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OF THE  
UNITED STATES**

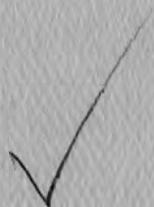
CAPTION: PENSION BENEFIT GUARANTY CORPORATION,  
Petitioners, V. LTV CORPORATION, ET AL.

CASE NO: 89-390

PLACE: Washington, D.C.

DATE: February 27, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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PENSION BENEFIT GUARANTY :  
CORPORATION, :  
Petitioner :  
V. : No. 89-390  
LTV CORPORATION, ET AL. :

-----x  
Washington, D.C.  
Tuesday, February 27, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

CAROL CONNOR FLOWE, ESQ., General Counsel, Pension Benefit Guaranty Corporation, Washington, D.C.; on behalf of the Petitioner.  
LEWIS B. KADEN, ESQ., New York, New York; on behalf of the Respondents.

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1 restore a terminated pension plan only if an employer's  
2 financial condition had improved. Or it could have said  
3 that PBGC could restore a plan where it could persuade a  
4 court that doing so was in the public interest. But it  
5 didn't.

6 What Congress said was -- was that PBGC should  
7 make this determination, and it limited our discretion  
8 only by requiring that we exercise it appropriately and  
9 consistently with our statutory duties.

10 The court of appeals slid right by the statutory  
11 language though and went immediately to the legislative  
12 history. And then, rather than examining the legislative  
13 history to see whether there was a clearly expressed  
14 legislative intent contrary to PBGC's action in this case,  
15 the court of appeals turned the analysis on its head.

16 The court of appeals searched the legislative  
17 materials for an explicit reference to the use of  
18 restoration that PBGC made here. Not surprisingly, it  
19 found none because the legislative history confirms what  
20 the plain language of the statute says, that Congress  
21 intended PBGC to determine when its restoration authority  
22 was to be used.

23 This legislative history is sparse, but it's  
24 straightforward. It says that Congress intended PBGC to  
25 restore a plan if a plan or employer had a favorable

1 reversal of business trends or if, and again I quote,  
2 "some other factor made termination no longer advisable."

3 The court of appeals simply disregarded this  
4 final phrase and focused instead on the one example given  
5 -- a favorable reversal of business trends. The court  
6 then concluded that was the only circumstance under which  
7 the agency could restore a terminated pension plan. That  
8 approach was contrary to this Court's teachings in Chevron  
9 and its progeny. And it also --

10 QUESTION: May I interrupt you for a moment? It  
11 would help me if I understood why the termination decision  
12 was reversed in this case.

13 MS. FLOWE: There were two reasons, Justice  
14 Stevens. The first reason was because LTV adopted follow-  
15 on plans, new pension arrangements which, when combined  
16 with the insurance payments that PBGC was paying under  
17 these terminated plans, effectively continued the  
18 terminated plan as if there had been no termination but --

19 QUESTION: Well -- this is what I really need  
20 some help on because the briefs somehow gloss over the  
21 facts, just as you did in starting out with the statute.

22 What does that mean? Does that mean that  
23 someone who was getting a pension under the old plan  
24 that's being financed now by your client could get a  
25 pension under the new plan too?

1 MS. FLOWE: In effect, yes, Justice Stevens.  
2 What it means is that --

3 QUESTION: Well, how could that be? If they --  
4 if they were already returned from a closed plan or  
5 something like that, how could they earn a right to a new  
6 pension under the -- under this follow-up plan? I don't  
7 understand it.

8 MS. FLOWE: Under the statutory scheme that  
9 Congress established here, PBGC doesn't pay all benefits  
10 under an underfunded terminated plan. Congress specified  
11 that we would pay only certain basic benefits, and even  
12 those are limited by a statutory maximum.

13 The follow-on plan makes up the nonguaranteed,  
14 the non-insured payments that PBGC does not pay. It also  
15 allows active --

16 QUESTION: Let me just be sure I understand --

17 MS. FLOWE: Sure.

18 QUESTION: -- just to get an example.

19 MS. FLOWE: Sure.

20 QUESTION: In other words, if there's a closed  
21 plant, the people qualified for retirement benefits  
22 because the plant was closed and they lost their jobs and  
23 they were getting pensions and then they -- you terminate  
24 the plan so PBGC pays part of the benefits and the LTV  
25 finances the balance. Is that how it worked?

1 MS. FLOWE: That's correct.

2 QUESTION: And now those same people will get  
3 benefits under the follow-up plan?

4 MS. FLOWE: That's correct. They will --

5 QUESTION: Well, how can they earn benefits if  
6 they've already retired? That's what puzzled me.

7 MS. FLOWE: Well, suppose -- let's take a  
8 numerical example and suppose we have a retiree who was  
9 receiving a pension of, let's say, \$800 a month --

10 QUESTION: Right.

11 MS. FLOWE: -- under the pension plan that  
12 terminates. Because of our various statutory limitations,  
13 we may pay only \$600 --

14 QUESTION: Right.

15 MS. FLOWE: -- of that \$800. The follow-on plan  
16 would pay the remaining \$200 or some substantial portion  
17 of that remaining \$200.

18 QUESTION: I see. And the follow-up plan covers  
19 people who have already retired and are receiving benefits  
20 under the old plan.

21 MS. FLOWE: It covers those people --

22 QUESTION: I see.

23 MS. FLOWE: -- and it also covers active workers  
24 who might have had a vested benefit under the old plan in  
25 a certain amount. But once the old plan terminated, that

1 employee was no longer entitled to continue earning  
2 service for additional benefits under that old plan.

3 QUESTION: But you had to pay his vested?

4 MS. FLOWE: That's correct, Justice White. We  
5 would pay the amount of the benefit that was accrued and  
6 vested as of the date of termination. The follow-on plan  
7 would allow that same employee to continue earning  
8 additional benefits and to continue earning service for  
9 purposes of becoming eligible for new benefits.

10 QUESTION: Well, this is what I don't  
11 understand. How can an employee who has already retired,  
12 continue to earn benefits? He's retired. He's no longer  
13 working.

14 MS. FLOWE: Well, I'm now referring to active  
15 employees. The follow-on plan covers --

16 QUESTION: But then if they're active employees,  
17 they aren't getting benefits under the old plan. Aren't  
18 they either working or not working?

19 MS. FLOWE: The retirees would be getting  
20 benefits under the old plan.

21 QUESTION: Right.

22 MS. FLOWE: The active --

23 QUESTION: And not earning benefits under any  
24 new plan.

25 MS. FLOWE: And -- and receiving benefits from

1 the new plan.

2 QUESTION: I see.

3 MS. FLOWE: To make their -- to make them whole,  
4 substantially whole. The active employees have earned  
5 some portion of a benefit under the old plan.

6 QUESTION: Yeah, but you don't pay them anything  
7 because they didn't have a vested benefit and they haven't  
8 retired yet.

9 MS. FLOWE: Well, if they -- under most plans,  
10 they would have earned already a vested benefit, provided  
11 they had sufficient service. If they -- if they have more  
12 than -- than ten years of service under old law or five  
13 under new law, they will have a vested benefit --

14 QUESTION: I see.

15 MS. FLOWE: -- and they are entitled to receive  
16 that vested accrued benefit -- active employees now --  
17 once they reach --

18 QUESTION: When they do --

19 MS. FLOWE: -- their normal retirement age.

20 QUESTION: I see.

21 MS. FLOWE: So, they do -- they do have an  
22 earned benefit under the old plan, but it's frozen as of  
23 the date of termination. The follow-on plan picks up from  
24 that frozen date and let's them continue earning  
25 additional benefits, continue building on that insured

1 benefit as if the old plan had not terminated, as if it  
2 were continuing on.

3 QUESTION: And so that when they retire in the  
4 future, the part that had vested you're responsible for,  
5 and the balance they will pay.

6 MS. FLOWE: From the follow-on plan.

7 QUESTION: All right.

8 MS. FLOWE: That's correct.

9 QUESTION: When -- when you say that the PBGC  
10 pays vested benefits, you don't necessarily mean up to the  
11 full amount of the vested benefit? You still mean subject  
12 to whatever limitations there are, or are there no  
13 limitations on the vested benefits?

14 MS. FLOWE: It's rather complicated, Justice  
15 Scalia, but in most cases we would pay the full vested  
16 benefit at the time that employee reaches his retirement  
17 age.

18 QUESTION: Right.

19 MS. FLOWE: There may be cases where --

20 QUESTION: Nothing --

21 MS. FLOWE: -- even that would be limited.

22 QUESTION: Nothing vests but what PBGC would  
23 cover, by and large?

24 MS. FLOWE: As a matter of fact, that's largely  
25 true. There are cases where, for example, these shutdown

1 benefits --

2 QUESTION: Right.

3 MS. FLOWE: -- if an employee is already -- or a  
4 retiree -- is already eligible for a shutdown benefit at  
5 the time that a plan terminates, he will not receive the  
6 full amount of that benefit, even though it might  
7 otherwise be vested, because it will exceed the amount  
8 that we would guarantee by some fairly substantial amount.

9 QUESTION: Okay. And what you just described to  
10 Justice Stevens as being the consequence is only the  
11 consequence because of the particular deal struck by the  
12 union with the corporation here.

13 Conceivably, the union could have said, listen  
14 people that are already retired, tough luck, we'll --  
15 we'll let them just get what -- what the Pension Benefit  
16 Corporation pays them. But for workers who are currently  
17 working, we'll supplement their salaries. It could be  
18 done that way.

19 MS. FLOWE: That's correct. It could be done  
20 that way.

21 QUESTION: But in this case it was both, both  
22 the people already retired and the ones that continued to  
23 work?

24 MS. FLOWE: That's absolutely right.

25 The PBGC's follow-on plan policy was designed to

1 deal with this situation. These limitations we've just  
2 been discussing, these things that employees lose when an  
3 underfunded plan terminates, act as sort of a risk-sharing  
4 mechanism.

5 It means -- they mean that when an underfunded  
6 plan terminates, employees share the risk of that  
7 termination with the PBGC. And that aligns their  
8 interests with PBGC's and against termination. If an  
9 employee stands to lose benefits when his plan terminates,  
10 then he's going to resist termination, and he's also going  
11 to pressure his employer to fund the plan better in the  
12 first instance.

13 Because follow-on plans eliminate these losses  
14 that Congress built into the statutory scheme, they also ✓  
15 eliminate the disincentive for termination.

16 Now, PBGC has three duties under this statutory  
17 scheme. We have a duty to encourage the continuation of  
18 plans. Stated differently, to discourage the termination  
19 of plans. Obviously, to the extent that we prohibit the  
20 vitiation of these risk-sharing features of the statutory  
21 scheme we discourage unwarranted terminations.

22 We also have a duty to ensure the timely and  
23 uninterrupted payment of benefits in plans that do in fact  
24 terminate. Again, by protecting the insurance program  
25 against unwarranted terminations, we also fulfill that

1 statutory duty.

2 And finally, we have a duty to maintain our  
3 premiums at the lowest possible level consistent with  
4 these other duties. Here, too, if we can discourage  
5 unwarranted and unnecessary terminations, we can keep our  
6 premiums as low as possible.

7 The follow-on plan policy grew out of a need to  
8 do all of these things -- to discourage unwarranted  
9 terminations so as to protect the program; to make sure  
10 that these disincentives to termination from the  
11 standpoint of employees and their unions continue to be  
12 maintained in the statutory scheme.

13 QUESTION: Ms. Flowe, may I ask you whether the  
14 benefit -- Pension Benefit Guaranty Corporation takes the  
15 position that it can order restoration based solely on the  
16 existence -- coming into existence of what it thinks is an  
17 abusive follow-on plan or must it also include in the  
18 calculus whether the company can -- can financially absorb  
19 the cost on restoration?

20 MS. FLOWE: Justice O'Connor, the grant of  
21 authority under Section 4047 is unusually broad. However,  
22 -- and -- and it is the agency's position that follow-on  
23 plan abuse alone is a sufficient basis under that  
24 provision --

25 QUESTION: Even though the company clearly

1 cannot pay the costs, so that it's going to result in some  
2 kind of immediate retermination action one way or another?

3 MS. FLOWE: Well, whether the company can pay or  
4 not, first of all, does not necessarily equate with the  
5 immediate retermination. Here, for example, there was no  
6 significant risk at all of any immediate retermination  
7 because the plan --

8 QUESTION: Well, I want to understand the  
9 position, and the position you take is it makes absolutely  
10 no difference what their economic condition is, that if  
11 there is an agreement to what you call an abusive follow-  
12 on plan, you can order restoration.

13 MS. FLOWE: At least where, as here, there is no  
14 significant risk that doing so would be futile because  
15 there might be an immediate retermination.

16 QUESTION: Well, that just doesn't answer the  
17 question at all. Now, here there was a determination that  
18 three things existed and they were -- all three were  
19 relied on. Were they not?

20 MS. FLOWE: We did have three grounds here. The  
21 third ground is -- is subsumed within the first two. But  
22 we did also make a determination that restoration was  
23 warranted here because of the company's improved financial  
24 circumstances.

25 QUESTION: Well, what if we thought that that

1 determination was not adequately supported on the record?  
2 Does that mean it would have to be remanded so that the  
3 agency could think about it again?

4 MS. FLOWE: I think not, Justice O'Connor. I  
5 believe that the Court could reverse the court of appeals  
6 on the follow-on abuse question because there was no  
7 significant chance of -- of immediate retermination here.  
8 And please let me explain why.

9 When these plans were restored, they had then  
10 sufficient assets to continue for at least several  
11 additional years without any further contributions  
12 whatsoever. In addition, the agency did make a  
13 determination here that the company could afford to fund  
14 these plans at least for the foreseeable future.

15 That finding was not seriously challenged by the  
16 court of appeals. It simply believed that it was the  
17 wrong test, that we had to make a finding of long-term  
18 ability to afford.

19 QUESTION: Well, what standard for a financial  
20 improvement did the PBGC apply to evaluate the situation?

21 MS. FLOWE: On the separate ground of the  
22 improved financial circumstances warranting restoration,  
23 what PBGC looked at was the factors that had led it to  
24 determine these plans in the first instance. There were  
25 several financial factors that caused PBGC to exercise its

1 discretion under Section 4042 of ERISA to terminate these  
2 plans to protect the insurance program against the risk of  
3 unreasonably large losses.

4 LTV's financial condition did improve over the  
5 next several months leading each of those factors to cease  
6 to exist. That fact is really undisputed in this case  
7 because those factors --

8 QUESTION: Did you consider whether the tax  
9 waivers that had been granted by IRS in the past would be  
10 extended in the future?

11 MS. FLOWE: We did, Your Honor, assume that in  
12 making our determination that they had the ability to fund  
13 at least for the short-term. We did make an assumption  
14 that the IRS would grant the company waivers of the --

15 QUESTION: If that assumption were unwarranted  
16 would the finding be unwarranted?

17 MS. FLOWE: No, Your Honor, it would not,  
18 because if that assumption were unwarranted, their ongoing  
19 contribution obligation would have been a smaller amount.  
20 Those past due contributions, rather than being amortized  
21 into their current contribution obligation, would have  
22 been paid as a part of their plan of reorganization a few  
23 years down the road. That was actually a conservative  
24 assumption that made the amount of their contribution  
25 obligation slightly higher.

1 But in any event, the assumption --

2 QUESTION: Well, if -- if there were a waiver,  
3 would that affect whether or not the past due obligation  
4 was a pre-petition or a post-petition debt?

5 MS. FLOWE: In our view, Justice Kennedy, a --  
6 once there was a waiver granted the amount of the  
7 amortization payment which was then -- which would then  
8 have been due as a part of the ongoing contribution, would  
9 have been entitled to administrative expense treatment.

10 QUESTION: So it would not be a pre-petition  
11 debt then?

12 MS. FLOWE: That's correct.

13 QUESTION: If it -- and if there were no waiver,  
14 would it be a pre-petition debt as to the '84-'85?

15 MS. FLOWE: At least as to the '84-'85  
16 contributions, those would have continued to have been  
17 treated as pre-petition debts.

18 QUESTION: Are there -- are there circuit court  
19 authorities on that point to back you up?

20 MS. FLOWE: There is not. That is a question  
21 that has yet to be addressed by the courts of appeals.

22 QUESTION: So far you've argued this case as  
23 though there had never been a bankruptcy or any -- any  
24 action by a bankruptcy court. Does it make any difference  
25 to you?

1 MS. FLOWE: We think not, Justice White.  
2 Certainly, we considered the fact that LTV was in  
3 bankruptcy here and in fact we first objected to these  
4 follow-on plans in a bankruptcy court proceeding.

5 QUESTION: What was your standing in that  
6 proceeding?

7 MS. FLOWE: We were simply --

8 QUESTION: As a creditor or what? No?

9 MS. FLOWE: We were -- we were in fact a  
10 creditor, but we were there exercising our regulatory  
11 authority to say that these follow-on plans --

12 QUESTION: Well, why didn't you appeal the  
13 approval of the plan?

14 MS. FLOWE: Well, we did --

15 QUESTION: Of the follow-up plan?

16 MS. FLOWE: Well, we did in fact appeal. And I  
17 might add that the bankruptcy court did not reach the  
18 merits of our objections. The bankruptcy court said  
19 instead that it wasn't appropriate for him to consider the  
20 regulatory objections we were making and that if we  
21 thought we had some administrative options, we should go  
22 exercise those.

23 We, nevertheless, appealed his refusal to  
24 consider the merits of that matter. LTV moved to dismiss  
25 our appeal on the grounds that it was interlocutory. And

1 while this -- at the same time, we were also considering  
2 the possibility of using our Section 4047 authority. Once  
3 we had, in fact, decided to use our Section 4047  
4 authority, we then dismissed that appeal --

5 QUESTION: So the bankruptcy court --

6 MS. FLOWE: -- before LTV's motion was decided.

7 QUESTION: The bankruptcy court really said,  
8 it's none of my business. Is that -- is that it?

9 MS. FLOWE: That's, in effect, what he said.

10 QUESTION: And what were the -- why did he even  
11 approve the plan? Did he think -- he just thought that it  
12 was -- it was a -- they had the money to do it, and it was  
13 a fair thing to do?. Is that -- is that it?

14 MS. FLOWE: He was approving -- he wasn't so  
15 much approving the plans as he was approving the  
16 expenditure of money to fund the plan.

17 QUESTION: That's -- yeah --

18 MS. FLOWE: And that was in the context of LTV's  
19 seeking approval of --

20 QUESTION: Did the creditors object to this  
21 plan?

22 MS. FLOWE: They did not. They did not. There  
23 were no objections other than PBGC's to the funding of  
24 these follow-on plans in the context of that case.

25 QUESTION: So this is really the approval of a

1 expenditure of funds to meet corporate obligations?

2 MS. FLOWE: That's correct. And the -- the  
3 bankruptcy court made the -- the finding that it was  
4 appropriate within the context of the reorganization to --  
5 for LTV to enter into the collective bargaining agreement  
6 and to fund these follow-on plans under that collective  
7 bargaining.

8 QUESTION: Why would your restoring the old plan  
9 cost the company more money?

10 MS. FLOWE: The -- because with the -- once they  
11 terminated the old plan, PBGC takes over all of the  
12 unfunded liabilities --

13 QUESTION: I've got you.

14 MS. FLOWE: -- in those plans and --

15 QUESTION: And when you restore it, you -- you  
16 get out from under that?

17 MS. FLOWE: Precisely, and --

18 QUESTION: Any money you've paid out is gone, I  
19 guess, but any continuing --

20 MS. FLOWE: Well, as a matter of fact, under  
21 Section 4047 these plans are restored to their pre-  
22 termination status. That is, they're restored as if they  
23 had never been terminated in the first instance, so that  
24 we should be able to get back those monies that we have  
25 paid out.

1 QUESTION: Yes, but even if -- even if you had  
2 not restored the plan, would you not be entitled as a  
3 subrogee to get back your money, if they are financially  
4 sound?

5 MS. FLOWE: We do have a claim under the statute  
6 for 75 -- up to 75 percent of the unfunded guaranteed  
7 benefits.

8 QUESTION: Well, why wouldn't you be entitled to  
9 100 cents on the dollar of the money that you had to  
10 advance, if they are financially sound?

11 MS. FLOWE: If they were financially sound and  
12 were able to pay each and ever creditor 100 cent on the  
13 dollar, we would get only, even then, 75 percent because  
14 that is the amount of the statutory liability under the  
15 law in effect when these pension plans terminated.  
16 Congress only gave --

17 QUESTION: I thought that was the amount you had  
18 to pay, but that's the amount you can recover. Only 75  
19 percent of what you pay out?

20 MS. FLOWE: Exactly.

21 QUESTION: I see.

22 MS. FLOWE: Exactly. Under -- under that  
23 employer liability provision in the statute. So that, in  
24 any event, we -- we take a very large loss. And that  
25 assumes, of course, that we could collect 100 cents on the

1 dollar on our claim. And, as we explain in our brief, our  
2 historical experience has been very, very substantially  
3 less than that in terms of what we are able to recover.

4 QUESTION: Well, but that's -- I know, but those  
5 are different companies. The part of your -- the premise  
6 of the restoration is that this is a financially sound  
7 company, isn't it?

8 MS. FLOWE: Well, that's true. And -- and --

9 QUESTION: So you should get your 75 cents on  
10 the dollar back -- eventually.

11 MS. FLOWE: One would hope.

12 QUESTION: Well, if they're -- if you're not,  
13 then apparently -- maybe one of the grounds for -- there's  
14 some tension between your position you can't get your  
15 money back that way and your position that they are  
16 financially able to handle the plan.

17 MS. FLOWE: Well, not necessarily, Your Honor,  
18 because our claim would be an immediate lump sum  
19 liquidated claim for the entire amount of that  
20 underfunding, whereas the company's obligation under  
21 restored ongoing plan is only to make each year the  
22 statutory minimum funding obligation, which in this case  
23 is more like \$200 to \$225 to \$250 million a year as  
24 compared to our claim, which is for about \$2 billion.

25 So that, to say that they can't -- that they may

1 not be able to pay 100 cents on the dollar on a \$2 billion  
2 dollar claim is different from saying they can afford a  
3 \$200 million a year funding obligation.

4 QUESTION: Well, you have a \$2 billion claim but  
5 have you -- you have not paid out that much money, have  
6 you?

7 MS. FLOWE: We do -- we have not at this  
8 junction paid out.

9 QUESTION: And that's the total amount you are  
10 liable for?

11 MS. FLOWE: That's the present value of the  
12 liabilities, the unfunded liabilities --

13 QUESTION: Yeah.

14 MS. FLOWE: -- in that plan. But the way the  
15 statute is set up is that -- that -- those -- that stream  
16 of future liabilities is reduced to a present value for  
17 purposes of the liability claim PBGC asserts against an  
18 employer that terminates an underfunded plan.

19 QUESTION: But during the time you had the plan,  
20 did you have the -- did you have the discretion to use the  
21 assets to pay current obligations or to use your own  
22 funds?

23 MS. FLOWE: Administratively, PBGC pays a part  
24 of benefits under terminated plans from the assets of the  
25 plan it takes over and it pays another part from the

1 premium income that we receive from the premiums that the  
2 statute requires us to cover --

3 QUESTION: The statute says that when you  
4 restore the plan you turn over -- back to the company any  
5 remaining assets and liabilities. So I take it that you  
6 then have a separate claim in the bankruptcy court for the  
7 liabilities that you've already paid, and they're no  
8 longer outstanding.

9 MS. FLOWE: That's correct, Justice Kennedy. We  
10 would return over to them what's left and also what's left  
11 of the liabilities because obviously during the interim,  
12 while this litigation has been proceeding, some of those  
13 liabilities have been satisfied as well by our payment of  
14 benefits. So there would be fewer liabilities returned to  
15 them also.

16 QUESTION: Ms. Flowe, do -- do -- do I under  
17 your position correctly to be that it really doesn't  
18 matter about the tax waiver and it doesn't matter how  
19 these matters would be treated in the bankruptcy, even  
20 assuming the worst, that these plans would still have had  
21 enough funds in them for a couple of years to continue in  
22 existence? Is that -- is that true?

23 MS. FLOWE: That's correct, Justice Scalia.  
24 Without a penny of further contributions these plans would  
25 have survived at -- from the date of restoration for

1 several years. And, of course, at that time it might well  
2 have been that the company would have been out of  
3 bankruptcy by the time that the plans came anywhere close  
4 to running out of money.

5 QUESTION: You started off earlier by saying  
6 there were two reasons why the agency restored and you  
7 have been discussing the first, and the second one was the  
8 change in the financial situation. Were those two reasons  
9 independent or -- or where they alternative -- or -- or  
10 cumulative?

11 MS. FLOWE: They were independent grounds. We  
12 believe that follow-on plan abuse alone is a sufficient  
13 ground under the statute, under this broad grant of  
14 authority, provided that it will --

15 QUESTION: Oh, it may be. I'm not asking  
16 whether it may be sufficient in and of itself. I'm saying  
17 did the agency express that to be an independent ground or  
18 -- or was it the combination of the two?

19 MS. FLOWE: In this case, it was an independent  
20 ground for the restoration decision.

21 QUESTION: Well, you answered my question just  
22 the opposite when I asked you. You said that the company  
23 -- the Pension Benefit Guaranty Corporation relied on both  
24 grounds here.

25 MS. FLOWE: Well, we did -- I -- I'm sorry,

1 Justice O'Connor, I must have misunderstood your question.

2 QUESTION: So which is it?

3 MS. FLOWE: We had --

4 QUESTION: Let's try to get to the bottom of it.

5 Did you rely on both grounds or not?

6 MS. FLOWE: We had two grounds. Each of them  
7 standing alone would have justified our decision in this  
8 case. We believed each of those grounds were an  
9 independent basis standing alone for restoration in this  
10 case.

11 QUESTION: Was that expressed any place in the  
12 record or in the language of the order? Is that apparent  
13 or is that something you're just telling us now?

14 MS. FLOWE: I believe it is probably not  
15 apparent from the face of the order. The order just says  
16 we are restoring your plans for these reasons, one, two,  
17 three, without discussing whether they each stand alone or  
18 not.

19 If there are no further questions, I'd like to  
20 reserve the balance of my time.

21 QUESTION: Very well, Ms. Flowe.

22 Mr. Kaden, we'll hear from you.

23 ORAL ARGUMENT OF LEWIS B. KADEN

24 ON BEHALF OF THE RESPONDENTS

25 MR. KADEN: Mr. Chief Justice, and may it please

1 the Court:

2 Contrary to the government's position, this case  
3 is not about the integrity of the insurance fund, nor is  
4 it about conspiracies between employers and unions to give  
5 liabilities to the government.

6 Our position is simply stated. Nothing in ERISA  
7 bars the negotiation of replacement benefits after a plan  
8 termination. And indeed, both ERISA and the policies of  
9 the Taft-Hartley Act and the Bankruptcy Code support the  
10 negotiation of those benefits.

11 And secondly, nothing in this record supports  
12 the conclusion of the government that LTV's financial  
13 improvement -- financial condition had improved in the few  
14 months between termination in January 1987 and restoration  
15 that September.

16 In our view, the question --

17 QUESTION: Do you -- Mr. Kaden, you say then  
18 that even the abuse of follow-up -- follow-on plans that  
19 apparently is cited by PBGC would not be a basis for  
20 restoration?

21 MR. KADEN: Should not, in the absence of  
22 evidence of financial improvement, be a basis for  
23 restoration, and we will -- we will try to develop that  
24 through an examination of both of ERISA and of the  
25 competing policies of these other statutes.

1           The question in this case -- what this case  
2 really involves is a question whether this government  
3 agency for restoring a pension plan for the first time in  
4 its brief history met the requirements of the  
5 Administrative Procedure Act.

6           Did they develop a record adequate for review?  
7 Did they have an ascertainable standard? Did they proceed  
8 by reasoned analysis? Did they have evidence to support  
9 their assumptions? Did they consider each relevant  
10 factor?

11           QUESTION: Will you find all of those  
12 requirements in the Administrative Procedure Act?

13           MR. KADEN: Yes. As -- as this Court has said  
14 in Overton Park and State Farm, in reviewing informal  
15 adjudication, it is the Court's responsibility to engage  
16 in a thorough probing review to determine the  
17 rationality --

18           QUESTION: And you say --

19           MR. KADEN: -- of the agency's decision.

20           QUESTION: And you infer from that all those  
21 four or five things that you just ticked off?

22           MR. KADEN: I think those four or five elements  
23 are ticked off in this Court's opinion in State Farm.

24           QUESTION: As prerequisites?

25           MR. KADEN: As -- as the elements of

1     rationality. In other words, if you don't an  
2     ascertainable, comprehensible standard, and you don't have  
3     any reasoned analysis, and you haven't considered relevant  
4     factors -- that is essentially a quote from this Court's  
5     opinion in -- in State Farm -- when you add it all up,  
6     what you don't have is a record adequate for review.

7             Now, in our view, in this case, this agency had  
8     a batting average of zero on those requirements. Let me  
9     try to explain where LTV was --

10            QUESTION: Let me just ask this, Mr. Kaden, if  
11     it's -- if it's true -- I don't know if it is or not -- as  
12     matter a law that a follow-up plan such as I think I  
13     understand now went into a place and if that's a  
14     sufficient reason for restoration, isn't the record  
15     sufficient to establish those facts?

16            MR. KADEN: If -- if these follow-on plans met a  
17     test of abuse, and if abuse were a grounds all by itself  
18     in the absence of financial evidence --

19            QUESTION: Right.

20            MR. KADEN: -- for restoring the plans, then  
21     that might be the case. I think as -- as we argue, that  
22     simply cannot be the case when one looks both at the  
23     structure of ERISA and the competing policies of these  
24     other statutes.

25            QUESTION: Well, what does it take in addition

1 to just -- just having a follow-up plan to be an abusive  
2 one?

3 MR. KADEN: It -- it may be possible, as the  
4 government suggests, that one can imagine a circumstance  
5 in which an employer and a union got together and said  
6 we're going to push our liability off on the government  
7 and we're going to create another defined benefit plan  
8 subject to the government's guarantee. That would, in  
9 effect, be a fraudulent termination perhaps --

10 QUESTION: Yes, well, I -- I --

11 MR. KADEN: -- and that might be abusive.

12 QUESTION: I take it that the agency keeps  
13 referring to an abusive follow-up plan.

14 MR. KADEN: That's right. Perhaps there is such  
15 a thing. My -- my suggestion, Justice White, is that  
16 didn't happen here.

17 QUESTION: Well, and if -- if it was an abusive  
18 -- if the claim is that it was abusive, is there a record  
19 to establish that?

20 MR. KADEN: Not in this case. In this case what  
21 the record shows unequivocally, is that this agency made a  
22 determination in December 1986, acted on it in January  
23 1987, that LTV in bankruptcy could not both reorganize and  
24 afford these pension plans.

25 Now, the government didn't go to the Department

1 of Labor, which has the power to enforce contributions,  
2 and say try to get some money from LTV. Instead, they  
3 terminated the plans. Upon termination --

4 QUESTION: On -- on -- on request?

5 MR. KADEN: Not upon -- they -- they asked us  
6 whether we intended to fund the plans.

7 QUESTION: Yes.

8 MR. KADEN: And we said no, under the law we  
9 cannot fund these pre-petition obligations, nor do we have  
10 the capacity to.

11 QUESTION: So you -- and so it was terminated  
12 then?

13 MR. KADEN: And so it was terminated. LTV,  
14 following termination, found itself in this position --  
15 8,000 retirees had their income reduced from approximately  
16 \$800 a month to \$400 a month. An active worker with 29-  
17 1/2 years of service, counting the days until early  
18 retirement at age 30, was out of luck. Under their  
19 limitations, he now had to wait until he hit age 62 for a  
20 regular retirement.

21 An employee disabled on the job was out of  
22 disability insurance. A spouse whose husband died on the  
23 job had no more spousal life insurance. In response to  
24 those hardships, as well as a strike threat by the  
25 steelworkers --

1                   QUESTION: Yes, but, Mr. Kaden, if I understand  
2 your opponent, they don't object to those feature of the  
3 plan.

4                   MR. KADEN: Oh, no.

5                   QUESTION: They object to the features that  
6 they're -- they're helping to finance.

7                   MR. KADEN: Indeed, they do. Making up that  
8 difference between the \$400 and the \$800 for a shutdown  
9 victim, they object to. Making up the 30 and out, the  
10 early retirement option for that 29.5-year employee, they  
11 object to. That's part of their abuse policy.

12                   QUESTION: Well, I think their abuse policy is  
13 based upon the proposition that it would seem a very  
14 strange intent for the Federal Government to allow your  
15 company to compete with other companies in the same  
16 industry who have to pay the entire pension benefits for  
17 your company to be able to give its employees the same  
18 benefits and have the taxpayer fund -- fund 85 percent of  
19 them.

20                   MR. KADEN: Well, of course, Your Honor, it's  
21 the premium payer. But the fact is that they had to make  
22 a decision whether to exercise their termination power.

23                   LTV then had to make a decision how to respond  
24 to strike threat, how to negotiate a labor contract  
25 pursuant to the Taft-Hartley Act and how to respond most

1 significantly to a lawsuit brought by the steelworkers to  
2 enforce these benefit promises.

3 QUESTION: That's very good and -- and it seems  
4 to me the agency gave you a good -- a good tool to respond  
5 to the strike threat by saying, look, if I give you these  
6 benefits, we're going to be back in the soup because the  
7 -- because the fund is not going to continue to fund the  
8 85 percent.

9 MR. KADEN: That -- unfortunately, in the  
10 position that LTV found itself, that was not an effective  
11 answer. The -- the company did not want to spend \$70  
12 million on replacement benefits. It had to because of the  
13 existence of the lawsuit to enforce those benefit  
14 promises.

15 QUESTION: Well, what difference does that --  
16 what difference does that make as to whether or not  
17 there's an abuse? There's no scienter requirement, is  
18 there, here? You postulated that at the outset that LTV  
19 couldn't get together with the union and say let's shove  
20 off these base premium costs on the employer.

21 But that's exactly what's happened here. Isn't  
22 the Pension Benefit Guaranty Corporation entitled to  
23 consider the effect quite regardless of the intent?

24 MR. KADEN: Not -- not in the absence of  
25 evidence of financial improvement. But the point is --

1 QUESTION: Well, no, no. We're just talking  
2 about whether the -- the definition of an abuse.

3 MR. KADEN: The definition of abuse has to  
4 include meeting your contractual obligations. In this  
5 case what the labor contract promised were these benefits.  
6 It didn't promise a pension plan subject to the PBGC's  
7 termination power.

8 It said, when you hit 30 years of service, you  
9 get this benefit, or if you are victim of shutdown, you  
10 get this benefit. The PBGC itself had gone to the Third  
11 Circuit and said that contractual entitlement survives and  
12 it is enforceable after termination. That's the  
13 Heppenstall case.

14 The steelworkers brought a Heppenstall lawsuit  
15 against us. We had to contend with that. We had very  
16 little legal defense, assuming that the PBGC's position  
17 and the Third Circuit's position was right.

18 QUESTION: Where -- in what circuit where you  
19 litigating?

20 MR. KADEN: We were litigating in the Second  
21 Circuit.

22 QUESTION: Had the Second Circuit decided the  
23 question?

24 MR. KADEN: Second Circuit had not had an  
25 occasion, but our opinion was that that was a sound claim

1 because, indeed, the contract has a life separate and  
2 apart from the mechanism of funding that constitutes the  
3 pension plan.

4 QUESTION: And you -- and you're saying that was  
5 a justification for fobbing off 85 percent of your  
6 liabilities under the other premium payers from other  
7 companies?

8 MR. KADEN: We -- we couldn't fob off those  
9 liabilities. We -- we wanted to but the problem after LTV  
10 filed bankruptcy is that the provisions of ERISA gave us a  
11 full stop -- a sharp red light against a voluntary  
12 termination.

13 QUESTION: But what is the --

14 MR. KADEN: In the absence of the steelworkers  
15 --

16 QUESTION: But what is the difference whether or  
17 not you had to do and whether you chose to do it? The  
18 effect on the PBGC, the effect on other premium payers,  
19 the effect on the integrity of this act is the same.

20 MR. KADEN: It depends on the structure of the  
21 statute and whether Congress ever contemplated this theory  
22 of abuse.

23 The fact is, if you look at the structure of  
24 both the determination provisions and the restoration  
25 provision, if you look at the legislative history, if you

1 look at the integrity of this statute, what you see is  
2 restoration as a device for dealing with financial  
3 turnaround. Financial turnaround and other financial  
4 factors we think is the proper way of reading that  
5 legislative history.

6 When you look at the subsequent legislative  
7 history, and we understand the dangers of looking at that,  
8 as the Chief Justice said in the County of Washington  
9 case, it is perilous, but not wholly irrelevant.

10 In this case, they went to Congress and asked  
11 for a bar against replacement benefits except pursuant to  
12 their standards. Everyone reflected in those debates that  
13 it was not the status quo in the law. One committee gave  
14 them that provision. Three committees rejected it. And  
15 the Congress in 1987 rejected it.

16 Further --

17 QUESTIONS: Maybe -- maybe the members of the  
18 legislature didn't want to vote for that in particular but  
19 they were perfectly content to vote to -- to let the  
20 agency use its judgment, as the text of the Act seems --

21 MR. KADEN: Well, let's

22 QUESTION: -- they did vote when -- when it was  
23 enacted.

24 MR. KADEN: Well, let's look at the question of  
25 how the agency exercised its judgment. As I indicate, I

1 think the structure of the act itself makes clear that the  
2 policy -- that the negotiation of replacement benefits has  
3 nothing to do with the restoration power and is not  
4 abusive of the statute.

5 But if there's any doubt about that, let's look  
6 at the conflicting mandates of other important Federal  
7 statutes, and let's start with the Taft-Hartley Act.  
8 Section 8(d) of the labor law, as you know, says that an  
9 employer must bargain over wages, hours, terms and  
10 conditions of employment.

11 We know that retirement benefits are within that  
12 circle of mandatory bargaining. We know, too, from this  
13 Court's decision in the Insurance Agents case and others,  
14 that it is a serious act to circumscribe the ambit of  
15 mandatory bargaining.

16 The Solicitor General says, well, of course, we  
17 don't permit wages to be paid in cocaine. That's because  
18 their is an explicit provision of the Federal criminal  
19 law. But we don't permit a government agency, either this  
20 one or the IRS or anyone else, to go about regulating the  
21 rules that apply to the substantive outcomes of bargaining  
22 contrary to the provisions of the Taft-Hartley Act.

23 The Bankruptcy Code in Section 1113 also  
24 provides that a debtor in possession cannot ignore --  
25 cannot escape the provisions of his labor contract unless

1 he follows particular procedures that could not be  
2 followed in this case without risking a destructive  
3 strike.

4 QUESTION: But none of this was literally  
5 impaired. You -- you were entitled to adhere to the  
6 provisions of the contract that you had negotiated to.  
7 The only thing is who is going to pay for the whole thing?

8 This agency didn't prevent you from negotiating  
9 a contract, is not preventing you from abiding by the  
10 contract. The only question is whether the fund is going  
11 to foot the bill. That's all.

12 MR. KADEN: On, no. Indeed, we did. No one is  
13 asking them to pay the cost of the replacement benefits.  
14 We were prepared to pay that \$70 million ourselves and we  
15 negotiated concessions of \$50 million to offset that cost.  
16 And the bankruptcy court, as Justice White indicated,  
17 approved that in order to preserve the estate for -- for  
18 reorganization.

19 But it was essential for us to negotiate that in  
20 the free arena of collective bargaining, as required by  
21 those laws. This agency's abuse policy says when you  
22 negotiate that replacement benefit for retirees thou shalt  
23 not obey the principle of seniority.

24 Now, in our labor history, the principle of  
25 seniority is an important one. It's recognized explicitly

1 in the Military Service Act and the Veterans Act. It's  
2 recognized in their own statute.

3 QUESTION: Now, what would -- what would the --  
4 what would the -- what would you have to pay that you  
5 weren't going to pay -- when they reinstated the old plan,  
6 what extra obligation came onto LTV?

7 MR. KADEN: If they were successful in  
8 reinstating the plan, two things might happen, and it  
9 turns on whether the contributions are owing or not by a  
10 debtor in possession, whether they are pre-petition  
11 obligations or not.

12 There's no question that with the passage of  
13 time the unfunded liability in these plans is now over \$3  
14 billion, and if they were returned to us today, the  
15 question is do we have to make those contributions?

16 If we do, our creditors would be forced under  
17 the Bankruptcy Code to evaluate whether liquidation was  
18 better than paying that bill. In liquidation, the plans  
19 would automatically be reterminated under Section 4041 of  
20 ERISA, under the voluntary termination standards.

21 By contrast, if we didn't have to pay those  
22 contributions because they were pre-petition obligations,  
23 as the Second Circuit noted, then the largest of these  
24 plans would have to be reterminated immediately because it  
25 has no assets today, and that is clear if one calculates

1 out from the -- from the record.

2 So, in either event, it depends on whether it's  
3 a pre-petition obligation, but we view it as a futile act.  
4 But it does one thing. It changes their claim in  
5 bankruptcy from \$2 billion to \$3 billion to the detriment  
6 of other creditors and to the detriment of the principle  
7 of uniformity of treatment that is part of the Bankruptcy  
8 Code.

9 The result of this manipulation, if they're able  
10 to do it, is that they get a \$3 billion claim. Today they  
11 have a \$2 billion claim. Those large claims get satisfied  
12 in a reorganization, if it can be reorganized, only they  
13 get more and everyone else, all other creditors get less.

14 And the result is they've used the restoration  
15 procedure to manipulate the Bankruptcy Code. We don't  
16 think Congress, in trying to sort out the tensions between  
17 ERISA, the Bankruptcy Code and the Labor Act ever  
18 contemplated that kind of manipulation.

19 Let me turn now to the financial --

20 QUESTION: And why is it that it increases what  
21 they can collect from 2 to 3 billion?

22 MR. KADEN: If the plan were restored today and  
23 then had to be immediately reterminated because it was out  
24 of assets or because the bankruptcy court found that a new  
25 termination was necessary to avoid liquidation, the only

1 consequence of that successful restoration would be to  
2 manipulate the recoveries in that -- in that fashion.

3 QUESTION: Well, why --

4 MR. KADEN: We don't think the harmonizing of  
5 those three statutes could have intended that result.

6 QUESTION: Why, Mr. Kaden, does it go from \$2  
7 million to \$3 million? I mean, in terms of figures.

8 MR. KADEN: For two reasons. One, in the  
9 intervening time between the time they restored -- they  
10 tried to restore these plans or they terminated these  
11 plans and today, the law changed to give them 100 percent  
12 claim instead of a 75 percent claim.

13 And, two, over the course of time benefits have  
14 been paid out, no contributions go in, some of the  
15 liabilities have been reduced, but other liabilities  
16 accrue.

17 QUESTION: So this is money they have paid out.

18 MR. KADEN: No, it's not money they've paid out.  
19 It's a -- it's a widening gap. When you measure the  
20 liability to these plans, it's the present value of all  
21 the liability year by year over time. And between 1987  
22 and January when the plans were terminated and today, two  
23 things have happened to cause that gap to widen.

24 One is the accrual of more liability, as more  
25 people retire, as more people gain retirement benefits,

1 and the second is the change in the law to give them 100  
2 percent claim in bankruptcy as opposed to a 75 percent  
3 claim in bankruptcy. Indeed --

4 QUESTION: Well, but wouldn't they be entitled  
5 to some increase over 2 million just by virtue of the fact  
6 of the passage of time from the --

7 MR. KADEN: No, because the size of their claim  
8 on termination is fixed on the date of termination. In  
9 other words, at the moment they terminated these plans in  
10 January 1987, assuming this Court affirms and the plans  
11 remain terminated, that claim, which is roughly \$2  
12 billion, is fixed.

13 That is the claim in the bankruptcy. They are  
14 our largest creditor, and they will be satisfied in a plan  
15 of reorganization with however much they get out that  
16 process of negotiation and reorganization.

17 The only way they get to manipulate it is if  
18 this Court reverses and the restoration is effective and  
19 then, for the reasons that Justice O'Connor and I  
20 discussed, the plans have to be reterminated. In that  
21 case, they will have succeeded in boosting the claim by a  
22 million dollars.

23 QUESTION: Because they subsumed the gap that's  
24 --

25 MR. KADEN: Not because they subsumed the gap.

1 Because of the passage of time and the change of the law.

2 QUESTION: Of course, your -- the -- your  
3 opposition says that there -- there is no assurance that  
4 they'd have to reterminate anything.

5 MR. KADEN: Well, it -- it -- it is fact that  
6 cannot be disputed that the largest of these plans, the  
7 Jones & Laughlin hourly retirement plan, today has no  
8 assets. It had some assets in September 1987 when they  
9 tried to return it to us. In the absence of contributions  
10 it would predictably run out of assets and, in our view,  
11 it did some time in 1989.

12 So under 1341 of -- of ERISA, they would have  
13 to. They cannot leave a plan in place that has no assets  
14 to pay benefits for. They're obliged to terminate that,  
15 as indeed they did with our Republic salaried plan, which ✓  
16 is not at issue in this case, in September of 1986.

17 QUESTION: What is your position as to the  
18 nature of the liabilities, the shortfall for '84 and '85?  
19 Are they pre-petition debts and does that change depending  
20 on whether or not an IRS waiver is granted?

21 MR. KADEN: No. They are pre-petition debts  
22 because they deal -- in that case, the obligation was due  
23 pre-petition. So even under the PBGC's theory. as Ms.  
24 Flowe indicated, they're pre-petition debt.

25 But under our theory, what you have to look at

1 is when the obligation arose, when the service for which  
2 this liability was consideration, was provided. And that  
3 was plainly pre-petition.

4 QUESTION: Suppose there's an IRS waiver? Same?

5 MR. KADEN: Same. The IRS waiver affects the  
6 pace of payment and the interest you pay on it. It does  
7 not affect the status of the claim in the bankruptcy.

8 Let me turn to the -- to the validity or the  
9 lack of validity in our view of the administrative record  
10 on the financial improvement point, their second ground.

11 Now, we would argue as -- as I indicated, under  
12 the statute there is no independent abuse ground. If you  
13 think something violates ERISA, you ought to ask a court  
14 to declare it invalid. And in this case, if they had to  
15 -- they tried eight times and eight courts said no it was  
16 not invalid.

17 But if they ever succeeded in showing that those  
18 replacement plans were illegal, they could be declared  
19 illegal. They would go away. The contract provides for  
20 severance, and that would be -- and a new negotiation, and  
21 that would the end of it.

22 QUESTION: You say -- you say the agency has no  
23 authority under its mandate to itself determine that a  
24 plan is abusive if it can't show that it violates some  
25 other law?

1 MR. KADEN: No, no, no. If it can show that  
2 it's abusive in violation of its own law, it can ask a  
3 court so to declare --

4 QUESTION: Well, abuse --

5 MR. KADEN: -- and the plan will disappear.

6 QUESTION: Well, do you mean it has to point to  
7 a provision of its statute?

8 MR. KADEN: No. All I'm saying now is -- I'm  
9 not back trying to -- trying to review the -- the abuse  
10 theory. I'm simply saying that the restoration power is  
11 neither necessary nor appropriate as a remedy for abuse.

12 If there's an abuse, all they have to do is say  
13 so, ask a court to confirm it. They were in court. They  
14 could have asked Judge Sand in the Southern District of  
15 New York on appeal from the bankruptcy court to say this  
16 was an abuse and these replacement plans were gone.

17 QUESTION: Well, maybe they -- maybe they --

18 QUESTION: Well, why are they limited to that  
19 one remedy?

20 MR. KADEN: I'm not -- I'm not suggesting that  
21 they -- they are not limited to that remedy if they can  
22 show evidence of financial improvement. What I am  
23 suggesting is the structure of the act requires that in  
24 order to return plans with all these billions of dollars  
25 of obligations you have to answer the fundamental

1 question, which is can the company afford it?

2 QUESTION: Well, it seems to me you give very  
3 little discretion to the agency and it seems to me you can  
4 read the agency's statute quite differently than you do to  
5 give them considerably more discretion.

6 MR. KADEN: I -- I don't think you read 4047  
7 differently in the context of the financial improvement  
8 provisions of the terminations standards and in the  
9 context of these competing mandates of other statutes.

10 QUESTION: Well, doesn't the very financial  
11 provision section also say other reasons?

12 MR. KADEN: Other factors in --

13 QUESTION: Other factors?

14 MR. KADEN: -- in the context in which appears.  
15 I suggest, Chief Justice Rehnquist, that it is clear that  
16 that means other financial factors.

17 Financial turnaround is one thing that could  
18 happen. But there are other financial changes in  
19 condition that could occur. Without a business  
20 turnaround. You could -- you could get a pot of money if  
21 you had won a judgment somewhere and be able to afford  
22 plans that -- that a year ago you could not.

23 QUESTION: Wouldn't that be financial  
24 improvement? I don't understand that. What other factors  
25 could be financial improvement other than financial

1 improvement?

2 MR. KADEN: Well, I'm not sure. One has to look  
3 at the structure of the statute. But financial --

4 QUESTION: I'm trying to, and I --

5 MR. KADEN: No, my --

6 QUESTION: I think another factor means a factor  
7 other than financial improvement.

8 MR. KADEN: No, because the phrase is financial  
9 turnaround not financial improvement.

10 QUESTION: Financial turnaround.

11 MR. KADEN: Financial turnaround and other  
12 factors in the context of the whole statute, and in view  
13 of these competing policies, I would suggest means other  
14 financial factors.

15 QUESTION: Mr. Kaden, the -- the argument you  
16 were just making assumes that -- that the agency is saying  
17 -- maybe they picked the wrong word by calling it an  
18 abusive follow-on plan. But I don't think they're saying  
19 that it's illegal, that it's something they could into --  
20 into --

21 MR. KADEN: Well --

22 QUESTION: -- district court to prevent any more  
23 than they could -- any more than they would say that a  
24 financial turnaround is illegal.

25 MR. KADEN: Well, I would suggest --

1 QUESTION: I mean, it's perfectly lawful --

2 MR. KADEN: Yeah.

3 QUESTION: -- but it's -- the -- the issue isn't  
4 whether its illegal but whether it is a valid reason for  
5 the agency to terminate the plan or to --

6 MR. KADEN: Or to restore the plan.

7 QUESTION: Yeah.

8 MR. KADEN: I -- I would suggest, though, that  
9 in view of the environment in which this decision takes  
10 place -- plans once terminated because the company could  
11 not afford them -- we are now fencing off that part of the  
12 case and looking solely at the replacement benefits.

13 Replacement benefits instituted in settlement of  
14 a valid lawsuit in response to a strike threat pursuant to  
15 a mandate under 1113 of the Bankruptcy Code and 8(d) of  
16 the Taft-Hartley Act, the agency has to have more  
17 substance. There has to be more there to permit that kind  
18 of circumscribing of the collective bargaining process.

19 QUESTION: Well, just -- just strike the  
20 adjective abusive. I mean, the follow-on plan -- I mean,  
21 I think what they're saying is that the -- they don't view  
22 the object of this statute to be to put onto the fund the  
23 obligation of -- of assisting a corporation by paying 85  
24 percent of its pension benefits.

25 MR. KADEN: That was their decision. They had -

1 - they didn't have to make that decision. We could not  
2 terminate those plans on our own. But once they terminate  
3 them based on their economic assessment, as they say in  
4 the record, that we could not both reorganize and afford  
5 these plans.

6 All we are saying then is neither the structure  
7 of ERISA nor these other statutes permits this abuse to be  
8 a grounds all by itself in the absence of evidence of  
9 financial improvement to return the plans.

10 QUESTION: What if it was a mandatory  
11 termination? Does the restoration provision not apply to  
12 any mandatory termination situation?

13 MR. KADEN: No. The -- the -- in our view, you  
14 have to be able to afford a plan in order to take it back.  
15 Because if you don't -- if you can't afford a plan, when  
16 you take it back, it will be immediately terminated  
17 mandatorily again. And that kind of ping pong effect  
18 could not have been contemplated by the draftsmen of  
19 ERISA.

20 QUESTION: I'm -- I'm not sure we understand  
21 each other. I was asking is it always the case that the  
22 agency has the option, that if they don't like this, they  
23 didn't have to terminate in the first place? Couldn't it  
24 happen that the agency is compelled by law to terminate  
25 it --

1 MR. KADEN: The only --

2 QUESTION: -- and then what they call an abusive  
3 follow-on plan comes up?

4 MR. KADEN: The only circumstance where a  
5 mandatory termination by them can take place is in the  
6 event there are no assets in the plan. And when that  
7 happens, whatever else happens, whatever other violations  
8 there may be that deserve other remedies, you cannot  
9 return a plan without assets to a sponsor that has no  
10 money to put into it, that cannot fund it, which circles  
11 back to the financial improvement.

12 Because once you do, if you restore a plan  
13 without assets under Section 4041, you have to immediately  
14 reterminate it and it would be an endless circle. That  
15 cannot be what Congress had in mind in drafting the  
16 restoration language of 4047.

17 Let me turn briefly to the financial  
18 improvement. Here I think the record is self-evidently  
19 insufficient. They had -- it was an afterthought, as the  
20 district court noted. They had only the same evidence  
21 before them in September that they had acted on in January  
22 to terminate the plans, the same two-year business plan.

23 The record indicates no consideration of the  
24 effect of reorganization or the prospect of retermination  
25 if they return plans that cannot be afforded. When they

1 did consider certain -- certain factors, they failed to  
2 take note of whether they had any enduring quality.

3 They noted a little bit of cash build-up beyond  
4 the business plan in the early months of 1987. There was  
5 a strike at USX going on at the time. There's no analysis  
6 in the record of whether that strike influenced this brief  
7 positive performance. The fact is that that cash build-  
8 up was foreseeable, was foreseen in December, was in the  
9 business plan, and that was the only evidence they had  
10 before them when they concluded that there had been a  
11 financial change during those five months.

12 The assumptions they did rely on, as the  
13 district court found, were fundamental but completely  
14 unexplained. The IRS had just denied a waiver in the fall  
15 of '86. They assumed we could get three waivers. Under  
16 the statute, under the Internal Revenue Code, you need  
17 security for waivers.

18 We had no security to give, given our status in  
19 bankruptcy. They assumed that we could keep the 50  
20 million concessions that we had gained in exchange for the  
21 replacement benefits, even though the replacement benefits  
22 would be gone if the plans were restored, a completely  
23 fallacious assumption, no analysis of it one way or  
24 another. The fact is that part of the -- of the record is  
25 entirely insufficient under the Administrative Procedure

1 Act.

2 QUESTION: I bet you don't agree, Mr. Kaden,  
3 that the agency's reasons were independent rather than  
4 cumulative?

5 MR. KADEN: I think they've made clear that --  
6 that the reasons are independent. I just don't think  
7 that's legally valid. I think they have to be mutually  
8 dependent.

9 QUESTION: I know you -- I know you argue that  
10 as a matter of law, but let's assume I disagree with you  
11 as a point of law. In fact, were the reasons that the  
12 agency gave at the time the agency gave them, were they  
13 independent reasons?

14 MR. KADEN: They were independent reasons.

15 QUESTION: Okay.

16 MR. KADEN: Their position is that abuse by  
17 itself justifies restoration, and for the reasons I've  
18 indicated, we disagree with that.

19 Our final point is the process point. The  
20 question of what procedures apply in informal adjudication  
21 is, as the Solicitor General indicates, an important one  
22 not yet addressed by this Court. But let me suggest that  
23 the suggestion here, that we didn't have notice and an  
24 opportunity to rebut, is -- is fundamental.

25 It's fundamental to the development of a record

1 sufficient for review. So it is not like a -- what the  
2 D.C. Circuit Judge Ginsberg called a design standard where  
3 you impose procedures on an administrative agency which  
4 may bring into play the Vermont Yankee mandate not to do  
5 that.

6 It is, rather, a suggestion of procedures that  
7 goes toward creating a reviewable record. That is a  
8 performance standard in the phrase that Judge Breyer used  
9 in his book on regulation and reform. And, indeed, the  
10 difference between imposed procedural requirements which  
11 bring into play Vermont Yankee and procedures necessary to  
12 create a record sufficient for review.

13 That difference, which brings into play Overton  
14 Park, is a difference Justice Scalia noted in his Vermont  
15 Yankee article some years ago.

16 We think on that ground alone --

17 QUESTION: Thank you, Mr. Kaden.

18 MR. KADEN: -- the case should be remanded.

19 QUESTION: Ms. Flowe you have three minutes  
20 remaining.

21 REBUTTAL ARGUMENT OF CAROL CONNOR FLOWE

22 ON BEHALF OF THE PETITIONER

23 MS. FLOWE: May it please the Court:

24 I'd like to first begin by addressing the --  
25 what I consider outrageous claim that we were somehow

1 motivated here by a desire to manipulate our claim against  
2 this company.

3 The underpinnings of that assertion is the new  
4 law that was passed, which took -- which was passed three  
5 months after we took the action in this case. Obviously,  
6 we couldn't have anticipated that. But that argument also  
7 assumes that these plans are going to reterminate and  
8 there's no basis for that assumption here.

9 As I mentioned earlier, the plans themselves had  
10 more than enough assets to continue for several years.  
11 We --

12 QUESTION: Does one of the plans now have no  
13 assets in it?

14 MS. FLOWE: That is incorrect, Justice O'Connor.  
15 As I mentioned in my earlier dialogue with Justice  
16 Kennedy, because the agency uses this proportional  
17 funding, we've been paying some of the benefits out of our  
18 premium funds under that plan.

19 That does mean that there will be a -- an amount  
20 payable back to the agency once restoration is upheld.  
21 But the plan does have money. It will not have to  
22 terminate in an mandatory termination, if restoration is  
23 upheld.

24 Now, they also -- Mr. Kaden also talked about  
25 the fact that the company itself might be able to do this,

1 absent a mandatory termination. But he doesn't tell you  
2 how difficult it is to do that. As he himself  
3 acknowledged, the company couldn't voluntarily terminate  
4 these plans in the first instance. And there was a good  
5 reason for that. It's because the union wouldn't let  
6 them. Under ERISA to terminate a plan voluntarily, the  
7 company has to bargain with the union to remove the -- the  
8 contract bar to termination.

9 If follow-on plans are not on the table, it's  
10 altogether possible that the union will not agree to  
11 termination and will, instead, if it is convinced that  
12 some financial concessions have to be made, will make them  
13 in other areas rather than allowing these pension plans to  
14 terminate again. But even if the company --

15 QUESTION: Why is that any good? I mean -- that  
16 -- that, it is seems to me, to be the great flaw in the  
17 government's theory that we're creating an efficient  
18 economic marketplace or something.

19 I cannot imagine that unions are so  
20 unsophisticated that if we agree with your position in  
21 this case, they will simply say in the next negotiations,  
22 okay, don't give us increased pension benefits, give us -  
23 - give us the money in some other way. I mean higher  
24 wages or whatever. And you're still have one company  
25 competing against another company at a disadvantage

1 because 85 percent of the pension benefits are being paid  
2 by the fund for one of them.

3 Why -- why should we stretch the -- you know, to  
4 reconcile the bankruptcy law and the labor law in order to  
5 preserve the necessity that the union get its -- its  
6 advantages in some other way than pension benefits in  
7 particular?

8 MS. FLOWE: I'm not sure I understand, Justice  
9 Scalia. What I'm suggesting is that be -- if the union  
10 doesn't think it can have follow-on plans, once the  
11 company tries to negotiate to get permission to terminate  
12 -- to reterminate these pension plans, the union will say  
13 no.

14 Because -- and -- and only if it's convinced  
15 that the company has to have some financial concession  
16 somewhere, might it agree to other kinds of concessions in  
17 order to allow these pension plans to continue. And even  
18 if the company can convince the union that -- I --

19 QUESTION: You don't think a union will think,  
20 boy, if I let them terminate, the fund will pay 85 percent  
21 of all the pensions in the future? That means this  
22 employer is going to be able to pay a lot higher wages.  
23 Why wouldn't that be an intelligent thing?

24 MS. FLOWE: Again, if follow-on plans are off  
25 the table, in the agency's experienced judgment in this

1 area no arrangement other than follow-on plans, which  
2 replicate the terminated pension plan, have proven to be  
3 as satisfactory to employees generally. It may not be the  
4 -- it may have the same economic dislocation, but it  
5 should continue having the very important deterrent effect  
6 to discouraging unwarranted terminations.

7 Thank you.

8 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Flowe.

9 This case is submitted.

10 (Whereupon, at 1:59 p.m., the case in the above-  
11 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. 89-390 - PENSION BENEFIT GUARANTY CORPORATION, Petitioner V. LTV

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CORPORATION, ET AL.

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