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ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-9

TITLE MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, et al., Petitioners V. DORIS RUSSELL

PLACE Washington, D. C.

DATE April 24, 1985

PAGES 1 thru 44

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MASSACHUSETTS MUTUAL LIFE :

4 INSURANCE COMPANY, ET AL., :

5 Petitioners : No. 84-9

6 v. :

7 DORIS RUSSELL :

8 - - - - - - - - - - - - - - - - - - -x

9 Washington, D.C.

10 Wednesday, April 24, 1985

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 1:00 o'clock p.m.

14

15 APPEARANCES:

16 JOHN E. NCLAN, JR., ESQ., Washington, D.C.;

17 on behalf of Petitioners.

18 BRAD NALEY BAKER, ESQ., Hermosa Beach, Cal.;

19 on behalf of Respondent.

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1 C O N T E N T S

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1 PROCEEDINGS

2 CHIEF JUSTICE BURGER: Mr. Nolan, you may

3 proceed whenever you're ready.

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

5 ON BEHALF OF THE PETITIONERS

6 MR. NOLAN: Thank you. Mr. Chief Justice, and

7 may it please the Court:

8 In presenting the reargument for Petitioner

9 this afternoon, I would like to review briefly the facts

10 and the law, to take some time to comment on those

11 issues which were of interest to the Court on the

12 argument of this case, and to comment briefly on the

13 Lewick case which the Court decided last week and its

14 relevance to this case.

15 This case presents two very important issues:

16 the first, whether punitive damages are available under

17 ERISA; and the second, whether consequential damages in

18 this instance, including damages for emotional and

19 mental distress, are available under ERISA.

20 The district court, going with the great

21 weight of authority, held that they were not. The

22 United States Court of Appeals for the Ninth Circuit

23 reversed, holding they were, and this Court granted

24 certiorari.

25 The Respondent Russell was an employee of Mass

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1 Mutual, a claims examiner in Los Angeles, when in May of
2 1979 she was disabled with a back condition. She began
3 drawing benefits under the salary continuation plan and
4 those benefits continued until October of 1979, when, on
5 the basis of an examination that said that she was not
6 physically disabled, the salary payments were
7 discontinued.

8 When she was notified of that, she responded,
9 saying that she wished to provide additional information
10 and that she wished to appeal. She did provide that
11 information in a letter under date of November 27th,
12 1979, and it included a psychiatrist's report which said
13 that her disability was psychosomatic rather than
14 orthopedic.

15 On the basis of that report -- that report and
16 her letter of November 27th, was treated as a formal
17 appeal, and on the basis of the report there was another
18 psychiatric examination which reinforced the conclusions
19 of the first. The second examination was dated February
20 15th of 1980.

21 On March 11th of 1980, the plan administrator
22 acted, reversing the denial of the claim and restoring
23 retroactively all of the salary payments that had been
24 claimed by the Respondent. Subsequently she applied for
25 long-term disability and that application was approved.

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1 The Court of Appeals for the Ninth Circuit
2 held, among other things, that the time of her appeal
3 started from the date of her first letter, rather than
4 the date when the operative information on which her
5 claim was based was received, and on that basis that
6 from then until her claim was granted ran 12 days over
7 the 120-day period provided in the regulations, and they
8 held that that was a breach of fiduciary duty.
9 As a result of that, we are here today, still
10 embroiled in this litigation, more than five years after
11 the date on which all of the benefits to which she was
12 entitled, indeed all of the benefits that she claimed,
13 were awarded to her.
14 Now, I know that this Court is very familiar
15 with Section 502 of ERISA, but just to go through it
16 again very briefly. Section 502(a)(1) provides for the
17 individual rights of action for participants and
18 beneficiaries, that they can recover benefits under the
19 plan, enforce terms of the plan, or clarify terms to
20 future benefits under the plan.
21 Section 502(a)(2), the section that is at
22 issue here, provides a civil action for relief under
23 Section 409 for the Secretary of Labor, participants,
24 beneficiaries, and fiduciaries. And Section 503
25 provides for injunctions and other appropriate equitable

1 relief for participants --

2 QUESTION: You mean 502(3)?

3 MR. NOLAN: I think it's 502(a)(3), Justice

4 White.

5 QUESTION: Right.

6 MR. NOLAN: It provides for individual relief

7 for participants and beneficiaries and fiduciaries, the

8 right to injunctions, and other appropriate equitable

9 relief.

10 QUESTION: Why isn't that section -- I suppose

11 you could explain, consistent with your case, why that

12 isn't redundant? If you can sue under 409, why do you

13 need (3)?

14 MR. NOLAN: Well, it's fairly complex, Justice

15 White. I guess that you could say also that it might be

16 redundant with 502(a)(5), which provides substantially

17 the same thing.

18 QUESTION: But this gives individual relief?

19 MR. NOLAN: Yes, and that gives it to the

20 Secretary, with a --

21 QUESTION: And it gives it to the beneficiary,

22 (a)(3) does.

23 MR. NOLAN: Yes.

24 QUESTION: And under 409, I suppose one of

25 your arguments is that the relief goes only to the

1 plan?

2 MR. NOLAN: That certainly is one of our

3 arguments, yes.

4 Basically, the difference between 502(a)(2),

5 the section at issue here, which provides for relief

6 under 409, and 502(a)(1) and (a)(3), is that 502(a)(1)

7 and (a)(3) quite plainly provide rights and remedies for

8 beneficiaries, participants --

9 QUESTION: And a cause of action, and a cause

10 of action.

11 MR. NOLAN: And a cause of action.

12 And 502(a)(2) does not, except in a derivative

13 sense, that they are authorized to bring an action on

14 behalf of the plan.

15 QUESTION: Under 409?

16 MR. NOLAN: Under 409, that's correct.

17 Section 409 deals with liability of

18 fiduciaries, and it provides that fiduciaries shall be

19 liable for breach of fiduciary duty, liable to make good

20 to the plan any losses that the plan has suffered as a

21 result of the breach, to restore --

22 QUESTION: What of 404 and its provision that

23 the fiduciary must discharge his duties solely in the

24 interest of the participants and beneficiaries?

25 MR. NOLAN: I think 404, Justice Brennan, is a

1 continuing obligation of fiduciaries. It runs through
2 everything in ERISA and every fiduciary duty. 409, to
3 distinguish it, provides liabilities for breach of any
4 fiduciary duty, and it provides that the fiduciary shall
5 make good to the plan for losses, shall restore to the
6 plan any profits made from the use of the plan assets,
7 and for such other equitable and remedial relief as the
8 court may find.

9 Now, when we talked --

10 QUESTION: Didn't the old law of trusts
11 generally provide for compensatory damages to a
12 beneficiary for breaches of fiduciary duties?

13 MR. NOLAN: I think quite clearly not, Justice
14 Brennan. It did not. What the law of trusts provided
15 -- and we'll talk more about this in the course of the
16 argument today -- is that the plan or the trust would be
17 restored. The loss to the estate in the event of a
18 breach of fiduciary duty would be restored.

19 And the first area of questions that the Court
20 raised was the question that Justice White referred to a
21 moment ago, whether or not the recovery under 409 is
22 limited to the plan and thus whether it excludes
23 participants and beneficiaries; secondly, whether the
24 recovery --

25 QUESTION: The beneficiary can sue on behalf

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1 of the plan?

2 MR. NOLAN: But cannot recover.

3 QUESTION: Himself or herself.

4 MR. NOLAN: That's correct. The recovery is

5 to the plan.

6 And secondly, whether the relief provided by

7 Section 409 includes legal, as well as equitable relief,

8 or whether it is exclusively equitable; and thirdly,

9 with regard to state rights, state tort action rights

10 for example, were they preempted by ERISA, and if so is

11 there any obligation or is there any provision in ERISA

12 or elsewhere to replace them?

13 Going first to the issue of recovery by the

14 plan, it is our position, of course, that recovery is

15 limited to the plan, that the provision for individual

16 recovery on the part of beneficiaries and participants

17 is found exclusively in 502(a)(1) and 502(a)(3), that

18 there are no individual rights to recovery under 409.

19 The Court understands, of course, what that means, not

20 just that punitive damages and consequential damages are

21 not available, but no other relief is available either.

22 Now, why do we say that? We say that first

23 because that's what the statute says. The statute talks

24 about making good to the plan, restoring to the plan,

25 such other equitable or remedial relief

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1 QUESTION: As I recall it, the legislative
2 history has a lot of references to "make whole." What's
3 that?
4 MR. NOLAN: That's correct, Justice Brennan,
5 the legislative history has a lot of references to
6 restoring to the plan or restoring to the pension fund.
7 QUESTION: Only to the plan? You think "make
8 whole" had reference only to the plan?
9 MR. NOLAN: There is a reference or maybe a
10 couple to "make whole" in the legislative history.
11 Those references refer to the plan, as distinguished
12 from the beneficiary, and I think that the legislative
13 history on this is absolutely conclusive. You cannot
14 read the legislative history of Section 409 without
15 concluding that Congress intended to limit recovery to
16 the plan.
17 They talk about it over and over again and say
18 a dozen times, maybe a score of times, about restoring
19 to the plan. By contrast, there's not a single
20 reference anyplace in the statute or the legislative
21 history to recovery on the part of individual
22 beneficiaries --
23 QUESTION: Under 409.
24 MR. NOLAN: -- in actions under 409.
25 QUESTION: Because there are plenty of

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1 remedies supplied to them elsewhere, as you have pointed
2 out.
3 MR. NOLAN: There are many remedies supplied
4 to them elsewhere, and particularly in this regard, for
5 breach of fiduciary duty, in 502(a)(1) and 502(a)(3), by
6 contrast.
7 We feel that this result is dictated also by
8 the law of trusts, where actions by beneficiaries
9 against trustees were in effect derivative actions to
10 recover for the plan, as distinguished from individual
11 recovery.
12 QUESTION: Was the argument made to the Court
13 of Appeals that recovery under 409 was for the plan
14 only? Because I don't see any discussion of it in the
15 Court of Appeals' opinion.
16 MR. NOLAN: It was, I believe, made to the
17 Court of Appeals. We were not counsel at that time.
18 QUESTION: Do you find any discussion of it in
19 the Court of Appeals' opinion, about recovery to the
20 plan?
21 MR. NOLAN: I don't believe that the Court of
22 Appeals talked about recovery to the plan. I know they
23 talked about the broad general purpose of ERISA, whether
24 or not it applied to the claims procedure, and that it
25 ought to be broad enough to reach this, and I think that

1 there wasn't anything to the contrary in the statute,
2 perhaps.
3 I think that this result is dictated also by
4 common sense. I must say, if you look at the structure
5 of the statute, it is not, I would suggest, reasonable
6 to assume that the Secretary of Labor, with the kind of
7 manifold, complex responsibilities he has, should be
8 empowered to bring a suit for breach of fiduciary duty
9 on behalf of individual beneficiaries, as distinguished
10 from the plan.
11 Moreover, if there is a right to recovery on
12 the part of beneficiaries and participants under 409,
13 what beneficiary or participant would use 502(a)(1) or
14 502(a)(3), with the very specific limitations in those
15 sections as against the relatively open authorization of
16 Section 409?
17 The second question that we talked about
18 before was whether the recovery under 409 is equitable
19 and legal or whether it is exclusively equitable. We
20 say it is exclusively equitable. We say that, again,
21 primarily by reference to the statute itself. There is
22 no reference to legal.
23 QUESTION: And when you say "exclusively
24 equitable," you exclude damages, don't you?
25 MR. NOLAN: That would exclude damages, yes,

1 Justice Brennan. It would also exclude --

2 QUESTION: Equitable relief does on occasion

3 include damages, doesn't it?

4 MR. NOLAN: Well, it doesn't really. That is

5 not to say that there are not cases that do. There

6 are. But in the context of trust law, in the cases

7 decided under trust law, there are not very many. Most

8 of them are recent and most of them are California.

9 QUESTION: Well, incidentally, if ordinary law

10 of trusts provided for damages in equitable relief,

11 certainly there's nothing in the legislative history to

12 suggest that Congress cut back on the remedies that were

13 available to beneficiaries, is there?

14 MR. NOLAN: Congress tied relief under 409

15 pretty closely to equitable principles of trusts.

16 QUESTION: Would you say the same thing as to

17 the provision in 502 -- what is it, 502(a)(3), where it

18 talks about to obtain appropriate equitable relief?

19 MR. NOLAN: Yes.

20 QUESTION: You'd say the same thing?

21 MR. NOLAN: It is the same thing.

22 Incidentally, as the Court knows I'm sure, all

23 three of those sections are regarded generally by courts

24 as equitable. You do not, for example, have a right to

25 a jury trial. Cases coming up under Section 502(a)(1),

1 which looks like it might be legal, as well as
2 502(a)(3), which is plainly equitable, and 502(a)(2),
3 which is what we're talking about here, have all been
4 generally held by courts to be equitable and therefore a
5 jury trial is not provided in them.
6 But not only does the statute not say "legal,"
7 but the term "legal" was in there in an earlier form of
8 the bills that became ERISA and it was removed, and in
9 the statute as finally enacted it doesn't say "legal."
10 It says "equitable or remedial," and there's no
11 reference to "legal" anyplace in the statute or anyplace
12 in this legislative history.
13 That may be particularly significant here
14 because ERISA was amended. ERISA was enacted in 1974,
15 as you know, and it was amende in 1980, and the
16 amendment that was inserted provided for legal or
17 equitable relief, in that order. And in Section 502(g),
18 I believe it deals with delinquent contributions, but it
19 indicates very clearly that Congress knew exactly how to
20 say what it wanted to say with regard to what part of
21 the statute.
22 But that's not Section 409 and Section 409
23 does not say "legal."
24 QUESTION: Mr. Nolan, your reference before in
25 response to a question about a money payment in an

1 equity case, was it not true in terms of the common law
2 of trusts that if money was to be awarded it was not as
3 damages, but to compensate for something which should
4 have been done initially?

5 That is, the failure of the trustee to pay
6 payments due, when the decision went against the
7 trustee, was that in terms of damages or merely giving
8 the beneficiary what he or she had always been entitled
9 to?

10 MR. NOLAN: It was not, Chief Justice, in
11 terms of damages. It was always or substantially always
12 in terms of restoring to the trust that which it had
13 lost.

14 And the trust law also, with regard to the
15 equitable or legal issue that we're talking about, is
16 significant again, because Congress not only consigned
17 ERISA to be interpreted through equitable principles of
18 trust law, but Congress essentially codified -- and it's
19 acknowledged that it did throughout the legislative
20 history -- codified the trust law of fiduciary breach in
21 Section 409.

22 And that law, of course, provided only for
23 equitable and not legal relief, and there just isn't any
24 place for punitive or compensatory or consequential
25 damages under equitable relief.

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1 With regard to the state remedies, state tort
2 remedies that we talked about before and whether they're
3 preempted or not, I think it's quite clear that to the
4 extent that they existed they are preempted. There
5 isn't any question about it here. This is one of the
6 most sweeping preemption provisions that you can find.
7 It says the the law, ERISA, supersedes any and all state
8 laws not or hereafter enacted that relate to any
9 employee benefit plan.
10 Congress knew at the time it considered and
11 enacted ERISA that the employee benefit plans were
12 becoming increasingly interstate, and that they were
13 subject to the uncertain, arbitrary, inconsistent
14 results of state law, and Congress wanted to provide a
15 uniform law for ERISA, particularly where the law of
16 fiduciary breach was at issue.
17 And that's why it very deliberately replaced
18 the patchwork of inconsistent state regulation with
19 ERISA itself. Now, there were great advantages to the
20 employees who are protected by ERISA, the advantages of
21 vesting, funding, reporting requirements, the disclosure
22 requirements.
23 And, not least of all, and of greatest
24 importance as far as this case is concerned, the
25 statutorily mandated claims procedure of ERISA,

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1 expressly provided for by statute, requiring regulation
2 by the Secretary of Labor, providing in the statute
3 itself for full and fair review of any denial of an
4 employee benefit claim.
5 And that is where we would suggest that your
6 decision last week in the Lewick case is relevant. Now,
7 Lewick of course was a preemption case, but it started
8 out as a suit for damages, for punitive and compensatory
9 damages for the alleged breach of a duty of good faith
10 and fair dealing in connection with an employee
11 disability claim.
12 This Court pointed out in the Lewick case the
13 advantage and importance of having a uniform law of
14 labor management relations, and it is of course no less
15 important in the employee benefit area. But we would
16 suggest that the real relevance of the Lewick case to
17 this case is in the Court's comments about the
18 arbitration process and the central role that
19 arbitration plays in labor management relations, and
20 that that is analogous to the central role that the
21 statutory claim procedure plays here, because to hold
22 that damages were available under ERISA would undercut
23 and bypass the statutory claims procedure to the extent
24 that it would effectively become a dead letter.
25 In the first instance, the existence of

1 damages would interfere with the decisionmaking process
2 under the claims procedure.
3 QUESTION: Why would that interfere with the
4 claims procedure any more than suits, court suits under
5 (a)(1) or (a)(3)?
6 MR. NOLAN: Court suits under (a)(1) or (a)(3)
7 have consistently required exhaustion of the claims
8 procedure remedies, and I think, Justice White, that
9 that is actually the key question. If damages were
10 available by suit under 502(a)(2) and 409 and were not
11 available in the claims procedure, the claims procedure
12 would not be an adequate remedy that would have to be
13 exhausted before going to court.
14 So the suit could be filed, not after the
15 claims procedure had been completed and exhausted, but
16 it could be filed at any point along the way or even
17 before the claims procedure would start. That really is
18 the question that illustrates how the existence of
19 damages would eliminate for all practical purposes the
20 claims procedure.
21 QUESTION: Mr. Nolan, you said you're arguing
22 three things. Now you've argued the three. Are you
23 going to argue separately that in any event punitive
24 damages is not available under 409, even if compensatory
25 damages are?

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1 MR. NOLAN: Well, I would argue, certainly --
2 QUESTION: I don't insist that you do.
3 MR. NOLAN: I think that that is an a fortiori
4 case. I think that 409, if it is limited to recovery to
5 the plan, if it is equitable, then there's no place --
6 QUESTION: For either, for compensatory?
7 MR. NOLAN: -- for either.
8 QUESTION: Yes. But what if we disagreed with
9 you, that it isn't limited to equitable relief and it
10 could be legal remedial relief? I see some arguments
11 that damages are not remedial.
12 MR. NOLAN: I think that a decision that went
13 that way would have to come to terms with trust law, I
14 guess, because there is a lot of trust law that talks
15 about restoration to the plan --
16 QUESTION: Well, you wouldn't have to come to
17 terms with trust law if Congress had said expressly in
18 here that beneficiaries may sue for damages. Congress
19 would just have said it.
20 MR. NOLAN: Right. They didn't.
21 QUESTION: And if we disagree with you, it
22 would be interpreting what Congress said, not trust
23 law.
24 MR. NOLAN: Well, if Congress said that,
25 Justice White, I wouldn't be standing here --

1 QUESTION: No, you wouldn't.

2 MR. NOLAN: -- arguing to you. The strength

3 of our argument is that that wasn't what Congress said.

4 QUESTION: And one reason you say is because

5 they had trust law in mind?

6 MR. NOLAN: Yes.

7 With that, I would like to respond to any

8 questions that any member of the Court might have and

9 reserve the remainder of my time for rebuttal.

10 CHIEF JUSTICE BURGER: Very well.

11 Mr. Baker.

12 ORAL ARGUMENT OF

13 BRAD NALEY BAKER, ESQ.

14 ON BEHALF OF RESPONDENT

15 MR. BAKER: Thank you, Mr. Chief Justice, and

16 may it please the Court:

17 ERISA was a remedial statute that was created

18 to expand the rights of participants and to protect

19 participants, not, as Petitioners have contended, to

20 limit the rights of participants. The purpose of ERISA

21 was to protect the participants and provide appropriate

22 relief and remedies, including sanctions and ready

23 access to the federal courts.

24 We are not requesting that the Court imply new

25 remedies to Section 409. We're asking the Court to

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1 interpret the language in 409 in light of the
2 legislative intent and the purpose of the statute.
3 Now, I disagree wholeheartedly with Petitioner
4 when he indicates that there is nothing in the
5 legislative intent which indicates that legal damages
6 are available. To the contrary, both the House and the
7 Senate clearly indicated that they were specifically
8 designing the enforcement provisions to provide broad
9 remedies to not only redress violations of the Act, but
10 to prevent violations of the Act.
11 They then go on to say that it is their intent
12 to provide the full range of legal and equitable
13 remedies available in both state and federal courts.
14 This is not speaking only in terms of equitable
15 remedies. This is a remedial statute that should be
16 liberally construed.
17 In the 1970's when ERISA was passed, Congress
18 knew full well that the full range of legal remedies
19 included both compensatory and punitive damages. It
20 would be especially effective, punitive damages would be
21 effective, to prevent violations of the Act, which is
22 one of the basic intents, one of the basic intents of
23 both the House and the Senate.
24 Civil actions are authorized under Section
25 1132. It appears as those Section 1132 allows

1 participants to collect damages -- not necessarily
2 damages, but benefits, from the plan. It allows,
3 however, participants under Section 409 to collect
4 damages for breach of fiduciary duty.
5 Now, there is -- repeatedly, Petitioners have
6 indicated that ERISA was patterned after the law of
7 trusts. That is partially correct. It was patterned
8 after the law of trusts with regards to how fiduciaries
9 handled trust assets, and it is that relationship that
10 is governed by the law of trusts.
11 However, traditionally a breach of fiduciary
12 duty which establishes a relationship between the
13 participant and the fiduciary, as opposed to a
14 relationship of the trust assets and the fiduciary, is
15 traditionally a tort, which is a legal wrong, and that
16 is a very key distinction.
17 The state tort remedies that were available
18 for breach of fiduciary duty have in fact been preempted
19 by ERISA. There has been a void that has been created.
20 It is the position of the Petitioners that they wish to
21 seek the best of both worlds. They want the broad
22 interpretation of Section 1144, which is the preemption,
23 and then they want the narrow interpretation of Section
24 409, which will then create a vast void and deprive
25 participants of rights that they had prior to the

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1 passage of ERISA.

2 The actual language under Section 1109, which

3 is 409 of ERISA, is that "such equitable or remedial

4 relief as the court deems appropriate" should be given

5 for breaches of fiduciary duty. Now, they contend that

6 the "remedial" means only equitable.

7 Now, assuming that that was correct for a

8 moment, it's quite clear that under traditional

9 equitable law that there is restitution and a make whole

10 concept that runs throughout the traditional trust law

11 concept. So tc indicate that only benefits can be

12 collected does not even uphold what traditional trust

13 law allowed, whatever it takes to make the person

14 whole.

15 With regards to -- well, we clearly contend --

16 we do not agree that "remedial" means only equitable.

17 If you look at just the language of the statute, there

18 is the connecting word "or". If "equitable or remedial"

19 meant the same thing, then "remedial" would be mere

20 surplusage. They would not set those two terms opposite

21 each other.

22 Such a narrow interpretation would in essence

23 immunize fiduciaries from any and all liability for even

24 intentional and malicious acts that were perpetrated

25 against participants and beneficiaries. There are many

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1 very good examples of real life situations that have
2 been cited in the Steelworkers brief, which is amicus
3 for the Respondent's position.
4 I would like to cite a typical example, where
5 we have an employer who is a sole owner of a business,
6 who has a self-funded, self-administered plan. He has
7 an employee, a longstanding employee who he has disliked
8 for years. He knows that the employee has got three
9 children and a disabled wife. The employee becomes
10 disabled himself.
11 The employer intentionally does not pay that
12 person disability benefits, and specifically tells the
13 person: I'm not going to pay you. By the time that the
14 employee can get to court, he has lost his house, he has
15 had a total mental breakdown.
16 If the Petitioners' position is to be held --
17 and let's assuem also the court has found that that was
18 an intentional, malicious act against the participant.
19 Under the Petitioners' position, all the employer would
20 have to pay to the participant would be just the
21 benefits. He would also have to pay attorney's fees,
22 but those attorney's fees would obviously go to the
23 attorney.
24 There would be no possible recourse that the
25 participant would have against an employer who did that

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1 type of thing to him. This clearly could not be the
2 intent of Congress when they passed ERISA, which was
3 passed to protect the participants, not to immunize
4 fiduciaries. As the Ninth Circuit indicated, it would
5 be anomalous to occupy the field without replacing the
6 state remedies that were lost through preemption with
7 federal remedies, substantive law.
8 Now, in the legislative history it indicated
9 that there was going to be a substantive body of federal
10 common law that was to be developed to assist in
11 implementing the purposes of ERISA. This is the purpose
12 of this Court today, is to delineate what that federal
13 substantive law is.
14 And it also in the legislative history
15 indicated that the courts could draw upon state laws in
16 order to help form that federal substantive law, as long
17 as it did not conflict with labor policy or any other
18 federal policy.
19 QUESTION: What is your answer to the claim
20 that, since Congress addressed specifically in (a)(1)
21 and (a)(3) causes of action on behalf of the beneficiary
22 and generally saying what remedies were available, why
23 shouldn't that be the limit of the remedies available to
24 the beneficiary?
25 MR. BAKER: That is the limit of the remedies

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1 available of the beneficiary towards the plan. We've
2 got two separate entities working here. You've got the
3 actual trust fund for the plan and you have the
4 fiduciary.
5 QUESTION: Well, (a)(1) and (a)(3) do give
6 specific remedies to the individual beneficiary.
7 MR. BAKER: To the individual beneficiary
8 against the plan.
9 QUESTION: No, not (a)(1) and (a)(3) -- well,
10 I know, but the recovery is for him.
11 MR. BAKER: The recovery is for him.
12 QUESTION: Sure.
13 MR. BAKER: But the recovery is only against
14 the plan.
15 QUESTION: Well, I understand that.
16 MR. BAKER: And we have no problem with that
17 construction of 502(a)(1) and (a)(3).
18 QUESTION: But that is where Congress
19 specifically addressed recoveries by beneficiaries.
20 MR. BAKER: Also in (a)(2) it says
21 "appropriate relief under Section 409." Now, to
22 specifically indicate that you or any beneficiary has
23 appropriate relief coming to them in another code
24 section, it is a very strange interpretation to indicate
25 that we're giving you rights under this other code

1 section --

2 QUESTION: To bring a derivative action.

3 MR. BAKER: -- but you don't get anything

4 else.

5 Well, to bring a derivative action? I think

6 they could have easily said to bring a derivative

7 action. If you look at the language of Section 409, it

8 doesn't say only the plan may collect against the

9 fiduciary. Clause one says to the plan, clause two says

10 to the plan, but when you get to clause three, which is

11 the "such other equitable or remedial relief as the

12 court deems appropriate," there is no qualifier, "to the

13 plan."

14 If in fact you -- number one, no court has

15 ever supported Petitioners' position, no federal court.

16 There is one district court case in New York, a state

17 case. It hasn't even been discussed in any federal

18 opinion that we have been able to find.

19 If in fact only the plan can collect under

20 Section 409 --

21 QUESTION: Was that argument made to the Court

22 of Appeals?

23 MR. BAKER: Yes, it was.

24 QUESTION: The Court of Appeals didn't take

25 the trouble to reject it specifically.

1 MR. BAKER: No, they did not.

2 QUESTION: They apparently didn't think it was
3 worth it. Is that what you suggest?

4 MR. BAKER: I would assume so. It would
5 create the illogical situation where a self-funded,
6 self-administered plan, the fiduciary would take the
7 money out of his right pocket as the fiduciary and put
8 it into his left pocket as the plan, and that would be
9 the remedy for breaching a fiduciary duty against a
10 participant. Such a solution would be ridiculous.

11 QUESTION: Why is that ridiculous? I don't
12 quite follow you. Why wouldn't that give the
13 beneficiary exactly what he's entitled to, to have the
14 plan made whole?

15 MR. BAKER: If it's a self-funded plan, there
16 is no separate trust fund. It's merely a general fund
17 that is there. And let's assume that it is a solely
18 owned company, by an individual, and he is acting as
19 fiduciary.

20 QUESTION: And he diverted fiduciary assets,
21 and the beneficiary sues and says, put them back in.

22 MR. BAKER: In that situation, it clearly says
23 "to the plan." That's clause one.

24 QUESTION: Yes.

25 MR. BAKER: That is "to the plan." However,

1 if the breach of fiduciary duty, which is traditionally
2 a tort -- if there is a breach against an individual,
3 why should the plan receive damages that were incurred
4 by an individual participant for the breach of fiduciary
5 duty?
6 QUESTION: I'm having a little trouble
7 conceptualizing your actual case. I mean, what is it
8 that your fiduciary hypothetically has done to the
9 individual?
10 MR. BAKER: Let's say that the fiduciary has
11 not paid any disability benefits for a year.
12 QUESTION: And under the text of the statute
13 the beneficiary has a clear statutory right to sue for
14 those benefits.
15 MR. BAKER: To sue for those benefits.
16 QUESTION: Right.
17 MR. BAKER: However, in the -- with regards to
18 the breach that occurred, let's take it one step beyond,
19 that this is an intentional, malicious action to ruin
20 this individual and he has clearly stated, the fiduciary
21 has clearly stated that, I'm going to ruin you, sir.
22 QUESTION: And he does, and the statute does
23 provide a remedy for that situation, right.
24 MR. BAKER: It only provides that he gets his
25 benefits, no matter how long they were held.

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1 QUESTION: That's the extent of his harm.

2 MR. BAKER: Well, unless of course in the

3 interim he has lost his house, he has had a mental

4 breakdown, and all the other things that would be

5 associated with being ruined.

6 QUESTION: That's somewhat like the Wisconsin

7 case. They made the same sort of claim there.

8 MR. BAKER: I agree with the Court's ruling in

9 that case. There should be an exhaustion of

10 administrative remedies prior to entering into the

11 court. We have no problem with the Allis Chalmers.

12 Let me hit once again the contention that if

13 in fact only the plan can recover under Section 409, it

14 appears as though there is no such thing as a breach of

15 fiduciary duty against a participant, that the fiduciary

16 be immune. There is nothing that the fiduciary could dc

17 to the participant that would ever give rise to any

18 damages.

19 QUESTION: That's right, that the fiduciary's

20 responsibilities are to the plan and the beneficiary's

21 rights are against the plan. It seems to me it's all

22 quite consistent.

23 MR. BAKER: Well, Section 404 indicates that

24 the fiduciary's primary responsibility is to the

25 participant, nct to the plan. So --

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1 QUESTION: Who is a participant?

2 MR. BAKER: A beneficiary or participant.

3 QUESTION: Why do they always mention both of

4 them?

5 MR. BAKER: Well, because a participant is

6 someone who is actually participating in the plan, where

7 a beneficiary might be an heir, assignee, or after the

8 person retires they may no longer be a participant but

9 they may be a beneficiary.

10 QUESTION: See, even your third clause in 409,

11 where you talk about the general language of remedial

12 relief, is really relief that's beneficial to the plan,

13 because it's removal of a faithless fiduciary and that

14 would be also a benefit to the plan.

15 MR. BAKER: That is correct.

16 QUESTION: That's the specific example they

17 give in that clause.

18 MR. BAKER: Including, but in no way limiting

19 the remedies that are available to participants for a

20 breach of fiduciary duty.

21 And it still comes back to the traditional

22 concept that breach of fiduciary duty is a tort. It is

23 not founded in law of trusts, as Petitioners have

24 contended. That is a separate relationship with the

25 fiduciary and the participant.

1 Thee is a law of trusts concept between the
2 fiduciary and the plan assets, but the law of trusts
3 does not govern the fiduciary relationship between the
4 participant and the fiduciary. That is clearly a tort
5 if in fact there is, let's say, a malicious intention
6 against the participant by the fiduciary.
7 It would be the Petitioners' contention there
8 is no way that a participant may collect any damages
9 whatsoever against that fiduciary. And that's personal
10 liability. As we discussed before, we are not seeking
11 damages against the plan, just the fiduciary on a
12 personal basis. We do not want to jeopardize the
13 financial soundness of the trust fund or the pension
14 plan.
15 If in fact also only the plan could collect
16 under Section 409, this would go against the basic
17 intent of Congress, which was to provide broad remedies,
18 both legal and equitable, and it would not seem to be
19 protecting the participants. The Petitioners have come
20 forward and said, look at what the participants are
21 getting, they're getting all these protections for
22 funding and accrual and vesting. Of course they've got
23 to give something up, is basically what they're saying.
24 I see nothing in the legislative history that
25 indicates that the participants are giving up anything.

1 In fact, all the language indicates they are receiving
2 additional protections, and that's the purpose of ERISA,
3 not to immunize fiduciaries. The fiduciaries are being
4 held to a stricter standard.
5 There is one point also that the Petitioners
6 make where they indicate that it is quite clear that
7 legal remedies have now been removed from the civil
8 enforcement provisions because an earlier Senate version
9 included the word "legal" and that Senate version was
10 not passed and therefore "legal" is out.
11 A true reconstruction of what happened at that
12 time I believe is in order at this point. Both the
13 House and the Senate had essentially identical intents,
14 and that was to provide broad remedies to redress and
15 prevent violations of the statute, to give the full
16 range of legal and equitable remedies. At the time that
17 that language was available, the Senate passed their
18 version of what they wanted to do and the House passed
19 their version.
20 The House's earliest version indicated that
21 "such other and equitable" -- excuse me -- "such other
22 equitable or remedial relief as the court deems
23 appropriate." That language embodied the intent to
24 redress and prevent violations of the Act. The Senate
25 stated "appropriate relief, legal or equitable," to also

1 embody the same intent, which was to prevent and redress
2 violations of the Act and to provide the broadest types
3 of remedies.
4 So you've got two sets, versions that are
5 embodying the same concept. The House version was
6 accepted 100 percent, without any compromise, without
7 any discussion. There is no comment in the legislative
8 history at all with regards to any conflict between the
9 Senate version and the House version.
10 The only inference that I can draw from that
11 is that the Senate felt that the House version was
12 identical to its own. So rather than the Senate version
13 refuting the "legal" concept, it actually sheds light
14 upon what does "equitable or remedial" mean. "Equitable
15 or remedial" could only mean equitable or legal, because
16 the Senate and the House both stated versions that
17 embodied the same intent.
18 It is like the old mathematical or logical
19 theorem: If A equals B and A equals C, then B must
20 equal C. The Senate version was exactly the same as the
21 House version and the House version was accepted with no
22 compromise, no comment.
23 The Senate, if in fact it was that important
24 an issue, would not have just blindly accepted the House
25 version with no comment. For the Petitioners now to

1 come forward and say, because the Senate version was not
2 accepted "legal" is clearly out, when both the House and
3 the Senate indicated that legal and equitable remedies
4 were available, this just doesn't make sense.

5 QUESTION: But they didn't. They didn't end
6 up saying "legal and equitable."

7 MR. BAKER: No, they said "equitable or
8 remedial," and what does "remedial" mean, "remedial,"
9 taken in context of the intent to provide the full range
10 of legal and equitable remedies, which is what the
11 Senate and the House both wanted, and they both drafted
12 versions that supposedly embodied that concept. The
13 Senate deferred to the House.

14 The only reason I can think of why they would
15 defer to the House is the House's language covered what
16 they wanted. They wanted legal or equitable. The
17 Senate defers to the House.

18 QUESTION: Well, Mr. Baker, go back to (a)(3)
19 again. You suggested to me that (a)(1) and (a)(3) both
20 provide a remedy to the beneficiary as against the
21 plan.

22 MR. BAKER: That is correct.

23 QUESTION: Well, (a)(3) simply says that a
24 beneficiary may sue to enjoin any act or practice which
25 violates any provision of the title. I would think the

1 natural reading of that is that he could sue a fiduciary
2 who is doing some act that is contrary to the trust
3 agreement. And they say that he can get appropriate
4 equitable relief.
5 Do you think he couldn't sue a fiduciary under
6 (a)(3)?
7 MR. BAKER: Yes, he could sue a fiduciary
8 under (a)(3).
9 QUESTION: So here is a specific Congressional
10 consideration of what remedy should a beneficiary have
11 against a fiduciary, and they said it.
12 MR. BAKER: They also repeated it in 409, that
13 a fiduciary could be enjoined, removed, or --
14 QUESTION: That may be so, but they never
15 mentioned any beneficiary in 409. They didn't mention
16 that he could get any relief.
17 MR. BAKER: Then I guess, if that is the
18 position, then a breach of fiduciary duty, which is a
19 tort from one individual to another, will in fact be
20 immunized and will be preempted by ERISA and there will
21 be no cause of action, if that is the reading of the
22 statute that you have, that 409 does not provide for any
23 ability of a participant to receive any damages for
24 breach --
25 QUESTION: Do you think it's a general canon

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1 of trust law that a beneficiary could sue the fiduciary
2 in tort?
3 MR. BAKER: Breach of fiduciary duty is a
4 tort, yes, as opposed to the relationship between the
5 fiduciary and the trust, which is the basic trust law.
6 And that's what's embodied in the first --
7 QUESTION: Do you think that's a pretty
8 general rule, not just a California rule?
9 MR. BAKER: We have found cases, yes, across
10 the board. It was a -- the cite we gave in the brief
11 was an American Juris., an AmJur cite which contained
12 many cites from other jurisdictions besides California.
13 QUESTION: Are the remedies in such a tort
14 recovery limited to recovery to the trust res?
15 MR. BAKER: I'm sorry, can you repeat that?
16 QUESTION: In the event of a common law tort
17 action by a beneficiary against a fiduciary, are the
18 remedies normally limited to a recovery to the trust
19 fund or res?
20 MR. BAKER: No, that would be a personal
21 remedy that would go to the beneficiary if there was a
22 breach of fiduciary duty there. It's a personal cause
23 of action for tort against the fiduciary.
24 QUESTION: I understood your opponent, Mr.
25 Nolan, to take a different view of what the cases show.

1 MR. BAKER: He has made that statement, yes.
2 I guess --
3 QUESTION: Twice, twice now.
4 MR. BAKER: That's right, he's been here
5 twice.
6 (Laughter.)
7 QUESTION: Mr. Baker.
8 MR. BAKER: Yes.
9 QUESTION: May I ask you a question, too,
10 about punitive damages. Do you agree with the Court of
11 Appeals that the purpose of punitive damages is to
12 punish and deter?
13 MR. BAKER: Yes, I do, Your Honor. I believe
14 that.
15 QUESTION: What is the general purpose of the
16 criminal law?
17 MR. BAKER: Criminal laws should also deter.
18 However, they aren't being used in the context of
19 ERISA.
20 QUESTION: Not under ERISA, but the general
21 purpose of criminal law is to punish and deter; you
22 agree with that, of course?
23 MR. BAKER: Well, that is one aspect, and
24 there's also a rehabilitation aspect, that I'm not
25 prepared to discuss at this particular point. But yes,

1 I would agree with you.

2 QUESTION: Do you have any question about the

3 constitutionality of punitive damagess?

4 MR. BAKER: I believe -- no, I personally have

5 no problem.

6 QUESTION: You have none?

7 MR. BAKER: Well, that argument has gone back

8 and forth for decades now.

9 QUESTION: But we've never decided the

10 question.

11 MR. BAKER: Smith versus Wade appears to

12 indicate that punitive damages are available in our

13 society.

14 QUESTION: Certainly in some circumstances,

15 speaking generally. This statute, which you say

16 authorizes punitive damages, has no limit whatever on

17 the amount, unlike the antitrust laws, for example. If

18 Congress had wanted to provide for punitive damages,

19 don't you think it would have provided for treble

20 damages or double damages or imposed some sort of

21 limit?

22 MR. BAKER: Not necessarily. When there's a

23 tort such as breach of fiduciary duty that is well

24 established in common law, the amount of damages will be

25 commensurate with the amount of punishment that should

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1 be imposed, and it's going to be imposed against the
2 fiduciary as an individual, not against the plan. So in
3 common law it's a case by case basis as to what is the
4 amount of deterrence that should be made.
5 QUESTION: My understanding of the common law
6 going back to the eighteenth century is that punitive
7 damages were allowed in cases where compensatory damages
8 could not be proved, in libel cases for example. But
9 your client has received compensatory damages under the
10 Act, and you're asking not only for extra-contractual
11 damages but for punitive damages as well, and punitive
12 damages are wanted, I would suggest, on a totally
13 standardless basis, unlike the criminal law which
14 requires due process procedure before you impose a heavy
15 fine on a defendant.
16 MR. BAKER: That is getting into more of a
17 constitutional argument at this particular point. It's
18 not standardless. The Ninth Circuit in fact did create
19 a standard, that it had to be willful, malicious, or
20 wanton.
21 QUESTION: Does the statute say that?
22 MR. BAKER: No, that is the Ninth Circuit.
23 QUESTION: That's what the Ninth Circuit
24 said.
25 MR. BAKER: That is the standardization.

1 QUESTION: Yes, but do you regard that as an
2 adequate standard for the application of the criminal
3 law, to punish a defendant for violating a criminal
4 statute?
5 Well, put that aside for the moment. What do
6 you understand to be the common law of England today?
7 MR. BAKER: I am not familiar with what the
8 common law of England is today with regards to punitive
9 damages, I am sorry.
10 QUESTION: I don't testify as an expert
11 witness, but my understanding is that they have long
12 since abandoned punitive damages in the sense that we
13 use the term over here. There are statutory provisions
14 for punitive damages in some situations.
15 And my suggestion is that there's grave doubt
16 about the constitutionlity of punitive damages in a case
17 like this.
18 MR. BAKER: If in fact there is an individual
19 tort against an individual, similar to Smith versus
20 Wade, the standard in the Smith versus Wade case was
21 whether or not a reckless standard would impose punitive
22 damages. We're not even seeking such a minimal standard
23 as reckless. We are seeking only a willful, malicious
24 or wanton disregard of human rights standard, which is
25 much higher than the standard this Court imposed.

1 QUESTION: What you are really seeking is a
2 windfall for your client. Your client has been made
3 whole. If punitive damages are allowed, why shouldn't
4 they go to the state, to benefit the public at large?
5 You'd have equal deterrence and you wouldn't provide a
6 windfall on a standardless basis to a plaintiff who has
7 already been made whole.
8 MR. BAKER: If in fact the Court wishes to
9 place that limit upon where the punitive damages may be
10 placed, the Court has the power to do that. The Court
11 has not felt it necessary to do that at this particular
12 point. I do not know if this is the particular case in
13 which to impose that type of distribution of punitive
14 damages.
15 Thank you very much.
16 CHIEF JUSTICE BURGER: Do you have anything
17 further, Mr. Nolan?
18 REBUTTAL ARGUMENT OF
19 JOHN E. NOLAN, JR., ESQ.
20 ON BEHALF OF PETITIONERS
21 MR. NOLAN: I have just a couple of comments,
22 Mr. Chief Justice.
23 Justice O'Connor, with regard to the
24 difference between Mr. Baker and me about tort suits by
25 the beneficiary against the trustee, Mr. Scott has

1 something to say about that. He says that: "Modern
2 courts have not permitted the beneficiary of a trust to
3 maintain an action at law for a tort against the trustee
4 for a breach of trust."
5 So it is that by and large there are no such
6 actions, so you don't have the question about whether it
7 goes to the fund or to the individual beneficiary.
8 If I could respond to an earlier question of
9 Justice White's about punitive damages, it is clear that
10 if you take away all of the other aspects of our
11 argument we would have still the same argument with
12 regard to punitive damages under that statute.
13 Punitive damages are not equitable.
14 QUESTION: Nor remedial.
15 MR. NOLAN: They're not remedial, and they're
16 not relief. So I don't think you get to punitive
17 damages under ERISA under any concept without regard to
18 whether there is exclusively recovery in the plan under
19 409 or not.
20 And I think that you do make -- you gut the
21 claims procedure. You make a dead letter of the
22 specific statutory provisions that provide for
23 individual rights of action on the part of the
24 participants and beneficiaries.
25 And you flood the federal courts with

1 additional litigation, because there has to be a 409

2 count in every complaint brought by a participant or a

3 beneficiary and there's no state court jurisdiction of

4 those claims under those circumstances. So they all go

5 on into the district courts aside from the claims

6 procedure, and that's the result of finding damages

7 under ERISA in the circumstances of this case.

8 Thank you.

9 CHIEF JUSTICE BURGER: Thank you, gentlemen.

10 The case is submitted.

11 (Whereupon, at 1:59 p.m., oral argument in the

12 above-entitled case was submitted.)

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#84-9 - MASSACHUSETTS MUTUAL IFE INSURANCE COMPANY, ET AL, Petitioners

V. DORIS RUSSELL

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