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PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: MASSACHUSETTS, Petitioner V. RICHARD N. MORASH

CASE NO: 88-32

PLACE: WASHINGTON, D.C.

DATE: February 21, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

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MASSACHUSETTS, :

Petitioners :

V. : No. 88-32

RICHARD N. MORASH, :

- - - - - x

Washington, D.C.

Tuesday, February 21, 1989

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:13 o'clock a.m.

APPEARANCES:

CARL VALVO, Assistant Attorney General of

Massachusetts, Boston, Massachusetts; on behalf of
the Petitioner.

JASON BERGER, ESQ., Boston, Massachusetts; on behalf of
the Respondent.

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JASON BERGER, ESQ.,	
On behalf of the Respondent	22

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

2 (11:13 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 88-32, Massachusetts v. Morash.

5 Mr. Valvo, you may proceed whenever you're
6 ready.

7 ORAL ARGUMENT OF CARL VALVO
8 ON BEHALF OF THE PETITIONER

9 MR. VALVO: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 This case is here on certiorari to the
12 Massachusetts Supreme Judicial Court. The primary issue
13 presented is whether an employer's agreement to pay
14 additional compensation in lieu of vacation is an ERISA
15 employee welfare benefit plan, as the Court below held,
16 or is it a payroll practice outside the scope of ERISA,
17 as the Secretary of Labor concluded. The facts of the
18 case are as follows:

19 The employer bank had agreed that employees
20 could forego some or all of an annual vacation leave
21 and, instead, receive payments for the unused vacation
22 time. These payments came from the general assets of
23 the bank.

24 In 1985, two employees of the bank were
25 discharged, each with an accumulation of days they had

1 actually worked instead of taking vacation. Upon their
2 termination, the bank refused to pay for this time
3 worked, and, subsequently, criminal complaints under the
4 Massachusetts Statute, Section 148, were filed.

5 Upon report from the trial court to the SJC,
6 the SJC held that the prosecutions under the state
7 statute were preempted by ERISA.

8 Now, if the bank's arrangement is a welfare
9 benefit plan, as the Court below held, then employers
10 with common vacation policies like the bank's, may be
11 required to comply with ERISA's elaborate regulatory
12 provisions, with no real corresponding benefit to
13 employees.

14 If, however, the practice is a payroll
15 practice, as the Secretary of Labor terms it, the states
16 will continue to enforce statutes like Section 148,
17 which have long been proven to be an efficient and
18 effective means of resolving vacation pay claims, which
19 often amount to no more than a few hundred dollars.

20 If the SJC is correct, then a disappointed
21 employee's sole remedy, with respect to vacation pay,
22 will be to file a federal ERISA action to claim his --
23 his pay.

24 Now, whether one views these payments as
25 straight compensation for time worked or as a lump sum

1 amount that aggregates what would have been paid to the
2 employee had he taken vacation, the Secretary's payroll
3 practices regulation controls. This regulation was
4 promulgated shortly after the enactment of ERISA,
5 pursuant to express and a quite broad delegation of
6 rule-making power to the Secretary, to carry out the
7 provisions of the statute and to define its terms.

8 And, I might add that, unlike Justice Scalia
9 perhaps, the Secretary had to both read the statute and
10 deal with reality. He had to make the plan requirements
11 of ERISA work in the real world, so that this payroll
12 practice is a -- the regulation is an accommodation of
13 the purposes and history of the statute, as applied to
14 common payroll practices used throughout the nation.

15 QUESTION: Mr. Valvo, is the regulation in a
16 bit of tension with the language of the statute?

17 MR. VALVO: No, Your Honor.

18 QUESTION: Section 3(1) says, "Employee
19 welfare benefit plan means any plan, fund, or program
20 maintained by an employer to provide vacation benefits."

21 MR. VALVO: Right. Now, the Secretary was, in
22 fact, trying to give some scope and clarity to the term,
23 "Employee welfare benefit plan," that would include, of
24 course, such an enumerated benefit. He, at the time,
25 read that statutory provision to include and mean the

1 pooled vacation arrangements that Congress was aware of,
2 through the provisions in the Taft-Hartley Act.

3 QUESTION: They covered elsewhere.

4 MR. VALVO: Pardon me?

5 QUESTION: Covered elsewhere in the statute.
6 If that's all it covers, it covers nothing of the
7 statute doesn't cover elsewhere.

8 MR. VALVO: There are several provisions in
9 the enumerated benefits in Taft-Hartley that were also
10 mentioned in ERISA, and some in exactly the same
11 language, some in slightly different language. For
12 instance, daycare centers versus childcare centers.
13 It's difficult to assume that Congress meant a different
14 -- had a different meaning for some of these terms, just
15 because it used it again in 3(1), than the use of the
16 term in the Taft-Hartley Act.

17 So, I think that it's fair to conclude, as the
18 Secretary did, that Congress was not so much concerned
19 with defining neat boxes of benefits in ERISA that would
20 be in addition to whatever was in the Taft-Hartley
21 enumeration of benefits. It was just throwing a lot of
22 things into the scope of ERISA, and one of those things
23 was the funded vacation arrangements that Congress was
24 well aware of in the longshore and construction
25 industries.

1 QUESTION: Mr. Valvo, why does the regulation
2 cover this? I mean, you talk as though it's clear that
3 the regulation applies to what happened here, but all
4 the regulation, as I read it, necessarily covers, is --
5 is an understanding between an employer and an employee,
6 that he continues to receive salary when he's on
7 vacation, period.

8 MR. VALVO: I have two answers to that, Your
9 Honor. One, is the (b)(1) portion of that regulation,
10 which --

11 QUESTION: Why don't we look at where -- where
12 is it in the --

13 MR. VALVO: That is at page 11 of the reply
14 brief.

15 QUESTION: Is this it?

16 MR. VALVO: Yes, Your Honor. Both the (b)(1)
17 portion and the (b)(3) portion are on a sheet that was
18 provided to the Court, so that you can look at them
19 together. The (b)(1) portion of that regulation --

20 QUESTION: It's at page 11?

21 MR. VALVO: Page 11 of the reply. That
22 provision provides that straight compensation for time
23 worked is a payroll practice and not a benefit under
24 ERISA, because Congress simply did not intend to cover
25 wages and salaries within the scope of ERISA.

1 Now, if one looks at these payments for
2 salaried employee, as nothing more than the compensation
3 that was earned at a previous time by working on, in
4 effect, the employee's own time, that is, uncompensated
5 time -- that is compensation for time worked, and it
6 fits squarely within the (b)(1) portion of the
7 regulation.

8 Now, if you look at the (b)(3) portion of the
9 regulation --

10 QUESTION: But one can also read that this is
11 compensation for time not worked. I mean you --

12 MR. VALVO: (B)(1)?

13 QUESTION: It's in lieu of the vacation. It's
14 not -- maybe, I didn't quite understand your argument.

15 MR. VALVO: Well, let me give you an example.
16 A salaried employee works for a set amount for a given
17 year, say \$20,000 for a year.

18 QUESTION: Correct.

19 MR. VALVO: If he gets four weeks vacation --
20 what the employer is telling him is -- I will pay you
21 \$20,000, and you work 48 weeks. If that employee works
22 the 49th week, he's now worked an extra week for the
23 employer, but he hasn't been paid anymore than the
24 \$20,000 that he --

25 QUESTION: No, but he has been compensated for

1 that week.

2 MR. VALVO: Well, he'll get regular
3 installments of 52 or 12, whatever the arrangement is,
4 of the \$20,000. In a sense, he's not getting any more
5 than he originally agreed to get in return for 48 weeks.
6 When he works that 49th week, he will be uncompensated,
7 unless the employer has an agreement like the bank has
8 here, to allow him to take a payment instead of taking
9 vacation.

10 QUESTION: But, if he takes that, he's not
11 getting paid for time worked, cause he got paid during
12 the 49th week. I mean, one -- I'm just saying one can
13 look at this in different ways --

14 MR. VALVO: Well, yes.

15 QUESTION: If you just look at the language of
16 the regulation.

17 MR. VALVO: You -- you're right in the sense
18 that he received his regular paycheck, but that regular
19 paycheck was nothing more than an installment on the
20 \$20,000 that he was getting for working 48 weeks. An
21 employer ordinarily divides the \$20,000 into 12 or 52
22 uniform installments, and pays them out regularly. It
23 doesn't stop sending out the paycheck, if you happen to
24 be on vacation that week. But, the total compensation
25 for that year for a salaried employee, would be for the

1 48 weeks, rather than the -- anything extra.

2 It's very similar to working overtime, or on
3 weekends, or holidays. Those are -- that's time that
4 the employee does not originally bargain to work for,
5 and if he does work on a weekend, he expects to be paid
6 over and above the \$20,000.

7 But, again, you can look at it a different
8 way. You can look at it as a payment to the employee,
9 while he's on vacation. And, that is covered by the
10 (b)(3) portion of the regulation.

11 Now, the reason why it appears that it may not
12 cover this particular situation is because these
13 employees were terminated. They couldn't go on vacation
14 anymore. The employer, upon termination, had two
15 options. He could have discharged them, effective
16 immediately, and paid them the cash value of the unused
17 vacation that they still had.

18 Or he could have said, "You're fired,
19 effective" -- if, let's say you have 20 days' vacation
20 coming -- "you're fired, effective 20 work days from
21 now, and I'll pay you your regular paycheck during each
22 of the weeks for that 20 days." That's economically
23 equivalent to a termination with a lump-sum cash out on
24 the last day of work.

25 QUESTION: Is that a severance benefit then?

1 MR. VALVO: No, Your Honor, It's not a
2 severance. It's -- a severance payment would be payable
3 only at termination. Whereas, a vacation payment is
4 payable during the course of employment up to
5 termination.

6 QUESTION: Well, what if the employer would
7 allow employees to make an irrevocable deferral of
8 vacation benefits, which would be available to the
9 employee, only on termination of the employment, or in
10 an emergency?

11 MR. VALVO: Well, then you're getting -- then
12 you're talking about an arrangement, which we don't have
13 here --

14 QUESTION: Right.

15 MR. VALVO: That may be described by the
16 statutory definition of pension. Now, no one has ever
17 argued that this is a --

18 QUESTION: Would that be a severance benefit
19 of some kind?

20 MR. VALVO: Well, the ERISA section 3(2) talks
21 about pension benefits, as opposed to welfare benefits.
22 The Secretary has treated these kinds of severance
23 payments as welfare plans, but they fit within the
24 definition of pension. No one has ever suggested that
25 these are pension benefits, because they're not deferred

1 Irrevocably to termination.

2 QUESTION: Well, that -- I -- do you think a
3 worker who -- I mean, do we know that a worker who has,
4 let's say, two weeks of vacation pay that he hasn't
5 taken in a particular year -- could he have come up to
6 the employer, and said, "I want payment for those two
7 weeks that I didn't take." Do we know that from the
8 record?

9 MR. VALVO: This record permits that
10 inference, but --

11 QUESTION: Oh, it does?

12 MR. VALVO: But, it also permits the inference
13 that the employee could have deferred vacation time, and
14 taken vacation time. There's nothing -- the record, I
15 agree, is not fully developed on this score. It was the
16 -- a stipulation at a motion to dismiss stage, but --

17 QUESTION: Well, but, if that makes a
18 difference, then I don't know how we're suppose to
19 handle it?

20 MR. VALVO: Well, there's nothing in the
21 record that requires you to find that there was an
22 irrevocable deferral to termination or beyond. The
23 records simply states -- this is page 19 of the joint
24 appendix, "It is agreed that the bank made oral, and, or
25 written agreements, and that such agreements promised

1 employees payment, in lieu of unused vacation time."
2 That's all it says, and it doesn't say anything about
3 when those payments had to be made.

4 Another difference between severance and
5 vacation, Justice O'Connor, is that severance would be
6 payable, over and above any wages or other forms of
7 compensation that might be due, whereas vacation pay is
8 payable at termination, only if there's some unused
9 vacation left. Not all employees will have all of that
10 unused vacation, in which case, when they're terminated,
11 that's it, and they get nothing, unless there's a
12 severance agreement.

13 Now, the Secretary's (b) -- the (b)(3) portion
14 of the regulation, I think, has to be looked at with two
15 interrelated factors in mind. One, is that these
16 vacation payments are closely akin to wages, for a
17 variety of reasons, some of which I've already
18 mentioned. But, secondly, and it's an interrelated
19 point, these payments are paid out of the general assets
20 of the employer -- not out of a trust fund.

21 Those two factors, together, both of which are
22 necessary, but not sufficient in and of themselves, come
23 together to create a benefit which the Secretary
24 concluded was not a -- the type of benefit that Congress
25 intended to reach, and that they were payroll practices,

1 routine in the -- in the --

2 QUESTION: But, the hypothesis for (b)(3), or
3 one of the hypotheses for invoking it, as I read it, is
4 that, during the time a person, the employee, performs
5 no duties. Here, these people did perform duties. They
6 stayed home from their vacation. So, I don't see how
7 (b)(3) can apply.

8 MR. VALVO: Well, then we're talking about
9 (b)(1). They stayed on --

10 QUESTION: Well, but, I mean, I thought

11 MR. VALVO: It depends on how you look at it.

12 QUESTION: Well, how does one look at (b)(3),
13 and get it to apply?

14 MR. VALVO: Because, if you see these payments
15 as an aggregation of the monies that would be paid --
16 here's the termination date, and they have unused
17 vacation time left. If you look at these payments as
18 aggregating what would be payable in that vacation time
19 -- payable on the date of termination. That would be
20 time they would perform no duties.

21 QUESTION: Well, that really takes some kind
22 of astigmatism to look at it that way, doesn't it?

23 MR. VALVO: Well, it's, it's -- imagine an
24 employee who has -- he's hired with the understanding
25 that he accrues one day of vacation a month. At the

1 six-month point of his employment, he's fired. Now, he
2 has six days of vacation coming. How do we treat that?
3 Do we treat it as payment for time worked? We can, and
4 we look at (b)(1). Or, do we have six days of vacation
5 coming, meaning vacation days which he would be able to
6 take, perform no duties, and still receive regular pay.
7 If that's the way we look at it, then we look at
8 (b)(3). We win either way.

9 QUESTION: Why don't we -- the government's
10 brief says, "that the Department of Labor has
11 interpreted its payroll practices regulation to exclude
12 from ERISA's coverage, all vacation benefits paid from
13 the general assets, including earned, but unused
14 vacation days."

15 MR. VALVO: That's what we have here.

16 QUESTION: Well, I know. I know. Well, how
17 did it -- what part of its regulation was it
18 interpreting to reach that result?

19 MR. VALVO: Well, it's interpreting the
20 payroll practices regulation, which includes --

21 QUESTION: What part of it?

22 MR. VALVO: (B)(1). I would say (b)(3), but
23 the brief -- I think that's what the --

24 QUESTION: Well, at least the government has
25 interpreted its own regulation to cover this case, and I

1 suppose we -- If, if that's a reasonable interpretation
2 of its regulation, I suppose we would accept it.

3 MR. VALVO: Well, I'm happy to accept that,
4 you know, I would like you to --

5 QUESTION: But, how can we know whether it
6 would? How can we know whether it's a reasonable
7 interpretation, unless we know which of two separate
8 regulations it's interpreting?

9 MR. VALVO: Well, Your Honor, the difficulty
10 is that these vacation payments, can be viewed in
11 different ways. One can look at it in an economic sense

12 QUESTION: Well, the government filed a -- the
13 government has filed a brief in another case, that it
14 served on you, didn't it?

15 MR. VALVO: Yes.

16 QUESTION: What did it say in that?

17 MR. VALVO: I think that it was referring only
18 to the -- a footnote that described severance, the
19 distinction between severance and vacation. But it --
20 but we're talking about -- the Secretary in this case is
21 focusing on (b)(3), interpreting (b)(3) to cover our
22 case, and we're certainly happy to accept it. In fact,
23 we argue that we rely on (b)(3). But, we have another
24 string to our bow, and that's (b)(1), and, whether you
25 look at these payments in an economic sense -- I think

1 that would steer you to (b)(1).

2 If you look at vacation payments in the sort
3 of "street understanding" of what we're talking about,
4 then we're, we're in (b)(3). Either way, we win.

5 Now, even if the arrangement here is a
6 vacation benefit plan, Section 148 is not preempted,
7 because it's a generally applicable criminal law, saved
8 from preemption under Section 514, (b)(4). Everyone in
9 the case agrees that a generally applicable criminal law
10 is one that's not specifically aimed at ERISA plans. We
11 say that if a vacation benefit can be delivered by
12 means, other than a plan, as the SJC contemplated, then
13 a vacation payment statute is not specifically aimed at
14 ERISA plans, and is, therefore, generally applicable.

15 QUESTION: Well, what type of statute is not
16 generally applicable criminal law, then, in your view?
17 I'm somewhat troubled by your argument.

18 MR. VALVO: A statute -- certainly, a statute
19 that made it a crime not to pay pension payments, or not
20 to make contributions into a ERISA welfare benefit
21 plan. That would certainly be a -- not a generally
22 applicable criminal law, because it would be aimed
23 directly at ERISA activity.

24 I would go one step further. A statute that
25 made it a crime not to pay wages, and made it a crime

1 not to pay pension payments, would also be preempted,
2 because part of its prohibited conduct can only be
3 engaged in in an ERISA context. Now, let's --

4 QUESTION: It's an original proposition. I
5 certainly would have thought that the law here was not a
6 generally applicable criminal law.

7 MR. VALVO: Well, it applies to activity
8 beyond ERISA and, therefore, when we're talking about an
9 exemption from ERISA, we have to assume that Congress,
10 in using the term, which has received no attention in
11 the legislative history, was thinking, in terms of
12 ERISA, what is generally applicable beyond ERISA.

13 QUESTION: Well, if we agree with you on the
14 first part of your argument, and agree with the
15 government's position, we certainly don't have to rest
16 it on this argument, I assume?

17 MR. VALVO: That's correct, Your Honor. This
18 is an alternative.

19 QUESTION: But, under your view, the law is
20 applicable, only that applies just to ERISA, and nothing
21 more?

22 MR. VALVO: Well, if a generally applicable
23 criminal law --

24 QUESTION: Just to an ERISA criminal law?

25 MR. VALVO: -- can be applied to an ERISA

1 activity, but it has to be able to apply to conduct
2 beyond ERISA activity. Let me give you an example.

3 QUESTION: Let's take the example you've
4 already given -- a statute, you say, that applies to
5 employee benefits, you say, would not be generally
6 applicable?

7 MR. VALVO: If those benefits were delivered
8 only by ERISA plan.

9 QUESTION: Ah, but, all it says is employee
10 benefits.

11 MR. VALVO: Well, we don't know that. If
12 we're talking --

13 QUESTION: All it says, is, "any failure to
14 pay employee benefits." Now, some of those will be
15 ERISA benefits, and some won't. So, you say, that would
16 be generally applicable?

17 MR. VALVO: Yes. Yes.

18 QUESTION: So, you pretty much have to have a
19 state law that says -- makes it a crime to fail to
20 comply with ERISA?"

21 MR. VALVO: (Inaudible) even if it says --

22 QUESTION: Do you think that's what Congress
23 meant by "generally applicable"?

24 MR. VALVO: Well, Your Honor, if the activity
25 -- if the prohibited conduct, includes activity that can

1 be engaged in, outside of an ERISA context, then
2 Congress was willing to tolerate some supplementation,
3 or touching of ERISA by criminal laws. Otherwise, there
4 would be no exemption from 514(a)'s general blanket
5 preemption.

6 QUESTION: It could have said, "Any state law
7 that applies beyond ERISA -- that applies to any
8 activity, other than ERISA activity." It didn't say
9 that. It said, "generally applicable state laws."

10 MR. VALVO: But, we have to assume, that since
11 it's an exemption from 514(a), that the same rules that
12 apply to generally applicable civil statutes, don't
13 apply to generally applicable criminal statutes, and
14 there are a number of reasons for this.

15 First of -- I think, the language, "generally
16 applicable criminal law," is relatively unbounded, and
17 doesn't limit itself to the kinds of statutes that the
18 respondent and the SJC would limit it to. For instance,
19 larceny and embezzlement statutes. If Congress wanted
20 to write a statute like that, it could easily have said
21 "larceny and embezzlement" or "criminal misappropriation
22 of property." Something like that. But, it didn't. It
23 said "generally applicable criminal law."

24 Secondly, there is a presumption that operates
25 in favor of preserving historic police powers. Now, I

1 agree, that that presumption has been overcome, with
2 respect to 514(a), and generally applicable civil
3 statutes. But Congress has not clearly stated an
4 intention to, or at least, where the definition of --
5 where the dividing line is, from separating criminal
6 laws, which it seeks to save, and those which it seeks
7 to preempt. And we think that the presumption in favor
8 of historic police powers, in the absence of a clear
9 statement by Congress, operates here.

10 In Massachusetts -- In Metropolitan Life v.
11 Massachusetts, the Court used that presumption in, in
12 interpreting the insurance -- the insurance law
13 exemption from preemption, and it saved the statute for
14 Massachusetts. The same presumption has force here,
15 perhaps a fortiori, since criminal law is at least as
16 deserving of, of protection from the presumption as an
17 insurance law would.

18 Finally, there's no reason to conclude that
19 Congress wanted to give that term, "generally applicable
20 criminal law," its most restrictive interpretation,
21 particularly where, any law, criminal or civil, that
22 would -- is saved under 514(b) would also be subject to
23 regular conflict analysis under preemption. That is, to
24 say, if a generally applicable criminal law -- even like
25 148. If that could be shown to actually conflict with a

1 provision of ERISA to prevent the effectuation of the
2 Federal purpose, then it would have trouble under
3 conflict analysis.

4 So, in conclusion, because Congress did not
5 intend to displace state non-payment of wage statutes,
6 as applied to vacation pay, the SJC's decision should be
7 reversed. I would like to reserve the remainder of my
8 time, unless the Court has any further questions.

9 QUESTION: Thank you Mr. Valvo.

10 Mr. Berger, we'll hear now from you.

11 ORAL ARGUMENT OF JASON BERGER

12 ON BEHALF OF THE RESPONDENTS

13 MR. BERGER: Now, Mr. Chief Justice, and may
14 it please the Court:

15 I'd like to begin with some of the essentials,
16 which I think have been related to by the Commonwealth
17 in this case. First of all, with regard to the facts of
18 this case. There's no question but that the facts in
19 this case are relatively -- I shouldn't say relatively
20 -- very meager.

21 But one important fact, that the Supreme
22 Judicial Court of Massachusetts focused on, can be found
23 at page 289 and 290 of its decision, and that fact, and
24 I'll read it. It says, "Lastly, the parties agree and
25 appeal, that pursuant to bank policy, employees who

1 accrue unused vacation time, receive a lump sum cash
2 payment, in lieu of unused vacation time, unused time,
3 upon termination of their employment."

4 We submit, Your Honors, that the SJ-- the
5 Supreme Judicial Court was focusing on that specific
6 issue in reaching its decision that this plan was like a
7 severance plan, akin to a severance plan and, therefore,
8 an ERISA welfare benefit plan.

9 QUESTION: The Secretary of Labor says it
10 isn't a plan at all.

11 MR. BERGER: The Secretary of Labor says --
12 well, I'm not sure, Your Honor, that the Secretary of
13 Labor says --

14 QUESTION: Well, he has to say that. It isn't
15 a plan, or whatever those words are. It isn't a plan or
16 an arrangement, or something.

17 MR. BERGER: Well, I'm not sure though, that
18 the Secretary of Labor says this is not a plan at all.
19 The Secretary of Labor -- let me state it somewhat
20 differently. Petitioners, including the Solicitor, have
21 focused on a general assets test, to determine whether
22 vacation plan is a general assets, everyday payroll
23 practice, or whether, in fact, it's an employee welfare
24 benefit plan.

25 But, the Secretary of Labor, itself, in one of

1 Its own opinion letters, involving American Motors, has
2 found a general assets plan to be a -- a general assets
3 vacation-pay plan, to be a severance plan. Now, in that
4 case, which is cited in the Solicitor's brief, and I
5 think it's given reference to in Petitioner's brief, the
6 exercise -- it was a voluntary plan, just as this one.
7 The employees of American Motors had a right,
8 voluntarily, to set aside time, if they wished, their
9 vacation time, if they wished, for payment upon
10 termination. Now, the Secretary focuses in its brief on
11 the irrevocability of that exercise, and yet, even in
12 that plan, the exercise by the employee wasn't
13 irrevocable. It was also revocable.

14 QUESTION: Okay, the Secretary in this case
15 says this is not a plan within the meaning of the --
16 within the meaning of the statute?

17 MR. BERGER: The Secretary, in this case,
18 argues that it doesn't agree with the Supreme Judicial
19 Court. That's correct.

20 QUESTION: Well, it says it isn't a plan, and
21 its regulation says that, "the term welfare plan shall
22 not include the following," and then it lists certain
23 things then, and among those things that the Secretary
24 says, now, is this very arrangement that we have before
25 us, which is not a plan.

1 MR. BERGER: My difficulty with that -- if
2 that's, indeed, what the Secretary is saying. My
3 difficulty with that is that I think that creates a very
4 difficult tension with the statute itself. I mean, the
5 statute itself, in Sections 3(1)(a) and 3(1)(b), lists a
6 variety of benefits, if you will, benefits that are
7 subject to plans that shall come under the definition of
8 Employee Welfare Benefit Plan. And, in 3(1)(a), it
9 squarely mentions vacation benefits. And, in 3(1)(b),
10 it squarely mentions --

11 QUESTION: Well, I know, but it still has to
12 be a plan to provide vacation benefits.

13 MR. BERGER: But, but this --

14 QUESTION: It has to be a plan, and the
15 Secretary says this isn't a plan.

16 MR. BERGER: But the Secretary didn't have
17 before it the aspects of a plan. I think what the
18 Secretary is saying, if I'm correct in my reading, is
19 that it would like to see most general asset programs,
20 viewed as non-plans. I, I don't believe the Secretary
21 is saying that no vacation benefit program, such as this
22 one, can be a plan.

23 QUESTION: Well, it certainly -- it certainly
24 -- he certainly says -- the Secretary certainly says
25 that this plan, that this arrangement here, is not a

1 plan. This, this specific arrangement is not a plan.

2 MR. BERGER: I agree that the Secretary argues
3 through the Solicitor that this particular approach is
4 not a plan. To that extent, we agree -- disagree with
5 the Secretary. However, we don't disagree that the
6 payroll practice regulation is invalid. What we see --
7 what we say is, that the regulation promulgated by the
8 Secretary has more than one -- more than one test within
9 it. I'm not sure the word "test" is the correct -- is
10 the correct word. But, a close reading of the -- of
11 that -- of that regulation, which is the second
12 regulation focused by the Commonwealth, sets a number of
13 different employments --

14 QUESTION: Yes, why the Secretary interprets
15 that regulation to cover this specific arrangement.

16 MR. BERGER: But, in that sense, I disagree.
17 In that sense, I disagree with the Secretary. I think,
18 if, if the Secretary is, in fact, saying that, and
19 again, I'm not sure the Secretary's saying that, through
20 the solicitor's brief. I think the solicitor's brief is
21 essentially arguing that most, if not all, general asset
22 plans do not come within the definition of employee
23 welfare benefit plan.

24 And, I'm suggesting that that's, first of all,
25 contrary to what the Secretary itself has found in

1 another plan -- American Motors. And two, if that is
2 really the Secretary's opinion -- that that opinion of,
3 of its own regulation, creates a serious tension with
4 the statute.

5 And -- and a -- a better way of reading its
6 own -- its own regulation, which it wrote -- you have to
7 take into consideration all the words of that
8 regulation, not simply the word "general assets." And
9 the other words of the regulation involve an employee
10 who's absent while on vacation, or on holiday. They
11 used those two examples.

12 And these two employees, just as the employees
13 in American Motors, were no longer on vacation, and they
14 were no longer on holiday. They were no longer
15 employees, and they no longer had any duty to this
16 employer for that -- and for that matter, the employer,
17 I suppose, had no duties to it, since it had terminated
18 the employees in question.

19 QUESTION: But, it was, nevertheless, some
20 kind -- could be viewed as compensation on account of
21 work performed, such as a holiday premium.

22 MR. BERGER: Well --

23 QUESTION: You could view it that way,
24 certainly, within the language of the regulation?

25 MR. BERGER: I actually feel that the first

1 part of the regulation, which is, (b)(1), where it lists
2 those four criteria, should be read specifically to
3 those four type of criteria, because those four criteria
4 essentially arise immediately. An employee works
5 overtime, he's paid for his in excess of 40 hours in a
6 week, that week. An employee works a shift, he gets, or
7 she gets her 35 cents an hour shift differentials.

8 QUESTION: Well, nothing refers in the
9 regulation to immediate payment though, does it?

10 MR. BERGER: No, but the examples given, are
11 all immediate-payment examples. With regard to the
12 premium suggested in (b)(3)(1), that the premium
13 suggested there, is a premium to induce the employees to
14 take vacations at a time favorable to the employer for
15 business reasons. And, I submit that that premium is a
16 very different kind of a premium. In other words, if
17 I'm coming up to the end of my vacation year --

18 QUESTION: But, that's just an example.

19 MR. BERGER: The other five -- there are four
20 other examples, which are not provided by anyone, it
21 appears. But, the other four examples are all for
22 periods of absence. I think they're jury duty, training
23 time, military duty, and sabbatical leaves for
24 educators. So, with all five examples, the Solicitor --
25 sorry -- the Secretary's focusing on absent time, but

1 time, during which the employee's expected to return to
2 work. All five of those examples are, at best, hiatuses
3 in work time.

4 QUESTION: Well, in your view, what employee,
5 or employer agreements to provide vacation benefits are
6 not plans?

7 MR. BERGER: Are not plans?

8 QUESTION: Yes.

9 MR. BERGER: We would agree that any vacation
10 time taken within a year, and paid for within that year,
11 or any vacation time taken and paid for, is not a plan.
12 In other words, if, if it's the normal everyday vacation
13 time, that I think we all understand as normal everyday
14 vacation time. I take two weeks off. I'm paid for that
15 two weeks. That's not a plan. In fact, if I saved my
16 two weeks -- if I save my two weeks until next year, and
17 took my two weeks next year -- say, my employer allowed
18 me to do that -- that would still be -- I'm still within
19 -- I'm taking vacation time. I'm just being paid for
20 it. It's just a continuation of wages.

21 QUESTION: What if he gives you money for the
22 two weeks that you didn't take?

23 MR. BERGER: I think --

24 QUESTION: At the end of this year, he gives
25 you money for the two weeks you didn't take?

1 MR. BERGER: I think when a cash payout
2 becomes involved, there begins to become an implication
3 toward a plan. But our opinion, and we submit to you
4 the correct opinion on this issue, is that a deferral is
5 necessary. In other words, once an employee begins, in
6 a voluntary way, to defer vacation time for some later
7 cash out purpose and, therefore, gets no money and pays
8 no taxes in the year in which the money is earned, and
9 can defer that, that payment until some later time, and
10 the employee is then -- the employer, I'm sorry -- is
11 entrusted with that fund, with that money. It begins --
12 It begins to become more like a plan. That's correct.

13 QUESTION: How important are those words,
14 "entrusted with that fund," because the point of the
15 regulation is, there's no trust fund. It's just payment
16 by the employer directly. He hasn't set aside anything
17 in a trust.

18 MR. BERGER: I think that's why the -- I think
19 that's the distinction, exactly.

20 QUESTION: That's a distinction the government
21 draws.

22 MR. BERGER: That's exactly the distinction
23 I'm drawing, too. The distinction I'm attempting to
24 draw --

25 QUESTION: But then, why don't you lose under

1 that distinction -- that's what I don't understand.

2 MR. BERGER: Well, let me --

3 QUESTION: Because the regulation just reads
4 right on it. "Payment by an employer of compensation,
5 on account of work performed."

6 MR. BERGER: Well, let me try to explain it
7 somewhat differently, then. First of all, let me try to
8 bring -- for one moment at least -- the Court back to
9 the case at issue. The case at issue involves payment
10 upon -- after termination, and only payment after
11 termination.

12 QUESTION: Yes, but on account of work that
13 had been performed prior to termination, because he had
14 earned so many days of vacation, for which he had not
15 been paid. In other words, if he gets two weeks a year,
16 he works six months, and he gets fired without having
17 taken the two weeks, he's entitled to one week's pay, on
18 account of the six months he had previously worked.

19 MR. BERGER: He accrued that time. I agree.
20 I guess I'm not yet sure about the question that you've
21 presented.

22 QUESTION: Well, but the point is that then
23 the regulation just reads right on your case.

24 MR. BERGER: No, because the regulation reads
25 -- the way I read the regulation is for periods of time

1 not worked where pay continues.

2 QUESTION: No, no. I'm talking about the
3 (b)(1) part, the (b)(1) part. The (b)(1) payments, and
4 just as we've described it -- it's a payment by an
5 employer of compensation, as compensated, on account of
6 work performed, during the six months with -- where he
7 never got any vacation. He's earned a week's free
8 vacation that he didn't get, and that's -- that's
9 exactly what the regulation says.

10 MR. BERGER: First of all, I think that if the
11 Secretary had intended to cover a vacation premium,
12 within (b)(1), he would have written it within (b)(1),
13 just as he did within (b)(3). In (b)(3), the Secretary
14 seems to cover the type of vacation premium he's
15 concerned, or she's concerned with. I guess it was he
16 at the time.

17 With regard to (b)(1) --

18 QUESTION: What if you get a Christmas bonus
19 every year of \$10 a month, say for every month where he
20 had -- so he got \$120 coming at Christmas. He worked
21 six months, and they fire him, or terminate, and so he
22 would normally get the \$60.00. Would that be covered by
23 this or not? Wouldn't that be just like the vacation?

24 MR. BERGER: No, I don't think it would be
25 just like the vacation. I don't think it would be like

1 the vacation situation we're faced with in this case,
2 where -- where employees were allowed to defer their
3 vacation, with pay upon termination. And, I don't think
4 that -- I don't think --

5 QUESTION: Yes, but on this record, we don't
6 know, or do we -- I'm not entirely clear. We don't know
7 whether this is just accrued vacation within a given
8 year, when there was a termination, or they had saved up
9 vacation for two or three years.

10 MR. BERGER: In fact, the bank paid the two
11 employees for time accrued within that year.

12 QUESTION: Oh, that's right, up to January.

13 MR. BERGER: They did. They paid them. I
14 think the year was 1985, and they paid him for the
15 period, January of '85 to the termination date, April
16 '85.

17 QUESTION: Maybe the answer to Justice Stevens
18 questions is, that you can't (b)(1) that way, because
19 the Secretary doesn't read it that way, because the
20 Secretary acknowledges that if you have a joint vacation
21 arrangement -- the employee is working for a number of
22 different employers, and the vacation is funded, then it
23 would, indeed, be an employee welfare benefit plan.

24 QUESTION: But, the reason being, that it's
25 not a payment by an employer. It's a payment by a

1 trustee. That's the key words here -- "payment by an
2 employer."

3 MR. BERGER: But, in fact --

4 QUESTION: If you have several employers, and
5 you have a trustee funding the whole thing, it doesn't
6 fit.

7 MR. BERGER: But, but, in fact, the payment
8 out of these vacation trust funds --

9 QUESTION: I think you're not understanding
10 here (inaudible).

11 MR. BERGER: I can only think of one case, and
12 not a case by this Court. But, I can think of one case,
13 in which payment out of a vacation trust fund was
14 discussed, and in that case -- I did write it down some
15 place -- Ashton v. Cory, which is a decision of the
16 Court of Appeals for the 9th Circuit. I believe a
17 decision of Justice Kennedy.

18 QUESTION: But, the regulation wouldn't read
19 on that case.

20 MR. BERGER: Well, but, it wouldn't read on
21 that case, but the same issues are involved.

22 QUESTION: Well, except it's not payment by an
23 employer in that case.

24 MR. BERGER: Well, in that case, the employer
25 made the entire payment to the fund, and the fund

1 distributed the payment in a year period. That's
2 correct. That's correct. But, the same exact payments
3 were made. The same exact type payments were made.
4 And, to that extent --

5 QUESTION: Except for the distinction that the
6 government relies on. Distinction between a funded
7 plan, and a non-funded plan.

8 MR. BERGER: But, a distinction again, that I
9 think creates a great tension with the statute. I mean,
10 the statute doesn't make that -- doesn't seem to allow
11 that kind of distinction. And, and frankly, as I read
12 the regulation of the Department of Labor, I don't think
13 the Department of Labor -- again, is, is focusing solely
14 on the general assets test, if they had been. If it had
15 been -- it would not have written that opinion later on
16 American Motors, in which it says that a general assets
17 plan can be an ERISA benefit plan dealing with vacation
18 pay.

19 QUESTION: How do you understand the
20 Secretary's position -- or what do you understand the
21 Secretary of Labor's position to be, with regard to an
22 irrevocable deferral of vacation benefits, payable only
23 on termination?

24 MR. BERGER: From, from my review of the
25 solicitor's brief, which is all I have on that position

1 -- the solicitor seems to point to the word
2 "irrevocable" to be the distinction between that
3 situation and this situation.

4 QUESTION: And, to acknowledge that that might
5 be a covered ERISA plan?

6 MR. BERGER: That's the way I read it.

7 QUESTION: Now, do you take the position that
8 there is evidence in this record that this is that kind
9 of plan?

10 MR. BERGER: I can't take that position.

11 QUESTION: You cannot?

12 MR. BERGER: I cannot take that position,
13 because I'm not -- I don't see the evidence of that
14 within the record. On the other hand, the only fact
15 pattern, before the court, involved two employees who,
16 upon termination, were compensated for their unused
17 vacation time. And, that was a stipulation that we
18 arrived at to present the issue before the court, that
19 it would require termination before such payment. And,
20 there's nothing in the record at all, which speaks to
21 the other issue.

22 But, but -- to get back, I think to Justice
23 Stevens' question about the deferral nature, and perhaps
24 I -- there is something to argue, I think, that any
25 deferred -- anytime that vacation time is deferred to a

1 later period of time, and not paid for, until -- except
2 in -- except in a lump-sum distribution -- that that
3 speaks to an employee welfare benefit plan.

4 And, I think that the Secretary's own
5 regulation supports that, because the Secretary's
6 regulation in (b)(3)(1) talks about the type of premium
7 that it considers to be -- in the vacation context --
8 that it considers to be a payroll practice. In there it
9 says, "a payment to induce employees to take vacations
10 at a time favorable to the employer for business
11 reasons."

12 I think one can argue from that, that the
13 Secretary envisioned a situation where there was a
14 deferral of vacation time for lump-sum payment that
15 wasn't required or induced by the employer. And then,
16 at that later time, with cash out -- focusing mostly on
17 cash out -- that this would speak to more of the plan
18 issue.

19 There's one other thing about the irrevocable
20 nature of the plan at American Motors, and that is, that
21 that wasn't totally irrevocable. If I remember the
22 facts of that situation, an employee could apply for
23 monies, based on hardship, very similar to a 401(K)
24 arrangement, and "hardship" is a word that's subject to
25 a great deal of difference of opinion. But there could

1 -- there were ways employees could draw from their
2 account, if you will, during the term of their
3 employment.

4 And that, the Solicitor and the Department of
5 Labor did not see, as taking that program out of the
6 definition of an employee welfare benefit plan.

7 QUESTION: Mr. Berger, I haven't read the
8 American Motors opinion. Is a citation of that in your
9 brief?

10 MR. BERGER: It's in the Solicitor's brief.

11 QUESTION: It's in the Solicitor's brief?

12 MR. BERGER: In fact, it's in a footnote of
13 the Solicitor's brief.

14 QUESTION: Would you -- do you happen to have
15 it handy? Well, I can find it, I guess.

16 MR. BERGER: Well, we just happen to have it
17 handy. It's in footnote 12 on page 19.

18 QUESTION: Thank you.

19 MR. BERGER: I'd like to turn to -- one
20 argument the Commonwealth makes in their brief -- in
21 their reply brief -- not here, with regard to vacation
22 being equated with wages. The Commonwealth makes
23 reference to bankruptcy preference -- the bankruptcy
24 preference code, Section 507. And in its reply brief
25 states that vacations there are treated as wages, and

1 since they're treated as wages there, they must, or
2 should be treated here as wages as well.

3 Now, the Commonwealth has conveniently used
4 ellipses in quoting that statute, because the word next
5 to "vacation" in Section 507, is the word "severance,"
6 and it says, "that for the purpose of 507, severance
7 payments shall be equated with wages, as well."

8 Now, since it's acknowledged by this Court
9 that severance plans are already seen as an employee
10 welfare benefit plan, Section 507 gives the Commonwealth
11 no help, whatsoever, with regard to the argument of
12 wages.

13 Finally, the Commonwealth argues that there's
14 no administration necessary, with regard to this plan,
15 and attempts to argue, I think, that the Fort Halifax
16 case -- decision of this Court -- is controlling. But,
17 that, as the Supreme Judicial Court found, is not all
18 true. A plan such as this one, which is again, very
19 much akin to a severance pay plan, requires a great deal
20 of administration by an employer. There's -- there's
21 the need to keep records, with regard to vacation time
22 earned, vacation time not taken, vacation time saved.
23 There could be a periodic --

24 QUESTION: May I ask you another question, Mr.
25 Berger?

1 MR. BERGER: Sure.

2 QUESTION: I guess I really didn't understand
3 this case. What if an employer had a practice of --
4 every time it fires an employee, he gives them two weeks
5 pay. He doesn't give two weeks notice. That's the
6 customary practice. Is that a severance plan -- and
7 just pays it out of general assets?

8 MR. BERGER: I believe that's a severance plan.

9 QUESTION: That would be covered by ERISA?

10 MR. BERGER: I think, if --

11 QUESTION: Every employer who has that kind of
12 practice is covered by this statute, must maintain all
13 the recordkeeping, and all the rest of it?

14 MR. BERGER: I believe it is. I think if an
15 employer has a consistent approach to severance, and the
16 example you're giving me, is a consistent approach, that
17 that's a plan. And, that if every employer --

18 QUESTION: Well then, I think probably every
19 employer in the country must be covered by the statute.
20 Because everybody has some kind of severance policy, I
21 suppose, when they --

22 MR. BERGER: I think we'd all like to believe
23 that's true. I'm not sure --

24 QUESTION: I mean, even if they give him one
25 day's pay, or a watch, or something, that would be a --

1 MR. BERGER: I'm not sure the watch would be
2 covered. I think the cash would be covered.

3 QUESTION: Have to be cash?

4 MR. BERGER: I think so.

5 QUESTION: Why?

6 MR. BERGER: Why wouldn't the watch --

7 QUESTION: Does the statute require benefits
8 be payable in cash?

9 MR. BERGER: No. But, to the extent that the
10 statute was very concerned with employers' not keeping
11 their promises, and the statute was also concerned with
12 tax treatment. You know, that certain types of benefits
13 -- most benefits, for that matter, if not all benefits
14 under ERISA, aren't taxed in one way or another, are
15 subject to a favorable tax treatment. In that sense, I
16 suppose, a watch could be taxed, if it's construed to be
17 wages and not a gift. But, I think it was mostly
18 concerned with promises not kept, in the area of money
19 -- actual compensation. I suppose it would depend on
20 the cost of the watch.

21 Back to the administration issue. The plan
22 that is at issue in this case creates a periodic demand
23 upon the employer. If you will accept, as we believe,
24 that this plan paid only upon termination, and those are
25 the only facts before the Supreme Judicial Court, at

1 least then, with every termination, there was a
2 possibility that the employer would have to make some
3 determination, after eligibility, to make a payoff. So,
4 I think there's clearly enough administration here, to
5 bring the program squarely within ERISA.

6 Today, the Commonwealth does not make an, an
7 argument before this Court, with regard to the question
8 of "relates to," although a considerable part of its
9 first brief to this Court, deals with whether this, this
10 statute -- this state statute relates to an ERISA
11 welfare benefit plan. Now, if the plan is an ERISA
12 welfare benefit plan, as we say it is, I can't see any
13 argument, whatsoever, that the Commonwealth statute
14 doesn't relate to the plan.

15 Now, the Commonwealth statute is a clear
16 effort to enforce the plan. It attempts to enforce it
17 by a criminal action, and in my experience, many
18 employers are more concerned about a criminal finding
19 than they are about paying. No one wants to be found
20 guilty of a misdemeanor. So, clearly, the Commonwealth
21 is attempting to enforce a welfare benefit plan, with
22 regard to its Section 149 -- 148, 149. And they've just
23 as much, admitted that here, today, I think.

24 Secondly, in its brief, again, it says that
25 there's no restitution available, which is not true.

1 There's restitution available through the Massachusetts
2 Criminal Court system, as there is for many criminal
3 court systems, if not all. And, and there's a case that
4 I brought with me today, or to cite, because we did not
5 have chance to file a reply to their reply, which is
6 Commonwealth v. Nawn. That's a 394 Massachusetts
7 decision, page one, which talks about a criminal -- the
8 right of a criminal court to grant restitution. So,
9 clearly, an individual who was pursuing this statute,
10 would have a right to restitution, as well as a right to
11 enforce the plan. Enough, I think, is said about
12 "relates to."

13 And, that leaves a question of general
14 applicability, whether this is a generally applicable
15 criminal law. There's really very little I can add to
16 the questions already raised by the Court about that,
17 that phase -- that term. First of all, to the extent
18 again, as we submit, that the plan before us is, in
19 fact, an ERISA welfare benefit plan -- this statute
20 squarely deals with employee welfare benefit plans. It
21 might say wages, which are vacation benefits. But, to
22 the extent that it deals with vacation benefits, is
23 absolutely and squarely directed at a welfare benefit
24 plan. I don't see any way around that argument. Now,
25 to the extent that it also deals with wages -- there's

1 nothing to say that the statute isn't valid as a whole.
2 And, the Supreme Judicial Court of Massachusetts did not
3 find it to be invalid as a whole. They found it invalid
4 only to the extent that it reached employee welfare
5 benefit plans, which were, in fact, welfare benefit
6 plans under ERISA.

7 So, from that point of view, I think the
8 statute is directed right at -- right at an ERISA cover
9 topic, and, therefore, invalid to that extent.

10 To the extent that it is -- to the extent that
11 the Commonwealth values that are generally applicable in
12 any sense -- again, under that analysis, anything would
13 be generally applicable, because it applies to everyone
14 within a specific group or classification. A state -- a
15 state could draw a 15-person statute, and I'm not saying
16 an inappropriate one, and say, this would be criminal if
17 any one of these 15 people commit this crime, and it
18 would apply, generally, to all those individuals. But,
19 that certainly does not make the statute generally
20 applicable. Additionally, ERISA really chose -- the
21 Congress, when it promulgated ERISA, really chose a very
22 comprehensive scheme for enforcement. And, it shows for
23 participants and beneficiaries, a civil remedy. It did
24 not choose for them a criminal remedy. So, again, it
25 shows its disfavor with regard to criminal remedies in

1 that same area.

2 The definition of "generally applicable" that
3 the Supreme Judicial Court found, which I think is the
4 definition held by most people, is a statute which
5 applies to the public, in general. And, by creating
6 such a statute, what the Congress, I think, was
7 intending to do, was to say, if you steal from a plan --
8 if you're an individual, and you steal from a plan --
9 don't look to ERISA to protect you against prosecution
10 for stealing. Anybody who steals can be prosecuted, and
11 stealing from a plan does not protect it. But, Congress
12 certainly did not want the states to be able to
13 promulgate specific laws and hide them, with -- within
14 general language, that would apply to ERISA.

15 And finally, I disagree strongly with the
16 Commonwealth argument that this exception should be read
17 broadly. It should be read narrowly, such as any
18 exception to the statute.

19 But I do agree that the exception is subject
20 to a conflict analysis. In other words, if it is a
21 generally applicable law, it still must pass the test as
22 to whether it is in conflict with ERISA as a whole. And
23 here, it clearly is.

24 First of all, as I said before, ERISA set up a
25 civil enforcement requirement. The courts discussed

1 that in a number of recent cases. This is criminal --
2 certainly, something not chosen, and clearly not chosen
3 on purpose by Congress. Therefore, it's in conflict in
4 that it is criminal.

5 It's in conflict in terms of the payment
6 procedures. Under ERISA, you have approximately 90 days
7 to pay a benefit. Under the Mass statute, it's
8 immediately upon discharge, that day, and approximately
9 six days later -- the payroll period later. So, there's
10 a second conflict.

11 And, the third conflict, and a very extreme
12 conflict, at that, is that this statute is directed at
13 any officer of the corporation. It need not be an
14 individual who had any involvement, whatsoever, with the
15 ERISA plan. The statute doesn't require any involvement
16 at all, just the names and number of officers, including
17 the president. And then, these individuals have
18 personal liability for that plan -- for the payment of
19 that plan, both personal and criminal.

20 ERISA certainly did not choose personal
21 liability for people not related, in any fashion, to the
22 plan at issue. And, it certainly didn't choose criminal
23 responsibility for those individuals, except under
24 specific problems, such as disclosure. So, again,
25 that's the third conflict.

1 In closing, let me again, go back to the
2 primary question I think I've been asked by this Court,
3 with the few minutes I have remaining.

4 QUESTION: You have about one minute.

5 MR. BERGER: That's all it will take, I
6 think. And, that is that, "vacation benefits" are a
7 word used squarely within the statute. No question,
8 whatsoever, about that. It's used twice. It's used in
9 3(1)(a) and 3(1)(b). In 3(1)(b), the word is "pooled
10 vacation benefits." Just the type of benefits that the
11 solicitor, I think, suggests, and petitioner certainly
12 suggests, are the only types of benefits precluded --
13 included within ERISA. If that were true, 3(1)(a), as
14 it applied to vacation benefits, would be superfluous.
15 There would be no reason in the world to have those
16 words.

17 Thank you.

18 QUESTION: Mr. Valvo, do you have anything
19 further?

20 MR. VALVO: Unless the Court has questions, I
21 can rest on my arguments, sir.

22 CHIEF JUSTICE REHNQUIST: Very well. The case
23 is submitted.

24 (Whereupon, at 12:08 p.m., the case in the
25 above-entitled matter was submitted.)

CERTIFICATION

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No. 88-32 - MASSACHUSETTS, Petitioner V. RICHARD N. MORASH

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