

**ORIGINAL**

**OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE**

**THE SUPREME COURT  
OF THE  
UNITED STATES**

**CAPTION:** MEAD CORPORATION, Petitioner V. B. E. TILLEY,  
ET AL.

**CASE NO:** 87-1868

**PLACE:** WASHINGTON, D.C.

**DATE:** February 22, 1989

**PAGES:** 1 - 54

1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x  
3 MEAD CORPORATION, :

4 Petitioner, :

5 v. :

No. 87-1868

6 B. E. TILLEY, ET AL. :  
7 -----x

8 Washington, D.C.

9 Wednesday, February 22, 1989

10 The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States  
12 at 11:14 a.m.

13 APPEARANCES:

14 PATRICK F. McCARTAN, Cleveland, Ohio; on behalf of  
15 Petitioner.

16 CLIFFORD L. HARRISON, Radford, Virginia; on behalf of  
17 Respondents.

C O N T E N T S

ORAL ARGUMENT OF

PAGE

PATRICK F. McCARTAN, ESQ.

On behalf of Petitioner

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CLIFFORD L. HARRISON, ESQ.

On behalf of Respondents

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P R O C E E D I N G S

(11:14 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 87-1868, Mead Corporation against Tilley. Mr. McCartan, you may proceed whenever you're ready.

ORAL ARGUMENT OF PATRICK F. McCARTAN

ON BEHALF OF PETITIONER

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

This case presents two questions for consideration by the Court. The first and principal question is whether upon termination of a pension plan the Employee Retirement Income Security Act of 1974, ERISA, requires the payment of subsidized early retirement benefits before any surplus plan assets may revert to the employer.

We submit that ERISA imposes no such requirement. But if the Court should disagree, then it would be necessary for the Court to decide whether the court below, the Fourth Circuit Court of Appeals, abused its discretion in reaching and deciding the damage issue, when that issue was not considered by the district court and was not raised, briefed or argued in the court of appeals.

The factual background against which the Court



1 will decide this question is relatively simple. The  
2 Respondents are six former salaried employees of the  
3 Petitioner, of the Lynchburg Foundry Company, formerly a  
4 previously -- excuse me, a wholly-owned subsidiary of  
5 the Petitioner.

6 They were participants in a salaried employees  
7 retirement plan, which was a tax-qualified, single  
8 employer, defined benefit plan funded entirely by Mead.  
9 Under the terms of the plan, normal retirement benefits  
10 became payable at age 65. Employees became entitled to  
11 actuarially reduced early retirement benefits at age  
12 55.

13 And employees became entitled to subsidized  
14 early retirement benefits if they had attained age 62  
15 and completed 30 years of service at the time they  
16 severed their employment with Petitioner. This benefit  
17 was subsidized in the sense that there was no actuarial  
18 reduction for the early commencement for the benefits.

19 In 1983, Petitioner sold the foundry, severed  
20 the employment of the Respondents, and terminated the  
21 plan. Employees who had satisfied the requirements for  
22 receiving normal or subsidized early retirement  
23 benefits, received those benefits. All employees who  
24 were ineligible for such benefits received their normal  
25 retirement benefit, payable at age 65, based upon their

1 completed years of service on the date of plan  
2 termination. In other words, the actuarial value of the  
3 normal retirement benefit.

4 The Respondents were in this latter group.  
5 Five had completed 30 years of service but had not  
6 attained age 62. One had 28 years of service and was  
7 only age 61 at the time of plan termination.

8 Prior to the actual termination of the plan,  
9 Mead requested and received from the Pension Benefit  
10 Guaranty Corporation a Notice of Sufficiency of Assets.  
11 The IRS subsequently issued a favorable determination  
12 letter indicating the termination of the plan did not  
13 affect its tax-qualified status.

14 Having satisfied all liabilities of the plan,  
15 Mead then took a reversion of approximately \$10.7  
16 million, as provided by the terms of the plan. This  
17 suit followed, Respondents claiming that Mead should  
18 have paid subsidized early retirement benefits before  
19 any surplus plan assets could revert to the Petitioner.

20 On cross-motions for partial summary judgment,  
21 the district court held that the Petitioner was not  
22 required to make payment of such benefits because they  
23 were not accrued benefits within the meaning of ERISA  
24 and the Respondents had not satisfied all terms and  
25 conditions of the plan.

1           The Fourth Circuit reversed, holding that upon  
2 plan termination, ERISA required payment of these  
3 subsidies even if those benefits were not accrued  
4 benefits within the meaning of the statute and even  
5 though Respondents had not satisfied all conditions  
6 under the plan for the receipt of such benefits. For  
7 its sole statutory authority, the court of appeals  
8 relied on Section 4044(a)(6) of ERISA, which ranks the  
9 order in which assets must be allocated upon plan  
10 termination among six categories, the last being the  
11 payment of all other benefits under the plan.

12           In construing this category to create a  
13 substantive right to recover subsidized early retirement  
14 benefits, the court below relied upon Amato against  
15 Western Union, where the Second Circuit that Congress  
16 did not intend to limit this allegation category to  
17 accrued benefits within the meaning of the statute.  
18 But, instead, intended that, if assets were available,  
19 they should be paid to meet the participant's benefit  
20 expectations under the plan.

21           The court below then calculated the amount due  
22 each Respondent by taking a five percent actuarial  
23 reduction for each year that the individual is under the  
24 early retirement age at the time of plan termination.

25           QUESTION: Mr. McCartan, --

1 MR. McCARTAN: Yes, Your Honor.

2 QUESTION: I guess we have here two different  
3 categories of employees. Those who had worked the 30  
4 years but weren't yet 62, and those employees who were  
5 neither. They hadn't yet worked the 30 years and they  
6 weren't 62.

7 MR. McCARTAN: That's correct, Justice  
8 O'Connor. Five of the Respondents.

9 QUESTION: Now, is there possibly a distinction  
10 there? Has somebody who has worked the 30 years in  
11 effect earned the retirement benefits? Could you say  
12 they are accrued but not yet vested until they are 62?

13 MR. McCARTAN: I think not, Your Honor. To  
14 begin with, a benefit can be earned only under the terms  
15 of the plan. If it is a benefit which is mandated by  
16 ERISA to be paid, it must be an accrued benefit.

17 Under the terms of this plan, there were two  
18 conditions for the receipt of early retirement  
19 benefits. The employee had to have 30 years of service  
20 and reach age 62 in service.

21 Now, once you make either the age or service  
22 expectations of the participants, rather than the terms  
23 of the plan, the touchstone of liability, there is no  
24 way for determining what the obligations of the plan  
25 are, and I submit there is no reason for disregarding



1 the terms of one condition and not another.

2 QUESTION: I guess you've read that Ashenbaugh  
3 decision out of what -- the Third Circuit?

4 MR. McCARTAN: The Third Circuit, Your Honor.  
5 That's correct.

6 QUESTION: And Judge Mansmann's opinion in that  
7 that tried to draw that distinction.

8 MR. McCARTAN: That's correct. In dissent.

9 QUESTION: Uh-huh.

10 MR. McCARTAN: The majority opinion in that  
11 court -- in that case, as I'm sure Your Honor is aware,  
12 held that subsidized early retirement benefits were not  
13 accrued benefits within the meaning of ERISA.

14 But, coming back to your original question, you  
15 cannot have the age or the service expectation of the  
16 participant determine the liability of the plan  
17 regardless of the terms of the plan.

18 In this case, it was an age-in-service  
19 expectation that we're being asked to ignore. In  
20 another case it may be a service requirement, as was the  
21 case in the Blessitt case in the Eleventh Circuit.

22 QUESTION: Well, what's an example of an  
23 accrued non-vested benefit?

24 MR. McCARTAN: I'm sorry, Justice Kennedy.

25 QUESTION: Is there a paradigmatic example of

1 an accrued non-vested benefit?

2 MR. McCARTAN: An accrued non-vested benefit  
3 would be the example of an employee under this plan,  
4 which contains a 10-year cliff vesting provision, who  
5 had been in the employ of Mead for nine years. If that  
6 employee leaves at nine years, he had an accrued  
7 benefit, but it was unvested. He gets nothing.

8 QUESTION: When did it begin to accrue?

9 MR. McCARTAN: It began to accrue upon the  
10 moment he became eligible to participate in the plan.  
11 But it was an accrued benefit within the meaning of the  
12 statute, not a subsidized benefit. What was accruing  
13 under the terms of the plan at that time was the annual  
14 benefit commencing at normal retirement age, not a  
15 subsidized early retirement benefit.

16 Because, if there is anything that is clear in  
17 this case, it's that Congress in 1974 specifically  
18 decided not to include the subsidized early retirement  
19 benefit in the term "accrued benefit" within the meaning  
20 of the statute.

21 QUESTION: Although normal retirement benefits  
22 accrue continuously during --

23 MR. McCARTAN: That's correct, Your Honor,  
24 under Section 411(b).

25 QUESTION: Did you have those in this case?

1 MR. McCARTAN: That's right, Your Honor.  
2 Anyone who had satisfied the requirements for the normal  
3 retirement benefit, which in effect was reaching 65,  
4 received that benefit. That benefit has to be  
5 nonforfeitable under the statute. Those who had not  
6 attained that age but had vested benefits, received an  
7 actuarially reduced value of their normal retirement  
8 benefit, based upon their years.

9 QUESTION: They were just accrued?

10 MR. McCARTAN: Those are the only benefits that  
11 accrue under the statute.

12 QUESTION: They were accrued. Were they  
13 vested, the ones who hadn't reached retirement age?

14 MR. McCARTAN: Yes, Your Honor. Any time an  
15 employee reaches the 10-year cliff vesting provision in  
16 the plan --

17 QUESTION: I see.

18 MR. McCARTAN: -- all benefits that have  
19 accrued become vested and nonforfeitable within the  
20 meaning of the statute.

21 QUESTION: Now, for tax treatment of these  
22 pension plans, I gather that you calculate the  
23 contingent liability created by the early retirement  
24 provisions and IRS would take account of that?

25 MR. McCARTAN: I think not, Your Honor. Under

1 Section 401(a)(2) of the Revenue Code --

2 QUESTION: Uh-huh.

3 MR. McCARTAN: -- which has been in place since  
4 1938 --

5 QUESTION: Uh-huh.

6 MR. McCARTAN: -- upon plan termination, the  
7 plan sponsor must satisfy all plan liabilities before  
8 there can be any reversion of surplus assets to the  
9 employer. The Treasury regulation implementing that  
10 section of the Code provides that that requires payment  
11 of all fixed and contingent liabilities. And the IRS in  
12 a series of revenue rulings, dating from the late '30s  
13 and early '40s, has defined contingent liabilities as  
14 benefit credits accrued up to the time of termination.

15 Now, as a matter of administrative practice --

16 QUESTION: So, what about Mead's early  
17 retirement benefits under that --

18 MR. McCARTAN: Well, prior --

19 QUESTION: -- IRS definition?

20 MR. McCARTAN: Prior to ERISA, Your Honor, it  
21 was only the benefit that accrued under the plan which  
22 determined -- which was based upon the terms of the  
23 plan. Since ERISA, it is only the accrued benefit -- I  
24 don't mean to circular -- which accrues over the life of  
25 the plan and the service of the employee.



1 But what the IRS required pre-ERISA as a matter  
2 of administrative practice, was that employers treat  
3 benefits which accrued ratably under the terms of their  
4 plan as contingent liabilities, which then had to be  
5 vested and satisfied upon plan termination.

6 Now, the same thing happens now, but by  
7 operation of law, Section 411(d)(3) of the Code. Under  
8 that provision, and the corresponding provision in  
9 ERISA, the accrued benefit which has not vested, which  
10 is a contingent liability within the meaning of the IRS  
11 rulings, must vest upon termination of the plan. So,  
12 the contingent liability, up until the time of plan  
13 termination, is converted into a fixed liability and  
14 must be paid by reason of 411(d)(3) of the Code.

15 QUESTION: Mr. McCartan, --

16 MR. McCARTAN: Yes, sir.

17 QUESTION: -- why -- show me where in the  
18 statute the ordinary retirement benefits accrue but the  
19 early retirement benefits don't accrue. I -- I don't  
20 see in the definition of accrued benefit any language  
21 that would lead me ineluctably to that conclusion.

22 MR. McCARTAN: I'd be happy to do that, Justice  
23 Scalia. The accrued benefit is defined in Section  
24 323(a) of ERISA and Section 411(a)(7) of the Code as, --  
25 and I quote, "The employee's accrued benefit under the

1 plan and, except as provided in Section (c)(3),  
2 expressed in the form of an annual benefit commencing at  
3 normal retirement age."

4 QUESTION: You're relying on that phrase,  
5 normal retirement age? Is that what you --

6 MR. McCARTAN: No. The benefit commencing at  
7 normal retirement age. But you will note the exception,  
8 Subsection (c)(3), and that's what the plan  
9 administrator in this case had to look to because these  
10 employees were being taken out with lump-sum cash  
11 distributions. They were not waiting until they reached  
12 age 65 to receive the normal retirement benefit.

13 Subsection (c)(3) instructs that when the  
14 accrued benefit --

15 QUESTION: Where can we find this in the briefs?

16 MR. McCARTAN: Excuse me, Your Honor. That  
17 appears in our brief appendix at page 5. You will see  
18 in the --

19 QUESTION: The blue --

20 MR. McCARTAN: -- appendix to the blue brief on  
21 page 4 we have set forth Section 323(a), 411(a)(7) of  
22 the code, and then 411(c)(3) appears in the appendix at  
23 page 5.

24 QUESTION: Thank you.

25 MR. McCARTAN: Subsection (c)(3), which the

1 definition, Justice Scalia, of the accrued benefit  
2 refers the reader to, instructs that when the accrued  
3 benefit is to be determined as an amount other than an  
4 annual benefit commencing at normal retirement age, then  
5 the accrued benefit shall be the actuarial equivalent of  
6 such benefit.

7           The actuarial equivalent of a benefit  
8 commencing at normal retirement age necessarily excludes  
9 subsidized early retirement benefits because such  
10 benefits, by definition, are commencing prior to normal  
11 retirement age.

12           Treasury Regulation 1.411(a)-(7), which is  
13 cited and quoted on pages 32 and 33 of the blue -- of  
14 the blue brief, I think makes this very clear and  
15 confirms that a subsidized early retirement benefit  
16 provided by the plan is not taken -- is not to be taken  
17 into account in determining the accrued benefit within  
18 the meaning of the statute.

19           Example 1 to that regulation, which is set  
20 forth on pages 32 and 33, provides -- and if I may, I'd  
21 like to read it because I think this is this case.

22           QUESTION: Thirty-two and 33 of what?

23           MR. McCARTAN: Of our brief on the merits, Your  
24 Honor. The brief I believe you have before you.

25           Now, bear in mind we started with the

1 definition of accrued benefit within the meaning of the  
2 statute. That definition takes us to 411 Subsection  
3 (c)(3).

4 Now, the regulation implementing that section  
5 in Example 1, and this is an example of how you  
6 determine the normal retirement benefit, provides --  
7 Plan A provides for a benefit equal to 1 percent of high  
8 five years' compensation for each year of service and a  
9 normal retirement age of 65. The plan also provides for  
10 a full unreduced, accrued benefit without any actuarial  
11 reduction for any employee at age 55 with 30 years of  
12 service. That's the Mead plan.

13 Even though the actuarial value of the early  
14 retirement benefit could exceed the value of the benefit  
15 at the normal retirement age, the normal retirement  
16 benefit would not include the greater value of the early  
17 retirement benefit because actuarial subsidies are  
18 ignored.

19 And that is exactly the kind of situation that  
20 we have in this case. And I submit that the language of  
21 the statute and the implementing regulation interpreting  
22 that language read this way and are structured this way  
23 because Congress specifically addressed this issue in  
24 1974.

25 QUESTION: You're not saying that's unaccrued.



1 You're just saying it's an accrued benefit of a  
2 different sort?

3 MR. McCARTAN: While you can say it may be an  
4 accumulating benefit, it is certainly not an accrued  
5 benefit within the meaning of the statute, Your Honor.  
6 And it is only the accrued benefit --

7 QUESTION: It would be imprecise to say that  
8 it's unaccrued?

9 MR. McCARTAN: No, it would not be imprecise to  
10 say that it is unaccrued. A benefit of this kind  
11 becomes earned all at once, when both conditions for the  
12 receipt of the benefits are satisfied.

13 This is very clear and I think confirmed from  
14 the legislative history. The Senate, back in 1974,  
15 proposed a version of ERISA which took the subsidized  
16 early retirement benefit into account in determining  
17 what would be the accrued benefit. And we have to bear  
18 in mind the accrued benefit is the benefit that this  
19 statute surrounds with all of the protection, the  
20 minimum standards that Congress required any plan  
21 sponsor meet.

22 The House disagreed. The Administration  
23 disagreed because it did not want to deter employers  
24 from providing such benefits and wanted to maintain the  
25 cost of maintaining defined benefit plans of the kind

1 that we have here. The quotation from the House  
2 Committee on Education and Labor, which appears on page  
3 33 of our brief, I think makes it very clear what the  
4 House position was.

5 The conference committee chose the House  
6 version and in the conference report said very clearly,  
7 and I quote, "The accrued benefit does not include the  
8 value of the right to receive early retirement benefits."

9 Now, the effect of this 1974 congressional  
10 choice, I submit, was to exclude subsidized early  
11 retirement benefits from the accrued benefit under ERISA  
12 and all the protections that statute provides, including  
13 that of Section 4111(d)(3) which requires that accrued  
14 benefits become vested and payable upon plan  
15 termination. They are not accrued benefits within the  
16 meaning of the statute, they do not vest upon plan  
17 termination and, therefore, are not payable.

18 Your Honors, if I may, I would like to address  
19 the issue which really goes to the only basis for the  
20 holding of the court below, which is that Section  
21 4044(a)(6) of ERISA creates substantive rights to the  
22 payment of subsidized early retirement benefits.

23 Section 4044 is entitled Allocation of Assets.  
24 I submit there is nothing in the language of the  
25 statute, there is nothing in the implementing

1 regulations of the statute, there is nothing in the  
2 structure of the statute, and there certainly is nothing  
3 in the legislative history of the statute which  
4 indicates that Congress intended to do anything in this  
5 provision other than to rank the order in which the  
6 assets of a plan generally with insufficient assets  
7 should be put upon termination of a plan.

8 Section 4044(a)(6) is the last of these  
9 categories. It requires the plan administrator to  
10 allocate assets to satisfy, and I quote, "all other  
11 benefits under the plan." Now, a benefit can be earned  
12 under the plan only if it satisfies the criteria of the  
13 plan.

14 Here the conditions outlined by the plan for  
15 the receipt of the subsidized early retirement benefit  
16 were not satisfied. While five of the Respondents did  
17 have 30 years of service, they had not attained age 62  
18 in the service of Mead. The fifth had 28 years of  
19 service, but was 61 years of age at the time the plan  
20 terminated.

21 QUESTION: Of course, if you agree that (a)(6)  
22 does create new rights, then you'd be out of the -- It  
23 wouldn't be tied to accrual or not, so all of your other  
24 analyses would indeed be irrelevant. So that is crucial.

25 I mean, you would acknowledge that if six

1 creates new rights, all it says is all other benefits,  
2 it doesn't say accrued --

3 MR. McCARTAN: If six creates new rights -- and  
4 I think it would be strange indeed if it did when  
5 Congress made it very clear that the only benefit that  
6 was to be surrounded by the protection of the statute  
7 was the accrued benefit -- the answer to your question  
8 is yes.

9 But I think it's important to keep in mind  
10 here, Justice Scalia, that Congress in writing this  
11 statute was endeavoring to embrace and to enforce the  
12 terms of these plans, not to rewrite them or to  
13 disregard them. And I submit if the Congress in this  
14 allocation category intended to create a whole new  
15 category of substantive rights based upon benefit  
16 expectations, it would have said so in the statute. And  
17 I think there would be some indication in the  
18 legislative history.

19 I don't think Congress intended that. I don't  
20 think Congress said that. And the legislative history  
21 indicates that Congress wasn't even thinking about doing  
22 that in Section 4044(a)(6).

23 Now, the court below found some comfort in the  
24 Second Circuit's interpretation of the legislative  
25 history of Section 4044(a), the interpretation that the



1 Second Circuit put on the legislative history in the  
2 Anato case. There the court attached a great deal of  
3 significance to the fact that the adjective accrued was  
4 eliminated from the fourth category of the House bill.

5 But the fourth category of the House bill is in  
6 no way an analog for Category 6 of Section 4044(a). The  
7 closest analog to Category 6 in the predecessor bills  
8 was Section 112(d)(2) of the House bill. That was a  
9 provision for the payment of other benefits that vest  
10 upon -- not that vest, that are payable upon plan  
11 termination.

12 The first indication that I can see in the  
13 legislative history for a predecessor to Category 6 is  
14 in the Administration's recommendations to the  
15 conferees. There, the Administration recommended that  
16 there be a category of this time. And the bill emerges  
17 from conference with this catchall provision.

18 So, elimination of the adjective accrued from a  
19 section in the predecessor House bill that really is not  
20 the closest analog to Category (a)(6) proves very  
21 little. In fact, I submit it proves nothing as to what  
22 Category 6 was intended to embrace.

23 QUESTION: May I ask you a question --

24 MR. McCARTAN: Yes, Justice.

25 QUESTION: -- that bothers me a little bit.

1 There is a provision, as I recall, in the statute that  
2 says before you get any reversion of the \$10 million  
3 you've got to satisfy all liabilities, including  
4 contingent liabilities.

5 MR. McCARTAN: That's correct.

6 QUESTION: Why could it not be argued that  
7 whether or not it's technically accrued or not you do  
8 have a contingent liability for this early retirement  
9 payment which you must fund? The statute requires you  
10 to be actuarially sound and all the rest of it. So why  
11 is that not a contingent liability?

12 MR. McCARTAN: I think this related to the  
13 question asked earlier by Justice O'Connor. If we look  
14 at the implementing regulations and revenue rulings with  
15 respect to 401(a)(2) of the Code, which is really the  
16 genesis of the contingent liability language, the Code  
17 merely provides that all liabilities be satisfied.

18 QUESTION: Right.

19 MR. McCARTAN: The IRS has said that that means  
20 both fixed and contingent liabilities.

21 QUESTION: Right.

22 MR. McCARTAN: The examples given repeatedly by  
23 the IRS are benefits that accrue ratably under the terms  
24 of a plan. That's pre-ERISA. And as a matter of  
25 administrative practice pre-ERISA, the IRS would insist

1 that the employer treat benefits which accrued ratably  
2 under the terms of the plan as the accrued benefit,  
3 post-ERISA, and require that they vest and be paid upon  
4 termination.

5 Now the same thing happens by operation of law,  
6 Your Honor. Under Section 411(a)(3) of the Code, the  
7 accrued benefit, which is now a defined term of ERISA,  
8 is the only benefit that must vest upon termination of  
9 the pension plan. And I think the IRS interpretation of  
10 this section in the implementing regulations supports  
11 this position. The IRS in this case issued a favorable  
12 determination letter.

13 QUESTION: I understand it. Can I find  
14 anything in either -- If I just looked at the statute  
15 and the terms of your plan, how would I know whether or  
16 not the potential liability to a retiree age 62 and  
17 over, and over 30 years of service, whether or not  
18 that's a contingent liability?

19 MR. McCARTAN: I think the best place to look  
20 in the plan, Your Honor, would be Article VIII, which  
21 provides for benefits upon termination of employment.  
22 You will note that in that article of the plan, which  
23 does appear in the joint appendix here, the only  
24 benefits that survive termination of employment, if you  
25 will, are the vested early retirement benefit and the

1 vested normal retirement benefit. And that has to be  
2 put in the context of termination of employment, not  
3 just termination of the plan.

4 But there is no provision there, as there is in  
5 Article V, Section 2(b) for the payment of subsidized  
6 early retirement benefits after separation from  
7 employment and reaching the required age.

8 QUESTION: Well, let me ask you another -- put  
9 the question a little differently. Supposing a man had  
10 30 years of service and was 63 years old and there was a  
11 termination, would he not have a right to the early  
12 retirement benefit?

13 MR. McCARTAN: Absolutely, Your Honor. That  
14 employee would --

15 QUESTION: Well, then why -- at the time you've  
16 terminated this plan some of these people were in that  
17 very posture. Why wasn't there a contingent liability  
18 to them?

19 MR. McCARTAN: Your Honor, they were not in  
20 that very posture. As I understood your example, it was  
21 an individual who had attained age 63 --

22 QUESTION: Oh, you're right.

23 MR. McCARTAN: -- and 30 years of service.  
24 That individual would have earned that benefit under the  
25 plan.



1 QUESTION: Right.

2 MR. McCARTAN: It would be a liability of the  
3 plan and would be payable on termination.

4 QUESTION: But when that individual was 61 and  
5 had 30 years of service, there was no contingent  
6 liability for this premium?

7 MR. McCARTAN: With respect to that benefit,  
8 that's correct.

9 QUESTION: You said there is no contingent  
10 liability.

11 MR. McCARTAN: There is no contingent liability.

12 QUESTION: I know it hadn't vested. I can see  
13 your Article VIII talks about vesting, but I'm not sure  
14 --

15 MR. McCARTAN: Because that benefit, Your  
16 Honor, is not earned until both conditions of the plan  
17 are satisfied. And if the termination --

18 QUESTION: In order to be actuarially sound you  
19 must have put away -- you must have planned for that  
20 possibility of paying that person.

21 MR. McCARTAN: The sponsor always funds for  
22 benefits that are projected liabilities of the plan,  
23 whether or not they are going to be earned.

24 QUESTION: But isn't that because they are  
25 contingent liabilities?

1 MR. McCARTAN: Not because they're contingent  
2 liabilities but because many of them never will be  
3 earned. This is the AFL-CIO argument, and it proves too  
4 much. In a defined benefit plan, an employer working on  
5 the basis of actuarial assumptions will fund for all  
6 projected liabilities of the plan, many of which will  
7 never be earned. The actuary takes into account the  
8 fact that there are going to be deaths, they're going to  
9 terminate --

10 QUESTION: They may never be earned, but in the  
11 period before they're earned are they not contingent  
12 liabilities?

13 MR. McCARTAN: No.

14 QUESTION: They're not?

15 MR. McCARTAN: Not at that point. The only --

16 QUESTION: What is the difference between  
17 liability and a contingent liability then?

18 MR. McCARTAN: Because the only liability which  
19 accrues after ERISA is the accrued benefit. When you  
20 are funding a defined benefit plan, Justice Stevens, you  
21 do it on an aggregate basis and not for the benefit of  
22 any individuals.

23 QUESTION: Well, I understand. I understand.

24 MR. McCARTAN: And the assumptions take into  
25 account that Employees A, C, F and G may leave. Some

1 may die. Some may advance into other ranks in  
2 management of the company.

3 And to say that because you are funding for the  
4 possibility of paying a liability that may never be  
5 earned, that therefore that becomes an accrued benefit,  
6 proves entirely --

7 QUESTION: Well, let's leave out the words  
8 "accrued benefit." At the date of -- when this plan was  
9 terminated your position is there was no contingent  
10 liability to these particular claimants?

11 MR. McCARTAN: That's correct. By operation of  
12 law. The contingent --

13 QUESTION: What about the day before the plan  
14 terminated?

15 MR. McCARTAN: On the day before the plan, all  
16 benefits that had been accruing ratably under Section  
17 411(b), which is the accrued benefit --

18 QUESTION: Now, they are the only contingent  
19 liabilities?

20 MR. McCARTAN: -- were contingent liabilities.

21 QUESTION: They're not only contingent, those  
22 are actual liabilities.

23 MR. McCARTAN: No they weren't. Not until they  
24 were vested. And if the employee had not served ten  
25 years of credited service --

1 QUESTION: No, no. I'm talking about people  
2 who have served more than 10 years. And all of them  
3 have vested rights, don't they?

4 MR. McCARTAN: All of those who served more  
5 than 10 years --

6 QUESTION: Yeah.

7 MR. McCARTAN: -- do have vested rights.  
8 That's correct. The contingent liabilities were the  
9 unvested accrued benefits to that point in time.

10 QUESTION: Thank you, Mr. McCartan.

11 MR. McCARTAN: Thank you, Your Honor.

12 QUESTION: Mr. Harrison, we'll hear now from  
13 you.

14 ORAL ARGUMENT OF CLIFFORD L. HARRISON  
15 ON BEHALF OF RESPONDENTS

16 MR. HARRISON: Mr. Chief Justice, may it please  
17 the Court:

18 The critical issue for this Court is the  
19 determination of Section 1334 of ERISA. And the one  
20 thing that I would like to get clear before this Court  
21 is that Mead spends most of its argument on an issue  
22 that we have already conceded.

23 We have conceded that this was not intended by  
24 Congress to be an accrued benefit. And there is a  
25 perfectly good reason why it could not have been an



1 accrued benefit, and that reason is to make this an  
2 accrued benefit would have destroyed this benefit.

3 In 1983 and in 1974 when ERISA was passed, the  
4 concept of an accrued benefit was tied to the concept of  
5 vesting -- vesting -- all accrued benefits had to vest  
6 within the vesting rules. The vesting rules had a  
7 maximum of a 10-year vesting schedule, 10-year cliff  
8 vesting. That was the longest you could take.

9 QUESTION: What was that word?

10 MR. HARRISON: Vesting. Ten-year cliff vesting.

11 QUESTION: Cliff? What does that mean?

12 MR. HARRISON: Okay. A cliff vesting is that  
13 you don't vest any benefits until you actually reach the  
14 10 years. Then you just fall off the cliff and you're  
15 vested.

16 QUESTION: Two Fs?

17 MR. HARRISON: Two Fs.

18 (Laughter.)

19 MR. HARRISON: It's what is called 10-year  
20 cliff vesting. Instead of a gradual slope vesting, it's  
21 a cliff. You just fall right off it and you vest. And  
22 that's the problem.

23 QUESTION: There has to be something exciting  
24 in these cases.

25 (Laughter)

1 MR. HARRISON: And that was the problem with  
2 making this benefit a -- a subject to the accruals. If  
3 you subject -- if you subjected the accruals to this  
4 benefit, you would eliminate this benefit, because this  
5 benefit had 30 years' cliff vesting. An early  
6 retirement benefit is a benefit who vest longer than  
7 what the accrual rules will permit.

8 So, Congress did not subject the early  
9 retirement benefits to the accrual, and allowed the  
10 employers and employees to fashion this type of  
11 benefit. The accrual rules were merely the minimum  
12 rules on the basic type benefits payable to age 65,  
13 which Congress was going to require employees to be  
14 subject to the vesting rules. The early retirement  
15 benefits are specifically included.

16 That doesn't mean that Congress intended to  
17 leave out early retirement benefits. No, no, no.  
18 Congress specifically, in the definition of normal  
19 retirement benefits, includes early retirement benefits  
20 in that definition.

21 QUESTION: In what section of the statute is  
22 that, Mr. Harrison?

23 MR. HARRISON: One-zero-zero-two, subparagraph  
24 22.

25 QUESTION: Where will we find that?

1 MR. HARRISON: We find that on, I believe, page  
2 10 of the red brief. I correct -- it's on page 8. I'm  
3 reading at the very bottom of the page. It extends over  
4 to page 9.

5 "For the purposes of this paragraph," is what  
6 It begins with. And we skip down a few sentences, "For  
7 the purposes of this paragraph," I'm reading now at the  
8 top of page 9. "The early retirement benefit under a  
9 plan shall be determined without regard to any benefit  
10 of the plan which the Treasury," fine. And they also  
11 talk about --

12 QUESTION: That doesn't immediately strike me  
13 as proving exactly --

14 MR. HARRISON: Well, pardon me, Your Honor.

15 QUESTION: -- exactly what you said.

16 MR. HARRISON: Really what I needed to cite is  
17 at the top of -- at the top of page 8 there. Well,  
18 that's at the bottom of page 8.

19 "The term 'normal retirement benefit' means the  
20 greater of the early retirement benefit under the plan  
21 or the benefit under the plan commencing at normal  
22 retirement age." It's the greater of the early  
23 retirement benefit or the normal retirement benefit at  
24 normal retirement age.

25 QUESTION: But on the early retirement benefit

1 under the plan --

2 MR. HARRISON: That's correct, sir.

3 QUESTION: -- doesn't that mean it would have  
4 to comply with all the terms of the plan?

5 MR. HARRISON: No, Your Honor. The  
6 quintessential case on that is the Sutton case. And  
7 this is also reflected in the legislative history.

8 QUESTION: Well, that's a case from the Fourth  
9 Circuit, isn't it?

10 MR. HARRISON: That's correct, Your Honor.  
11 Certainly not binding on this Court.

12 The benefit under the plan language refers to a  
13 benefit that's provided under the plan, as opposed to a  
14 benefit which is provided outside of the plan. On page  
15 10, middle paragraph, you have a section which talks  
16 about ancillary benefits, such as medical or life  
17 insurance benefits, which are sometimes provided for in  
18 connection with a pension plan and are sometimes  
19 provided separately.

20 There are benefits that can be provided for  
21 under the plan, and there are benefits -- there are  
22 employee benefits, such as salary, which are provided  
23 for outside of an employee benefit plan. Obviously, you  
24 would not pay benefits which were not provided under the  
25 plan out of the trust fund of the plan. And that was



1 the Sutton case. We had an early retirement benefit  
2 which was funded out of the corporate treasury and not  
3 out of a benefit plan. The employees in Sutton sought  
4 to take the money out of the trust fund, feeling that  
5 was a stronger case.

6 And the Sutton court held no, that a benefit  
7 under the plan has got to be a benefit that is provided  
8 for in the plan. And in the Sutton case, the court  
9 specifically held that since the benefits were not  
10 funded under the plan, then the benefits were not  
11 provided in the plan and there was no recovery. They  
12 did hold that the employees could maintain an action, if  
13 they felt they had one, against the employer's corporate  
14 treasury.

15 Now, what these employees are asking for, what  
16 they're asking this Court for, is the funds that are set  
17 aside for these early retirement benefits. Mead  
18 promised these employees an early retirement benefit in  
19 the hopes that they would work at least 30 years. And  
20 they did.

21 Every year the employees performed their part  
22 of the bargain, year by year, by remaining in Mead's  
23 employment. And every year Mead funded that benefit,  
24 little by little, to pay for it, as it was required  
25 under ERISA. This went on for years and years until a

1 large sum of money developed in the trust fund  
2 specifically allocated to pay that benefit.

3 Now, the question for the Court today is --

4 QUESTION: Were they required to accumulate it  
5 in order to pay that benefit?

6 MR. HARRISON: Yes.

7 QUESTION: How so?

8 MR. HARRISON: The funding requirements of  
9 ERISA requires the funding of early retirement  
10 benefits. While they may not vest, they are required to  
11 be funded.

12 QUESTION: Where -- where is that provided?  
13 Does it say specifically you will fund early retirement  
14 benefits?

15 MR. HARRISON: The -- no, it doesn't say that  
16 specifically. It talks about the plan experience, which  
17 has been determined in the regulations --

18 QUESTION: Uh-huh.

19 MR. HARRISON: -- to include funding of early  
20 retirement benefits. And, of course, that was done in  
21 this case. You've got to fund the plan's liabilities.  
22 You cannot, based on what the -- what --

23 QUESTION: Excuse me. Are they funding -- when  
24 you say they are funding it -- for every employee who is  
25 currently on the payroll? Are they setting aside enough

1 money that if that employee stays until he's 63 and  
2 until he's had 30 years, they'll have money for him?  
3 Or, rather, do they just have to put aside enough money  
4 that on the basis of experience that number of people  
5 who normally would do that, stay that long and reach  
6 that age, would be covered? Which is it?

7 MR. HARRISON: Clearly the latter, Justice --

8 QUESTION: Clearly the latter?

9 MR. HARRISON: Clearly the latter.

10 QUESTION: Well, that's quite a bit different  
11 then, isn't it?

12 MR. HARRISON: Oh, absolutely. What we are  
13 asking this Court for is not payment of the benefit.  
14 We're asking for the money that was set aside to pay  
15 these benefits. The present value of that benefit, if  
16 you would, because that is what the allocation section  
17 holds.

18 QUESTION: Mr. Harrison, the Pension Benefit  
19 Guaranty Corporation supports your opponent in this  
20 case. Isn't that right?

21 MR. HARRISON: That's absolutely correct, Your  
22 Honor.

23 QUESTION: And that's the agency that  
24 presumably is more familiar with this statute than other  
25 agencies might be?

1 MR. HARRISON: That's correct, Your Honor.

2 QUESTION: Don't we normally defer to agency  
3 interpretation of these complicated matters?

4 MR. HARRISON: That's correct, Your Honor.  
5 There are reasons why you should not in this case, first  
6 of which is that the Internal Revenue Service also looks  
7 at these matters. And in an identical case, the Amato  
8 case which was before this Court but never argued  
9 because it was dismissed by stipulation, the Internal  
10 Revenue Service on this very issue filed an amicus in  
11 support of the employee's position. Certainly more  
12 important --

13 QUESTION: Is that still the government's view?

14 MR. HARRISON: Mead suggested that it isn't.  
15 Mead suggested that it isn't. But I would proffer to  
16 this Court that what Mead has cited for authority in  
17 that proposition in no way holds that. There is no  
18 published authority whatsoever -- to my knowledge, no  
19 private authority whatsoever for that basis.

20 QUESTION: Was there an amicus brief by the  
21 government here?

22 MR. HARRISON: Only by the PBGC.

23 QUESTION: And who represented them?

24 MR. HARRISON: The PBGC?

25 QUESTION: Uh-huh.



1 MR. HARRISON: I do not remember the attorney's  
2 name, Your Honor. But I do have it in front of me. It  
3 was Gary M. Ford, General Counsel. Now --

4 QUESTION: But certainly not the Solicitor  
5 General?

6 MR. HARRISON: No.

7 QUESTION: Mr. Harrison, can I pursue the line  
8 of questioning --

9 MR. HARRISON: Sure.

10 QUESTION: -- I started earlier as to what is  
11 set aside under -- under the the ERISA rules. For  
12 people who have cliff vested, they've been there 10  
13 years --

14 MR. HARRISON: Yes.

15 QUESTION: -- it's required that for each  
16 individual you have to set aside each year a specific  
17 allocable amount of money because --

18 MR. HARRISON: That's correct.

19 QUESTION: Okay. For people who have not yet  
20 cliff vested, employees who are there but haven't yet  
21 been there 10 years, you don't set aside any particular  
22 amount for each individual, do you? You just -- but you  
23 have to set aside something on the basis of how many of  
24 those people are likely to hang around for 10 years.  
25 Isn't that what's done?

1 MR. HARRISON: That's correct, and they get  
2 that amount of money on termination.

3 QUESTION: Do they get that on termination --

4 MR. HARRISON: Oh, yes.

5 QUESTION: -- if they haven't cliff vested? I  
6 thought that --

7 MR. HARRISON: Yes. Absolutely. It's under  
8 Priority Category 5.

9 QUESTION: Under 5.

10 MR. HARRISON: Let me explain the PBGC's  
11 position here. The PBGC agreed with me that in ERISA on  
12 two basic fallacies -- that accrued categories occur in  
13 Category 6.

14 Now, first of all, Congress at one point  
15 considered that very issue.

16 QUESTION: Category 5.

17 MR. HARRISON: And an earlier draft of the  
18 House bill had the word "accrued" in the final catchall  
19 category. They took it out. In the final draft of  
20 ERISA they took the word "accrued" out. For this Court  
21 to rule with the PBGC, they're going to have to take a  
22 pen and pen it right back in.

23 Secondly, when it refers to all other non -- it  
24 is a physical impossibility for all other accrued  
25 benefits to occur in Category 6. The PBGC on page 20 of

1 its brief admits that the benefits that Justice Scalia  
2 was referring to -- and that is accrued benefits which  
3 are nonforfeitable solely because of termination. And I  
4 may be overstepping myself one step. These are  
5 nonforfeitable -- all accrued benefits vest on  
6 termination.

7 QUESTION: But I thought it was not accrued  
8 until you're there for 10 years? I'm talking about  
9 people who -- I'm talking about people who haven't been  
10 there for 10 years yet. Now, I thought you told me that  
11 you are not setting aside for each of them a certain  
12 amount of money every year.

13 MR. HARRISON: That's correct.

14 QUESTION: You're just setting aside an amount  
15 that will cover the number of them that are likely to  
16 stay ten years and, therefore, to be entitled to the  
17 plan's benefits.

18 MR. HARRISON: However, at termination, if you  
19 have an accrued benefit of even one year -- even one  
20 year -- that becomes a vested benefit solely because of  
21 termination.

22 Now, if you were to leave service or anything  
23 else happened other than termination before the ten  
24 years, your benefit is gone. It's considered  
25 forfeitable. Subject to determination.

1 QUESTION: But if there is termination?

2 MR. HARRISON: But on termination -- and that's  
3 on page 20 of the PBGC brief -- that becomes vested.  
4 It's vested solely because of termination.

5 QUESTION: Well, what exactly did your client  
6 -- your clients had all worked there, what? Nearly 30  
7 was it --

8 MR. HARRISON: No.

9 QUESTION: -- at the time --

10 MR. HARRISON: They'd worked all over 30 years  
11 except one, who was 28 years.

12 QUESTION: And they had -- none of them had  
13 reached -- reached age 62?

14 MR. HARRISON: None had reached age 62.

15 QUESTION: And so what -- what did they in fact  
16 get from Mead voluntarily when the plan was terminated?

17 MR. HARRISON: They got the actuarially reduced  
18 value of their accrued benefit.

19 QUESTION: Oh, accrued pension benefit?

20 MR. HARRISON: Accrued pension benefits.

21 QUESTION: And you --

22 MR. HARRISON: And none of the contingent  
23 liabilities.

24 QUESTION: And so how much was that roughly?

25 MR. HARRISON: The exact numbers are --



1 QUESTION: What order of magnitude?

2 MR. HARRISON: The exact numbers are on the  
3 last page of the red brief. There is a fold-back  
4 section labeled Appendix 1. And the exact benefits to  
5 Bernard Tilley was \$87,000; to W. L. Crofts, \$87,000.

6 QUESTION: That's the "Benefit Paid" column  
7 you're reading from?

8 MR. HARRISON: That's correct.

9 QUESTION: And the amount you say they should  
10 have paid is in the next column over? So that Tilley  
11 got \$87,000, but he should have gotten \$100,000 in your  
12 view?

13 MR. HARRISON: Well, had he been -- had they  
14 based the early retirement benefit on age 62. Now, of  
15 course, damages was a question. And that -- that  
16 particular theory of damages does not go to Justice  
17 Scalia's point of that -- you wouldn't fully pay this --  
18 there wouldn't be money set aside to fully pay this  
19 benefit.

20 Actually, under our argument that -- we are  
21 looking for the funds that are allocated for this  
22 benefit. There wouldn't be funds completely sufficient  
23 to pay this benefit. But there would be funds in the  
24 pension plan.

25 QUESTION: But --

1 MR. HARRISON: Because this case was decided on  
2 a summary judgment, we never did get to the issue of  
3 exactly how much funds --

4 QUESTION: But the -- but the two --

5 MR. HARRISON: -- was actually there.

6 QUESTION: -- the two columns are correct, in  
7 at least the order of magnitude. When I say that, it  
8 might be 87, it might be 88, it might be 100, it might  
9 be 101. But you're not talking about 200 as opposed to  
10 100?

11 MR. HARRISON: Oh, no. It's a relatively small  
12 benefit.

13 QUESTION: Well, the increment of what you  
14 claim over what you got is a minor percentage of what  
15 you got.

16 MR. HARRISON: That's correct. It is a minor  
17 percentage of what we actually received.

18 QUESTION: And is that what's described as the  
19 subsidized early retirement?

20 MR. HARRISON: That is the subsidized early  
21 retirement benefit.

22 The key funding provision -- this is a matter  
23 of funding. Where Mead and where the employees look at  
24 the case differently is that Mead feels that the benefit  
25 must be payable. The employees feel that the benefit

1 merely need to be funded.

2 And if one looks at Section 1344(a), which is  
3 on page 9 of the employee's brief -- okay -- wait a  
4 minute. I'm looking for 1344(a), and that was not it;  
5 1344(a) is an allocation section.

6 Now, what we are asking for is the trustee to  
7 allocate benefits to us. That is on page 7 of  
8 employee's brief, the red brief. Or, a better place to  
9 look to see how the assets should be allocated, then  
10 look at the statute. And the statute says the trustees  
11 shall allocate the assets in the following order, and it  
12 sets forth six priority categories. The sixth category  
13 is all other benefits under the plan. The fifth  
14 category, curiously enough, is all other nonforfeitable  
15 benefits.

16 The PBGC rests its case on the idea that only  
17 nonforfeitable benefits occur in Category 6. Now, that  
18 may seem completely ridiculous because 5 says all other  
19 nonforfeitable benefits. But that is where they rest  
20 their case. The PBGC's argument is that even though the  
21 benefits are nonforfeitable by reason of termination,  
22 they're forfeitable so long as the plan is continuing,  
23 so we will treat them as forfeitable.

24 For this Court to rule with the PBGC it's going  
25 to have to use both ends of the pencil. It's going to

1 have to do some erasing on Category 5, and it's going to  
2 have to do some penciling in on Category 6.

3 The problem with the PBGC, as they state on --  
4 In page 20 of their brief, they admit that all accrued  
5 benefits vest on termination, and all vested benefits  
6 are nonforfeitable. Therefore, all accrued benefits on  
7 termination must reside no lower than Category 5.

8 Now, the PBGC tries to dance around that --

9 QUESTION: Excuse me. Every accrued benefit is  
10 nonforfeitable?

11 MR. HARRISON: On termination only. That's  
12 correct.

13 QUESTION: On termination --

14 MR. HARRISON: Every accrued benefit.

15 QUESTION: On termination only?

16 MR. HARRISON: And the PBGC admits to that.

17 QUESTION: Does nonforfeitable there mean  
18 nonforfeitable on termination, presumably?

19 MR. HARRISON: That's correct. All other  
20 nonforfeitable benefits under the plan at that point.  
21 One through 4 is your basic nonforfeitable benefits.  
22 Five is all other nonforfeitable benefits, which has  
23 been interpreted to mean benefits nonforfeitable solely  
24 by termination.

25 QUESTION: I thought you argued by saying you



1 -- you concede that what you're talking about here is  
2 not an accrued benefit?

3 MR. HARRISON: That's correct, because we're in  
4 6 and not 5. The PBGC is saying that only accrued  
5 benefits occur in 6. Physical impossibility. Accrued  
6 benefits can go no lower than 5. Since all accrued  
7 benefits are vested and all vested benefits are  
8 nonforfeitable, all other nonforfeitable benefits on  
9 termination occur in priority Category 5. That leaves  
10 priority Category 6 with nothing in it. Absolutely  
11 nothing.

12 And it's not like -- Congress considered  
13 putting accrued benefits there. They had it earlier in  
14 the statute. They've got the word "accrued" in two of  
15 the other priority categories. They knew what it was.  
16 They just purposely left it out in this category, and  
17 for good reason. The way that the statute is drafted  
18 you're not going to get any accrued benefits in priority  
19 Category 6. It's an allocation section.

20 And what it asks the trustee to do is to take  
21 the assets of the plan and allocate them in this  
22 fashion. It's not whether or not the benefits is  
23 payable, it's take the assets under the plan and  
24 allocate them in this fashion. And to extent that there  
25 was benefits under the plan to pay this benefit, they

1 should be allocated in Number 6, all other benefits,  
2 under the plan.

3 QUESTION: Well, I suppose then any person who  
4 had been -- who had been -- any person who was 50 years  
5 old and who had only worked for five years ought to get  
6 something.

7 MR. HARRISON: Yes, but if they've only worked  
8 for five years you're talking about a very small amount  
9 of money.

10 QUESTION: Well, I know, but it doesn't have to  
11 vested, it doesn't have to be anything. It's just a --  
12 they just -- all you say is they were setting aside a  
13 certain amount of money --

14 MR. HARRISON: That's correct.

15 QUESTION: -- for this person. And there it  
16 was, and there it is, and he ought to have his share.

17 MR. HARRISON: He should have his share. That  
18 is our position. Now, --

19 QUESTION: Would you just -- let me back up  
20 right there for a minute. Say you've got an employee in  
21 this particular plan who works six years. He had  
22 something that accrued. Did he get any money out of  
23 this distribution?

24 MR. HARRISON: Yes.

25 QUESTION: He did? They agree with that?

1 Because I -- frankly, when I read page 20 of the PBG  
2 brief, I don't -- it doesn't come across to me --

3 MR. HARRISON: Oh, absolutely.

4 QUESTION: -- clear as a bell that that  
5 happened.

6 MR. HARRISON: There --

7 QUESTION: But that's undisputed, that --

8 MR. HARRISON: Undisputed.

9 QUESTION: Okay.

10 MR. HARRISON: Two types of benefits. An  
11 accrued benefit which has to apply to the vesting rules,  
12 and one of the rules of the vesting rules -- and one of  
13 the problems in this case is that Mead uses the rules of  
14 an ongoing plan concurrently with the rules of a  
15 terminated plan. Two different rules.

16 In the rules of a terminated plan, so vested.  
17 And so, if you had six years of credited service --  
18 service, you had six years of an accrued benefit, you  
19 got paid six years of an accrued benefit --

20 QUESTION: No.

21 MR. HARRISON: -- when this plan terminated.

22 QUESTION: But you say that that same person  
23 ought to get his share of the early retirement --

24 MR. HARRISON: To the extent --

25 QUESTION: -- set aside.

1 MR. HARRISON: To the extent there are funds  
2 allocated. Of course, there will be, at that point, an  
3 extremely small benefit.

4 QUESTION: Well, nevertheless --

5 MR. HARRISON: But it would be -- it would be a  
6 benefit.

7 QUESTION: -- \$10 is \$10.

8 MR. HARRISON: Yes. It would be a benefit  
9 under the plan. It would be funds allocated.

10 QUESTION: But wouldn't that mean that for  
11 every employee covered by the plan who was -- hadn't  
12 reached 62 -- or is 55, that the calculation of the  
13 retirement benefit would be based on the early  
14 retirement for him rather than the ordinary retirement  
15 date because it would always be larger, wouldn't it?

16 MR. HARRISON: It would always be larger.  
17 That's correct.

18 QUESTION: So that this -- so that although  
19 your suit only involves five or six people who were, you  
20 know, very close to the cliff, or the second cliff,  
21 actually, the principle at stake affects everybody in  
22 the plan. Is that right?

23 MR. HARRISON: That would be correct.

24 QUESTION: I see.

25 MR. HARRISON: Everyone with an entitlement to



1 benefit who could have possibly qualified for the early

2 --

3 QUESTION: Yes.

4 MR. HARRISON: -- retirement benefit.

5 QUESTION: So it would -- but it would seem to  
6 me that everybody in the plan would, would profit by  
7 getting the -- by having the pension calculated on the  
8 basis of early retirement rather than ordinary  
9 retirement.

10 MR. HARRISON: Absolutely. However, I'd like  
11 to state that what we are asking for is the funds that  
12 would set aside for that benefit. The funds --

13 QUESTION: Yes, but there aren't funds aside  
14 employee by employee, as you've explained in your  
15 colloquy with Justice Scalia. You actually set aside a  
16 large amount of money based on the actuary's computation  
17 of how many are apt to stay in the -- in the company --

18 MR. HARRISON: That's correct.

19 QUESTION: -- for so long. And so you don't  
20 have sums of money allocated to each employee. You have  
21 just a lump of funds.

22 QUESTION: So, how can you -- how can you --

23 QUESTION: So I don't know how much --

24 QUESTION: -- pay these few people? You'd  
25 probably run out of money.

1 MR. HARRISON: Your Honor?

2 QUESTION: There -- there are a lot of other --  
3 there should be a lot of other claimants to this fund.

4 MR. HARRISON: Well, there would be some other  
5 claimants to this fund. But --

6 QUESTION: Well, how much -- how, how much do  
7 you pay each one?

8 MR. HARRISON: Okay. To the extent that it is  
9 actuarially funded.

10 QUESTION: Which is -- which will -- nobody  
11 will get anywhere near the full amount.

12 MR. HARRISON: That would be correct, Your  
13 Honor.

14 QUESTION: Because you're assuming that 90  
15 percent of them will leave before -- before the early  
16 retirement then.

17 MR. HARRISON: That would be absolutely  
18 correct, Your Honor. The fair market value of that  
19 benefit at that time would be much less than the full  
20 value of the benefit.

21 QUESTION: It wouldn't -- it wouldn't pay an  
22 employer to have such a plan then because that means  
23 that any surpluses -- even though these people have no  
24 entitlement to this money -- you say it's likely not to  
25 be there -- any surpluses in the fund, because of

1 conservative accounting practices on, on, on the other  
2 matters, all those surpluses will go to these people.  
3 The employer will never get them back.

4 MR. HARRISON: Well, that's absolutely  
5 incorrect. Mead makes --

6 QUESTION: Well --

7 MR. HARRISON: -- that argument.

8 QUESTION: Well, isn't that what happens? It  
9 -- it comes in under, under and the employer doesn't  
10 get the reversion of it.

11 MR. HARRISON: No. To the extent that there  
12 are benefits there for -- money set aside for benefit,  
13 it would go under 6. If it was overfunded, maybe we'd  
14 get the reversion.

15 And Mead makes the argument that this  
16 particular law will basically end trust law as we know  
17 it, and that's completely wrong. One thing it fails to  
18 point out, that since 1984 this is the law in the United  
19 States of America. The REA amendments basically enacted  
20 that. And we cite to basically the PBGC regulations  
21 which enact that law.

22 All we're dealing with is whether or not this  
23 law was the state of the law before the REA amendments.  
24 The idea that this would completely end reversions is  
25 just wrong.

1 QUESTION: Well, then doesn't your argument  
2 make the REA amendment a nullity?

3 MR. HARRISON: No, Your Honor. The REA  
4 amendment, specifically in its legislative history, knew  
5 of the conflict and they -- the legislative history  
6 states that we do not take any position on whether or  
7 not this either codifies present law or changes it.  
8 They just took no position.

9 The present Congress at that time decided that  
10 that's what they wanted the law to be.

11 QUESTION: Haven't there been any number of  
12 plans that have terminated with the consent and approval  
13 of IRS and the Pension Benefit Guaranty Corporation,  
14 where your position just wasn't followed? They let the  
15 surplus be paid back to the employer.

16 MR. HARRISON: No, Your Honor. And that's  
17 something I do want to emphasize. What the IRS actually  
18 gives -- what the employer gives the IRS is Form 5310.  
19 The Form 5310 has a blank statement on it, "We have  
20 complied with Rule 411 of the Internal Revenue Code."  
21 And based on that blanket compliance the Internal  
22 Revenue Service, who simply does not have the manpower  
23 that it would take to investigate all this, issues a  
24 letter that the plan is still qualified. Based on that  
25 information.



1           It does not require the employer to give that  
2 detailed information of the exact benefit formula. And,  
3 similarly, the PBGC --

4           QUESTION: They haven't checked out one of  
5 these cases? Do you know of one case where they've  
6 gotten an employer for this violation?

7           MR. HARRISON: Yes. Amato. The Amato case  
8 before this Court. They specifically -- in fact, the  
9 Amato brief is set forth in appendix to the yellow brief  
10 of Mead, the Amato PBGC brief. And in Amato they held  
11 that in a pre-REA case -- they held that this was not  
12 permissible. In Amato, for some reason, they did look  
13 into it and they did go into it and found that -- they  
14 felt the Section 411 requirements were not complied with.

15           The basic issue for this Court is whether or  
16 not they are going to reward an employer for terminating  
17 a pension plan. To give the employer money that would  
18 have -- that was set aside for benefits, and they would  
19 have had to pay for benefits had this plan continued.  
20 Are you going to give it to the employees who earned  
21 that money through their years of service?

22           This is not like the Blessitt case. The  
23 Blessitt case involved employees asking for benefits  
24 which they have not yet earned through their years of  
25 service.

1 QUESTION: What happens if an employee just  
2 leaves the company? Does he get anything?

3 MR. HARRISON: Prior to termination?

4 QUESTION: Yes.

5 MR. HARRISON: If he has an accrued benefit  
6 that is vested, he would get something.

7 QUESTION: How about early retirement?

8 MR. HARRISON: If he was not age 62 and with 30  
9 years of credited service, he would forfeit that benefit.

10 QUESTION: Well, just by leaving? Even though  
11 the money was set aside for it him and there it is?

12 MR. HARRISON: That's correct, because the  
13 actuary takes into account the fact that some people  
14 will leave.

15 QUESTION: Uh-huh.

16 MR. HARRISON: And the present value of the  
17 benefit, it is a contingent benefit, and the plan is  
18 ongoing -- if you leave, you get nothing. That is the  
19 nature of the benefit.

20 But on termination, Mead, who had promised  
21 these benefits to an employee -- to employee -- they  
22 should have to pay the fair market value of these  
23 benefits. After all, these employees stayed with  
24 Lynchburg Foundry Company in cases up to 35 years  
25 anticipating this benefit. And, in fact, Bernard

1 Tilley, who did not lose his job as a result -- no one  
2 lost their job. Mead sold the company but everyone  
3 stayed in their same desk. Bernard Tilley is alive  
4 today in this room and retired at age 62 from the  
5 Lynchburg Foundry Company at the same desk he had been  
6 at for the last 35 years.

7 If there are no further questions --

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
9 Harrison.

10 The case is submitted.

11 (Whereupon, at 12:14 o'clock p.m., the case in  
12 the above-entitled matter was submitted.)  
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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. 87-1868 - MEAD CORPORATION, Petitioner V. B. E. TILLEY, ET AL.

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

BY alan friedman

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