

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

32 RY  
SUPREME COURT, U.S.  
WASHINGTON, D.C. 20543

THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

DKT/CASE NO. 84-9

TITLE MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, ET AL.,  
Petitioners v. DORIS RUSSELL

PLACE Washington, D. C.

DATE January 16, 1985

PAGES 1 - 47

**AR**  
ALDERSON REPORTING

(202) 628-9300  
20 F STREET, N.W.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - x  
MASSACHUSETTS MUTUAL LIFE :  
INSURANCE COMPANY, ET AL., :  
Petitioners :  
v. : No. 84-9  
DORIS RUSSELL :  
- - - - - x

Washington, D.C.

Wednesday, January 16, 1985

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 12:56 p.m.

APPEARANCES:

JOHN E. NOLAN, JR., ESQ., Washington, D.C.;  
on behalf of Petitioners.  
BRAD N. BAKER, ESQ., Hermosa Beach, California;  
on behalf of Respondent.

- - -

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
JOHN E. NOLAN, JR., ESQ.,	3
on behalf of Petitioners	
BRAD N. BAKER, ESQ.,	18
on behalf of Respondent	
JOHN E. NOLAN, JR., ESQ.,	43
on behalf of Petitioners - rebuttal	

- - -

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

2                   CHIEF JUSTICE BURGER: We will hear arguments  
3 next in Massachusetts Mutual Life v. Russell.

4                   Mr. Nolan, you may proceed whenever you are  
5 ready.

6                   ORAL ARGUMENT OF JOHN E. NOLAN, JR., ESQ.,  
7                   ON BEHALF OF PETITIONERS

8                   MR. NOLAN: Mr. Chief Justice, and may it  
9 please the Court:

10                  This case arises under an important federal  
11 statute, ERISA, and it is safe to say that if the  
12 statute was working the way Congress intended that it  
13 should, the case would not be here today at all.

14                  The Respondent Russell received all of the  
15 benefits to which he was entitled under the plan, under  
16 the statute, all of the benefits that she had claimed in  
17 March of 1980, just short of five years ago. Shortly  
18 after that, this suit was filed. It was filed in state  
19 court. It was removed to the Federal District Court in  
20 California where the Court granted summary judgment for  
21 Petitioners, ruling that punitive damages and  
22 extracontractual compensatory damages in this case  
23 including damages for pain and suffering and emotional  
24 distress, were not available under ERISA.

25                  The Ninth Circuit reversed, holding that they



1       were, and this Court granted certiorari.

2               First, with regard to punitive damages, that  
3       issue is squarely presented by this case, whether or not  
4       they are available under ERISA. We contend that they  
5       are not, essentially for two reasons, that that is not  
6       what Congress said, and quite plainly, after review of  
7       the legislative history, that is not what Congress  
8       intended, and secondly, that if punitive damages were  
9       available, they would interfere with the proper  
10      functioning of the employee benefit system in the  
11      federal courts.

12             ERISA is a long, complex, comprehensive  
13      statute, but the provisions directly involved in this  
14      case are only two, and they are relatively simple.  
15      Section 502 provides that a civil action is available to  
16      the Secretary of Labor and to participants,  
17      beneficiaries and fiduciaries for relief under Section  
18      409. Section 409, which deals with fiduciary breach,  
19      provides that fiduciaries who breach their duty will be  
20      personally liable to the plan to make good the losses  
21      that their breach occasioned or to restore to the  
22      plan --

23             QUESTION: Are you suggestion, Mr. Nolan, that  
24      under 409 the duties imposed run only for the plan, not  
25      for beneficiaries?

1 MR. NOLAN: I am suggesting that, yes, Justice  
2 Brennan. Section 409 deals with fiduciary  
3 responsibility, and it talks about personal liability of  
4 fiduciaries, but it is our position that recovery under  
5 409 is limited to the plan as distinguished from the  
6 individuals.

7 QUESTION: Now, it talks about duties imposed  
8 upon fiduciaries by this subchapter. What are they?

9 MR. NOLAN: Some of them are defined  
10 explicitly, Justice Brennan, and others are to be  
11 inferred from the law of trusts to which Congress  
12 committed the entire statute of ERISA for its  
13 administration.

14 409, in addition to requiring that fiduciaries  
15 make good to the plan any loss occasioned by the breach,  
16 it requires that fiduciaries restore to the plan any  
17 gains that they have made from the use of plan assets.

18 QUESTION: Well, didn't trust law generally  
19 provide for recognizing that a beneficiary should be  
20 made whole?

21 You just suggested, I think, that Congress  
22 delegated to the law of trusts much of what ERISA was  
23 intended to accomplish.

24 MR. NOLAN: That's correct, Your Honor.

25 QUESTION: The beneficiaries under the old law

1       were always entitled to be made whole.

2               MR. NOLAN: Well, I think in the context of  
3 ERISA, Justice Brennan, to be made whole means to get  
4 the benefits to which they are entitled under the  
5 statute.

6               QUESTION: And that's all.

7               MR. NOLAN: And that's all. And that --

8               QUESTION: And anything else has to be for the  
9 benefit of the plan only.

10              MR. NOLAN: Well, under Section 409, it is our  
11 position that it does, Your Honor. There are a lot of  
12 provisions in ERISA. As you know, it is a very long  
13 statute, and the liabilities that it establishes run in  
14 many different ways. But 409 in our view is properly  
15 read to be a safeguard for the plan, the plan assets,  
16 and that, as a matter of fact, is what the four types of  
17 plaintiffs that are authorized to bring actions under  
18 409.

19              QUESTION: Well, and I can't -- there's  
20 nothing else in ERISA you suggest that could be read as  
21 providing for something more to beneficiaries than what  
22 the plan provides for them in the way of benefits?

23              MR. NOLAN: I believe that's correct, Your  
24 Honor, but the provision of ERISA that provides for  
25 individual rights for participants and beneficiaries is

1 in 502, specifically 502(a)(1)(B), and that section  
2 which provides that participants and beneficiaries have  
3 the right to enforce their benefits under the plan, to  
4 determine what they are, to clarify their rights under  
5 the plan, has its comparable provision referring to  
6 equitable remedies in Section 502(a)(3).

7 And when you look at that, we would suggest  
8 that you would view that as part of the overall  
9 comprehensive statutory scheme where individual rights  
10 are provided for there in 502.

11 QUESTION: But only to the extend of the  
12 benefits that the plan provides.

13 MR. NOLAN: But only to the extent of the  
14 benefits of the plan.

15 QUESTION: And there is no remedy for  
16 beneficiaries, for something more anywhere else?

17 MR. NOLAN: Other than the equitable remedies  
18 provided there, I think that's right. I think your  
19 question, Mr. Justice Brennan, really goes to the heart  
20 of this case, and that is what Congress was trying to do  
21 when it enacted ERISA. It is our position that Congress  
22 was enacting a benefits statute, that it was seeking to  
23 put on the books a statute which would provide for  
24 certain minimum standards, procedures and rules directed  
25 to getting pension and welfare benefits to the people



1 who were entitled to them, that as distinguished from  
2 any number of other things, including the issues  
3 involved in this case.

4 It preempted state law. It was not seeking to  
5 duplicate it or to match it. It was not providing a  
6 state --

7 QUESTION: Well, where state law previously  
8 may have provided beneficiaries with a remedy for more  
9 than just the benefits under the plan, was that too  
10 preempted?

11 MR. NOLAN: To the extent that it was a state  
12 law which related to an employee benefit plan, yes, it  
13 was preempted. Now, I know that this Court recognizes  
14 that this was not a one-way street, that the benefits  
15 that participants and beneficiaries receive under ERISA  
16 are very, very significant. They involve the vesting  
17 and the funding and the access to the courts and all of  
18 the other provisions, review of the detailed civil and  
19 criminal sanctions that are provided, but they  
20 necessarily also involve some tradeoffs, and in our  
21 view, a part of those tradeoffs are the state tort  
22 remedies, of which this is a classic example.

23 With regard to --

24 QUESTION: Mr. Nolan, if the plaintiff below  
25 has been someone suing on behalf of the plan, would

1 compensatory damages be available under 409?

2 MR. NOLAN: I believe they would not, Justice  
3 O'Connor.

4 QUESTION: Well, certainly the language  
5 speaking of other equitable or remedial relief as the  
6 Court may deem appropriate as applied to a suit by the  
7 plan might result in a difference, might it not?

8 MR. NOLAN: I think that it probably would,  
9 Justice O'Connor. To the extent that it does under  
10 Title VII, for example, where in actions like that the  
11 party has a right to reinstatement with or without back  
12 pay and such other equitable remedies as the Court might  
13 provide, and I think that the reason that damages,  
14 whether they are punitive damages or in this case  
15 compensatory damages for emotional distress, are at war  
16 with this is that they involve a damages or legal  
17 concept outside of the equitable remedies provision of  
18 the statute.

19 Now, to the extent that your question goes to  
20 having the fund or the plan retain any losses that were  
21 occasioned by the breach, I think that that is very  
22 specifically provided by the first two clauses of  
23 Section 409, and that is the make whole concept  
24 specifically, expressly.

25 QUESTION: Or there might be consequential

1 damages beyond mere reimbursement of the amounts due.

2 MR. NOLAN: Damages, if there were damages to  
3 the plan, I think that that might be available under the  
4 equitable part of the section.

5 QUESTION: Why would it be available under the  
6 equitable part of the section, Mr. Nolan? I thought  
7 that common law courts gave damages, chancellors gave  
8 equitable rulings.

9 MR. NOLAN: That's generally true, that's  
10 generally true, Justice --

11 QUESTION: Well, then, my question remains why  
12 would damages be available under a section providing for  
13 equitable relief?

14 MR. NOLAN: Well, I think in part this is  
15 terminology, but to the extent that it involves the  
16 restoration of the plan, it would be involved, in our  
17 view, under Section 409, and the courts in dealing with  
18 Section 409 have used, as this Court undoubtedly  
19 recognizes --

20 QUESTION: Sure.

21 MR. NOLAN: -- a wide variety of equitable  
22 remedies to do justice.

23 QUESTION: But is damages one of the wide  
24 variety of equitable remedies that they have used?

25 MR. NOLAN: It is usually not. Oh, it is

1 always not in the context of 409, and it is usually not  
2 in equity generally.

3 QUESTION: And it could be other remedial  
4 relief, in any event.

5 MR. NOLAN: I believe that the key language,  
6 Justice O'Connor, is such other equitable or remedial  
7 relief, which ties that clause very specifically to the  
8 two preceding clauses. I don't think it can be read the  
9 way Respondent reads it here by skipping from the  
10 authorization at the top of Section 409 right down into  
11 that language and reading it as if it read equitable  
12 relief or remedial relief. It is really tied together.

13 QUESTION: Well, isn't the law of trusts  
14 historically a creature of equity?

15 MR. NOLAN: The law of trusts is very  
16 definitely a creature of equity, Justice White.

17 QUESTION: And suits against trustees raise  
18 equitable questions.

19 MR. NOLAN: That's correct.

20 I guess the most significant point about  
21 punitive damages is that they are not mentioned  
22 anywhere, not just in 409, but not mentioned anywhere in  
23 ERISA. They are not mentioned anywhere in the very  
24 extensive legislative history of ERISA.

25 QUESTION: Well, at the same time, Mr. Nolan,



1 is there mention in the discussions in the legislative  
2 history of preemption of state remedies, that Congress  
3 intended to preempt any that gave more than just --  
4 beneficiaries more than just the benefits of the plan?

5 MR. NOLAN: There is no --

6 QUESTION: Did Congress say that explicitly?

7 MR. NOLAN: There is nothing that I know of in  
8 the legislative history, Your Honor, that would suggest  
9 that Congress intended to give the beneficiaries  
10 anything more than their benefits under the plan. I  
11 think that the key --

12 QUESTION: No, what -- no, my question was  
13 whether in saying this Congress also said, and to the  
14 extent beneficiaries had any right to anything else  
15 under state law no longer, get only what ERISA  
16 provides.

17 MR. NOLAN: That is correct. That --

18 QUESTION: Did Congress say that expressly?

19 MR. NOLAN: Congress said it in the statute in  
20 the preemption part of ERISA, that any law relating to  
21 employee benefit plans would be preempted, and that, of  
22 course, differentiates ERISA from a number of other  
23 federal statutes which intend expressly to leave state  
24 law standing.

25 MR. NOLAN: Well, I am still wondering, was

1       there anything said in the legislative history  
2       indicating that the Congress addressed itself  
3       specifically to the rights of beneficiaries under  
4       ordinary trust law in the states?

5               MR. NOLAN: No, Justice Brennan, there was  
6       not. There was much in the legislative history on the  
7       point that we have been discussing just the last couple  
8       of minutes. There is much in the legislative history to  
9       suggest over and over and over again that the rights  
10      established in Section 409 are the rights of the plan,  
11      not the rights of individual beneficiaries.

12             Punitive damages, as I was saying, are nowhere  
13      mentioned in the statute, and that we find particularly  
14      significant because it is plain that when Congress wants  
15      to provide for punitive damages, they know exactly how  
16      to do it. In the last fifty years since enactment of  
17      the Securities and Exchange Act in 1934, and running  
18      through TEFRA in 1982, they have done that in fourteen  
19      different statutes. Three of those statutes were  
20      enacted in 1974, the same year that ERISA was enacted.  
21      And that I think, as this Court has recognized on other  
22      occasions, is very strong evidence that they didn't  
23      intend to include punitive damages and then  
24      absentmindedly overlook them.

25             QUESTION: Were there any states that allowed

1 a beneficiary to recover punitive damages before ERISA  
2 was enacted?

3 MR. NOLAN: Punitive damages as we know,  
4 Justice Brennan, are found in many states, not all, but  
5 many, and of course, there was a variety of state  
6 pension and welfare laws, and there were actions under  
7 those laws, and there were a variety of results. That  
8 in part was what Congress was driving at, again, to  
9 refer to the legislative history in seeking --

10 QUESTION: And the variety of results in some  
11 instances --

12 MR. NOLAN: The variety of results, exactly.

13 QUESTION: -- included punitive damages.

14 MR. NOLAN: Including punitive damages in  
15 amounts that were arbitrary, inconsistent, unreliable,  
16 and including as Congress said a uniform source of law  
17 for evaluating fiduciary conduct which they sought to  
18 establish in ERISA which that kind of system would not  
19 provide for.

20 I think that --

21 QUESTION: Well, are you saying that it was a  
22 regular feature of trust law in one or more states or a  
23 lot of states that would award punitive damages in  
24 connection with suits against trustees who have stolen  
25 from the fund or who engaged in some kind of conduct?

1 Can you --

2 MR. NOLAN: No.

3 QUESTION: As well as just surcharging them,  
4 would they award punitive damages as part of trust law?

5 MR. NOLAN: No, I don't think that it was ever  
6 any more than a rare and occasional anomaly of trust  
7 law. I was referring to different kinds of actions  
8 under state law for wrongful termination, cases like  
9 this under state law, not employee benefits cases on  
10 trustees.

11 QUESTION: So you would say even if there was  
12 no preemption, there is no basis for awarding punitive  
13 damages against a trustee.

14 MR. NOLAN: There are cases like that, Justice  
15 White, but -- and we have reviewed that fairly  
16 carefully, but they are rare --

17 QUESTION: All right.

18 MR. NOLAN: And they are anomalous, and  
19 actions by a beneficiary against a trustee are  
20 ill-favored and rarely --

21 QUESTION: But you can't say that in this case  
22 because California law provides such a remedy.

23 MR. NOLAN: That is correct.

24 QUESTION: Yes.

25 QUESTION: The Ninth Circuit held there was



1 preemption here, didn't it?

2 MR. NOLAN: The Ninth Circuit held there was  
3 preemption, yes, Justice Rehnquist.

4 QUESTION: And I don't believe the Respondent  
5 have cross-petitioned or assigned anything in their  
6 brief that would challenge that holding.

7 MR. NOLAN: I think there is quite clearly  
8 preemption in this case. This case deals --

9 QUESTION: Well, does your opponent question  
10 that, do you know?

11 MR. NOLAN: I don't believe that our opponent  
12 does.

13 I would like to return again to the  
14 comprehensive legislative scheme that is ERISA, because  
15 I think that that is perhaps the most persuasive single  
16 reason for this Court holding that punitive damages are  
17 not available here. As this Court said in the Northwest  
18 Air Lines case, where a statute is comprehensive -- and  
19 ERISA is among the most comprehensive statutes -- and  
20 where it provides for private remedies in some  
21 situations, and federal government remedies in other  
22 situations, that is very strong evidence that it didn't  
23 intend that additional remedies should be grafted on to  
24 a statute like that.

25 The review of ERISA is convincing indeed. Its

1 civil and criminal penalties and sanctions providing for  
2 imprisonment, fines in various amounts for various kinds  
3 of conduct, one would have to conclude that Congress  
4 reviewed the subject that they had under consideration  
5 exhaustively and in great detail, and unlike some other  
6 statutes which do involve filling in the details by  
7 courts, this is not that case. This is a very specific,  
8 very comprehensive act directed to providing minimum  
9 standards for pensioners and benefits for those entitled  
10 to them on a nationwide basis, and the emphasis is on  
11 the delivery of those benefits rather than on state tort  
12 claims which may be associated with the subject matter  
13 of earlier cases or like this case.

14 We contend also that punitive damages, if they  
15 were available, would have an adverse impact on the  
16 functioning of the employee benefit system and in fact,  
17 the federal courts. The Congress very carefully  
18 provided in the statute and by regulation promulgated by  
19 the Secretary of Labor for an appeals process in the  
20 event that a claim is denied, and that that appeals  
21 process would effectively be scrapped if the right to  
22 damages were available to those who were applying for  
23 them. Who will go through the appeals process if he had  
24 a right to damages for emotional distress, pain and  
25 suffering, and particularly if he had a right to

1 punitive damages on the outside?

2 This case is probably as good an example of  
3 that as any.

4 We have talked about the remedial aspect of  
5 the statute and how that works with the individual  
6 rights provided under Section 502 and the plan rights  
7 provided in Section 409. I would be glad to respond to  
8 any questions that any Justice might have, or to reserve  
9 the remainder of my times for rebuttal.

10 CHIEF JUSTICE BURGER: Very well, Mr. Nolan.  
11 I think not at this time.

12 MR. NOLAN: Thank you.

13 CHIEF JUSTICE BURGER: Mr. Baker?

14 ORAL ARGUMENT OF BRAD N. BAKER, ESQ.,

15 ON BEHALF OF RESPONDENT

16 MR. BAKER: Thank you, Mr. Chief Justice, and  
17 may it please the Court:

18 ERISA was enacted to protect participants from  
19 actions of the small percentage of fiduciaries who were  
20 not acting in good faith and were not providing the  
21 benefits that participants were rightfully entitled to.

22 Respondent at this time does not request the  
23 Court to imply remedies into ERISA but to interpret the  
24 language that is in ERISA right now in light of looking  
25 at the legislative history, the legislative language.

1 It is the traditional role of this Court to analyze the  
2 statute, and that's what I wish to do for you at this  
3 particular point.

4 In the purpose of ERISA, it indicates that  
5 ERISA was created to protect participants and to provide  
6 appropriate remedies, sanctions and ready access to the  
7 federal court. The legislative history of both the  
8 House and the Senate is unambiguous and quite clear, and  
9 it states that the enforcement provisions were created  
10 and specifically designed to provide broad remedies for  
11 participants to redress or prevent violations of the  
12 act. It then goes on and says it is the Committee's  
13 intent to provide the full range of legal and equitable  
14 remedies, and in both -- available both in state and  
15 federal courts.

16 Now, at the time that this specific  
17 legislative intent created a full range of legal and  
18 equitable remedies for participants, it was quite clear  
19 that compensatory and punitive damages were part of the  
20 full range of legal remedies available to participants.

21 The Section 502 -- excuse me -- (a)(2)  
22 language which refers over to Section 409 allows  
23 participants equitable or remedial relief as the Court  
24 deems appropriate, and this is for breaches of fiduciary  
25 duty. Traditionally, breaches of fiduciary duty are a



1 tort. It is not founded in trust law, but a breach of  
2 fiduciary duty is a tort.

3 If you look at the ERISA the way it is set up,  
4 Section 502 provides for remedies against the plan.  
5 Section 409 sets forth the tort remedies against the  
6 fiduciary.

7 The preemption which totally occupied the  
8 field and removed many tort remedies, intentional torts  
9 as well as breach of fiduciary duty torts, completely  
10 wiped the slate clean. It would be anomalous at this  
11 particular point to so narrowly construe Section 409 as  
12 to not provide the teeth in ERISA necessary to fill that  
13 void, that preemption.

14 QUESTION: Then you do agree that all state  
15 law was preempted by ERISA.

16 MR. BAKER: Every court including yourself in  
17 Shaw v. Delta Air Lines, seems to be taking that  
18 position. Our position in the Ninth Circuit was certain  
19 torts should not be preempted. However --

20 QUESTION: Have there been many states that  
21 allowed punitive damages in suits by beneficiaries  
22 against fiduciaries?

23 MR. BAKER: In the restatement of torts, a  
24 breach of fiduciary duty is a tort, and it cites many  
25 cases from differing jurisdictions in California all the

1 way, and since 1908 they have allowed --

2 QUESTION: Punitive damages?

3 MR. BAKER: -- punitive damages, compensatory  
4 damages, the full range of whatever you can get under a  
5 tort against the fiduciary.

6 QUESTION: Well, a fiduciary who faces the  
7 possibility of punitive damages hasn't much incentive,  
8 has he, to accept the job?

9 MR. BAKER: I believe you are referring to  
10 the -- all the amicus briefs on behalf of the  
11 Taft-Hartley plans where you have half of the  
12 fiduciaries from the employers and half from the  
13 employees. You have got some checks and balances and  
14 safeguards there that themselves would immunize the  
15 fiduciaries from punitive damages.

16 It is also interesting to note that in the  
17 context where we are right now, that the administration  
18 of welfare plans under Section 405(c)(1) and (2), these  
19 fiduciaries may allocate their responsibilities and  
20 obligations for nontrust asset type decisions, and if  
21 they adequately in fact do delegate their authority,  
22 they are immune from liability, so that trustees who are  
23 sitting on the plans to make sure that the trust assets  
24 are being governed and that the policies themselves are  
25 being established properly, they will not be affected

1 unless they are in there actually working on a  
2 day-to-day basis exhibiting discretion as to whether or  
3 not a participant should or should not receive a  
4 benefit.

5 So those obligations can be delegated to  
6 professionals who, just like insurance, and it is  
7 interesting to note that the -- any participant who  
8 happens to be receiving benefits pursuant to an  
9 insurance administered plan, do have the full range of  
10 remedies in state law for their protection, compensatory  
11 damages, punitive damages.

12 The particular situation we are in right now  
13 is a self-funded, self-administered plan that if the  
14 benefits are not paid, the direct benefit accrues to the  
15 employer who is administering the plan. It is a total  
16 conflict situation, and it was these types of breaches  
17 that ERISA was created to prevent. And we are not  
18 talking about wholesale -- wholesale poor actions by  
19 fiduciaries. This is a small percentage of fiduciaries  
20 who need to be kept in line.

21 QUESTION: May I ask on the facts of this  
22 case, I notice one of the petitioners is a person named  
23 Cecilia Steavenson.

24 Who is that?

25 MR. BAKER: That is the supervisor. She was

1        named not with regards to ERISA but --

2                QUESTION: Nothing to do with the ERISA.

3                MR. BAKER: Nothing to do with ERISA.

4                QUESTION: Then in the ERISA claim, who is the  
5        fiduciary, the corporation?

6                MR. BAKER: In the particular plan, we did not  
7        name the fiduciaries because we sued the plan. We  
8        should have been suing the fiduciaries. The fiduciaries  
9        were long-time company employees.

10               QUESTION: But you didn't sue them?

11               MR. BAKER: We have an amendment before the  
12        Court to amend the complaint to sue them at this  
13        particular point.

14               QUESTION: So your suit really is not against  
15        Massachusetts Mutual then.

16               MR. BAKER: Massachusetts Mutual, because they  
17        exhibit or they have control over the employees and are  
18        acting in a discretionary manner in setting up the  
19        policies of ERISA, could conceivably be a fiduciary, and  
20        we contend that they are a fiduciary under the  
21        definition of fiduciary.

22               QUESTION: Well, say they get five or six  
23        people, whether employees or outside people, to  
24        administer the plan and this same sort of thing  
25        happened, they were slow in making payments and for



1       whatever the reason might be, your cause of action would  
2       be against the individual trustees, wouldn't it?

3               MR. BAKER: That is correct, unless there can  
4       be proven that the company itself is exerting such  
5       influence over these people and they have not allocated  
6       their duties pursuant to 405(c)(1) and (c)(2). If  
7       employers allocate their duties properly and truly do  
8       have independent people administering the plans, then  
9       they will be exempt from liability for these types of  
10      damages, compensatory or punitive.

11             The legislative history or the legislative  
12      intent is quite clear that the whole range of legal and  
13      equitable remedies are available to participants.

14             QUESTION: Well, despite the language in the  
15      legislative history, Congress nevertheless enacted a  
16      very specific series of remedies and didn't incorporate  
17      expressly any provision for a beneficiary to obtain  
18      punitive or extracontractual compensatory relief, and  
19      our normal presumption, is it not, in those  
20      circumstances, would be not to read into the act  
21      additional remedies.

22             MR. BAKER: Looking at the language of Section  
23      409, you have an equitable or remedial relief in there,  
24      and the opposite --

25             QUESTION: Well, but looking at 409, it does

1 appear to be addressed to relief for the plan itself,  
2 not a beneficiary.

3 MR. BAKER: No federal court has ever taken  
4 that position, even the cases --

5 QUESTION: Well, reading the language of it,  
6 at least, that's what one would normally think it  
7 meant.

8 MR. BAKER: With regards to an earlier Senate  
9 version that Petitioners contend cast aspersions upon  
10 the intent of Congress since that earlier version was  
11 not adopted, and the earlier version had the words  
12 "civil action for legal or equitable relief can be  
13 granted to participants," the -- that was a section for  
14 breach of fiduciary duty, and that was the Senate  
15 version under S. 4 at Section 693. That language there  
16 specifically lines up with the language of 409 such that  
17 the only consistent reading you can have, looking at the  
18 legislative intent along with an earlier version, and  
19 what you actually end up with under 409 --

20 QUESTION: Well, the earlier version, of  
21 course, wasn't adopted.

22 MR. BAKER: That is correct. In fact, when  
23 the House of Representatives committee said that they  
24 intended to provide the full range of legal and  
25 equitable remedies, the precise language that is in

1 ERISA now was before them. It was the original version  
2 of the statute that was before the committee when the  
3 committee said it is our intent to provide the full  
4 range. If it is not provided under Section 409, there  
5 is no other provision in ERISA which would allow legal  
6 remedies.

7 QUESTION: But that might mean Congress didn't  
8 provide for any, and that gets down to the question I  
9 asked you. Our normal presumption would be that we  
10 don't read in additional remedies that Congress did not  
11 provide for.

12 MR. BAKER: The definition of remedial is  
13 quite -- it is a very nebulous definition. It can mean  
14 punitive, compensatory, whatever it takes to remedy the  
15 wrong that is perceived. So --

16 QUESTION: Well, again, that makes the  
17 assumption that 409 is addressed to remedies of the  
18 beneficiary as opposed to the plan.

19 MR. BAKER: That is correct.

20 QUESTION: Now, assuming we think it applies  
21 only to the plan, then where are we?

22 MR. BAKER: At that particular point, a tribal  
23 right of action argument would indicate that the statute  
24 was specifically provided, the benefit of that statute  
25 was for participants. State law has completely

1 preempted all state causes of action therefore making it  
2 a federal concern, and there should be an implied remedy  
3 for the participants.

4 There they would be -- they would also, if you  
5 do not --

6 QUESTION: Well, that brings you to  
7 Transamerica Mortgage Advisors, to Shaw v. Delta Air  
8 Lines, to cases where we have not implied additional  
9 remedies.

10 MR. BAKER: Absent specific legislative  
11 intent, and the legislative intent here by both the  
12 House and the Senate was to provide the full range of  
13 legal and equitable remedies, and if you do not read  
14 remedial to mean legal, then there have been no legal  
15 remedies afforded to the participants.

16 QUESTION: Supposing Congress in either a  
17 Senate report or a House report says we intend to  
18 provide the full range of legal and equitable remedies,  
19 and then in the statute itself you just have a very  
20 specific section that says the plan shall have a right  
21 to recover from Defendants type A, B, and C, nothing  
22 else.

23 Now, would that -- would you think that the  
24 legislative -- statement in a committee report would  
25 justify inferring a private right of action in the face



1 of statutory language like that?

2 MR. BAKER: If in fact -- no, there is a  
3 presumption you do not want to create a private right of  
4 action, and I --

5 QUESTION: There is also a presumption that  
6 what Congress had to say was said primarily in the  
7 statute, not in the legislative history, isn't there?

8 MR. BAKER: Also correct. The --

9 QUESTION: Well, why -- Congress did provide  
10 for a participant or a beneficiary to have a -- to be  
11 able to sue.

12 MR. BAKER: That is correct.

13 QUESTION: But it rather carefully said what  
14 he could sue for.

15 MR. BAKER: Under Section 409 or under Section  
16 502, or both?

17 QUESTION: 502.

18 MR. BAKER: Section 502 says against the plan  
19 you can only sue for equitable relief or benefits, and  
20 the purpose of that was because you don't want to -- you  
21 do not want to jeopardize the assets of the plan which  
22 would then jeopardize all beneficiaries.

23 QUESTION: No, I know, but Congress did  
24 provide for a civil action by participants or  
25 beneficiaries.

1 MR. BAKER: Correct.

2 QUESTION: And said what they could sue for.

3 This is just another argument, perhaps  
4 Congress didn't intend participants and beneficiaries to  
5 have any other kind of a cause of action.

6 MR. BAKER: Except that under 502 they  
7 specifically say for appropriate relief, the  
8 participants or beneficiaries may sue for appropriate  
9 relief under Section 409.

10 QUESTION: To enjoin any act or practice which  
11 violates any provision of this title or the terms of the  
12 plan, or to obtain other appropriate equitable relief,  
13 to redress such violations, or to enforce any  
14 provision.

15 MR. BAKER: That's a --

16 QUESTION: Do you think punitive damages falls  
17 within those words?

18 MR. BAKER: No, not at all. Those are  
19 remedies that are available against the plan under  
20 Section 502. You must refer it over to Section 409 to  
21 find out the remedies against a fiduciary.

22 QUESTION: Well, I know, but that section  
23 doesn't say anything about a participant or a  
24 beneficiary suing.

25 MR. BAKER: I believe that if it is read in

1 conjunction with a participant or beneficiary going to  
2 502(a) says a participant or beneficiary may sue for  
3 appropriate relief under Section 409, you then get  
4 referred over to Section 409, and it says that the  
5 participant may receive other equitable or remedial  
6 relief --

7 QUESTION: All right.

8 MR. BAKER: -- as the Court deems  
9 appropriate.

10 So the question before the Court is how to  
11 interpret the word "remedial." Does it mean just  
12 equitable?

13 QUESTION: May I just ask one other question  
14 to be sure I am right?

15 MR. BAKER: Certainly.

16 QUESTION: As I understand your position, you  
17 do not claim you have any rights at all against the  
18 plan.

19 MR. BAKER: Most certainly.

20 QUESTION: So that always, in all of this  
21 class of cases, there will always be individual  
22 liability of the individual trustees.

23 MR. BAKER: Of the individual trustees unless  
24 an employer puts himself in a conflict situation and is  
25 actually administering a self-funded plan so that an

1 employer becomes a fiduciary. But then he will still be  
2 sued in his fiduciary capacity.

3 QUESTION: Well, presumably you could -- I  
4 suppose that you might now, if the employer is kind of a  
5 third party who breached the -- compelled the trustees  
6 to violate their trust, maybe you have a claim against  
7 him, but that is not -- the theory of your case is  
8 wrongdoing by the trustees themselves, and you -- and it  
9 is quite clear, you do not seek to impose liability  
10 against a plan for that sort of thing.

11 MR. BAKER: Not at all. That would defeat one  
12 of the major purposes of ERISA to maintain the economic  
13 integrity of the plan.

14 QUESTION: In anything other than 409, is  
15 there anything else in the statute that implies that a  
16 beneficiary under this statute has a right of action  
17 against anybody not payable out of the plan? I mean,  
18 everything else is in terms of getting his -- making  
19 sure he gets his benefits.

20 MR. BAKER: 409.

21 QUESTION: 409 is your entire statutory basis  
22 for your position.

23 MR. BAKER: That's it.

24 QUESTION: Well, how about 502(a)(3), which  
25 gives a -- the authority for a civil action to be



1 brought by a beneficiary to obtain "other appropriate  
2 equitable relief?"

3 MR. BAKER: Okay. Traditionally equitable  
4 relief does not include compensatory or punitive  
5 damages, and it seems to be a consistent reading of the  
6 statute that you can only get equitable relief or your  
7 benefits from the plan, which is 502.

8 QUESTION: Well, do you read 502(a)(3) as  
9 giving a cause of action to a beneficiary against a  
10 trustee?

11 MR. BAKER: 502(a) --

12 QUESTION: (a)(3) --

13 MR. BAKER: -- (a)(3) does not give any right  
14 against a fiduciary. 409 is the only right that a  
15 beneficiary participant has to sue a fiduciary.

16 The -- if in fact remedial means just  
17 equitable, as must be the Court's finding in order to  
18 determine that no compensatory or punitive damages are  
19 allowed against fiduciaries, then you have created in  
20 essence an immunization of fiduciaries. They cannot be  
21 sued for compensatory or punitive damages no matter how  
22 willful or malicious their conduct is.

23 QUESTION: Well, that doesn't follow. They  
24 could steal money from the trust, and on behalf of the  
25 plan you could get remedial relief which might include

1 punitive damages. I mean, if you take your opponent's  
2 view of this case.

3 MR. BAKER: I am not certainly what my  
4 opponent --

5 QUESTION: If you say -- I mean, but if you  
6 read 409 as just providing a remedy for the plan,  
7 conceivably a trustee could act in a way that would  
8 justify a damage remedy against him which would come  
9 within the word remedial.

10 MR. BAKER: That is correct.

11 QUESTION: Yes.

12 MR. BAKER: That is correct. It is not -- the  
13 other equitable or remedial relief is not just provided  
14 for the benefits. The plan also could --

15 QUESTION: Right.

16 MR. BAKER: -- against fiduciaries receive  
17 other equitable or remedial relief.

18 There is nothing in the legislative intent or  
19 the legislative scheme that in any way indicates that  
20 they want to protect fiduciaries for willful, malicious  
21 actions against plan participants. In fact, just the  
22 opposite is true, you have been set up strict standards  
23 for fiduciaries and personal liability.

24 The balancing of costs argument the  
25 Petitioners have advanced, the costs that Congress, when

1 reading the legislative history, the costs that they  
2 were referring to were not the administration costs, the  
3 day in, day out. That did not change that much when  
4 ERISA was enacted. The true costs were the vesting and  
5 the accrual rates, and they wanted to make sure that  
6 when ERISA was established, it did not put such a  
7 financial burden on the employers with regards to making  
8 employees vested 100 percent on day one and have a 100  
9 percent accrued benefit. That is the cost analysis.

10 If compensatory and punitive damages are  
11 allowed under Section 409, these will not be costs that  
12 will be borne by the employer. These are against the  
13 fiduciaries themselves.

14 QUESTION: Do you think there is any  
15 difference at all for purposes of your argument in  
16 reading the statute to give you relief and punitive  
17 damages as opposed to compensatory, noncontractual  
18 damages? Is one more difficult to find than the other?

19 MR. BAKER: Once you expand beyond equitable  
20 into legal, the facts of the case will control and the  
21 standard of review will determine whether compensatory  
22 or punitive damages should be allowed against the  
23 fiduciary. I do not draw a distinction of compensatory  
24 or punitive damages, if the situation warrants, as the  
25 Ninth Circuit has said, and there should be a very

1 narrow definition that only willful misconduct or wanton  
2 disregard of participants' rights would --

3 QUESTION: Has this Court been more reluctant  
4 to find punitive damages authorization than  
5 compensatory, in your view?

6 MR. BAKER: Traditionally, yes. However,  
7 usually it is when there is such unambiguous  
8 congressional intent to protect participants and provide  
9 the full range of legal and equitable remedies. Once  
10 again, that will help interpret the word "remedial," and  
11 it is a remedial statute. It is either a remedial  
12 statute that expands the rights of participants, or it  
13 is a remedial statute that restricts the right of  
14 participants. All the way through the legislative  
15 history, ERISA is something that expands the rights of  
16 participants. Nowhere does it state we are restricting  
17 participants' rights, or participants are forfeiting  
18 rights they already had under state law for the benefit  
19 of the common good, and the benefit of the common good  
20 in this particular situation would be the immunization  
21 of fiduciaries. There is nothing in the legislative  
22 history that indicates the fiduciaries should be put in  
23 an immunized position, or that they should be a favored  
24 type of class.

25 I know of, personally know of no type of



1 statute that as a class protects an individual group of  
2 people from willful, malicious conduct, especially when  
3 that person is supposed to be acting on behalf of  
4 participants.

5 QUESTION: Well, there is no suggestion that  
6 you can't get compensatory damages against a defaulting  
7 trustee, is there?

8 MR. BAKER: Respondent's position is that  
9 compensatory -- you can't get anything --

10 QUESTION: You can't get anything.

11 MR. BAKER: All you get are just your  
12 benefits.

13 QUESTION: And that would be you would get  
14 them from the plan or not?

15 MR. BAKER: Only from the plan, that if in  
16 fact your welfare or your disability payments are  
17 chopped off for two years and you lose your house and  
18 they turn around and give you your two years worth of  
19 back disability payments, you cannot receive  
20 compensation for an erroneous act by a fiduciary that  
21 cost you your house or that might have been a spiteful  
22 action. Fiduciaries are completely immunized under  
23 Petitioners position.

24 QUESTION: May I ask this about the  
25 legislative history? I understand there is a lot in the

1 legislative history about concern about the integrity of  
2 the plans and misuse of assets and that sort of thing.

3 Is there anything in the legislative history  
4 to indicate Congress was concerned with the kind of  
5 problem you described, of trustees just being slow in  
6 payment or deliberately withholding payment for some  
7 malicious reason?

8 MR. BAKER: They really spend very little time  
9 on the remedies. I think that that was not a key  
10 issue. They presumed --

11 QUESTION: Well, was it an issue at all? Was  
12 it --

13 MR. BAKER: It was not discussed one way or  
14 the other. They did not say we are picking one set of  
15 remedies over another set of remedies. They said they  
16 wanted the full range of legal and equitable, and the  
17 full range --

18 QUESTION: On the question of timing, as I  
19 understand the regulations, they do say to you that if  
20 they don't act within three or four months, I forget  
21 what it is, you treat the application as though it had  
22 been denied, is that right, so that you may then go into  
23 court and get your action against the plan.

24 MR. BAKER: With regards to exhaustion of  
25 administrative remedies, that is correct.

1 QUESTION: So that if you waited two years, it  
2 would be at the beneficiary's option if he had a right  
3 to sue. He had a right to benefits.

4 MR. BAKER: That is correct. Respondent's  
5 position is not that the administrative remedies section  
6 should be removed. Petitioners' argument that the  
7 internal resolution of plans will go completely out the  
8 window if compensatory and punitive damages are awarded  
9 does not follow. If in fact you must or the  
10 participants still must exhaust their administrative  
11 remedies before they can sue, if the fiduciaries reverse  
12 their position and make payments within that period of  
13 time, that is the best evidence as to good faith which  
14 would immunize them from compensatory or punitive  
15 damages.

16 The Petitioners also indicate that there is a  
17 tradeoff going here, that there is -- because the  
18 participants receive certain rights under ERISA, they  
19 have to give up something else. There is absolutely  
20 nothing in the legislative history or any case law that  
21 has been cited that takes that position.

22 QUESTION: So I guess your argument really  
23 boils down to it that punitive damages is a form of  
24 remedy.

25 MR. BAKER: Is a remedy to redress or prevent

1 violations of the act. It is true that punitive damages  
2 are a great preventative deterrent tool.

3 QUESTION: Well, is that a remedy to a  
4 plaintiff?

5 QUESTION: Or a deterrence to others?

6 MR. BAKER: It is more of a deterrence to  
7 others. I think that we are not arguing here whether  
8 punitive damages are in society or not. You discussed  
9 that in Smith v. Wade. The standard for punitive  
10 damages I concede should be high. I think it should be  
11 the one enumerated by the Ninth Circuit, that only for  
12 willful, malicious misconduct or for wanton disregard or  
13 indifference towards the rights of participants.

14 QUESTION: Well, all of the wanton disregard  
15 and other phrases like that you have to get from the  
16 state law. You can't get it from ERISA.

17 MR. BAKER: You cannot get that from ERISA.  
18 However, ERISA in the legislative history indicated that  
19 they wanted a body of federal common law to be  
20 established to fill the void created by the complete  
21 preemption of all state laws.

22 QUESTION: Well, I imagine every state's  
23 punitive damage rule is different.

24 Are you arguing that?

25 MR. BAKER: Well, yes, I believe it is.



1 QUESTION: I didn't think so.

2 MR. BAKER: However, it is the Court's ability  
3 at this particular point to set the uniform standard for  
4 punitive damages under ERISA. Nowhere does it state  
5 that state law must be followed. In fact, state law  
6 will not be followed. It is for federal common law to  
7 be established to fill the void created by the total  
8 preemption, and the standard that has been established  
9 by the Ninth Circuit is a willful wantonness standard.

10 QUESTION: And you want us to adopt the Ninth  
11 Circuit's rule.

12 MR. BAKER: I do not feel that a mere reckless  
13 standard would be appropriate in this situation. I  
14 think it should be a willful standard.

15 It would be anomalous at this particular point  
16 to completely wipe out all remedies that participants  
17 had under state law.

18 QUESTION: May I ask, going back to your  
19 compensatory damages for a minute --

20 MR. BAKER: Surely.

21 QUESTION: The willful and wanton business  
22 goes to punitive damages.

23 MR. BAKER: That is correct.

24 QUESTION: But if we put that to one side for  
25 a minute, I guess we also have to fashion the standard

1 of reliability for prompt payment, too, because on the  
2 basic liability, your position is they were too slow in  
3 paying, and I suppose that could be just because they  
4 were negligent or had sloppy administration or  
5 anything.

6 MR. BAKER: Our particular case does not just  
7 deal with slow payment. It --

8 QUESTION: Well, I understand. You make the  
9 punitive damage claim, too, but your compensatory  
10 damages, say they just took four months to process your  
11 claim because they had a sick secretary or something, I  
12 suppose you would have a compensatory damage claim.

13 MR. BAKER: Under certain circumstances, if  
14 the --

15 QUESTION: Well, I have given you the  
16 circumstances.

17 MR. BAKER: You see, the four month period is  
18 still --

19 QUESTION: It took four months to process your  
20 claim, and in the meantime you couldn't pay off your  
21 mortgage.

22 MR. BAKER: That is still within the 26 --

23 QUESTION: Well, say eight months, say eight  
24 months.

25 MR. BAKER: Eight months, yes.

1 QUESTION: We have to decide what period of  
2 time -- basically we need a national rule to determine  
3 how slow a payment becomes -- creates a compensatory  
4 damage liability.

5 MR. BAKER: There is a standard that has been  
6 set forth already in the regulations, and that is  
7 Regulation 2560.503.

8 QUESTION: That's the 120 days, they treat the  
9 claim as denied.

10 MR. BAKER: It goes on just denied. If no  
11 response is made, you may treat it as denied for the  
12 purposes of exhausting your administrative remedies.

13 QUESTION: But do you say that every claim  
14 that takes more than 120 days to process gives rise to a  
15 damage liability?

16 MR. BAKER: That's a very difficult question.

17 QUESTION: But we have to answer it for the  
18 whole country.

19 MR. BAKER: I think it sets up a presumption,  
20 yes, that --

21 QUESTION: Well, is there a defense to it, and  
22 if so, what?

23 MR. BAKER: Reasonable cause.

24 CHIEF JUSTICE BURGER: Do you have anything  
25 further, Mr. Nolan?

1 ORAL ARGUMENT OF JOHN E. NOLAN, JR., ESQ.

2 ON BEHALF OF PETITIONERS - REBUTTAL

3 MR. NOLAN: I have four very brief points,  
4 Your Honor.

5 There have been a number of questions dealing  
6 with preemption and state remedies in my argument and in  
7 my opponent's, and that is referred to in our reply  
8 brief at pages 8 and 9, the rationale for it. Congress  
9 essentially said that the fiduciary standard embodied in  
10 federal legislation is considered desirable because it  
11 will bring a measure of uniformity in an area where  
12 decisions under the same set of facts may vary from  
13 state to state. It is evident that the operations of  
14 employee benefit plans are increasingly interstate. The  
15 uniformity of decision which the act is designed to  
16 foster will help administrators, fiduciaries and  
17 participants to predict the legality of proposed actions  
18 without the necessity of reference to varying state  
19 laws, and I would suggest that that is fundamental, core  
20 to this case and to the issues that we have discussed  
21 here.

22 There have been a number of questions about  
23 making the plan whole from Justice O'Connor and Justice  
24 White and others, and there is a case that deals with  
25 that, a federal case that deals with that that I would



1 commend to the Court. It is called Froyen v. Marshall  
2 and Eisley. It is a Wisconsin case decided in 1971 and  
3 found at 485 Fed. Sup. 629.

4 QUESTION: Marshall and Elsely.

5 MR. NOLAN: And -- Elsely, is it?

6 It says that the Court has broad discretion in  
7 awarding equitable relief to make the plan whole, and I  
8 think that responds to what happens if the fiduciary  
9 takes something and goes away, and whether you call it  
10 damages or not is an issue. I think that ERISA, it  
11 would be regarded as equitable relief as distinguished  
12 from damages, but the effect of it would be to restore  
13 the plan, to make the plan whole.

14 There have been a few cases that have gone the  
15 other way on our issue, by our count, about a half a  
16 dozen, and fifteen resolve it the way we recommend to  
17 the Court. The interesting thing about the six is that  
18 they all ride the same horse. They all take the same  
19 line from the legislative history, the line that refers  
20 to the full range of legal and equitable relief, and  
21 which is repeated in the House and Senate reports, and  
22 they use that as the basis for the decision.

23 We would suggest that that is an insubstantial  
24 basis, particularly where the bill was amended going  
25 through, and that reference which may have been accurate

1 when the legislative history was written, was stripped  
2 from the bill before it was enacted, and there is in the  
3 present bill no reference at all to legal relief, and we  
4 would suggest therefore no reference at all to the kind  
5 of damages relief raised by Respondents here.

6 Justice O'Connor had a question about  
7 502(a)(3), would it give participants or beneficiaries a  
8 right against fiduciaries. In our view, it would.

9 If there are any further questions, I would be  
10 glad to respond.

11 Justice White?

12 QUESTION: Is there -- is the claim in this  
13 case that the beneficiary should get punitive damages?

14 MR. NOLAN: The claim in this case is that the  
15 participant, I believe, should get punitive damages,  
16 yes.

17 QUESTION: And not -- rather than the plan.

18 MR. NOLAN: Rather than the plan, clearly.

19 QUESTION: What if the beneficiary sues under  
20 (3)(a)(2) for appropriate relief under Section 409? I  
21 understand your position is that all recoveries under  
22 409 go to the plan.

23 MR. NOLAN: That is correct.

24 QUESTION: And part of his cause of action is  
25 I am suing on behalf of the plan to get relief against

1 this fiduciary, and I want the fiduciary to pay punitive  
2 damages to the plan.

3 MR. NOLAN: Well, there are two aspects to  
4 that which make it good as a hypothetical but not very  
5 good as a case. The first is that if you are going to  
6 go through 409, you go through 502(a)(2), I believe,  
7 which has a specific reference to 409.

8 QUESTION: Yes.

9 MR. NOLAN: The other is that 502(a)(3) is by  
10 its terms expressly limited to equitable relief.

11 QUESTION: I understand that.

12 MR. NOLAN: It is in our view by the  
13 individual as to --

14 QUESTION: I know that. 502(a)(2) permits the  
15 participant to sue for appropriate relief under 409, I  
16 think.

17 MR. NOLAN: I believe that --

18 QUESTION: That's just what it says. It says  
19 a beneficiary may sue for appropriate relief under  
20 Section 409, and you say the only appropriate relief  
21 would have to be paid to the plan, and you also say that  
22 in any event, punitive damages is never appropriate  
23 relief.

24 MR. NOLAN: That's correct.

25 QUESTION: Okay.

1 CHIEF JUSTICE BURGER: Thank you, gentlemen.  
2 the case is submitted.

3 We will hear arguments next in Allis-Chalmers  
4 Corporation v. Lueck.

5 (Whereupon, at 1:56 o'clock p.m., the case in  
6 the above-entitled matter was submitted.)  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25



CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

84-9 - MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, et al., Petitioners

---

v. DORIS RUSSELL

---

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)

85 JAN 23 A9:22

RECEIVED  
SUPREME COURT, U.S.  
MARSHAL'S OFFICE