OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: NATIONWIDE MUTUAL INSURANCE COMPANY, ET AL., Petitioners v. ROBERT T. DARDEN

CASE NO: 90-1802

PLACE: Washington, D.C.

DATE: January 21, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

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NATIONWIDE MUTUAL INSURANCE :

COMPANY, ET AL., :

Petitioners :

v. : No. 90-1802

ROBERT T. DARDEN :

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Washington, D.C.

Tuesday, January 21, 1992

The above-mentioned matter came on for oral argument before the Supreme Court of the United States at 10:52 a.m.

APPEARANCES:

GEORGE R. RAGSDALE, ESQ., Raleigh, North Carolina; on behalf of the Petitioners.

CHRISTOPHER J. WRIGHT, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioners.

MARION G. FOLLIN, III, ESQ., Greensboro, North Carolina; on behalf of the Respondent.

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P R O C E E D I N G S

(10:52 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 90-1802, Nationwide Mutual Insurance Company v. Robert Darden.

Mr. Ragsdale, you may proceed.

ORAL ARGUMENT OF GEORGE R. RAGSDALE

ON BEHALF OF THE PETITIONERS

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

The issue here is whether an insurance agent, Mr. Darden, initially found by District Judge Boyle to be an independent contractor, was instead and employee of Nationwide for purposes of ERISA. If Mr. Darden was not an employee, the provisions of ERISA did not apply to him. Thus, the case turns upon the proper definition of employee.

We have been here before. This is a revisitation in an ERISA --

QUESTION: (Inaudible).

MR. RAGSDALE: Pardon me?

QUESTION: So have we.

(Laughter.)

MR. RAGSDALE: Justice White, I know you have been here, because you were a member of the Court which

decided United Insurance Company.

This is a revisitation in an ERISA context of identical issues which have already been decided in favor of the position which both Nationwide and the Government assert today. The background of history is that Congress enacted both the National Labor Relations Act and the Social Security Act by making them applicable to employees. And by using that word, standing alone, without more, as here.

And in the forties, this Court, in Hearst and Silk and Bartels, decided that it would conceive a definition of the word employee different from that which Congress intended. And Congress repudiated those three decisions and asserted what the Senate committee called the unbroken intention of Congress to insist upon the application of the common law of agency in determining who was and who was not a member of the class of employees.

After the confrontation between Congress and the Court was resolved, the litigation began anew. In 1962, the Court decided a Social Security case in Enochs, applied the principles of the common law of agency. And then in 1968, when Justice White was here, it decided United Insurance. And the writer of that decision, Justice Black, said these word, which I thought were profound, and I want to repeat the Court this morning. He

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said, in trying to determine who was a member of the class of employees in a Labor Act case, there is no doubt, he said, there is no doubt that we should apply the common law agency test here in distinguishing an employee from an independent contractor.

QUESTION: Justice Black was sort of a literalist. He hung on the literal meaning of words a lot.

QUESTION: (Inaudible) body here that does that.

QUESTION: Nobody does that anymore.

(Laughter.)

MR. RAGSDALE: Two terms ago, Justice Scalia, Justice Marshall, writing for a unanimous Court in Reid, and citing decisions of this Court going back to 1915, said: In the past, when Congress has used the term employee without defining it, as it did here in ERISA, we have concluded that Congress intends to describe the conventional master-servant relationship as understood by common law agency doctrine.

QUESTION: Mr. Ragsdale, the Solicitor General, whose representative will be speaking, I guess, this morning, suggests that the common law test should be applied with an eye to the remedial goals of the legislation. And in what ways do you agree with that and in what ways would the remedial goals of ERISA apply, do

you think, to affect the common law test?

MR. RAGSDALE: Justice O'Connor, he discusses it, but he does not propose it. Mr. Darden wishes it, but he cannot demonstrate that he is entitled to it.

There is no case that I know of -- and I've looked hard because I thought somebody would ask me -- there is no case that I know of which has ever turned and been made distinct by applying the common law principles of agency, and then twisting it one ratchet to make it by considering the remedial goals of ERISA, or the Labor Act, or the Social Security Act, to make it come out different. Only one court that I know of has gone through the exercise of considering it, and that was the district court in Harlow, cited in our brief. Judge Kobrines went through the exercise, and when he got through he decided that it made no difference to the outcome of the case.

My answer is that it cannot be demonstrated that a consideration of the remedial goals of the legislation will give a different result than that which is obtained by the application of the principles of the common law, and anyway --

QUESTION: I assume that the remedial goals of the legislation include the use of the word employee, don't they?

MR. RAGSDALE: That was what was coming after

anyway. And anyway, that was the word Congress chose to achieve the remedial goals of the legislation, to extend valuable, enormously important benefits to a segmented group of the work force, employees, who are the same focus as in the Labor Act, who are the same focus as in the Social Security Act.

But there is a line, and the line ends with employees, and it does not extend to every person in the United States who works.

QUESTION: Mr. Ragsdale, you assert in your brief that one reason we should agree with you is that the -- is that the test proposed by the Fourth Circuit will be very confusing and difficult to apply. Do you really think it's going to be any more difficult to apply than the common law employee test?

MR. RAGSDALE: I do. I do, Justice Scalia. It would seem to me that the --

QUESTION: I mean, the latter is venerable confusion, but it's still confusion, nonetheless, isn't it?

MR. RAGSDALE: It would seem to me that what I call the Darden test, the test articulated and decided by the Fourth Circuit, is dependent in every case upon the personal desires of the individual. Did he or did he not rely upon the affirmations or whatever were made to him?

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What does he expect, if anything? Does his investment behavior change as he goes through his life span? Does he forego the means of making other investments to provide for his retirement? How can anyone possibly know that unless every year a plan administrator sends out a questionnaire to everybody in the United States who is covered by a plan?

It is a subjective, unprincipled test which cannot be determined by -- objectively in advance. And as far as I can tell, it will cause great confusion, and I think that is one of the reasons that Mr. Wright is here this morning to argue for the Department of Labor and the Department of Treasury, and urge the Court not to adopt the Darden test, but indeed to reverse the decision of the Fourth Circuit.

QUESTION: Do employers need to know on an ongoing basis which persons are covered by ERISA and which are not?

MR. RAGSDALE: They do, Justice Kennedy, because if they do not, an employer -- let's take a big employer, any big employer. General Motors needs to know whose in their plan because they need to know if they've got enough money in their plan to take care of whoever is in it.

QUESTION: Well, of course they need to know who's in the plan. Do they need to know how many of those

who are in the plan are covered by ERISA? Do they need to know that for any ongoing management purposes?

MR. RAGSDALE: If I understand Your Honor, they do need to know who is covered by ERISA and who is not because their plan must be funded to provide for those who are. And it need not be funded for those who are not.

Two years -- two terms ago, in Reid, the Court unanimously applied the common law of agency, declaring that the correct test is the right of the hiring party to control the manner and means of rendering service. Judge Boyle, the district court judge who granted summary judgment -- unlike Mr. Finley, I lost, but I should have won -- Judge Boyle granted summary judgment in favor of Nationwide in the first place.

And he applied the decisions of this Court in United Insurance, quoting from it, assessing the total factual context in light of what that court called the pertinent common law agency principles. He applied 14 detailed and undisputed common law factors, and decided that Mr. Darden was an independent contractor. Those pertinent common law factors are essentially the same as those identified and applied 4 years later and two terms ago by this Court in Reid.

Mr. Darden appears to suggest that the common law of agency is the natural enemy of ERISA. Quite the

contrary. Federal courts, particularly the United States Court of Appeals for the District of Columbia, have twice applied the common law of agency in ERISA cases, in ERISA cases, and found in favor of the employee, not against the employee. It is a fallacy to presume that the common law of agency always works a bad result.

Mr. Chief Justice, I have not much time because my argument is bifurcated. Such time as I do have left, I respectfully reserve it for rebuttal.

QUESTION: Very well, Mr. Ragsdale.

Mr. Wright, we'll hear now from you.

ORAL ARGUMENT OF CHRISTOPHER J. WRIGHT

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE PETITIONERS

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

If I could first turn to Justice Kennedy's question, I would like to add a few more comments. Employee is a very basic term in ERISA and it's used in a variety of contexts, and I can think of three where an employer would very much need to know from the start whether he's dealing with employees or independent contractors. First, the basic tax qualification rule provides that a plan may only obtain the tax benefits available under ERISA if it exists for the exclusive

benefits of employees.

Second, ERISA's nondiscrimination rules allow tax benefits for plans only if the plans do not discriminate against low-compensation employees. Again, you need to know what -- who is an employee, and who is an independent contractor in figuring out whether there's discrimination.

Third, whether or not a plan qualifies for tax benefits which are available under title II of ERISA, if the plan affects employees, then the employer must comply with the reporting and disclosure provisions in title I of ERISA. So it's critical from the start for an employer to know whether he's dealing with people covered by the statute or not. And that is why both Labor and the IRS provide for employers to get opinion -- opinion letters from them, revenue rulings, as they are called in the case of the Internal Revenue Service.

And I think it's obvious, for the reasons Mr. Ragsdale stated, that the Fourth Circuit's test, which turns on the subjective reliance factors of individuals, is simply not a practical test to use here. On the remand after the Fourth Circuit's first decision, the district court determined that Darden is an employee largely because, although he had opened an individual retirement account and had taken out an annuity, he had only put

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about $18,000 in those accounts. If he had put more money in the account, the district court would have found that he wasn't relying on Nationwide's plan, and would have found him to be an independent contractor.

We don't think that the qualification of plans can turn on such subjective criteria.

Excuse me, Justice Scalia.

QUESTION: May I -- I thought you'd finished that thought.

As I understand it, although Mr. Ragsdale doesn't seem to think so, I took your brief to differ a little bit from -- and the Government's position to differ a bit from his in that he would rely upon the common law test and the Government apparently would rely primarily on the common law test but not exclusively.

MR. WRIGHT: That's right, Your Honor.

QUESTION: What do you add to the common law test?

MR. WRIGHT: We do, as Justice O'Connor put it, think that it has to be applied in terms of the remedial purposes of ERISA, and let me try to tell you what I mean by that.

QUESTION: Try.

MR. WRIGHT: First, let me say that we -- this isn't our test. This is this Court's test set forth in

Rutherford Food, which I think is the most relevant case for this Court to consider. Rutherford Food was the 1946 case involving the Fair Labor Standards Act. The definition of employee in the Fair Labor Standards Act is identical to the definition of employee in section 36 of ERISA. That is, it says an employee is any individual employed by an employer.

Now this Court looked primarily to the common law factors in determining whether the butchers involved in that case were employees or independent contractors. But it also said that Congress' choice of such broad language, any individual employed by an employer, indicated that in some cases the test might depart from the common law. This Court said that, page 728 of the opinion. It also added that it was most appropriate to look at industry practice to see whether a label was being attached simply to circumvent the purposes of the act.

In the Rutherford Food case, for instance, these boners were clearly a part of the whole process of turning cattle into retail products. And the --

QUESTION: Well, Mr. Wright, is the Rutherford Food case, is that from the same era and vintage as the Hearst case, which was overruled by Congress?

MR. WRIGHT: It is. But let me say that Congress has not --

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QUESTION: Overruled Rutherford?

MR. WRIGHT: No. And Congress' adoption of the exact language used in the Fair Labor Standards Act in 1974, in light of that language in the FLSA and this Court's decision seems to us to be a powerful evidence that Congress intends ERISA to be similarly interpreted.

Now --

QUESTION: But for the fact that nobody knows how it makes any difference, I guess that would be a strong argument. But if Congress, like Mr. Ragsdale, has never been able to find any instance in which it made a dime's worth of difference, why would they go to the trouble of amending the statute?

MR. WRIGHT: Well, let me turn to that. As you said earlier, there's some venerable confusion involving the common law test. The common law test has led to clear answers in some -- in many cases. And indeed, we think it's led to a very clear answer with respect to insurance agents like Darden. They are independent contractors. But debit agents, for instance, the sort of collection agent involved in the United Insurance case, the courts, the State courts are all over the lot in the auto accident cases as to whether debit agents are independent contractors or whether they're employees.

We think in a situation where the common law

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test does not clearly lead to one result or another, it would be proper to consider the remedial purposes of ERISA and conclude, just as this Court concluded in applying the common law test, that debit agents might properly be considered the employees.

QUESTION: But why is that? I mean, the remedial purposes of ERISA include limiting ERISA to employees. It seems to me real bootstrapping to say, well, since you consult the remedial purposes of ERISA, and those remedial purposes are limited to employees. And therefore, for some reason we should expand the meaning of employees?

MR. WRIGHT: I think that there are certain close cases where it's not so much an expansion as a rule of how to determine whether someone like debit agents are on one side or another.

Let me turn to a second difference. Under the common law --

QUESTION: So this is what the rule means: in a close case they are employees and are covered. Is that what the broad remedial purposes thing means?

MR. WRIGHT: Well, unfortunately, it's not always that easy. Sometimes the remedial purposes of ERISA would point, as in the Professional and Executive Leasing case, to a finding that the people in question

were not employees. That is the case that involves the second difference.

One of the common law factors is the label attached to the employees. And there is -- there have been many cases involving what seemed to be clear attempts to circumvent ERISA. For instance, in that case, that was the case where the professionals, in order to avoid the nondiscrimination rules and not cover their nurses and secretaries, made an agreement that they would be employees of a leasing company which purported to lease them back to their professional corporations to provide services. In that case, looking at the whole transaction, the IRS, and then later the tax court, agreed that the professionals were not employees of this leasing company, but were in fact employees of the professional corporation. So that if the professionals wanted to set up a tax-qualified pension plan, they would have to cover some of their employees as well.

There's a third difference between the way the IRS and Labor approach these cases and the way it often works in the common law test. And the common law test is often applied as in the auto accident cases in an intensely fact-specific way. With the debit agents, for instance, there have been cases from the same State where a debit agent who's on his way to make a collection, their

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primary job is found to be an employee. But if a debit agent happens to be on the way to sell insurance to someone, he is found to be an independent contractor.

Now for the reasons I started out with in speaking to Justice Kennedy, it seems clear to us that a more categorical approach has to be taken under ERISA, and persons -- there has to be a treatment of insurance agents employed -- for instance in this case, all insurance agents covered by the same agency agreement with Nationwide have to be placed on one side of the line or the other.

QUESTION: Even if the terms of their employment are different? I don't understand. All debit agents have to be --

MR. WRIGHT: If they're all covered by the same agency agreement. Everyone covered by the same agreement should be treated the same.

Thank you.

QUESTION: Thank you, Mr. Wright.

Mr. Follin, we'll hear from you.

ORAL ARGUMENT OF MARION G. FOLLIN, III

ON BEHALF OF THE RESPONDENT

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

I represent the respondent Robert Darden. I ask

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the Court to affirm the judgment in Mr. Darden's favor, allowing him to receive his retirement benefits. I'd like to discuss for just a second the history of these events of the statutes -- the way one could look at them.

The three cases that held that a broad remedial social legislation, such as the Fair Labor Standards Act, the National Labor Relations Act, the Social Security Act, should be construed in a manner to reflect the broad remedial purposes of the statute, not just use the common law test, all took place in the 1940's. Three -- two of those decisions are the ones, Hearst and U.S. v. Silk. Hearst case affected the National Labor Relations Act. U.S. v. Silk interpreted the Social Security Act.

Congress, in about 1947 or '48 came back and amended the Social Security Act, and also amended the National Labor Relations Act to specify that the term employee in those acts was to be construed using the common law interpretation, the common law agency interpretation.

Now the Fair Labor Standards Act, which is interpreted in the Rutherford Food Corporation case in about 1947, '46, has never been amended as far as I know. That definition, statutory definition, is exactly the same as the statutory definition of employee which is contained in ERISA.

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So that if you look at the state of the law in 1974, and that Congress had before it when they adopted ERISA, they knew that if they wanted to restrict the term employee to a common law meaning, they could write it in there like they had done before in the National Labor Relations Act and the Social Security Act. They could do it if they wanted. Maybe they never thought about it, but they didn't do that.

They adopted the same interpretation as the Fair Labor Standards Act. And they knew when they did that that the Rutherford Food Corporation was still the law of the land, and is somewhat vague and difficult to understand as it was. One could reasonably assume they knew they were adopting the statute, like the Department of Labor says, was a broad, remedial social statute.

And they also must have known the same time that under the Rutherford Food Corporation, the courts -- the courts would look to the purposes of ERISA in interpreting the term employee and they wouldn't be bound solely by the common law. So that our argument is that you are writing a slightly more open book.

And I add one other -- one other fact to it. That in 1961, this Court, in Goldberg v. Whitaker, held in a case involving the Fair Labor Standards Act, that some people who did some work at home in the crocheting field

were employees. And in that case, the Court repeated the ruling of the prior holdings that they'd done in Rutherford Food and the Hearst case by saying that the Court was not bound by the technical concepts of the common law, but would look to the purposes of the statute and use a definition based on the economic realities of the situation. That was in 1961. So the Court did that in '61. Congress would have had that opinion before then, in 1974, when they enacted ERISA. It was not clear -- I mean, I'm not contending that one can say exactly what Congress intended, but you've got to assume Congress -- or recently --

QUESTION: Well, Mr. Follin, if I understand what you're saying, you're saying we should look to the same definition and test as the Court did in Rutherford Food under a statute, a different statute with similar language. Is that what you're saying?

MR. FOLLIN: Well, that would be one way to look at it. Let me be more specific exactly --

QUESTION: I thought that was the position taken by the Solicitor General. And in his view, then that leads to a reversal here, because it wouldn't include an independent contractor such as your client.

MR. FOLLIN: Well, what I'm asking the Court to do is to focus on the purposes of ERISA. And whether you

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phrase it as using the Darden test standing by itself, or whether you take the Darden test or some of the factors that arise from ERISA and combine it in some fashion with the common law test, like it looked like the Court did in Rutherford Food.

There's a series of cases where courts have done different things. I just -- each statute's somewhat different. Fair Labor Standards Act, some of the circuit courts have --

QUESTION: I just want to be clear as to what your argument is.

MR. FOLLIN: Yes.

QUESTION: If I'm hearing you as I think I am, you are saying exactly what the Solicitor General is saying is the test, but you come out differently.

MR. FOLLIN: No, I don't say exactly the same as the Solicitor General. I agree with the Solicitor General that you have to take into account the broad remedial purpose of the statute. That is, that these common law factors are not sufficient alone.

Where I disagree with the Solicitor General is how I do it. That is, how you go about doing this. There is a way to do it. The Fourth Circuit has provided a guideline and a method to do it. If I could just give an example to the way I come out differently than he would on

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his test.

For example, one of the common law indicia that's listed in those lists of things you see in the restatement of agency, is whether the person involved owns his own tools or instruments of trade. That's a throwback, obviously to something a long time ago when people -- when this thing first came up.

In this case, Mr. Darden owned the building. He also owned his car. He owned the typewriters and desk inside his office. So in a way, he looks like an independent contractor under the common law test. However, if you look at the business he was in, which was selling insurance, he did not own the only real asset the business had, which was the expirations, that is the policies. An independent insurance agent has one asset. That is, his business, his good will, his policies.

QUESTION: Well, why are not these other physical properties that he owns also assets? Perhaps not as important or not as -- worth as much, but they're certainly assets.

MR. FOLLIN: They are assets. That is correct, Your Honor, but it seemed to me that when you're considering the case, they're incidental to the result or where you ought to be focusing on ERISA. That the focus should be on the ownership of assets that are meaningful

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with respect to retirement.

QUESTION: Do you think the Fourth Circuit opinion is consistent with Rutherford Food? They only cite, as I read their opinion, the two cases that Congress overruled. They never cited Rutherford Foods.

MR. FOLLIN: Well, there is an inconsistency there, Your Honor, because Rutherford Food considered some typical common law factors as well as the purposes of the statute. It looked like the Fourth Circuit just focused on the purposes of the statute.

QUESTION: Yes, and Rutherford Food is much closer to endorsing the common law test than Hearst or Silk were, I think. Don't you agree with that?

MR. FOLLIN: Well, I'm not so sure I do. I think the Court looked more at the economic realities in reaching its result.

QUESTION: In Rutherford Food?

MR. FOLLIN: Yes. In the way these people were -- they said, well, they were getting paid, you know, so much, how much for each piece of item that passed on, each piece of meat, or whatever they're doing. But the Court concluded they were (a) dependent on this company for their livelihood, and they were really part of the business.

Now in this case, in Mr. Darden's case, about

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who owned the business. He -- anybody that goes into business -- I mean, the reason you go into business for yourself is to build up some equity, something you can use when you get old. You can sell it. You can retire. You can give it to your children. You don't do it to get a salary now because it's a lot of work.

So Mr. Darden built -- he couldn't build up his own equity, his own business because Nationwide owned it. They owned the whole thing. He couldn't sell it. So were he to retire -- he couldn't give it to his children were he to retire. He couldn't sell it.

It's not like people -- it's -- typical independent agent can sell his business and retire on it. That's why when you focus on that factor, that's the main one, the main contentions I have, is the Court should focus on retirement benefits itself, not necessarily the furniture. The furniture, it doesn't make any difference who owns the furniture, to me. I don't think that amounts to a hill of beans.

QUESTION: So the taking into account the broad remedial purposes of the statute means finding to be employees those who need the money. Is that what it comes to?

MR. FOLLIN: No, Your Honor, that's not true. It focuses on people who have -- their assets are not

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oriented toward -- necessarily toward their retirement because they're depending in a way, they are relying and depending on the representations that the employer or whoever gave them the retirement made.

The case is that -- here is that Nationwide told them it was their retirement. They gave them a film and slide show that are in the evidence. This is your retirement. You can depend on this. He said okay, and he stayed there 20 years. And then they terminated him and he didn't get it. But the relationship --

QUESTION: Well, I thought the agreement also provided that if the agency were terminated and the agent then went into competition within a 25-mile radius, that the benefits would be lost.

MR. FOLLIN: That's correct. That's what it provided. And that was what it was that we're contending that those provisions are not enforceable because of ERISA, because of Congress' policy to see -- to give people a nonforfeitable right. That's why they enacted the statute. I mean, if you've got a nonforfeited right, I guess you can steal money and still get your pension. That's my understanding of the rule. And that's why we filed the claim.

Another factor in -- that relates to the remedial purposes of the statute and what the Fourth

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Circuit -- one of the things they discussed was control. And it's in both -- both in the common law definition you have control and in the other one, in the Darden thing, about who controls the details of the business.

In this case, the court found that Nationwide controlled the terms of the agreement itself, that is that they were able to dictate to their agents what went in it. They were given the agreement, said you can sign it or leave. Now, that reflects the type of person who's -- who needs or would be covered by ERISA. It's not -- and also, if you think about an independent contractor, you think about the common law definition. You can say, well, under the agreement they couldn't do this and they couldn't do that. But if you can dictate the terms of the agreement itself, it seems to me you have total control. It's irrelevant. What -- they let him do it. I would compare the relationship between Nationwide and Darden to more of a parent-child relationship than a brother-sister relationship.

QUESTION: Does the definition section of ERISA include the provision in the Fair Labor Standards Act that says an employee includes any individual employed by an employer? But it also goes on to say employ includes to suffer or permit to work.

MR. FOLLIN: That's not in ERISA, Your Honor.

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QUESTION: It is not?

MR. FOLLIN: No, sir.

QUESTION: Well, that is the -- that seems to have been very important under Rutherford, because that definition was taken from the Child Labor Act.

MR. FOLLIN: Well, I'm not aware of the origin of it, but I agree it had bearing on the court's decision. But I don't think the fact that the word employ --

QUESTION: But that certainly doesn't sound like a -- the common law definition, does it?

MR. FOLLIN: Well, I don't know. I looked it up in the dictionary and put it my brief, the word employ. And employ means -- it's a fairly broad term. It means to -- I don't recall, but one of the examples it had was you employ a lawyer to straighten out a legal tangle, which would imply that the word employee includes independent contractors. It's a word you use someone to do something for you. I might employ someone to fix my house. That doesn't mean that that person's my employee. It only means I'm using him.

I was looking at the --

QUESTION: Well, then would you still feel that Rutherford was controlling in the interpretation of the ERISA definition of employee?

MR. FOLLIN: I would think it would be, yes,

Your Honor.

QUESTION: Well, why if the ERISA did not carry over the full definition of employee from the FLSA and the Court in Rutherford relied in part in its determination on the part that was not carried over into ERISA?

MR. FOLLIN: Well, I think that the statement in Rutherford that the definitions of the law employed should look to the purposes of the legislation in a broad remedial statute. To me, that policy out --

QUESTION: Well, what statute isn't remedial, Mr. Follin? All statutes are presumably passed to remedy something.

MR. FOLLIN: Well, I'm sure they are, but I don't -- I wouldn't consider the Internal Revenue Service Act a broad remedial statute.

QUESTION: Why not? Supposing there's a sweeping overhaul to the Government. The Congress says too many people have been avoiding their taxes and we're going to do something to remedy this. We're going to really clamp down. Why wouldn't that be a broad remedial statute?

MR. FOLLIN: Well, I just -- the ones they said are broad remedial statutes dealt with problems that people had facing some kind of economic difficulty.

QUESTION: You think only statutes designed to

help people in economic difficulty should be broadly construed?

MR. FOLLIN: I was just trying to compare ones that the courts have said are that way. I don't know. There was the National Labor Relations Act, the Social Security Act, the Fair Labor Standards Act, and this -- and ERISA are the ones, the only four I'm aware of that where people have used that tag. There may be many others, but I'm not aware of them. I don't know. I have not tried to go find them all.

Those are the only four that we've really talked about here. This one is. And it appears to me it would be, and if that's the case, then it seems to me you're going to look to Rutherford, U.S. v. Silk, and these other cases and not use just the common law definition of employee.

QUESTION: Well, certainly you wouldn't look to Silk or to Hearst where Congress overruled the holdings?

MR. FOLLIN: Well, they overruled it only with respect to those particular acts. They didn't overrule the concept that was put forward. They said we don't want that in the National Labor Relations Act. The said -- they didn't say anything about the Fair Labor Standards Act.

QUESTION: No. I agree with that. But

certainly you would not look to the Hearst case after Congress said we don't want that in the National Labor Relations Act, would you?

MR. FOLLIN: No, absolutely. You wouldn't look at it in interpreting the National Labor Relations Act, true. But if you were trying to use that concept in it with respect to the broad remedial purpose of the statutes and how you apply it, you might look at it. Courts have.

QUESTION: Well, why would you do that if Congress later overruled it?

MR. FOLLIN: Well, because just -- in that -- let me just give you an example. In the case, that Reid case, CCN v. Reid, in the opinion of this Court where they said, well, you know, typically you look at the common law to look at common terms. You would look at the common law. And they put -- compare NLRB v. Hearst where the Court took a broader view based on the -- text -- context of the statute.

I mean, this Court, that was just a few years ago, cited NLRB v. Hearst Publications, the proposition that in a -- for this type of statute -- I'm not saying this particular statute, but this type of statute, you would take a different view. You would not just do it. So it's still alive and well.

QUESTION: Do --

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MR. FOLLIN: I took that to mean, excuse me, that it was alive and well.

QUESTION: Do you think the word compare in a subsequent case is necessarily an approving citation?

MR. FOLLIN: Well, I don't know whether you consider that approving citation, Your Honor. I would say it was in the opinion. I read it. And I took it to mean that Hearst was not overruled. If you say compare, and I -- compare to me means well go look it up. It's different. So that's what we did.

I think that it does -- the question is whether it makes a difference. It does make a difference. It makes a difference to Mr. Darden and it makes a difference to other -- I'm sure other people, even though in Mr. Darden's case, as far as the difference between a -- the common law definition, I guess he would be considered in sort of a gray area. There are factors --

QUESTION: The Fourth Circuit in its opinion said he didn't meet the common law definition, didn't it?

MR. FOLLIN: They said he probably did not.

QUESTION: Yeah.

MR. FOLLIN: Yes, that's correct. That's what they said. Now, the problem with the status of the case now on that -- looking from that aspect is that we never tried that issue out. The only thing we ever tried out

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was whether Mr. Darden passed the test in the Darden opinion. We never tried out the question of whether he was actually the common law employee or a common law independent contractor.

QUESTION: If we happen to disagree with you, it would go back I suppose, for further proceedings.

MR. FOLLIN: That's possible. Yes, Your Honor.

QUESTION: To see whether under the right standard Darden's an employee.

MR. FOLLIN: Correct. Because we never -- I just -- it's a mistake to say -- to jump to conclusion that he is an independent contractor based on what's before you now because the trial court just didn't want to hear about that. They didn't want to spend the time figuring out all these different things, the minutia of detail about control that was exercised over him.

But what I am asking the Court to do is to put into the standard the important relevant considerations arising out of the purposes of ERISA and to avoid simply adopting a common law standard that (a) doesn't have any relationship to the purposes of that statute, and (b) has been proven, at least to my satisfaction that did not work in cases where it's been tried.

And I cited in my brief Professor Larson's book on workers' compensation. He was very critical of taking

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this -- the common law standard, transposing -- just putting it over into workers' comp -- extremely critical of it, and said it'd not worked and terrible problem. And they've had to go back. Now they're changing it. They're changing it to a slightly different rule because workers' comp is entirely different from vicarious liability.

If you adopt the standard like that, and just stick it in here, I think if you -- if the results are the same as what is done is workers' comp, you'll end up coming back -- somebody will come back in 30 or 40 years and have to face a quagmire. I don't know.

If you got -- there was a case I read that you cited last year about seamen and longshoremen. I don't know. It seemed like in 1940 or so, the Court issued an opinion, and this created a lot of confusion and then you had come back 50 years later and kind of tidy it up. It seems to me you're better off in my view looking straight at the statute and Mr. Darden's particular facts, the particular things about Mr. Darden, and writing about that and citing on that basis.

The narrow, the very narrow basis, as narrow as possible, you leave open other considerations out of the circuit courts or other courts to follow, other people to follow, to interpret the ERISA and not close it off by saying you just can use these 10 or 11 factors out of the

restatement of agency. And then you go home and you've listed them. It's like, you know, it doesn't have any relationship to what the purposes of the statute are, and I think that if you relate the purposes of the statute and the common law factors, you can tie them together. And it's perfectly legitimate.

I understand the Rutherford case. I understand you want to be aware of precedent. I understand that the Court wants to go back and look at the common law when they see statutory terms. But I also ask you and urge you to look at the purposes of this statute that -- the statute takes life out of its -- and breath out of what its purposes are. Congress can't anticipate every act, every single person that comes along.

Mr. Darden's case is different. There may be -- never be another Mr. Darden or anyone like him. All I'm asking you to do is look at Mr. Darden's case with great attention to his particular set of facts.

If there are no further questions, Your Honors, I will conclude my remarks. Thank you very much.

QUESTION: Thank you, Mr. Follin.

Mr. Ragsdale, you have 9 minutes remaining.

REBUTTAL ARGUMENT OF GEORGE R. RAGSDALE

ON BEHALF OF THE PETITIONERS

MR. RAGSDALE: Thank you, Mr. Chief Justice.

In further responding to Justice O'Connor, let me say this. I said that the Solicitor General discussed this other kind of test, but that he did not propose it. I have to stand by that. And here is what he said. And I stand by this is what he said. He said the district court's initial decision applied the proper test and reached the correct result. That is indistinguishable from the position now taken by Nationwide and by me. He said, in our view, the district court approached this case properly and reached the correct result in its initial decision.

I stand shoulder to shoulder with the Solicitor General on that statement. He said, the construction of employee, also this construction -- that is the common law construction -- also conforms to congressional use of that term in other context. And he said: The result reached by Judge Boyle is also consistent with the purposes of ERISA. Whatever else he may have discussed, that is what he proposes. It is identical to that which Nationwide now proposes.

Justice White has held up --

QUESTION: He also said in his brief, and he said here, that while those courts have avoided the erroneous path taken by the court below, it is unclear whether they are giving appropriate weight to this Court's

decisions involving remedial social legislation, such as Rutherford Food, et cetera.

MR. RAGSDALE: I concede that he discussed it, as he should, but he does not propose it here.

Justice White has held up to the true light the problem created by this Rutherford Foods case. And that is, he has gone over an looked at the verb, not the noun employee, but he found the right answer. And he found congressional history in the verb to employ. Because in that act, that verb had a different meaning than it does here. And it was to suffer or permit to work. And he is correct. That was born of the Child Labor Laws, where in this country at that time, apparently many little children were either being made to work or permitted to work, and Congress wanted to see that (a) they weren't allowed to if they weren't supposed to, and (b) if they were, they had to be paid a fair wage.

And so there is congressional history wrapped in another word in the Fair Labor Standards Act cases and that is in part a justification for perhaps a different view and a different treatment.

In addition, and I'm not defending this, and I don't want to get into certain quagmires, but in addition to that, there is more congressional history, which is that Senator Black is quoted of the floor of the Senate as

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having said that the word employee in the Fair Labor Standards Act should be, was meant to be, and would be accorded the broadest possible use of that term.

Now, if that's legislative history, and I don't want to argue about it, it is not in ERISA. There is nothing similar to that in ERISA. There is no reason for the Court, finding itself here in ERISA, between the Labor Act and Social Security Act cases, which Congress has declared itself on, and the Fair Labor Standards Act cases over here, there is no reason for the Court to veer from its path and go with the Fair Labor Standards Act definition.

Now, Mr. Follin, my good friend Mr. Follin -- he and I have labored in this case for 10 wonderful years. He's a fine, wonderful lawyer and a good friend. But he urges this Court to do exactly what the plaintiff's lawyers in the Hearst case must have urged the Court to do.

QUESTION: Mr. Ragsdale, I notice in your opening -- in your brief, you managed to find the Hearst case, which dealt with the NLRB, and the Silk case, which dealt with Social Security, but you didn't manage to find the Rutherford Food case, which dealt with the Fair Labor Standards Act. Is there any reason for that?

MR. RAGSDALE: I didn't find it?

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QUESTION: Well, it isn't listed in your table of authorities.

MR. RAGSDALE: We don't believe it is authoritative for these circumstances, and should not be followed in this case. And we do not cite it to the Court as the true path to take. Others do, but we do not.

QUESTION: How about the -- how about your reply brief? The United States filed with this case before you filed your reply brief, didn't it?

MR. RAGSDALE: Yes.

QUESTION: And it certainly used Rutherford Food.

MR. RAGSDALE: Yes.

QUESTION: Did you ever discuss it --

QUESTION: The reply brief does discuss it.

QUESTION: Well, you did discuss it?

MR. RAGSDALE: We discussed it. We know it exists. We do not deny that it has been decided. We say that it is not applicable to the circumstances before the Court this morning. They are different.

Now, Mr. Follin is doing what the plaintiff's lawyers probably did in the Hearst case, which is, Mr. Chief Justice, please focus your gaze upon the history, terms, and purposes of the National Labor Relations Act. And that is exactly what Mr. Follin is saying this

morning. Focus on the purposes of ERISA.

When the Hearst Court focused on the history, terms, and purposes of the National Labor Relations Act and threw the common law test of agency over the side, Congress repudiated the decision, amended the act, and said, don't do that any more. That is why I say we are revisiting here this morning that which has already occurred in the past, just in another context.

QUESTION: We like to view that as Congress just amending the law, Mr. Ragsdale. I don't know that it proves the Court was wrong.

MR. RAGSDALE: No, I didn't say the Court was wrong.

QUESTION: I think the Court properly interpreted the previous National Labor Relations Act, and Congress enacted a new one.

MR. RAGSDALE: I don't think it's a matter of --

QUESTION: Maybe even a different Congress from the one that passed the original act.

MR. RAGSDALE: I take that point, and I concede it. I don't think it is a matter of right and wrong, I think it is a matter of discerning the congressional intent and focusing on it.

QUESTION: Well, they might have said, why you

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were quite right, Mr. Court, in construing the old act, but we just don't like it anymore. So we're going to amend it.

MR. RAGSDALE: Maybe.

QUESTION: Which doesn't affect how you should construe the old act.

MR. RAGSDALE: Well, Your Honor, the decisions of the United -- the decision of United Insurance was 7 years on the books before ERISA was enacted. We have a long history of congressional purpose and intent in my two favorite colors. And Congress could read those. And they knew United Insurance was there where the Court said there is no doubt that we must apply these common law principles. And they enacted ERISA in the face of that.

And Congress must have known that this Court now felt that way about it and would apply and insist upon the application of those principles in ERISA. Otherwise they would have corrected a forthcoming misapprehension by the courts, this Court and the lower Federal courts, and fixed it before it was broken.

But they did not do that. And they have not done that. And it must be the intention and desire of Congress for the common law test of agency to be used in this case.

Mr. Chief Justice, thank you very much.

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CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ragsdale.

The case is submitted.

(Whereupon, at 11:43 a.m., the case in the above-entitled matter was submitted.)

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NO. 90-1802 - NATIONWIDE MUTUAL INSURANCE COMPANY, ET AL., Petitioners V. ROBERT T. DARDEN

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BY Michelle Sanders

(REPORTER)