commission, as far as I am aware, did not even consider the matter until this case arose.

QUESTION: Yes.

QUESTION: Well, in fact, despite what Commissioner Purcell may have said -- we all know what he said -- there's a dispute as to what he meant. Acting Chairman Andrew D. Orrick, in the last Fifties, testified before a congressional committee quite in a contrary way, didn't he?

MR. STILLMAN: Your Honor, he did not testify that there was no security and there was no sale. In terms of the testimony --

QUESTION: He testified that the SEC had no business with this, and didn't know anything about it, and "please don't give us any jurisdiction over it".

MR. STILLMAN: Your Honor, in context I think that has to be judged in terms of the kinds of legislation that was then before Congress. It was a kind of legislation far different from a simple antifraud provision. It was legislation that would have imposed considerable day-to-days obligations of a more formal nature on people involved in the pension area, it would have required the Commission itself to engage in administering those provisions.

In that context, to say that the Commission was not the proper agency to administer that kind of legislation is far different from saying that there is no sale of a security. Congress itself, in the securities laws, in connection with certain types of regulations, has recognized that even though there is a sale of a security, not all types of regulation under the securities laws should apply.

For example, the periodic reporting provisions of the Securities and Exchange Act. They only apply where there is a market interest. Larger corporations with securities traded in the market.

Now, that doesn't mean that if you have a corporation that doesn't rise to that level you don't have sales of securities. When you get into the more detailed kind of --

QUESTION: On that question of different kinds of regulation that are imposed when you have securities, going back to the stock purchase plan for employees, which are -- everybody concedes those are covered. Does the SEC require registration on those?

It does, doesn't it?

MR. STILLMAN: In certain types. I am not sure of the details.

QUESTION: Why would there be a difference? If this is a security, and if this is a sale, what is the policy reason for saying that there's no need for registration, if it's this huge segment of the capital market?

MR. STILLMAN: The reason that was originally given back in Commissioner Purcell's testimony, back in 1941, he did not really go for policy questions.

QUESTION: Well, I'm not --

MR. STILLMAN: It was based upon the view at that time that it did not involve a sale.

QUESTION: No, but if we say now that it does involve a sale and does involve a security, should it not, and is it not important enough to require the registration as well? I don't understand -- other than concern about retroactive liability, perhaps.

MR. STILLMAN: At the present time, given the enactment of ERISA,as a policy matter registration probably would not be a needed thing.

QUESTION: You mean registration under the '33 Act?

MR. STILLMAN: That's right.

QUESTION: Under the Securities Act of '33?

MR. STILLMAN: Registration at the present time, given ERISA, ERISA has requirements for the filing with the government and the dissemination of a disclosure document.

QUESTION: But prior to the enactment of ERISA it would seem that the reasons why the antifraud provisions apply should equally have applied to the registration statement, shouldn't they?

MR. STILLMAN: If I may refer to this Court's decision in the National Securities case, in a different context, it involved the question of whether an exchange of securities by a shareholder in connection with a merger constituted a sale for purposes of the antifraud provisions, and the Court held: yes, that it was a sale.

In the face of Commission interpretation over the years and Commission rule, saying that for registration purposes it was not a sale.

At that time the rule was premised to some extent on the same kind of rationale that was originally used by the Commission in the case of pensions. Lack of individual volition on the part of the shareholder who votes for the merger and therefore not a sale.

And the Court expressly recognized that the term "sale" can have a different meaning for registration purposes than what it means for sale purposes.

QUESTION: Mr. Stillman, do you think the Commission is as free after this relative period of quiescence to take the position it now does, in view of the enactment of WPPDA in 1958 and ERISA in 1974, as it would have been prior to the enactment of those laws?

MR. STILLMAN: Yes, Your Honor.

It seems to me that those laws really have -- I cannot see what effect they have on the meaning of the word "security" and the meaning of the word "sale".

QUESTION: Well, but Congress has really been proceeding on two different tracks, hasn't it, at least since 1958? One for securities and one for pension funds.

MR. STILLMAN: But there is really no indication that Congress clearly believed that the antifraud provisions were not applicable. The kind of legislation that Congress was enacting in the pension area was such that it could have hardly made a difference whether the antifraud provisions were applicable.

In other words, the suggestion is made by the defendants that had Congress realized the antifraud provisions were applicable, it could have had a significant effect on whether they would have enacted the kind of pension legislation. I don't see that. The pension legislation that we're talking about imposed detailed affirmative disclosure filing requirements, the preparation of documents and, as you get into more recent years of ERISA, massive regulatory provisions.

It's hardly likely that because of the presence of an antifraud provision Congress would have declined to enact that other kind of legislation. Congress, in the securities laws, didn't decline to enact the registration provision simply because there was an antifraud provision.

The other legislation stood on its own and was necessary even with the presence of an antifraud provision.

QUESTION: Mr. Stillman, you've been talking about the definition of security, which of course is a threshold issue. I'm looking at Section 3(a)(10) of the '34 Act, which is substantially like 2(1) of the Act of '33. You rely on the term "investment contract". Both of those sections also have, as a catchall, "any instrument commonly known as a 'security'".

I'd like to ask you whether or not you think in 1933 or '34 participation in a pension plan would have been considered to be something "commonly known as a security"?

MR. STILLMAN: In terms of the man on the street, the employee, if you ask him, "Is your pension a security?" I suppose he would say no.

QUESTION: Would anybody have said yes?

MR. STILLMAN: Pardon?

QUESTION: Who would have said yes?

MR. STILLMAN: That is really irrelevant. This Court has recognized clearly that that provision does not limit in any way the other provisions.

QUESTION: Well, let's assume it is irrelevant. Who would have said yes?

Would you?

MR. STILLMAN: Someone who would have looked at --

QUESTION: I'm not asking Justice Stewart, I'm asking you.

QUESTION: He would, that's for sure.

[Laughter.]

MR. STILLMAN: If I had looked to see how a pension fund actually operates, to see, as was stated in the few sentences that I read from the union's brochure in this case, exactly how it worked, that the moneys are invested, the profits are returned, that those profits are necessary to make the payments; yes, that fits this Court's long-standing definition of --

QUESTION: Well, let me ask you another question about these two sections. They define the term "security" first of all in terms of 18 or 20 different types of securities that are identified: "The term means note, stock, teasury stock, bond, debenture" and so on, for 18 or 20 of those, including, among other things, participation in any profit-sharing agreement.

Do you think it might have occurred to somebody in Congress that if they had indeed intended to include pension plans, to have included participation in a pension plan among the 18 to 20 things they did itemize?

MR. STILLMAN: No, Your Honor, the whole --

QUESTION: You don't think it would have occurred to them?

MR. STILLMAN: No, Your Honor, I don't believe so. The whole framework of putting in particularly the provision "investment contract" was to have a residual provision to see to it that people would not be able to evade the securities laws because the instrument or the investment that they had was something that didn't fit one of the more particular provisions. It was a very broad, all-encompassing provision.

And this Court has made it very clear that specific provisions in that definition -- it said so in the Joiner case, I believe -- do not limit in any way the other provisions like "investment contract". And the definition that this Court has developed ever since the Joiner case and has been developed by this Court and the lower courts for over 40 years, clearly encompass this kind of an interest.

The defendants' reliance on Forman as somehow having overturned all this history, we think is really misplaced. The Court itself didn't view Forman as being anything more than an application of the pre-existing standards. Basically Forman was a holding that substance over form is a two-way street.

And just as in the prior cases, it had been used against defendants; in the Forman case it was used against the plaintiff. But it really didn't change the law. And, in particular, the reliance on Forman is really as a basis for claiming that somehow the United Benefit case is no longer the law, where, in United Benefit, the Court clearly held that the security element could be separated from the insurance element, and they also, in effect, say that Forman has overruled the long line of cases as to whether an instrument in order to be a security has to be something that's traded in the market. That is definitely not the law, and to say that a decision like Forman, which the Court did not view as being any change, has somehow eliminated all that, to us seems totally unreasonable.

MR. CHIEF JUSTICE BURGER: Your time has expired now, Mr. Stillman.

MR. STILLMAN: Okay. May I just say one thing at the end?

MR. CHIEF JUSTICE BURGER: Very briefly.

MR. STILLMAN: The Commission's concern in this case is not solely with respect to the applicability of the anti-fraud provions to pension plans. The definition of investment contracts over the years has served as probably the singlemost important factor in preventing people from avoiding the securities laws through use of unusual, novel devices. And if the defendants' position is accepted, it would have farreaching effects beyond the pension plan area. And that is of major concern to the Commission.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Walner.

ORAL ARGUMENT OF LAWRENCE WALNER, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I would like to address my remarks to the Doomsday argument advanced by the Teamsters, the denial of any possible remedy to a large group on the questions of sale. My colleague will take up the question of the definition of security and the legislative history and congressional intent.

We would like to emphasize the fallacy of the Doomsday argument created by the Teamsters and some of their amici in this case.

We have alleged that Mr. Daniel was intentionally, fraudulently induced to invest in the Teamster Pension Fund by materially misleading information.

The Teamsters originally claimed in the Court of Appeals that upholding the Daniel decision would result in pension industry liability of $200 billion. Now this was reduced by 80 percent, to $40 billion, by some of their amici.

But even this amount is incredible and an absurd claim, we suggest. In fact, I wonder if the amici propounding this position really perceive the essence of what they are asserting.

This figure that they suggest assumes that $40 billion of pension funds are sold both with materially misleading information, as well as the concurrent scienter requirement: an intent to defraud. There is absolutely nothing to support the allegation that so many funds are sold with that requisite intent.

QUESTION: Under your argument, wouldn't they have to be registered, even though not fraudulent?

MR. WALNER: No, sir. There is a registration exemption, we feel, under Section 3(a)(2), and this only goes to the issue of antifraud; we feel registration is expressly exempt, was expressly exempt in the decision of the Seventh Circuit. We feel it's expressly covered by an exemption in the statute itself, as well as long-standing SEC policy.

QUESTION: Of course, long-standing SEC policy would cause you to lose your case, wouldn't it?

MR. WALNER: Well --

QUESTION: The Court had no difficulty in Sloan, in avoiding a long-standing policy that went back to the same period, I think.

MR. WALNER: We feel they are still covered under the express exemption 3(a)(2) of the '33 Act, and we feel that the express terms of the statute otherwise embrace the antifraud provisions. The registration requirement is the provision that's exempted from compliance.

The Teamsters, when they tried to bring down the Grubb study against reduced their Doomsday argument from a figure of three and a half to thirteen and a half billion. But the Grubb study totally ignored the scienter requirement of the Ernst case. And, in effect, estimated the liability that would result if the vesting and break-in-service provisions of ERISA were made retroactive, and not the liability if the antifraud provisions of the securities laws were applied to pensions retroactively.

I would like to just read two sentences at the end of the Grubb report, to show you how far they backed off from their damage claims.

"Most terminated non-vested participants have not been led to expect that they were entitled to a pension. If liability exists only with respect to terminated participants who received information leading them to believe -- leading them to expect a pension, it does not apply to most terminated participants. In such a case the potential liability would be a very small fraction of the amount shown."

Now, even in the Schlansky case, which followed Daniel, in upholding the pension to be a security, the complaint was dismissed for failure to allege facts establishing scienter.

Now, there is no requirement, as we understand it, under 10(b) that anything be told the members. But when something is told to them, all that is required is a bona fide attempt to truthfully inform the members, on whose behalf contributions are made, of their rights and risk of loss. Even if the information is not correct, the absence of scienter as required by the Ernst case will bar any claims for liability under the antifraud provisions of the securities laws.

QUESTION: You mean -- you're talking generally, or just about welfare funds? I'm sure the SEC wouldn't agree with your very loose duty that your language seems to impose upon an issuer or the writer of a proxy statement. All that is required is a good-faith effort.

MR. WALNER: I'm talking only about the antifraud provisions.

QUESTION: Yes.

MR. WALNER: I think if there's an absence of scienter under a private cause of action, there simply is no cause of action.

QUESTION: Well --

MR. WALNER: And I think that is clear in the Ernst case.

QUESTION: -- scienter or its equivalent.

MR. WALNER: Pardon me?

QUESTION: Scienter or its equivalent.

MR. WALNER: Yes, sir.

QUESTION: That's what was held in the Ernst case, basically.

MR. WALNER: Yes.

QUESTION: In your view, Mr. Walner, is there any difference between the elements of a recovery in a 10b-5 action and a common-law fraud action?

MR. WALNER: There may be some differences in the kind and categories of proof, and I would like to point out in that connection that since ERISA has been discussed as, in effect, a preemption type argument -- although they haven't used the word "preemption" -- that ERISA has cut off common-law fraud, absolutely, under Section 514. They have cut off all common law and statutory State remedies.

So, at least with respect to the people who must claim after the effective date of ERISA, they are not able to claim any benefit from common-law fraud or common-law breach of fiduciary obligation, or any State statutes in that regard, and the Teamsters themselves point that out in a footnote in their brief, citing Section 514 of ERISA.

QUESTION: Is there a claim that ERISA has destroyed your common law claim?

MR. WALNER: No, sir, our -- we were slightly, I think inadvertently, misquoted by Mr. Carmell. Our contention is that we are a pre-ERISA case, because Mr. Daniel retired before the effective date of ERISA. ERISA has been the subject of so much discussion, as it may reflect both the intent of Congress and what position people find themselves in with respect to potential remedy.

One of the things I intended to go into later related to the cutoff by ERISA of common-law claims; for example, a person in a corporate pension fund, what are his rights? What are his remedies for intentional fraud to induce?

He no longer has a common law or State statutory right of any character under 514. Now, if you deny him the antifraud provision protection, so that if he's fraudulently induced to invest in a pension plan, he will have no remedy whatsoever for that activity.

QUESTION: Well, are you suggesting that Congress deliberately cut off a group of remedies but preserved this one?

MR. WALNER: Your Honor, I'm suggesting that --

QUESTION: Why would they --

MR. WALNER: -- it was never intended to cut off the antifraud provisions. They have a specific savings clause for all federal remedies. And I'm suggesting that that fact that this large group of people would find themselves without a remedy for that wrong is not something Congress intended.

We feel, because of the scienter requirement, the honest pension manager is shielded from any securities fraud liability. And if that is not sufficient to reflect protection of the pension industry, Senator Williams did introduce a bill that would have the effect of reversing the Daniel case.

So if Congress doesn't like the upholding of this decision, they have before them something they can vote on that would reverse it.

Now, if all of these protections --

QUESTION: Well, conversely, as suggested a few minutes ago by the Chief Justice, if they don't like the reversal of this decision, they can also change the law.

MR. WALNER: Absolutely.

If these protections I've discussed so far as not sufficient to alleviate any concern the Court may have about the effect on the industry, it is possible, of course, for the Court to fashion different forms of prospective relief.

We don't believe prospective relief is appropriate in this case, because of the allegation of intentional fraud. And the need to prove intentional fraud to establish a cause of action.

In the Manhart case, in which this Court allowed prospective relief, the reading indicates it was done so because of the conscientious and intelligent administration of the pension fund, and implicitly the good faith of the pension fund administers -- administrators.

We feel that if prospective relief is considered, it should be fashioned so as not to deny relief against the defendants in this case and in the consolidated case, because in the consolidated case -- consolidated with this case in the lower court -- we do have the Central States Pension Fund as a defendant. I am not asking for any relief based on guilt by association, but I do feel that's an important element to have before the Court.

Now, although the defendants have really acknowledge in their briefs that we have the equities, we're not asking for relief based on sympathy, but on well-grounded authority. It's not the unconscionable rule that we're complaining about in the securities accounts that denied Mr. Daniel a pension, that's not the gravamen of our complaint. It's the intentional misstatement about his rights, the intentional misrepresentation.

In fact, the rule is so bad -- just to comment on it as an aside -- Mr. Daniel could not have gotten a pension under the terms of his rejection if he had not missed a day in 22 and a half years. Because the rejection letter -- we discuss it in the footnotes in the brief -- the rejection letter says that he's denied a pension for a six and a half or seven-month break in service. He missed three and a half months for the involuntary layoff. The question is: What happened to the other three and a half months?

The other three and a half months resulted from a nonpayment of the pension contribution by the employer, allegedly as a result of an embezzlement by his bookkeeper. But the denial in the pension letter suggests that he still would have had a three or three and a half month break, which would have been disqualifying if he had never missed a single day.

Now, in speaking about the fears of damage to the industry, the Teamsters have really sought to masquerade as being representative of the industry norm, in terms of their plan, administration and advice to members, and they tried to paint the picture to this Court that if they are found to have securities fraud scienter in a lower court trial, the entire pension industry is doomed.

We want to tell you that's not so. In reporting a study made by their own agent, the defendants reveal that in a comparison with 32 other Teamster pension plans, Mr. Daniel would have received a pension in all of them except the Local 705 pension plan. So they are not, in any respect, representative.

QUESTION: Mr. Walner.

MR. WALNER: Yes, sir.

QUESTION: What other type of investment contract do you consider to be the closest analogy to this one?

MR. WALNER: The closest analogy to investment contract, Your Honor, I would consider to be a mutual fund purchased by an employee through his union or a variable annuity purchased through his union. I see no real difference, Your Honor, between money contributed directly from the employee to the pension fund or money contributed directly by the employer bypassing the employee.

In each case he's taking a reduction of what would be a wage. He is in effect buying it, whether he's taking it out of his own pocket or the employer is paying it directly. There are two reasons.

QUESTION: Let's take the purchase of a mutual fund.

MR. WALNER: Yes, sir.

QUESTION: What happens there? Does the employee end up with a designated participation in the mutual fund?

MR. WALNER: There would be a designated participation he would have. He also has --

QUESTION: Now, will you tell me how that could be forfeited? How could the employee lose that outright? As in this case.

MR. WALNER: If it were a mutual fund that he was buying with his own money --

QUESTION: And he paid for it.

MR. WALNER: And he pays for it.

QUESTION: Right.

MR. WALNER: He couldn't forfeit it, under those terms.

QUESTION: He couldn't forfeit.

MR. WALNER: The thing we're complaining about is that he's not made aware of the forfeitures opportunities here.

QUESTION: Right. But do you know of any type of investment where one, as you suggest, has contributed his wages or a portion of them over a period of years in the acquisition of that, which can be forfeited? Now, I know you're complaining about that here, but under many pension plan situations the interest is forfeited if this man had just walked away and stayed away for good, --

MR. WALNER: Well, Your Honor, --

QUESTION: -- whatever was vested, it would have been forfeited, wouldn't it?

MR. WALNER: -- there are other examples where a contingency or an expectation has been considered security, and the contingency --

QUESTION: Wipes out what he has paid altogether?

MR. WALNER: Pardon?

QUESTION: And wipes out what he has paid over a period of years?

MR. WALNER: It would wipe out the interest in the security. And the example I have in mind, Your Honor, specifically, is an employee stock option, where the option is granted to the employee who works there, providing he remains there for a period of years. It's an option to buy the stock at a specific price.

Now, if the employee leaves --

QUESTION: But you don't pay anything for it until you exercise the option.

MR. WALNER: But it's given in partial consideration for his services, because if he leaves the employment he doesn't have the option. Therefore he's continuing to pay for it with his service, and if he leaves before the time expires, he loses all interest in that option.

Its further contentions, Your Honor, on the fact that even when the option right vests, when he has an unconditional right to exercise it, it will still be valueless unless the value of the stock is in excess of the option price.

QUESTION: Is a stock option deemed to be an investment security within the meaning of the Act?

MR. WALNER: I believe it is a security by definition or by case decision.

QUESTION: I'm talking about for an employee of a corporation. Does a corporation have to register a stock option before it offers it to one of its officers? I haven't looked at that recently, but that surprises me a little bit.

MR. WALNER: If they have to register their securities generally, that registration would cover the offer to the employees. If they don't have to register --

QUESTION: If there is a registration statement in effect.

MR. WALNER: If there is a registration statement in effect, it would cover that employee.

QUESTION: Right.

MR. WALNER: If there's no registration in effect, they would not have to file a registration statement merely because of the employee options, as I understand it.

QUESTION: Yes.

MR. CHIEF JUSTICE BURGER: Your time has expired now.

MR. WALNER: I would just like to make --

MR. CHIEF JUSTICE BURGER: I think you've covered your points, counsel.

QUESTION: Well, Mr. Walner, I hope somebody is going to -- there are two issues here.

MR. WALNER: Yes, sir.

QUESTION: Whether this is a security, and whether this is a sale.

MR. WALNER: Yes.

QUESTION: And we have heard on both those issues from the other side. You said you were going to --

MR. WALNER: I was going to cover a little bit of sale --

QUESTION: -- talk about sale. I hope Mr. Barack will, because, as the Chief Justice says --

MR. WALNER: All right. I just wanted to make two remarks in response to Mr. Dickstein's argument with respect to sale.

He characterized the employees entering into employment as something about which the pension is incidental. In many cases the pension is the primary motive. There are many examples of a person who will stay on a job that he doesn't like, or not change jobs because he's expecting a pension in the present job. He may even forego a job with higher pay, because, when you count up the benefits of the pension, it amounts to more money.

There are employees who will stay in a job when they are sick, when they are hurt, because they want to hang on the last few years to get a pension.

Certainly in those cases the pension is the primary consideration. And even for the new employee seeking a career and deciding to make a choice between fields, he can easily discern the value of the pension to him in evaluating comparative salaries, and he can easily compute that the value of the pension will have a certain dollar benefit which may be the decision-making factor in choosing between interests.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Barack.

ORAL ARGUMENT OF PETER J. BARACK, ESQ.,

ON BEHALF OF THE RESPONDENT

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

This whole case revolves around the question of how to characterize the economic interest in the Local 705 Pension Fund acquired by Mr. Daniel for value rendered.

Now, this economic interest is an interest in a pool or fund of professionally managed investments, stocks, bonds, mortgages and the like.

It is, in this nature, akin to a mutual fund or a variable annuity. And, I might add, in answer to some of the comments made by the counsel for the petitioners this morning, that a variable annuity fund is also a fund, an interest in a variable annuity is a security, and it's the type of security which provides for the annuitant the payment in the future of an annuity, as you will, a retirement benefit.

The economic interest here, as in VALIC or United Benefit Life, was acquired in a periodic investment program by the giving of services, involving the pooling and professional management of other people's money to provide for a benefit, profits if you will, at retirement in the form of an annuity.

QUESTION: Well, we're concerned here with -- despite all the elaborate briefing and argument -- with two rather precise and fairly technical questions, i.e., whether within the meaning of the 1933 and 1934 Acts -- and/or those two statutes -- this interest is a security and, if so, if there was a sale of it.

Those are precise statutory questions. Not -- and if you are talking about economic effects, you can be talking about insurance or bank savings accounts, or lots of other things that are not covered by the Securities Act.

MR. BARACK: Well, I think what we have is a situation where we're not writing on a clean slate, as the Court has expressly recognized in Forman. There are six prior decisions interpreting the definition of investment contract rendered by this Court.

In these six decisions, various points become clear, which make it absolutely clear also that we have a security here. For example, the question has come up whether or not the fact that this might be a novel form of investment means that it is not a security.

For example, --

QUESTION: Well, lots of forms of investment are -- I mean, lots of them are not securities. An insurance policy is not a security, although it's a savings device, and it's a pooling device.

MR. BARACK: However, a variable annuity plan is a security. Now, why is it a security? It's a security because it meets the elements of the Howey Rule.

Now, what are the elements of the Howey Rule? Because this is a rule that has been reiterated by this Court in Forman as defining what a security is.

Now, the Howey Rule states that you have to have an entrusting of value or money to others to be managed with a reasonable expectation of profits to be managed in a common enterprise.

QUESTION: Right there, Mr. Barack, on the entrusting, now, what has the employee entrusted in order to acquire the interest?

I was interested, Mr. Stillman read part of a paragraph on page 14 of this document, but the paragraph starts out, "A funded pension is one which requires an employer to make contributions while the employee-member works, instead of after he retires."

The very paragraph he cites emphasizes the fact that the investment in money is made by the employer rather than the employee.

MR. BARACK: Well, I would suggest that the reading of the Howey Rule in order not to exalt form over substance, in order to look at the economic realities involved, all you need is investment of money or money's worth.

Now, there has been at least, I believe, one case, a District Court case in Texas, SEC v. Addison, which I think is cited on page 54 of our brief, which indicates that an investment of services would constitute the necessary investment of value to meet the first prong of the Howey test.

QUESTION: But isn't it true that in those cases, if a person contributing the services were terminated for some reason, after a year of work, he would still have some interest left, but here this man was terminated, you have no interest whatsoever.

MR. BARACK: That is a question that goes to the issue of contingency, an issue already discussed.

What I would suggest, the inquiry is whether something otherwise a security is declassified from the definition of security because of the fact that it is contingent. Now, I suggest the example used by Mr. Walner, that a stock option acquired by the giving of services, which option can only be exercised after a number of years, is a security which is not declassified from the definition of security because it is contingent.

Let us look further. In the Howey Rule, as reiterated in Forman, what is stressed is that there must be a reasonable expectation of profits. Not that there be immediate profits today or tomorrow or Year One or Year Two. All that is required is that there be a reasonable expectation of profits.

QUESTION: Well, if the plan were never subject to amendment, say the defined benefits were always two dollars, or whatever the payment was, it was never to be amended, would you still be able to make your argument?

MR. BARACK: Well, that is the question --

QUESTION: Is a continuing interest one that depends on the Trustees amending the plan to increase the benefits, provided there's enough money there that they can use to reduce employee --

MR. BARACK: That raises a very interesting question, which --

QUESTION: -- required contributions and so forth?

MR. BARACK: -- which is whether or not a fixed dollar annuity which cannot be amended is also a security. That question was not present in VALIC, and it is not presented in this case.

QUESTION: What's your view on that question?

MR. BARACK: Pardon?

QUESTION: What's your view on that question? For a fixed dollar annuity.

Would it be an investment?

MR. BARACK: I would think that it's a very close question, and I don't think I can answer that question.

QUESTION: Well, what interest would there be in profits? I mean, how do you --

MR. BARACK: However, this is not that case. Because here we have a situation where the lure to the investor was actually the profit element. As Mr. Stillman has quoted from their own brochure, it is the money that is contributed that is growing which is the lure to the investor.

Now, indeed, in this case the profits in the form of retirement benefits promised to investors have increased.

QUESTION: But you don't read the whole paragraph, that's what I object to about both of you. They say that there's enough money there so when it's invested you can be sure that the fund will grow so they can pay you the $250 monthly that's provided under the plan. They say there's going to be enough growth to meet the guaranteed benefits. That's what they say.

MR. BARACK: Well, that's --

QUESTION: They don't talk about this is going to give you 260 or 270 dollars.

MR. BARACK: Well, this is the promise of profits. They say we're promising you profits --

QUESTION: There's no promise of profits in that paragraph. There's a promise that you will get your $250 a month.

MR. BARACK: Well, this is a promise again that you are getting this, and they also reiterate throughout their descriptive materials, which have been distributed, which we allege are materially misleading, that over the course of the period of time these benefits have been increased.

And indeed this is just the facts here. The profits promised have increased from an initial $75 per month for persons retiring in 1955, to $550 per month for persons retiring in 1977.

QUESTION: Will you tell us what caused that increase? How much of it, what percentage of it is from investment efforts of the Trustees of the Fund, as distinguished from additional contributions made by the employer as a result of collective bargaining?

MR. BARACK: Well, we don't know the exact answer to that question in terms of the numbers, but let me tell you a number that we do know that is analogous to that. We do know that by the defendants' own computation, when there has been an investment along the example they use of approximately $9500 in the pension fund, that there will be substantial profits returned to the investor, and of these substantial profits approximately $5,000 would represent earnings on that fund, or approximately 50 percent of the amount invested.

Let's look at it from another point of view. The persons investing in this fund are investing $30 a week, $1500 a year for over $30,000 in a twenty-year career. If invested risk-free, at 7.5 percent in a savings bank, that would amount to $72,000 over a twenty-year career. The profit potential is tremendous. And this is what induces these people to invest here.

QUESTION: When Mr. Daniel signed on and the pension agreement was originally formulated to guarantee him \$240 or \$250 a month, as Justice Stevens questioned you about, was there any promise that he would get more than that if the investment went well?

MR. BARACK: We believe that the facts, when we get to trial in this case, will indicate --

QUESTION: Well, was there any provision in the agreement to that effect?

MR. BARACK: In the agreement? No. But I think that the promotional material which is used to induce these people to invest goes over the history of how these benefits have been increased periodically over the period of time.

QUESTION: You keep emphasizing the motive that induced these people to invest. What option did this particular individual have? He's going to take this job --

MR. BARACK: Well, this is an important -- this is an important --

QUESTION: -- he's going to take this job, he had to become a member of this plan, didn't he?

MR. BARACK: This is an important question. The question that -- we have to recognize that the defendants have conceded that a voluntary contributory plan, an interest in such a plan is a security. Now, they have appended a name to our particular type of employee plan: involuntary and non-contributory.

Well, what are they saying when they are saying that a plan is involuntary? They're saying something about the fact that either an employee who makes an employment decision cannot also make an investment decision, or that an investment decision undertaken by an employee is secondary to the employment decision undertaken.

Well, it's certainly true, and this case has held, that the presence of a security cannot be defeated by the fact that the transaction at issue involved other substantive dimensions. For example, this Court in VALIC, in United Benefit Life, has found a security, an investment contract there present, even though the person there was acquiring other elements of insurance. This --

MR. CHIEF JUSTICE BURGER: Your time has expired now, Mr. Barack.

MR. BARACK: Let me just conclude.

MR. CHIEF JUSTICE BURGER: If you can finish your sentence.

MR. BARACK: Mr. Justice Powell thus stated in United Benefit Life that there are two promises involved that are entirely distinct and may be separated from one another.

I think that -- let me just finally then conclude that this type of security, which we have present here, meets the definition of investment contract, because Mr. Daniel has turned over his retirement funds to others to be managed in a pooled investment program, on the promise of profits, and that therefore it was within the intent of Congress to protect against, by enacting the antifraud rules of the federal securities laws.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. That case is submitted -- oh, excuse me, Mr. Dickstein, you have eight minutes. We've heard so much and gone so much overtime, I thought they had used your time up.

[Laughter.]

MR. DICKSTEIN: Thank you.

MR. CHIEF JUSTICE BURGER: You've got eight minutes left.

REBUTTAL ARGUMENT OF SIDNEY DICKSTEIN, ESQ.,

ON BEHALF OF PETITIONER IN NO. 77-753

MR. DICKSTEIN: Mr. Barack, at the end of his argument, said that we have conceded that an interest in a voluntary contributory pension fund is a security. I feel like the man who gave up the tip of his finger and found that his whole arm had been swallowed up.

We have said it again and again and again, we said it in our reply brief. All that we do say, and this is consistent with what the SEC has said, is that where you have a plan where employer stock is purchased with employee money, that is a security. But nothing else is.

And Mr. Stillman, and I think with candor, in answer to your question, Mr. Justice Rehnquist, as to whether or not the security -- inaction of the Securities and Exchange Commission can in any way be attributed to their position with regard to no sale, stated with candor that as a matter of fact the SEC has taken no enforcement action whatever, even with respect to voluntary contributory plans.

And we believe that 35 years of quiescene, from an agency which is hardly known for its passivity, speaks volumes.

There was another question asked of Mr. Barack, and that was: How much of this increase in pension benefits from 75 to 550 represents increase in employer contribution?

Mr. Barack actually did have the figures and he stated them, although in an inadvertent way. The initial employer contribution to the 705 Fund were two dollars a week. Mr. Barack says it's now $30 a week.

During the period of time in which the pension benefit, the defined benefit has gone from $75 to $550, an increase of about sevenfold, the amount of contribution has gone up 15 times.

I think this is really relevant. Because it does tend to deal with even the isolated factors in this type of arrangement, which Mr. Barack shows that under the Howey definition of a security demonstrates that this is a security.

About Howey, I think the first thing to say is that the formulation in that case was designed to ascertain Congress's intent with respect to the use of the word "security". Here we think there are much better indicia of congressional intent.

But even if there were not, and even if one looks at the Howey formulation, we think it simply intends to reinforce the proposition that when you're talking about pensions you are outside of the realm of the securities laws.

They say investment of money is the first Howey criteria or element, and I say, well, we have it here because when the employer puts two dollars in the pension fund, that's the same as if he handed the two dollars to the employee and the employee handed it to the pension fund administrator and said, "Put this away for my retirement".

Well, this Court, of course, in Alabama Power, when it considered the question of pensions, recognized that it is by no means as simple as that. There are all kinds of reasons why employers have pension plans, and why employers make contributions to pension plans, including the humanitarian as well as the good labor policy reason, that when an employee is too old to work, he ought to have some money in his pocket as he leaves the plant door.

A dollar in the pension fund, in a noncontributory pension plan is not fungible with a dollar purchase of a mutual fund. And, as a matter of fact, ERISA makes sharp distinctions between contributory, between employer dollars and employee dollars, when the employee makes a contribution to a pension plan it, by terms of ERISA, is nonforfeitable. When the employer makes the contribution, of course it is forfeitable, unless and until vesting is achieved.

They talk about the interest income. Whose income really is it? In the simple model of a single employer pension plan, it's quite clear that the interest income which is earned on the money that that employer places in the fund has to do with the level of funding and how much more the employer has to put in in order to pay the defined benefit provided by that plan.

I will not go into each of these factors in isolation, but when one views them in Howey terms, one has to conclude that they are all somewhat skewed -- and I think I'm being charitable when I say "somewhat" -- because the point is these elements cannot be viewed in isolation.

All of the other factors pertaining to noncontributory pension plans, the plaintiff and the SEC dismiss as irrelevancies.

Break in service, minimum periods of employment. Who ever heard of a security where you get paid off if you're disabled and you don't get paid off if you quit your job?

We are talking about an aspect of employment.

I quite agree with Mr. Stillman --

QUESTION: But if you look at this thing in a broad sense, as you're suggesting now, do you suppose that before vesting occurs an employee would have standing to bring a lawsuit to challenge the administration of the Fund by the Trustees? Your figures suggest that the contributions went up fifteenfold when benefits only went up seven or eight-fold.

Now, would an employee have a standing to raise a question about that?

MR. DICKSTEIN: Certainly.

QUESTION: So he does have some interest in the Fund, then?

MR. DICKSTEIN: In that sense, it's just, I suppose, like a contingent remainder-man in an ordinary trust, --

QUESTION: And whether or not it's --

MR. DICKSTEIN: -- might have the right to bring a suit against the Trustee.

QUESTION: And the specific interest in it is whether it's as profitable as it ought to be.

MR. DICKSTEIN: No. His interest, I suppose, of the employee, if the Trustees were acting as imprudent trustees under ERISA or were embezzling funds, for example.

I think he would have a sufficient reason --

QUESTION: But if the embezzlement wouldn't prejudice his expectancy of $250 a month or whatever the benefit would be, what interest does he have?

MR. DICKSTEIN: In that sense he would have a sufficient interest; in a security sense he does not have a sufficient interest. We're simply talking in a different area.

QUESTION: Yes.

QUESTION: Well, forfeitability doesn't mean it's not a security, does it? Because you can have an agreement of sale for land, and if you've got a bunch of orange groves on it, it could conceivably come within the Howey-Joiner rationale and still the contract might be forfeited.

MR. DICKSTEIN: There is no single aspect which perhaps by itself -- you cannot find a situation in which you would say there is a security.

But if you put it all together and you examine the totality of the transaction, it's clear that it's not.

Mr. Stillman spoke about the six cases in which this Court has dealt with the question of security. And from Joiner in '43 to Forman in '75, it all comes down to this: the test is, what character the instrument is given in commerce. It was said in Joiner that way, it was said in Forman that way.

We think the common understanding here, the common understanding in '33, '34, and today, is that it is not a security.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 11:37 a.m., the case in the above-entitled matters was submitted.]

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