OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

CAPTION: FIRESTONE TIRE AND RUBBER COMPANY, ET AL. Petitioners V. RICHARD BRUCH, ETC., ET AL.

CASE NO: 87-1054

PLACE: WASHINGTON, D.C.

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IN THE SUPREME COURT OF THE UNITED STATES

FIRESTONE TIRE AND RUBBER COMPANY, ET AL.,

Petitioners

v. : No. 87-1054

RICHARD BRUCH, ETC., ET AL.

Washington, D.C.

Wednesday, November 30, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 o'clock a.m.

APPEARANCES:

MARTIN WALD, ESQ., Philadelphia, Pennsylvania; on behalf of the Petitioners.

DAVID M. SILBERMAN, ESQ., Washington, D.C.; on behalf of the Respondents.

CHRISTOPHER J. WRIGHT, ESQ. Assistant to the Solicitor General, Department of Justice, Washington, D.C.; as Amicus Curiae supporting Respondents.

C O N T E N T S

P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 87-1054, Firestone Tire and Rubber Company v. Richard Bruch.

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

ORAL ARGUMENT OF MARTIN WALD

ON BEHALF OF THE PETITIONERS

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

The questions presented in this case are answered by the language and the legislative history of ERISA and its predecessor statutes. The statutes makes clear two things. One, a court reviewing an ERISA plan fiduciary's denial of benefits should defer to the fiduciary's decision absent an abuse of discretion by the fiduciary. Two, a plan administrator should not be subject to personal liability for damages for failing to furnish documents to former employees who were not eligible for benefits and could not become eligible for benefits.

Neither the Third Circuit nor Respondents are free to create new policies contrary to the intent of Congress as evidenced in the statute and the legislative

history.

The court -- the case arose after Firestone sold its Plastic Division to a subsidiary of Occidental Petroleum requiring Occidental to retain in its employ all of the employees in their same jobs at their same wages. They did not lose a day of work. Firestone then determined that these employees were not entitled to reduction in force or what we call RIF termination pay, and did not make that payment.

The first question presented to this Court is who should make this decision. Congress said in ERISA the plan fiduciary should make this decision. The Third Circuit by de novo review opted for the courts.

QUESTION: What's -- what kind of a -- of a decision is it? Isn't it a construction of the contract or the plan?

MR. WALD: Well, the fiduciary, of course, the administrator, determines the plan initially.

QUESTION: Yes.

MR. WALD: The court of appeals said that there should be de novo review of that decision.

QUESTION: Well, I know but what do you look to to make the decision? Is there sometning in writing that --

MR. WALD: Yes. There are many things in

writing. It's a searching review. There were --

QUESTION: Yes, but is -- is the plan that the -- that was propounded here by the administrator in writing?

MR. WALD: It was in writing.

QUESTION: And so, this -- the decision turns on what the plan means?

MR. WALD: It does.

QUESTION: That's all I wanted to know. Yeah. So, it's a -- it's a contractual construction problem. Or it's a construction of a written instrument.

MR. WALD: It's construction of a written instrument because Congress in the statute said these documents, whether it's a collective bargaining agreement or any other kind of document, should be treated as a trust instrument.

The Court should review --

QUESTION: Excuse me, Mr. Wald. While we're on that, you -- you -- it's your understanding that trustees normally are given that kind of deference in their interpretation of the trust agreement, that if the --

MR. WALD: Yes, they are. They're given it under trust law and they're given it expressly by the statute in Section 402 and 503. So, Congress has given

it to them, and common law trust law, which Congress incicated should apply, has given to (inaudible) --

QUESTION: What -- what does the statute say? Does the statute specifically give them power to interpret the instrument with, with deference?

MR. WALD: Yes, it does in this respect. It gives them the, the the power to determine who's entitled to benefits in two ways. In Section 402 it says the fiduciary shall have the control, management, operation and administration of the plan, and in Section 503 it says the fiduciary shall decide claims of employees. So, it's clear that discretion is given to the fiduciary.

QUESTION: Do you think -- don't you think you could say the same thing about any trustee, that he'd have all of those powers?

MR. WALD: Under common law trust law, I think that's true.

QUESTION: But it's not my impression of common law trust law that if the trustee makes a questionable interpretation of the trust agreement, I wouldn't be able as one of the beneficiaries to go into court and say that interpretation is wrong. And the court would look at the trust agreement and say it's up to us to interpret this trust agreement.

MR. WALD: Well, I think trust law would say that the court would look at it. I agree with you, Justice Scalia, to that extent. But the courts will say under trust law that they will apply an abuse of discretion standard --

QUESTION: Well --

MR. WALD: -- not to decide it de novo.

QUESTION: I don't --

MR. WALD: I think that's crystal clear under trust law.

QUESTION: I don't think that's what Austin Scott taught me, but --

(Laughter.)

QUESTION: Mr. Wald, I share some of Justice Scalia's feeling on that score. My, my recollection of trust law -- and it obviously isn't, isn't a terribly recent one -- is that if you're talking about the. the many things that the trustee is given discretion to do in a trust instrument, decide on the medical needs or educational needs of various beneficiaries and allocate discretionary funds among them, the courts give great deference to a trustee. But is -- in deciding who is a beneficiary, I, I was not aware that trust law says the trustee has great discretion there.

MR. WALD: Well, they have to make -- they

have that discretion to the extent they -- they have to interpret the trust agreement, and I think Bogert, Scott in their Restatement and the cases all indicate that the trustee has the job of interpreting the agreement. And his interpretation will not be upset unless there has been an abuse of -- an abuse of discretion.

QUESTION: There are two rational ways of construing the trust instrument and the administrator picks one of them. That should be the end of it.

MR. WALD: Well, I think that might be, with all due respect, an oversimplification. There is under the --

QUESTION: It's possible.

MR. WALD: -- under the abuse of discretion standard a searching review of the trustee's decision, and if there's any indication that he acted out of an improper motive or in any way abused his discretion, then the court is free to set it aside. In this case there were two years of discovery, thousands of pages of production of documents, numerous depositions and interrogatories, and there was no evidence that there was any improper motive acted out of and -- or any abuse of discretion whatsoever.

QUESTION: Well, it still turns on who the beneficiary was under the instrument.

MR. WALD: And that's -- of course, Central States talks about who the trustees having determination to determine who a participant is. And I think it's, it's -- trust law holds that the trustee determines who are beneficiaries in interpreting the plan. That's part -- part of his -- part of his job.

QUESTION: Well, now to -- that doesn't explain anything to say determine who the beneficiary is. If, if the question is whether a particular individual was employed or not, for example, that would be a factual question which -- which one might, indeed, give, give some deference to the -- to the trustee on.

But if the question is whether conceding all these facts, such a person under the instrument is entitled, that's a pure question of law. And you're asserting that even that kind of a question we must defer to the -- to the trustee.

MR. WALD: I think Congress mandated that. They gave the -- they gave the trustee discretion in 402 and 503, for example. I think Congress made that decision. They define fiduciary as a person who exercises discretion. Five oh three is a claims procedure. It clearly indicates that the fiduciary is to resolve claims.

QUESTION: Well, as I understand it, your

opponents concede that that would be the case if the -- if it were a funded plan where there wasn't a conflict of interest, isn't that right? I mean, you aren't in disagreement over the abuse of discretion standard of the trustee on these very same questions if it were a funded plan and no alleged conflict of interest.

MR. WALD: Well, let me see if this answer is responsive, Justice O'Connor. Congress drew no distinction in regard to the fiduciary provisions between funded and unfunded plans.

QUESTION: I understand that. I'm just trying to ascertain the relative positions of you and your opponents in this case.

Do I correctly understand that everyone agrees that for the funded plan where there is no alleged conflict of interest, that the standard you proposed on abuse of discretion is the appropriate standard?

MR. WALD: I, I think if my -- if my --

QUESTION: At least as to that, as to those types of plans.

MR. WALD: If I understand the position of the Respondents and their amici, they are all over the lot about where the abuse of discretion standard applies or doesn't apply, what its limits are. I don't think they're consistent. So, I can't really tell you where

they stand on their position. I can tell you that we hold that the abuse of discretion stands.

QUESTION: But, of course, here a denial benefits the trustee, doesn't it?

MR. WALD: Denial benefits the trustee. And that is specifically contemplated by Congress. Congress was well aware that most of the plans were employer-administered. And they dealt with this in Section 408(c)(3), which expressly allows a fiduciary to be exempt from the prohibited transaction, and conflict of interest standards in Section 406, expressly states that a fiduciary can act as a fiduciary -- his agent, agents, employees can act as a fiduciary -- even though there is a potential conflict of interest. So, Congress has contemplated this and reached a decision on this.

Respondents and their amici --

QUESTION: Well, the Respondents say that Congress didn't spell out the standard of review in the court, and that it was left to the courts to develop a so-called federal common law rule on the standard of review. Now, is that right?

MR. WALD: Well, I think Congress adopted a standard of review to the extent that they, they did several things. They, they incorporated the sole benefit language from 302 in the Labor Management

Relations Act, which was a predecessor statute here. They established fiduciary standards which carry with them an abuse of discretion review, and I, I think they indicated -- again, we get back to this trust law applying. They indicated the scope of review.

Now, in regard to the common law argument, the common law rule under Textile Mills and Section 301 and subsequent cases is that Congress looks first at the statute, second at the legislative history, and only lastly at public policy.

In addition, under Textile Mill -- Lincoln Mills and Section 301, Congress did not displace the statutory indications of the law to apply, namely, contract law under 301 and trust law under 302. But Respondents and their amici are asking this Court to displace trust law and substitute something new. I don't know what it would be called. De novo review. But de novo review of a trustee's decision on a discretionary matter --

QUESTION: What would -- what would the common law of trusts tell us or trust law tell us about a trust in which the trustee has a conflict of interest?

MR. WALD: Oh, it would tell them that's perfectly okay as long as the trustee doesn't act out of the -- out of the conflict of interest. That's clear.

That's clear in trust law.

In addition, Congress has recognized, as I have indicated, that there was a conflict of interest, and they sanctioned it.

Moreover, trust law says -- if the settlor when they set up the plan or trust was aware that there was a conflict of interest, trust law says nothing wrong with the trustee handling that and administering it and controlling it and managing it and making a discretionary decisions. The limit is that it cannot act out of an improper motive or in his own interest. In other words, the limit is that he cannot abuse his discretion.

Congress, it should be kept in mind, has regulated employee benefit plans under trust principles since 1947 and incorporated trust principles into ERISA. Congress was well aware of the scope of review under Section 302 that was an abuse of discretion or arbitrary and capricious standard. They did not change that. In fact, to the contrary. In the legislative history and the statute itself, they incorporate, incorporate references to 302. It's cited by number in the coverage provision of the statute, and they lift, lift from 302 the sole benefit of the beneficiaries language and put it directly into the fiduciary

provisions of ERISA.

And, of course, that -- that is the common law rule of trusts, that the fiduciary must act for the sole benefit of the beneficiaries. Congress said that. This fiduciary acted under those rules, and Congress has made that decision that that gave complete protection to the beneficiaries. And, in fact, that's the highest obligation known to the law, the obligation of a trustee. It's much higher than the obligation of a contracting party who, of course, can act in a hostile and no-holds-barred way against a claimant.

QUESTION: Mr. Wald, what percentage of ERISA plans do you estimate in the country are of the type that this plan is, employer-administered and unfunded?

MR. WALD: Well, there is specific reference in the legislative history that indicates that 80 percent of the pension plans were administered -- employer-administered. Only 20 percent were jointly administered. And that's in the legislative history and report given to them -- a statistical report.

QUESTION: But I don't think that was the question. The question is what percentage is unfunded. Does that --

MR. WALD: I'm trying to --

QUESTION: -- break out the same as funded?

MR. WALD: I'm trying to say -- well, I would -- I would guess it's -- it's 60, 70, 80 percent, something like that.

QUESTION: Are unfunded?

MR. WALD: Yes, yes. The minority is the funded, jointly administered plan particularly in regard to health and welfare which severance is one, one, one of the type. Yes. The exception is the jointly administered or the funded.

QUESTION: Now, to the extent that policy considerations are relevant, these also support reversal of the Third Circuit's decision. ERISA protects the interest of participants in employee benefit plans, but it balances that with the sponsor's "interest in maintaining flexibility in the design and operation" of their plans. Congress regulated minutely funding, vesting, insurance and other aspects of employee benefit plans, but they left the day-to-day administration to the fiduciary. They decided that was the best way to help employees.

Now, it may not help employees in every individual case. Congress was saying what would help employees across the -- across the country as a whole, and they decided, among other things, that it was very important to help employees by doing nothing that would

discourage the formation or expansion of employee benefit plans. So, they did a balancing in making sure that the burdens were not so heavy as to hurt rather than help employees. They did not want to have unintended consequences adverse to employees.

QUESTION: Mr. Wald, it seems to me that you're making the argument that since Congress gives the administrator a power, it necessarily gives him discretion with respect to the exercise of that power. And I'm not sure it follows.

As far as trust law is concerned, you, you, you cite yourself the -- the Restatement of Trusts. And what that says is where discretion is conferred upon the trustee with respect to the exercise of a power, the exercise is not subject to the control by the court except to prevent an abuse of discretion. But that's crucial, where discretion is conferred with respect to the exercise of a power.

MR. WALD: Right.

QUESTION: You can confer a power without conferring discretion with respect to, to its exercise. And what you seem to be saying here is that all powers given to administrators under this legislation are powers as to which he is given discretion. And I don't know what you base that on.

MR. WALD: Statute does that, Section 402.

QUESTION: What does it say?

MR. WALD: It says that the administrator or fiduciary shall have the control, management in the operation and administration of the plan, and that certainly includes deciding who is entitled to benefits.

QUESTION: Fine.

MR. WALD: It also --

QUESTION: That's the conferral of a power. Where is the conferral of discretion as to how that power --

MR. WALD: Well --

QUESTION: -- is to be exercised?

MR. WALD: I think it's there. I also think it's in 503, where there is a claims procedure that says an employee can file a claim and that that claim ultimately will be decided by the fiduciary/administrator. So, that's a second place.

QUESTION: That's another power, but I don't see discretion --

MR. WALD: Well, when Congress -- I think the -- cases cited in our briefs that indicate that when Congress confers a power to a person outside the courts, the cases hold that Congress is also implicitly saying that the Congress should defer to the -- that private

person's exercise of that power.

QUESTION: Mr. Wald, you're relying very heavily on Sections 402 and 503 if I understand you.

MR. WALD: That's right.

QUESTION: Have you set the text of those sections out in your papers, in the brief or the petition?

MR. WALD: I believe they're attached to the briefs, yes.

QUESTION: I, I didn't find them.

QUESTION: Where? As an appendix to the brief?

MR. WALD: In the appendix, I believe so. I apologize if they're not there.

QUESTION: I, I don't see them in, in --

QUESTION: (Inaudible).

MR. WALD: Well, they're an appendix to the petition for cert and --

QUESTION: Yes, that includes a lot of provisions from the statute, but not the two on which you rely today.

MR. WALD: Well, I apologize if they're not there.

QUESTION: Well, your brief says specifically that those provisions are set forth in the appendix to the petition.

MR. WALD: To the petition for cert, yes. Thank you.

QUESTION: I see 401(a) and 404(a), but it's 402 that you're now relying on?

MR. WALD: Yes, very heavily on 402.

QUESTION: I'm amazed that if, if you're relying on it, you didn't set it forth in your brief.

MR. WALD: I'm amazed too and embarrassed if that's -- if that's the case.

Respondents urge de novo review.

Congress considered having arbitration as a means of deciding employee benefit disputes. Congress rejected arbitration as being too expensive and resulting in too many frivolous disputes. Now, if arbitration is too expensive and too likely to result in frivolous disputes, that is even more so in regard to de novo review.

De novo review, of course, would have discovery and the full panoply of those procedures -- be much more expensive. And we know that because attorney's fees are granted in this statute, that it's much more likely to result in the filing of frivolous cases. It will also result in a great nonuniformity among the various courts in deciding these cases. And, of course, Congress wanted to get consistency on a

national basis because so many of these plans exist on a national basis. And query --

QUESTION: You prefer nonuniformity among employers instead nonuniformity among the courts.

MR. WALD: No, I think that's nonuniformity because -- take a national plan. You have a central focus point, the administrator for that national plan. And that will be a focus through which all the plans pass. But if you de novo review, you have one decision in Maine and another in Florida. So, there's much more nonuniformity.

Now, query. If you have de novo review and you have contractual analysis, will you -- will we also have jury trials which, of course, adds even more to expense and to inconsistent decisions.

QUESTION: Mr. Wald, you have two questions presented in your petition for certiorari. Are you going to address the second?

MR. WALD: I am now.

The second question presented in this case is whether Firestone was required to furnish copies of plan documents to employees of the Plastics Division after the sale to Occidental. Firestone had already determined that these employees were not eligible for benefits, and the courts decided that having been

terminated, they could not become eligible for benefits.

Who is a participant is an ERISA plan -- in an ERISA plan? It's a defined term, "participant." It must be determined on the statutory definition by reference to the eligibility, years of service, age, that type of thing to decide who may become eligible. So, we're talking about a defined term.

And I respectfully suggest the court of appeals, Respondents and amici have said we don't like the definition Congress drew. So, we're suggesting that it should be modified. And we disagree with that, of course.

ERISA's policy requires application of the statutory definition. The legislative history indicates that information was to be given only to participants, those employees who were eligible or could become eligible for benefits. The congressional intent, as already mentioned, was not to overburden plans. Disclosure, particularly automatic disclosure, is very expensive and burdensome. And in (inaudible) -- in the --

QUESTION: In -- in the case of an employee who deems himself a participant and requests information, are you not entitled to bill him for the

cost of reproducing the plan or the documents?

MR. WALD: The photocopy costs. Not the storage or the retrieval.

QUESTION: Just the photocopy costs?

MR. WALD: And there are other -- and that --

QUESTION: Well, as a practical matter here, what was the cost involved?

MR. WALD: Well, modest. But I think the answer to that or one of the -- there were two answers to that.

One, administrators out of common good sense employee relations are going to reply to these requests affirmatively. Occasionally, there, there may be an administrative slip-up, an honest mistake, but good business judgment will cause them to comply.

Also the risk to the administrator is a fine of a $100 a day personal liability. So, this risk alone -- it's much cheaper to answer the request than to run such a risk of such an onerous burden.

QUESTION: Well, that's -- that's why I'm a little puzzled about the case. Why, why did -- why didn't you just give the employees what they wanted here --

MR. WALD: Well, there's no --

QUESTION: -- and bill them for the costs?

MR. WALD: You know, there's no finding by either court that the information wasn't furnished. In fact, a lot of information was furnished. The discovery in the case -- there may have been administrative slip-up or an honest mistake in one or two cases. But one employee, for example --

QUESTION: Well, I -- I take that's discovery after the claim is filed or after a suit is filed.

MR. WALD: Well, the -- the people here had all the information they wanted before they filed the suit. They got it all. They had it before they filed the suit. They had it.

QUESTION: Is there a finding to that effect?

MR. WALD: Well, that's -- it's in the -- it's in the record. It's clear, clear from the record. There's no finding by either court. No court made a finding in regard to what was or wasn't furnished because it was decided on the legal --

QUESTION: Mr. Wald, if a participant or an alleged claimed participant makes a colorable claim, is that enough?

MR. WALD: Well, some courts have said so. We don't think so, and we don't think so because it goes against the clear statutory language. The language says participants and defines the term, and they don't,

don't, don't say colorable claim. So, we think that judicial construction is in violation of the statute.

QUESTION: Do you think the Third Circuit required that the requesting party be making a colorable claim?

MR. WALD: No. I think, as I read the opinion, Justice O'Connor --

QUESTION: I read it as not requiring anything at all.

MR. WALD: That's the way I read it. Any claimant is entitled to get it. They did a faulty analysis I believe in terms of standing, which I won't deal with because I think we deal with it in our brief, and it's just poorly founded -- poorly finded.

Now, Respondents attempt to evade the statutory definition by drawing a distinction between the term "participant covered under the plan" and the term "participant." They contend a participant covered under the plan gets automatic disclosure which, of course, is very, very expensive, annual reports, periodic reports, and so forth and so on. They say that a, a participant -- plan participant gets documents only on request.

Now, the important thing on this I think is that the distinction doesn't hold up when you parse the

statute. When you go through Section 104 and you see where it says when you make automatic disclosure and when you make automatic disclosure and request, the distinction between the two versions, participant covered under the plan and participant, just doesn't stand up with the parsing of the statute.

I think the bottom line on participant is this. Congress did not say that claimants are entitled to information on request. They could have said that. They would not have used a circumlocution of eligible to become. They would have said claimants. The court of appeals, Respondents and their amici says the circumlocution means claimants. I respectfully suggest that if Congress had meant to say claimants, they would have said claimants.

Thank you. I'll reserve, if I may, the rest of my time for rebuttal.

QUESTION: Very well, Mr. Wald.

Mr. Silberman?

ORAL ARGUMENT OF DAVID M. SILBERMAN

ON BEHALF OF THE RESPONDENTS

MR. SILBERMAN: Thank you, Mr. Chief Justice, and may it please the Court.

In light of the discussion to this point, it seems to me appropriate to begin by discussing precisely

what it is the statute does and does not say on the specific question of the scope of review.

Section 402 is a section which says that every employee benefit plan must be established and maintained pursuant to a written instrument, and in the second sentence, such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan. The conference report on this section explains that a written plan is required so that employees may know who is responsible for operating the plan. And that's all that Section 402 has to say is you have to have a plan and it has to have a fiduciary named who's going to administer the plan.

Section 503 says that every plan must include a claims procedure, and the claims procedure must afford a reasonable opportunity to any participant whose claim has been denied for full and fair review by the appropriate named fiduciary of the decision denying the claim. And that's all that 503 has to say.

And that is all the Petitioner has to offer to say that the statute answers the question of what the appropriate scope of review is here.

Now, Petitioner's argument, as we understand it, really rests on an inference. The inference is that

because Congress referred to these people as fiduciaries, it intended to bring with it the law of -- the common law of trusts. And we believe that Petitioners' argument fails in two respects.

First, we think, as Justice Scalia developed it, Petitioner misunderstands trust law, that if trust law applies, we believe the court of appeals was correct here.

And second, we submit that in any event, the inference does not withstand analysis as a matter of statutory construction. The statute can't be read to require -- if trust law provided such a rule of deference, the statute can't be read to so mandate it.

Let me turn first to what it is the trust law has to stay -- say on this question. We believe the critical point is the one that Petitioners concede at page 9 of their reply brief. Petitioner there says that we are correct when we say, and I quote, "that courts ordinarily determine the meaning of legal documents such as trust instruments."

And that is the essence of what trust law says. It says that if -- it says that it's for a court to decide in the first instance whether a trust instrument confers on a trustee a mandatory power, that is to say a power the trustee has to exercise, a duty,

or whether the instrument confers on the trustee a discretionary power. And if it -- if the court concludes that the instrument confers a mandatory power, the court will then mandate the trustee to act.

Professor --

QUESTION: Suppose that goes not just to legal questions, as I suggested in an earlier question, but even -- even to factual questions. Right? I, I don't suppose that a trustee can -- is given deference when he decides that a particular individual is not an heir or is --

MR. SILBERMAN: I believe that --

QUESTION: -- or is not a child of -- whose, whose one of the beneficiaries. I guess a court -- even though the trustee made a judgment that was in the ball park, the court would inquire into that on its own, wouldn't it?

MR. SILBERMAN: That, that's precisely right, and Professor Scott in his treatise lays out cases in which, for example, the trust says that you should pay benefits when somebody is discharged from bankruptcy. And the court decides whether that fact has, in fact, occurred.

QUESTION: I remember.

(Laughter.)

MR. SILBERMAN: I take it not there is no case that's just as good.

So that we think that if trust law applies here, the court of appeals was quite right in saying that given that what we have here is, as Justice White developed at the very outset, a pure question of plan interpretation. What does the word "reduction in force" in this document mean? That -- that's a question for the court to decide and not a question where the trust -- the trustee or fiduciary prevails so long as he has offered a rational answer to that question.

But if we're wrong about that, and if trust law is something other than what we understand it to be, we think in any event this statute does not require the Court to apply a rule of deference if that what would be what trust law would answer. And we think that three considerations lead us to that conclusion.

First, it's important to bear in mind that this is not a claim for breach of trust. This is not a trust law claim. ERISA does contain causes of action for breach of trust like the cause of action this Court, Court had before it in the Russell case. That wasn't the claim we pled, that we brought.

ERISA has a separate cause of action to enforce the terms of the trust. That's section

502(a)(1)(B), which is set out as appendix to our brief, and what it says is that a -- creates a cause of action to "enforce" -- I'm sorry. Why don't we just read it? "To recover benefits due under the terms of the plan or to enforce rights under the terms of the plan or to clarify rights to future benefits under the terms of the plan."

That's the cause of action that we pled here. It's the cause of action that the legislative history analogizes to a 301 Taft Hartley suit and instructs the Court to develop a federal common law, much as the Court has developed a federal common law of labor contracts.

And it's the cause of action that this Court carefully distinguished in the Russell case. In Russell, the Court said we're not going to give you in a breach of trust suit -- we're not going to give you individual relief, compensatory relief. Your remedy is to bring a suit under the terms of the plan, and if you bring a suit under the terms of the plan, then in Russell's words, you can have "the merits of your application determined." Or at another place in the opinion the Court says you can get a declaratory judgment as to whether you are "entitled to benefits under the provisions of the plan contract."

So, the, the claim we're bringing here under

this statute is a -- more of a contractual claim than a trust law claim, and we don't think that the Court in developing the federal common law is in any sense obligated to turn to trust law rather than to contract law to decide this issue.

Now, the second reason why we think trust law shouldn't apply here is that trust law simply doesn't speak to the question that's posed in this case. Trust law speaks to trusts. It defines the rights, the responsibilities, the roles of the Court in supervising a particular kind of fiduciary, a trustee who holds property for the benefit of another.

QUESTION: But I take it under your view it wouldn't make any difference if this were a funded plan with independent trustees.

MR. WALD: Justice O'Connor, as we understand trust law, we think that if this were a funded plan with independent trustees, the argument for applying trust law would be a far stronger argument.

QUESTION: Yes, but you've just told us that trust law in any event --

MR. SILBERMAN: That's --

QUESTION: -- wouldn't require it. So, your -- your argument would not be any different.

MR. SILBERMAN: That's certainly --

QUESTION: For the result.

MR. SILBERMAN: That's absolutely correct as to the result and as to this category of question, a plan interpretation question. It may be that in some other case which involves a different kind of question, perhaps a fact question, the answer would differ if you were applying trust law than if you were applying contract type law.

QUESTION: I, I, I must say I, I begin to, to depart from your, your analysis here if, if you're saying that trust law doesn't apply to any of these -- any of these instruments because there are a lot of decisions that the administrator has to make. For example, we've had cases involving what happens when one of the employers pulls out of the plan, how much the employer must, must kick in in order to make up for his accrued liability under the plan, all sorts of other decisions that, that an administrator makes that are very similar to trustee decisions. And I certainly -- I certainly would think that it was Congress' intent by referring to him as a fiduciary to impose the same kind of liability and no more than that which a trustee has.

And you're -- you're negating all of that and saying that trust law doesn't apply at all. What do we look to? We make it up brand new now. Is that it?

MR. SILBERMAN: No. I, I perhaps mis-spoke, Justice Scalia. I'm saying -- I want to be saying two things: first, that if it's a cause of action to enforce the fiduciary duties of ERISA, as opposed to enforce the terms of a particular plan, then clearly those fiduciary duties were derived from trust law and need to be interpreted in light of trust law. So, that's point one.

QUESTION: For both types of plans. You wouldn't distinguish between the two plans.

MR. SILBERMAN: That's right if it's a cause of action to enforce any of these statutory trust-like duties. I'm saying that if it's a action to enforce the terms of a plan, a 502(a)(1)(B) action, that the Court is not bound to adopt trust law, but it can look to other sources, and that if there were a trust law rule that said in this kind of case that we defer to what the trustee does, that rule should not be borrowed here.

QUESTION: But if there is no such rule, it wouldn't make any difference, would it? And you'd be just as --

MR. SILBERMAN: That --

QUESTION: -- just as happy if we said everything is governed by trust law but trust law comes out with the same result that -- that 502(B) does anyway.

MR. SILBERMAN: Putting aside whether I'd be just as happy because I -- I mean, I don't -- as a matter of --

(Laughter.)

MR. SILBERMAN: It seems to me analytically that's not the way I think is the fair way of reasoning this through that trust law does govern in its own terms. I think the fairer way of reasoning it is that this is more of a contract question. But certainly my clients would be just as happy --

(Laughter.)

MR. SILBERMAN: -- by the decision you just proposed.

But it does seem to us, as we say, that we don't think the Court is bound by -- to develop to apply trust law in part because of the nature of this cause of action, in part because trust law does not speak to this kind of situation at all, to the situation where you don't have a trustee and you don't have a trust corpus, and you're not making decisions allocating money between a group of beneficiaries.

And finally, we think it would be inappropriate to borrow the hypothesized trust law rule of deference because it would be inconsistent with the statutory policies of --

QUESTION: May I -- may I go back to your second point a minute?

Are there not -- I don't think of any that come to mind, but are there not areas the law -- of the law in which a person has a fiduciary duty to others even though that person is not technically a trustee with a corpus and a res and all the rest of it. And could not one say that the administrator of the plan here does have fiduciary obligations to the beneficiaries that are comparable to those of a trustee?

I mean, I don't -- I'm quite sure I understand why it's so significant that there be a corpus and a trust and all that.

MR. SILBERMAN: Well, it's only significant, just -- Justice Stevens, insofar as an argument is being made here that you should borrow trust law, that yes, of course, there are lots of fiduciaries. An attorney is a -- has a -- is in a fiduciary relationship with the --

QUESTION: And some of the principles of trust law apply to the activities of those fiduciaries --

MR. SILBERMAN: Well, I -- I'm not --

QUESTION: -- when they're construing documents that affect their responsibilities and the like.

MR. SILBERMAN: Our submission -- or one of the considerations that we're urging is that the rules that the trust -- trust law chancery courts developed as to what the role of the courts would be in policing trustees were not rules developed about fiduciaries at large, they were rules developed about this developed about this particular kind of fiduciary because of his particular relationship and because, as the Court said in the Mine Workers v. Robinson case, that what a trustee often is called upon to do is to allocate a finite sum among competing beneficiaries.

So, the trust law's rules of deference start from the premise that we're, we're dealing with allocative decisions among a defined group of beneficiaries. And they just don't speak to this situation here where what's at issue is whether money stays in Firestone's pocket or comes to the plaintiff's pocket.

QUESTION: Yet the statute does throughout use the term "fiduciary," which is almost a term of art in trust law.

MR. SILBERMAN: Well, it's actually -- I think it's actually -- trustee is more the term of art in trust law than fiduciary, Justice -- Chief Justice Rehnquist. But, yes, it does. And we're not --

certainly the statute -- it's clear that this statute was intended to impose fiduciary duties as those duties were developed in the law of trusts on this type of fiduciary. That's what Section 404 is all about. And as I said to Justice Scalia, we certainly agree that those duties, those fiduciary duties, should be developed and interpreted in light of the body of trust law that defines those duties.

What we're saying is that this statute also creates a separate cause of action to enforce a plan, that that --

QUESTION: You -- I'm sure you're defending the result reached by the court of appeals, but it doesn't sound like you're defending its, its rationale.

MR. SILBERMAN: I think that's correct, Justice White.

QUESTION: So, you are -- you are asking us to affirm on a different ground --

MR. SILBERMAN: I think that's correct.

QUESTION: -- as a Respondent.

MR. SILBERMAN: That's correct.

QUESTION: And in, in effect you say the court of appeals was wrong.

MR. SILBERMAN: Well, no, because the third point I was getting --

QUESTION: Well, it, it, it was right in the result, but completely the wrong approach. It should have said this is a cause of action to enforce a plan and not go off on the notion that here's a fiduciary with a conflict of interest.

MR. SILBERMAN: Well --

QUESTION: Isn't that right?

MR. SILBERMAN: No. I think the third -- as I say, it seems to us there are three considerations which taken together lead to the conclusion that if trust law were against us, it wouldn't apply here, the third of which is the policies of ERISA which is I think what the court of appeals was focusing on.

I would say that I wouldn't put my -- all of my dollars on the policies of ERISA, which is what the court of appeals did. To that extent, I disagree with the court of appeals, but --

QUESTION: Was this argument made? Was your argument you've been making made to the court of appeals?

MR. SILBERMAN: I don't know the answer to that question. I believe not, but I wouldn't -- I wouldn't -- I was not counsel for, for the plaintiffs in the court of appeals.

QUESTION: Are you going to address the second question before you're through?

MR. SILBERMAN: I'll be happy to do it now, Justice --

QUESTION: Well, before you do, may I just be sure --

MR. SILBERMAN: Sure.

QUESTION: -- I understand your third point. I interrupted you when you started it, and I'm not sure I know what it is. If you'd just tell me what it is and then go on to the other.

MR. SILBERMAN: And there's the white light.

That the policies of ERISA militate against adopting any rule which says that in an unfunded situation, where you have the kind of conflict of interest you have here, that as -- that as long as the employer has given a rational interpretation of the plan, the employer's interpretation prevails.

QUESTION: I understand. All right. Go ahead to the other.

MR. SILBERMAN: Let me then turn to this --

QUESTION: Does there have to be a colorable claim made to being a participant?

MR. SILBERMAN: I -- I think that the plaintiffs here would be entitled to prevail under that rule. I -- that's not the rule we are urging here. We're urging the rule that the Labor Department adopted

contemporanecusly with the statute that so long as you are making a claim, you are a participant for purpose of this statute. As we --

QUESTION: Well, that seems so strange because a total stranger could do that. I mean, I, I don't understand why those courts that have said there has to be at least a colorable claim to being a participant should be required.

QUESTION: (Inaudible) strange that someone that can read the Restatement of Trust so precisely could use the word "participant" so loosely to mean somebody who makes a claim. It's a very strange meaning of that word, isn't it?

MR. SILBERMAN: Well, the statute defines participant as someone who is or may become eligible for benefits. What we've said -- and I, I --

QUESTION: Not is or may be -- not is or may be eligible, but is or may become. Isn't that quite different from -- if it said is or may be, then you might say, well, that might include a claimant, but it isn't may be. It's may become.

MR. SILBERMAN: Well, I -- it seems to me, Justice Scalia, that the statute is -- perhaps the words, the words point against us, but it's susceptible of being read to encompass at least the colorable claim

situation.

And on reflection, I think Justice O'Connor's point is telling, that if this is somebody who's a stranger to the plan and comes in and says I want some information or I want you to review my, my denial, that -- that the -- it would be okay for the trustees to say who are you. We don't have any obligation to you.

But if you're at least dealing with a colorable claim, it seems to me the statute is susceptible of being read to cover somebody who asserts a colorable claim. That's number one.

Two, the statute makes better sense as a whole -- it works better -- if you define it in those terms because if you don't define it in those terms, then to go back to the claims procedure that Mr. Wald spoke about which says you have to give the review to people who are participants, that means that as long as you're right on the merits, you wouldn't have to have any review, and there wouldn't be any violation. Clearly, that's not what Congress meant. Clearly, they had some notion here that you're going to give review not just to people who actually are entitled to benefits, but to some broader class.

QUESTION: I don't know. It makes a lot of sense to me that you wouldn't be liable for damages if,

if the person was, was going to lose on the merits anyway. I mean, this is -- this is -- we're not setting up some agency --

MR. SILBERMAN: (Inaudible).

QUESTION: -- that, that -- that requires due process. I don't know why that makes no sense. If the fellow was entitled to what he gets, you've violated the law by not giving him a review. But if he's just some outsider and not involved at all -- as far as the information provision at issue here is concerned, I, I think an employer would have to be mad not to -- not to give the documents over. I don't see how we, we would be harming anything by, by giving the language its most natural reading. If, if there's any doubt whether the person is a participant, I don't know why the employer wouldn't give him the documents -- if there's any doubt.

MR. SILBERMAN: I mean, I think as a practical matter, that's right in information sense. In the claims procedure, however, it's not simply that there wouldn't be damages, that there wouldn't be any duty, that the employer would be the -- the statute would mean that you have to have a claims procedure for those who are entitled to prevail, but not for other people.

Similar, the section which sets out fiduciary obligations, which say you owe an exclusive duty to

participants, would mean you only owe a duty to those who you write -- who you decide are participants, not to the people who are within the class who may or may not be.

So, I think the statute doesn't work all that well.

I think it's terribly important that the Labor Department, which is charged with enforcing the statute, contemporanecusly came to the view we urge in its regulations and said precisely what we urge here.

And finally, I think it's quite significant that the legislative history -- that the legislative history points in the same direction. And I want to -- because it's not in our brief, but it's in an amicus brief of the Pension Rights Center -- point out to the Court that when this statute was being considered, the Senate Finance Committee's bill, which was incorporated with the Labor Committee's bill to create the ultimate act -- the Senate Finance Committee's report on its bill said that a plan beneficiary is an individual who is receiving or claims a right to receive benefits under a qualified plan.

And the language that the Senate Finance Committee was referring to was precisely the language that was enacted in the statute. It was Section

501(g)(5) of the S. 1179, and it's now the definition of beneficiary. So, we think that the combination of the structure of the contemporaneous interpretation of the legislative history lead to at least the conclusion that Justice O'Connor states on the second issue.

Thank you.

QUESTION: Thank you, Mr. Silberman.

Mr. Wright?

ORAL ARGUMENT OF CHRISTOPHER J. WRIGHT

AS AMICUS CURIAE SUPPORTING THE RESPONDENTS

MR. WRIGHT: Thank you, Mr. Chief Justice, and may it please the Court:

As the court below stated, this case involves a situation where every dollar saved by Firestone is a dollar in its pocket. And Firestone's construction of its terms of its severance pay plan not to require payments to the plaintiff class saved it more than $6 million here. In a situation like this, deferring to Firestone's construction of the terms of its plan would undermine the most basic policy underlying ERISA, which is ensuring that employees get the benefits that they've been promised.

Because Firestone administers its plan itself and pays benefits out of general assets rather than from a trust fund, the only approach that is consistent with

ERISA's purposes and the rule that the United States believes should be adopted as a matter of federal common law under Section 502(a)(1)(B) is that contract principles govern here.

QUESTION: Well, Mr. Wright, you would apparently apply a different standard, an abuse of discretion standard, if it were independent trustees and a funded plan?

MR. WRIGHT: If it were a Section 302 sort of plan with both a trust and an independent trustee, then we think -- the question is not presented here.

QUESTION: Even on a question of interpreting the language of the contract.

MR. WRIGHT: As, as a matter of federal --

QUESTION: You would say deference and abuse of discretion --

MR. WRIGHT: As a matter of federal common law, we think that this Court might arise -- might arrive at -- at that view.

QUESTION: Well, that's the position you urge.

MR. WRIGHT: Well, in, in -- in that case, which isn't presented here because we don't have a neutral trustee and a funded plan.

QUESTION: Well, that certainly isn't the position being argued by Mr. Silberman, who says it

doesn't make any difference what kind of a plan it is. This is not the kind of issue or question on which deference is given.

MR. WRIGHT: Well, Mr. Silberman and I --

QUESTION: Under trust law or otherwise.

MR. WRIGHT: Well, under trust law -- we, we, we agree that under trust law, discretion should be given only where discretion is granted. And we certainly agree that no discretion has been granted to administrators of an employee benefit plans.

QUESTION: To misconstrue an instrument you mean.

MR. WRIGHT: To construe an instrument.

Now, whether -- and Mr. Silberman and I are in perfect agreement that in this case involving an unfunded plan and biased administrators, it, it would -- it would make no sense whatever to defer to the --

QUESTION: Yes, but I'm trying to explore what the rule would be in a funded plan with independent trustees.

MR. WRIGHT: Well, we see no reason why -- we think that the, the -- really the only position that we think has much merit in Petitioners' position is that Congress did want to keep the costs of administering employee benefit plans as low as possible. We're not

sure that the -- applying a deferential standard really does that. And, and I hope to get a chance to say more about that later.

But to the extent that it might on the margin in a case that presents the issue, we think that this Court might decide that deference could be paid where there's a truly neutral administrator and a funded plan.

QUESTION: Am I --

QUESTION: (Inaudible). You also suggest to us that -- that if we rule for Mr. Silberman's client, that we do it on the 502(1)(B) ground rather than the court of appeals ground.

MR. WRIGHT: Well, no. The court of appeals certainly stressed the fact that there is a -- is a biased administrator here.

QUESTION: Oh, there's no doubt about that.

MR. WRIGHT: The court did not -- I, I don't think that I'm disagreeing with Judge Becker's fine opinion. I would hope to flesh it out perhaps a bit by adding an introductory paragraph that --

QUESTION: Well, he was talking about a biased -- a conflict of interest in the trustee, wasn't he?

MR. WRIGHT: Well, Judge Becker recognized that there is a biased administrator here. I assume that it was Thomas E. Robinson, the same person who, who

decided not to give documents to the three plaintiffs who requested them, a decision that has been called from the bench as, as mad and I think inexplicable. That is the person whose, whose decision Firestone would, would have -- have the courts defer to here.

QUESTION: Am I correct that you don't really point to any language that -- in the statute that distinguishes between funded and unfunded plans for these purposes? You just think it's sort of a good idea to treat the two differently, and therefore we should do it --

MR. WRIGHT: Well, we think that it's --

QUESTION: -- and declare one to be sort of a trust -- subject to trust type obligations and the other one not because that works better.

MR. WRIGHT: We think it's clear that federal common law applies. Congress has made that clear. We think that it's clear that in construing ERISA, in many areas of ERISA, trust principles will apply. In, in many plans, there are trust funds. Here there is no trust fund, and trust law -- Section 74 of the Restatement says that where there's no trust fund, trust law doesn't apply. You -- contract principles would be applied in that situation.

Now, whether in another case involving a trust

fund and a neutral administrator the Court might want to borrow the arbitrary and capricious standard, we don't think that's presented here. We don't -- we wouldn't want to rule out that possibility if it turns out that that might, might be a cost-saving device.

I -- in response to Justice Stevens' question, I'd like to point out that -- that while a lawyer might be a fiduciary with respect to his client, if a dispute arose as to the meaning of the pay contract between the lawyer and his client, you certainly wouldn't defer to the lawyer's interpretation of the contract. So, we don't think that just because someone owes someone else a fiduciary duty, his opinion as to what contracts mean always gets deference.

QUESTION: Your, your -- when you say a lawyer is a fiduciary, you mean they're subjected to a higher standard than a normal contracting party, not that they have more rights.

MR. WRIGHT: Exactly. And, and almost all of Firestone's arguments here start by saying that administrators are, are fiduciaries and end by saying that therefore they're, they're -- ought to be judged under an arbitrary and capricious standard, and that seems backward to us for the reason you've just given. Congress meant to hold them to the highest standard

possible not, not to direct courts to give -- to give deference to decisions of what contracts mean made by biased administrators.

QUESTION: Mr. Wright, do you agree with your opponent's general estimate of the proportion of plans that are unfunded and that are funded?

MR. WRIGHT: Well, I'd like to point out that all pension plans have to be funded under ERISA. ERISA requires that.

QUESTION: We're talking about -- we're talking about severance pay here I guess.

MR. WRIGHT: Welfare plans -- I don't know the percentage, but, yes, I think more than are not are, are unfunded.

I'd like to briefly say a word about the second issue. One question that has come up is, is why didn't Congress say -- say claimants in saying who -- who -- whose entitled to, to information. Well, Congress wanted to be broader than claimants. You're, you're entitled to -- to request documents if you think you may in the future -- if you want to find out if in the future you're going to be entitled to payments.

QUESTION: But that doesn't apply to these people. They either are or are not.

MR. WRIGHT: No. I was simply trying to say

that's why -- that's why they didn't say claimants in the -- in the statute. They wanted to be broad.

QUESTION: (Inaudible) broad, so they said participants. That, that's a strange way to be broad.

MR. WRIGHT: Well, a participant is any employee or former employee who is or may become eligible. And -- and I'd also like to point out that doesn't include just anyone who walks in off the street. You at least have to be an employee or a former employee. And, and as the court below said, we think that "is" is often read in statutes like this to mean claims to be.

QUESTION: Well, does there -- do you have to be a colorable -- have to -- have to have a colorable claim to benefits?

MR. WRIGHT: We don't think it would be unwise to read in such a requirement so that if somebody who -- who never -- never participated in a stock plan asked for documents, he wouldn't have a colorable claim. But as has been pointed out from both -- by both Justice Kennedy and Justice Scalia, it -- the decision not to give the documents to a former employee who participated in the plan is, is, is just inexplicable.

And -- so, we don't even think that that's a necessary requirement. We think that if a former

employee asks for plans -- ask for plan documents, we think that Congress plainly wanted --

QUESTION: But, but you, you then don't give any effect to who is or may become eligible to receive a benefit. I mean, that's a provision in the statute.

MR. WRIGHT: Well --

QUESTION: I don't understand what effect you give to that clause.

MR. WRIGHT: If I can just answer that question. We, we think that they can come in under either clause. We think that "is" can be read to mean claims to be, and we think that a former employee literally may become eligible. He may become eligible if he returns to work for Firestone.

Thank you.

QUESTION: Thank you, Mr. Wright.

Mr. Wald, you have one minute remaining.

REBUTTAL ARGUMENT OF MARTIN WALD

MR. WALD: Well, I just -- with one minute I'd just like to say that the Solicitor General has just talked about Firestone's bias. After two years of the full panoply of discovery, there's no indication whatsoever that Firestone had any bias.

Second thing to be kept in mind is that -- statute makes clear that every plan is a trust. And we

seem to be forgetting that -- some of -- of the discussion.

Congress made it clear. When they adopted the references to the Labor Management Relations Act, they were aware of the application of the abuse of discretion standard. They indicated that they were satisfied with it. It's taken as a matter of law that they were aware of it. If they had been unsatisfied, they would have given some indication.

As regards to the contract aspect, 502 says who can sue for what. But 404 says the fiduciary must give the beneficiaries the benefits entitled to them under the plan. So, the fiduciary --

QUESTION: Your, your time has expired, Mr. Wald.

MR. WALD: Thank you.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 11:00 o'clock a.m., the case in the above-entitled matter was submitted.)

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:

NO. 87-1054 - FIRESTONE TIRE AND RUBBER COMPANY, ET AL., Petitioners

V. RICHARD BRUNCH, ETC., ET AL.

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BY Judy Freilicher

(REPORTER)