

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: WILLIAM J. MERTENS, ET AL., Petitioners v.

HEWITT ASSOCIATES

CASE NO: 91-1671

PLACE: Washington, D.C.

DATE: February 22, 1993

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WASHINGTON, D.C. 20543

(CORRECTED VERSION)

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   WILLIAM J. MERTENS, ET AL.,       :

4                   Petitioners               : (CORRECTED VERSION)

5               v.                               : No. 91-1671

6   HEWITT ASSOCIATES               :

7   - - - - -X

8                                       Washington, D.C.

9                                       Monday, February 22, 1993

10               The above-entitled matter came on for oral  
11   argument before the Supreme Court of the United States at  
12   1:54 p.m.

13   APPEARANCES:

14   ALFRED H. SIGMAN, ESQ., Oakland, California; on behalf of  
15   the Petitioners.

16   RONALD J. MANN, Assistant to the Solicitor General,  
17   Department of Justice, Washington, D.C.; as amicus  
18   curiae, supporting the petitioners.

19   STEVEN H. FRANKEL, ESQ., Chicago, Illinois; on behalf of  
20   the Respondent.

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

2 (1:54 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in number 91-1671, William J. Mertens v. Hewitt  
5 Associates.

6 Mr. Sigman.

7 ORAL ARGUMENT OF ALFRED H. SIGMAN

8 ON BEHALF OF THE PETITIONERS

9 MR. SIGMAN: Mr. Chief Justice, and may it  
10 please the Court:

11 This case presents the Court with the issue of  
12 whether a person who knowingly participates in a breach of  
13 fiduciary duty under ERISA is liable to restore losses  
14 suffered by a retirement plan.

15 In 1987, the Pension Benefit Guaranty  
16 Corporation imposed a distress termination on the Kaiser  
17 Steel retirement plan because of what it described at the  
18 time as its gross underfunding. Petitioners, and all  
19 other retirees similarly situated, suffered substantial  
20 losses in their retirement income. Mr. Mertens, for  
21 example, suffered a reduction in his monthly benefit from  
22 \$2,000 to \$500.

23 Petitioners brought this action to recover all  
24 losses to the plan. Petitioners sued the plan's  
25 fiduciaries, officials of Kaiser, for allegedly breaching



1 their fiduciary duties to the plan, and also sued the  
2 plan's actuary, in a separate action which the district  
3 court consolidated, for allegedly knowingly participating  
4 in that fiduciary breach.

5 Essentially, plaintiffs allege that the Kaiser  
6 fiduciaries and Hewitt acted together to purposefully  
7 underfund the plan by failing to change the plan's  
8 actuarial assumptions to reflect Kaiser's decision to  
9 essential terminate its steel-making operations.

10 As a consequence of that decision, a great  
11 number of Kaiser employees were -- were forced to take  
12 full early retirement benefits, which in turn greatly  
13 increased the funding costs to the plan. Because Kaiser  
14 did not fund the plan in a manner to pay for the increased  
15 retirements caused by the closing down of its steel  
16 operations, the plan became insolvent.

17 I'd like to argue three points to the Court  
18 today, the first being that under ERISA section 502(a)(3),  
19 which provides for all appropriate equitable relief to  
20 redress violations of the act, that that statute is broad  
21 enough to encompass redress against a person who knowingly  
22 participates in a breach of fiduciary duty. And that  
23 principle also is a fundamental principle of the common  
24 law of trusts, which should be incorporated into ERISA.

25 Secondly, I'd like to argue that when Congress

1 in 1989 enacted the so-called OBRA amendment to ERISA, it  
2 made -- which had explicitly referred to a preexisting  
3 underlying cause of action under section 502 for recovery  
4 of losses to a plan caused by any person who knowingly  
5 participates in a breach of fiduciary duty, that that  
6 amendment had confirmed that the right on the part of  
7 participants and beneficiaries to sue knowing participants  
8 in fiduciary breaches had always existed under section  
9 502.

10 Finally, Your Honors, I would like to argue that  
11 the liability that we argue for here today is essential in  
12 order to further the remedial purposes of the statute, the  
13 primary function being to deter fiduciary breaches in the  
14 first place, so as to secure the interests of retirees in  
15 their pension benefits.

16 QUESTION: If there were a suit under State  
17 law -- and I think this question relates on all three of  
18 the points you want to bring up, or at least it -- it  
19 gives me an initial grasp of the case. If there were a  
20 suit under State law, what would your position be on  
21 whether or not there's preemption?

22 MR. SIGMAN: Well, in fact we did raise a claim  
23 under State law. We sued Hewitt for malpractice under  
24 State law. And after this Court granted certiorari, the  
25 district court denied Hewitt's motion to dismiss on

1 preemption grounds.

2 I think that the answer to that question in  
3 part's going to depend on the resolution of this case. I  
4 would point out to the Court, however, that ERISA does  
5 provide specifically that plans can be sued and can sue.  
6 And there are many instances where district courts have  
7 held that malpractice actions against attorneys, against  
8 other service providers to plans, are not preempted. But,  
9 once again, that issue is not presented by this case  
10 because Hewitt did not raise it until after the cert  
11 petition had been granted.

12 QUESTION: Mr. Sigman, what provision of ERISA  
13 did the respondent violate?

14 MR. SIGMAN: We contend that the respondent,  
15 Hewitt, violated -- that -- that the violation involved  
16 was the violation of the fiduciaries to adequately fund  
17 the plan. And we contend that 502(a)(3) is broad enough,  
18 because it is an open-ended provision, to provide relief  
19 against Hewitt for aiding and abetting the fiduciaries in  
20 that violation.

21 QUESTION: And what's the section of ERISA that  
22 the fiduciary violated? What would we look to?

23 MR. SIGMAN: That would be section 404 and 409,  
24 Your Honor.

25 QUESTION: 404 and 409?

1 MR. SIGMAN: Right. Section 404 broadly sets  
2 forth the fiduciary standards of ERISA and 409 is the  
3 provision of the act which provides for an action against  
4 fiduciaries on behalf of the plan.

5 Congress provided in section 502(a)(3) of ERISA  
6 that pension plan participants and beneficiaries could  
7 recover, in addition to the remedies explicitly set forth  
8 in that section, other appropriate equitable relief to  
9 redress ERISA violations. The wording is very broad.

10 QUESTION: Yes. It's - it's very broad, but not  
11 universal. It -- it does say other appropriate equitable  
12 relief. What do you deem to be excluded by that adjective  
13 equitable?

14 MR. SIGMAN: I would say that damages, for  
15 example, for emotional distress would be excluded from  
16 that -- by that term.

17 QUESTION: Well, that's simply because  
18 there's -- that doesn't go to the relief, it goes to where  
19 there's a cause of action, doesn't it?

20 MR. SIGMAN: Yes, Your Honor.

21 QUESTION: What -- what relief for an available  
22 cause of action is excluded by -- by putting in the term  
23 equitable? Now, the other side has -- you know, has an  
24 explanation. It says, you know, equitable relief doesn't  
25 include money damages. But you say it includes any relief



1       that could be provided --

2               MR. SIGMAN: To redress. I think that that's --

3               QUESTION: To -- but -- but to redress a breach  
4 of fiduciary duty since that breach would be sued for in a  
5 court of equity, and therefore any relief provided would  
6 be equitable relief. So then why would you put in the  
7 adjective?

8               MR. SIGMAN: Well, Your Honor, I think that  
9 the -- that the limitation is, first, there must be a  
10 violation. And I think that the limitation relates  
11 to -- to the remedy. In other words, the -- the 502(a)(3)  
12 provides that --

13              QUESTION: Well, tell me what remedy would  
14 otherwise be available but for this adjective equitable?

15              MR. SIGMAN: Well, in this case we'd say make-  
16 whole relief, and we say that make-whole relief is  
17 encompassed within the adjective, within the term  
18 equitable relief, Your Honor.

19              QUESTION: Yes, so -- so you might as well have  
20 dropped the adjective.

21              MR. SIGMAN: Well, I don't think so, Your Honor,  
22 because equitable relief traditionally has encompassed  
23 make-whole relief in situations such as this.  
24 Beneficiaries of a trust who are wronged by the  
25 fiduciaries have historically had the relief -- had the

1 relief available to them to be restored, to be made whole.  
2 Exactly, Your Honor. And I'd point out that we're not  
3 seeking money directly for the individuals affected.  
4 We're seeking money on behalf of the plan. We're seeking  
5 to restore losses to the plan, and that is an appropriate  
6 equitable remedy, one which Congress had intended the  
7 courts to apply when --

8 QUESTION: This is not make-whole relief.  
9 You -- you say make-whole relief is not available.

10 MR. SIGMAN: We are saying that make-whole  
11 relief is available.

12 QUESTION: So all relief is available.

13 QUESTION: What isn't available?

14 QUESTION: I'm not looking for what is  
15 available. What isn't?

16 MR. SIGMAN: Well, we're saying what would not  
17 be available would be relief available to the participants  
18 of the plan for the emotional injuries that they've  
19 suffered as a result of having their pension reduced so  
20 substantially, that that would be excluded, for example,  
21 Your Honor. We're saying --

22 QUESTION: Not because --

23 MR. SIGMAN: -- That punitive damages would be  
24 excluded.

25 QUESTION: Well.

1 MR. SIGMAN: We're saying that the limitation  
2 imposed is --

3 QUESTION: But they're excluded not -- not  
4 because of the -- the manner of relief, but because there  
5 -- there's no cause of action for them. I mean it  
6 seems -- this is a remedial section. It -- it's talking  
7 about what kind of relief to address violations. Well,  
8 nevermind.

9 QUESTION: I don't want to take too much of your  
10 time.

11 QUESTION: Well, a short answer, I suppose, is  
12 that inequitable relief is excluded.

13 (Laughter.)

14 QUESTION: Or inappropriate equitable relief.

15 (Laughter.)

16 QUESTION: And what do you make out of the  
17 (a) (5), where it gives the Secretary the power to sue,  
18 doesn't it? Isn't it (a) (5)?

19 MR. SIGMAN: Yes. (A) (5) gives the Secretary  
20 the power to bring a suit --

21 QUESTION: And it -- it says "any other  
22 appropriate relief," doesn't it?

23 MR. SIGMAN: No. It's equitable relief. I  
24 apologize to the Court. The term equitable was mistakenly  
25 omitted from the -- from our briefs.

1 QUESTION: So it's --

2 MR. SIGMAN: On my part.

3 QUESTION: Still is equitable relief.

4 MR. SIGMAN: Yes, yes. (A) (3) and (a) (5), in  
5 terms of the release -- relief available, is identical.  
6 And equitable relief is provided for and I apologize to  
7 the Court for the mistake, the omission in the brief.

8 QUESTION: Well, that's interesting. I thought  
9 you were going -- I thought we could make the big argument  
10 about Congress must have intended something different.

11 (Laughter.)

12 MR. SIGMAN: I'm sorry to disappoint the Court.

13 (Laughter.)

14 MR. SIGMAN: As this Court has stated in the  
15 Firestone case, ERISA's legislative history further  
16 demonstrates that Congress had intended Federal courts to  
17 develop Federal common law in fashioning the additional  
18 appropriate equitable relief described in section 502.  
19 The legislative history also demonstrates that Congress  
20 intended to engraft traditional trust law principles into  
21 ERISA's remedial scheme.

22 Moreover, a fundamental concept of trust law is  
23 that courts will give to the beneficiaries of a trust  
24 those remedies which are necessary to -- for the  
25 protection of their interests. And it's also a



1 fundamental concept and principle of trust law that a  
2 knowing participant in a breach of fiduciary duty is as  
3 responsible as the fiduciary for the breach.

4 In this particular case, the relief which we  
5 urged the Court to approve is essential in order to  
6 fulfill the act's remedial purposes, among the most  
7 important being to deter fiduciary breaches which  
8 frequently could not happen without the assistance of a  
9 knowing participant in that breach.

10 In addition, as I've stated earlier, the  
11 fundamental and most important remedial feature of ERISA  
12 is to assure the interests of retirees in the pension  
13 benefits that they were promised under the terms of the  
14 plan. Imposing the liability which we seek here on  
15 knowing participants would thereby further ERISA's  
16 remedial goals. It would eliminate any incentive that a  
17 nonfiduciary might have to assist or to induce a fiduciary  
18 to breach his ERISA responsibilities.

19 I'd like to turn to the OBRA argument, if I may.

20 QUESTION: Let -- let me ask you, Mr. Sigman, if  
21 I may, section 409(a) talks about the liability of -- of a  
22 fiduciary. Is that correct?

23 MR. SIGMAN: That's correct.

24 QUESTION: And as to him, a court can offer --  
25 can order -- he is subject to such equitable or remedial

1 relief as the court may deem appropriate.

2 MR. SIGMAN: That's correct. And I think that  
3 409, Your Honor, also demonstrates that that relief can  
4 encompass monetary relief.

5 QUESTION: Well --

6 MR. SIGMAN: Because the -- at the beginning of  
7 the section it says "shall be personally liable to make  
8 good to such plan any losses to the plan resulting from  
9 each such breach."

10 QUESTION: And --

11 MR. SIGMAN: "And to restore to such plan any  
12 profits" --

13 QUESTION: But it's -- it's phrased in the -- in  
14 the disjunctive there. Is -- is that correct?

15 MR. SIGMAN: Yes, it is, Your Honor.

16 QUESTION: And then 502(a), section (1)(3), if  
17 the civil action brought by a participant benefit a  
18 fiduciary, that can be brought to obtain other appropriate  
19 equitable relief.

20 MR. SIGMAN: That's correct.

21 QUESTION: So that in one -- in 509 it talks  
22 about equitable or remedial relief, then this section  
23 talks about appropriate equitable relief. Do you think  
24 Congress was really being careful in the terms it used?

25 MR. SIGMAN: I would say that the statute could

1 have been more carefully crafted. For example, the -- for  
2 the phrase "equitable or remedial relief," I don't really  
3 think, frankly, that there's much difference between  
4 equitable and remedial.

5 QUESTION: It just sounds like someone was  
6 talking off the top of their head that had been to first  
7 year law school.

8 MR. SIGMAN: It sounds -- I believe that it's a  
9 redundant phrase. But I do think, despite the sloppiness  
10 in the drafting of the statute, that 409 does establish  
11 that it's appropriate to seek relief which would provide  
12 all losses or restore all losses lost to the plan.

13 In the 1989 OBRA amendment to ERISA, which added  
14 a new subsection, 502(1), Congress --

15 QUESTION: May I just ask one question before  
16 you go on to the other argument? Your claim is that  
17 the -- the breach of fiduciary obligation, not exactly  
18 negligence but the work of the actuary in combination with  
19 the fiduciary, caused the plan to be underfunded.

20 MR. SIGMAN: That's correct, Your Honor.

21 QUESTION: And is the relief that you're asking  
22 for that those individuals should pay the amount of the  
23 underfunding into the plan?

24 MR. SIGMAN: Actually, it -- it could go beyond  
25 just the amount of the underfunding into the plan. We're

1 seeking to -- relief which would make the plan whole.  
2 And, in other words, we're seeking relief that would  
3 result in a full benefit, a full retirement benefit, as  
4 originally provided for in the terms of the plan, to the  
5 retirees of the plan.

6 QUESTION: What are we talking about in dollars?

7 MR. SIGMAN: Well, it's not in the record, Your  
8 Honor, but in terms of the out-of-pocket loss which my  
9 clients have suffered --

10 QUESTION: Not -- not the individuals. I'm  
11 talking about the -- the whole group.

12 MR. SIGMAN: Well, because the PBGC has taken  
13 over the plan, the whole group has not suffered economic  
14 loss. Of the approximately 2,000 participants in the  
15 plan, only 143 fell above the threshold that the PBGC has  
16 required -- in other words, the PBGC will pay a full  
17 benefit to each participant or retiree --

18 QUESTION: But doesn't the PBGC have a  
19 subrogation claim against the actuary here?

20 MR. SIGMAN: The PBGC is in the litigation but  
21 it did not appeal. The PBGC is not here today. The  
22 PBGC --

23 QUESTION: Well theoretically, I would think,  
24 they would be entitled -- don't they stand in the shoes of  
25 the -- of the plan?



1 MR. SIGMAN: Well, the PBGC is now the statutory  
2 trustee of the plan. And it is surprising that the PBGC  
3 was so disinterested as not to appeal this issue.

4 QUESTION: What I'm trying to find out, if you  
5 can tell me just in rough figures, is by how much was the  
6 plan underfunded, which I suppose would measure the  
7 aggregate potential liability in this kind of a lawsuit?

8 MR. SIGMAN: Once again, it's not in the record,  
9 but the best answer I can give you is that in the context  
10 of the litigation, the PBGC produced what it called a  
11 termination report, indicating that the losses to the plan  
12 were in excess of \$50 million.

13 QUESTION: \$50 million.

14 MR. SIGMAN: That's correct. My clients --

15 QUESTION: And the actuary would be liable for  
16 that amount if your theory is correct.

17 MR. SIGMAN: Jointly and severally liable with  
18 the fiduciaries.

19 QUESTION: With the -- and all of whom are  
20 individuals, right?

21 MR. SIGMAN: Correct. The company itself,  
22 Kaiser, was also, we contended, a fiduciary of the plan.  
23 But given the fact that Kaiser was in bankruptcy, we did  
24 not bring suit against Kaiser originally.

25 Just very briefly in terms of the OBRA argument,

1 I wanted to point out to the Court that the OBRA argument  
2 provides that the Secretary may impose a civil penalty,  
3 not only on a fiduciary who commits a breach, but also on  
4 any other person who knowingly participates in such a  
5 breach. The civil penalty was set at 20 percent of the  
6 recovery amount, which was defined in the statute as an  
7 amount recovered by the Secretary in an action brought by  
8 him under section 502(a)(2) or (a)(5).

9 The OBRA amendment, we contend, also confirms  
10 that the term appropriate equitable relief includes the  
11 remedy of restoring all losses to the plan. Under OBRA  
12 the Secretary may reduce or waive the civil penalty if he  
13 finds that its imposition would impair the ability of the  
14 fiduciary or, in the language of the statute, the other  
15 person, to restore all losses to the plan.

16 We believe that that demonstrates that Congress'  
17 primary purpose was to assure that losses to the plan  
18 would be restored, and not only restored by the breaching  
19 fiduciary, but restored also by those who knowingly  
20 participate or participated in the breach of fiduciary  
21 duty.

22 In closing, I would urge the Court to reverse  
23 the decision of the court of appeals so as to leave these  
24 retirees in a position that is better than they would have  
25 been in, rather than worse than they would have been in

1 prior to the enactment of ERISA. Thank you.

2 QUESTION: Hold it a second. Who was the  
3 secretary referred to in -- in (1)?

4 MR. SIGMAN: I'm sorry?

5 QUESTION: Which secretary are we talking about?

6 MR. SIGMAN: Secretary of Labor.

7 QUESTION: Secretary of Labor.

8 MR. SIGMAN: Correct, Your Honor.

9 QUESTION: And he is permitted to bring -- bring  
10 the kind of a suit that --

11 MR. SIGMAN: Exactly.

12 QUESTION: -- We're talking about.

13 MR. SIGMAN: The Secretary is authorized under  
14 section 502(a)(5), and 502(a)(5) has the identical  
15 language as 502(a)(3). It would be, indeed, anomalous if  
16 the liability of a knowing participant would be dependent  
17 upon whether or not the plaintiff is the Secretary of  
18 Labor or if the plaintiff is the individual plan  
19 participant or the fiduciary.

20 QUESTION: But your opponent doesn't agree the  
21 Secretary has a claim, does he?

22 MR. SIGMAN: Correct. Thank you.

23 QUESTION: Thank you, Mr. Sigman.

24 Mr. Mann, we'll hear from you.

25

1 ORAL ARGUMENT OF RONALD J. MANN  
2 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE  
3 SUPPORTING THE PETITIONERS

4 MR. MANN: Thank you, Mr. Chief Justice, and may  
5 it please the Court:

6 The question in this case is whether ERISA  
7 deprived beneficiaries of their traditional equitable  
8 remedies against parties who knowingly participate in a  
9 breach of trust. In our view, the answer is found in the  
10 text of section 502(a)(3), which authorizes courts to  
11 award appropriate equitable relief to redress violations  
12 of ERISA and ERISA plans.

13 Although compensatory damages normally are  
14 considered legal relief, it is clear in the trust context  
15 that equitable relief includes a right to compensatory  
16 relief which accordingly should be available under section  
17 502(a)(3). That reading of the statute is bolstered by  
18 indications from related provisions of the statute, as  
19 well as the practical consequences of a contrary reading.

20 QUESTION: Mr. Mann, if you go to the subsection  
21 immediately before the one you're talking about, section  
22 502(a)(1)(2), I guess, is where it talks about "A civil  
23 action may be brought by the Secretary or by a participant  
24 for appropriate relief under section 1109." What does  
25 1109 provide?



1 MR. MANN: 1109 -- I'm looking at the appendix  
2 to our brief, which is page 1a to the appendix of our  
3 brief.

4 QUESTION: That's what I'm looking at.

5 MR. MANN: Okay. It has 409(a) and 502(a) on  
6 the same page. 409(a) is the provision which is in part  
7 4, that deals with fiduciaries, that establishes the types  
8 of relief that can be secured against fiduciaries by the  
9 plan. That is carried forward into 502(a) and 502(a)(2),  
10 at which you look.

11 I assume that you're referring to the phrase  
12 "equitable or remedial relief" which appears in section  
13 409(a). And as you noted, it is somewhat different from  
14 the phrase "equitable relief" that appears in 502(a)(3),  
15 which is --

16 QUESTION: Well --

17 MR. MANN: -- The provision at issue here.

18 QUESTION: Yes, but then 502(a)(2) speaks simply  
19 about appropriate relief without using the term equitable.  
20 So we have in 409(a) equitable or remedial used in the  
21 disjunctive. In subsection (2), appropriate relief  
22 without any modifying adjective.

23 MR. MANN: That --

24 QUESTION: And then in (3) we have appropriate  
25 equitable relief. Are we talking about three different

1 things?

2 MR. MANN: No, no. I think that -- I think that  
3 what you look at is in -- ERISA, traditionally, has been  
4 understood to refer to traditional principles of trust  
5 law. If you look at traditional principles of trust law,  
6 the most likely source and the source this Court has  
7 looked at is the restatement of trusts.

8 And the restatement of trusts establishes two  
9 types of remedies. There are some legal remedies and  
10 there are some equitable remedies, and they are described  
11 in different sections. In our view, the relief under  
12 502(a)(3), the reference to equitable relief should refer  
13 to the equitable remedies that were available at trust  
14 law. In section 409 when they refer to equitable or  
15 remedial relief, we believe they also intended to  
16 include -- include the legal remedies that were available  
17 at trust law.

18 QUESTION: What does remedial relief mean that  
19 the word relief by itself wouldn't mean?

20 MR. MANN: Well, I -- I share your view that  
21 remedial relief is -- remedial is probably not the best  
22 word. I would assume, though, that what that word has to  
23 mean is a reference to legal relief, and what they're  
24 trying to say is equitable or legal relief. It seems to  
25 me remedial is an adjective that means having to do with

1 relief.

2 QUESTION: It means relief.

3 MR. MANN: But to make sense out of the statute,  
4 it seems to me that we should assume that when Congress  
5 says equitable in one place and equitable or remedial next  
6 to it, that we have to find some meaning of the word  
7 remedial. And the most obvious meaning --

8 QUESTION: You're just kind of throwing up your  
9 hands.

10 MR. MANN: Well, no, but I mean the most -- the  
11 most obvious meaning of -- of the word in context is those  
12 things that are not equitable, which is the legal relief  
13 described in the restatement.

14 And it also makes some sense because if you look  
15 at the types of things that are legal relief and are not  
16 equitable relief, they are actions that would lie solely  
17 against the fiduciary. And so it would make some sense  
18 that when Congress drafted section 409 for remedies  
19 against the fiduciary, it would say you get not only  
20 equitable relief but also the very limited types of legal  
21 relief that were available at the common law.

22 In section 502(a)(3), which is not directed  
23 solely at fiduciaries, there would be no reason to -- to  
24 have that included, because anything that you can get  
25 against a fiduciary has already been included in section

1 409.

2 QUESTION: What -- what do you -- what do you  
3 refer to when you say you -- legal relief does not mean to  
4 you money damages; money damages against the fiduciary is  
5 not legal relief?

6 MR. MANN: Ordinarily, money damages are legal  
7 relief. But ERISA is a statute that is enacted in the  
8 trust context, and in the trust context it's extremely  
9 clear -- it is extremely clear in the trust context that  
10 equitable relief includes compensatory -- you can call it  
11 compensatory damages, because that's really what it is.

12 QUESTION: Right. But what -- what is the legal  
13 relief that's available in the trust context then?

14 MR. MANN: The -- the restatement describes two  
15 types of legal relief. One of them is for disbursement of  
16 money that is immediately and unconditionally due to the  
17 beneficiary under the terms of the trust.

18 For example, if you have a classic spendthrift  
19 trust under which the beneficiary is not supposed to  
20 relieve any -- receive anything until he turns 25, and at  
21 25 the corpus of the trust is to be disbursed to him. If  
22 he files a lawsuit, he's 26 years old, he can go into a --  
23 could go to a court of law and get that relief. And the  
24 second one --

25 QUESTION: Well, but that's no longer available.



1 I -- I mean the trust is over, the trust is at an end.

2 MR. MANN: But if the -- but if the trustee  
3 refuses to give him the property, before ERISA was passed  
4 he would have a lawsuit to get the property.

5 Understandably --

6 QUESTION: It's not a lawsuit under the trust,  
7 however. It's a lawsuit quite apart from the trust, so of  
8 course it's at law.

9 MR. MANN: That -- that's -- that is exactly  
10 right. But that is the legal --

11 QUESTION: Okay, what's -- what's the second  
12 one?

13 MR. MANN: The second -- the second one is  
14 actually quite similar. The second one is if the -- if  
15 the thing to be disbursed is not money but a chattel,  
16 which, I mean, has basically the same type of analysis.

17 QUESTION: If the thing -- but what was the  
18 common law legal remedy for breach of fiduciary duties  
19 such as -- as alleged in this case?

20 MR. MANN: There -- you -- you would have an  
21 action -- in the restatement it's under section 199(c) and  
22 it's an action -- an action which actually uses words very  
23 similar to section 502(a)(3). It's an action to compel  
24 the trustee to redress a breach of trust. This -- and if  
25 you look at the -- the commentary to section 199, it

1 makes clear that the relief was compensatory relief.

2 One of the examples, for example, is if the  
3 trustee has invested money in a bank that he should have  
4 known would fail. The bank fails, the money is no longer  
5 there, the trustee is personally obligated to make the  
6 trust whole for the loss.

7 In -- this case involves a suit where the  
8 trustee did not breach the trust by himself, but there is  
9 a person who knowingly participated with the trustee in  
10 the breach of trust. Now, at common law the understand --  
11 before ERISA, the understanding was we can't expect the  
12 trustee to sue the person who participated with him in the  
13 breach of trust, so we will allow the beneficiary himself  
14 to sue to recover the money for the trust. And -- and  
15 that is the action that's at issue here, and that's  
16 described in another part of the restatement, in section  
17 326, and it's also referred to in the treatises cited in  
18 our brief.

19 We think that the statute very clearly was  
20 referring to this particular cause of action because  
21 section 502(a)(3) uses the word "redress," which is  
22 exactly the word that's used in the particular section of  
23 the restatement and the natural meaning of the word, if  
24 you look in dictionaries, is to compensate or to pay back.

25 One further point I'd like to make, which I

1 think is one of the key considerations in this case, is  
2 the practical consequences of a contrary reading of the  
3 statute. ERISA has its remedies for -- civil remedies set  
4 forth in section 502(a), which this Court has described as  
5 very comprehensive. Except for section 502(a)(3), there  
6 is no provision that generally allows a civil action to  
7 recover for a breach of ERISA.

8           There are quite a number of important provisions  
9 of ERISA for which there is simply no remedy outside of  
10 section 502(a)(3). We could look at the provision at  
11 issue in Ingersoll-Rand, for example, which made it a  
12 violation of ERISA to fire an employee to prohibit his  
13 pension plan from vesting.

14           If individuals who are harmed by violations of  
15 those provisions cannot sue under section 502(a)(3) for  
16 compensatory damages, then ERISA has effectively left them  
17 without a remedy.

18           QUESTION: Well, can't the Secretary bring a  
19 suit?

20           MR. MANN: The Secretary can bring a suit, but  
21 those -- but those -- that suit, under section 502(a)(5),  
22 is also for appropriate equitable relief. And if  
23 equitable --

24           QUESTION: Well, I know, but just because a  
25 beneficiary couldn't sue him or herself doesn't mean that

1 he or she is without a remedy.

2 MR. MANN: No. But the problem is that there's  
3 no remedy.

4 QUESTION: Isn't that right?

5 MR. MANN: Well, just because the Secretary can  
6 sue doesn't mean the individual is without a remedy. But  
7 the Secretary has no greater right to compensatory damages  
8 than the individual.

9 QUESTION: That's a different argument, yeah.

10 MR. MANN: Well, I -- I understand.

11 QUESTION: Right.

12 MR. MANN: But respondents have conceded that --  
13 that persons other than fiduciaries can be sued under  
14 section 502(a)(3). The issue really is whether in  
15 their -- is whether or not you can get compensatory  
16 relief.

17 QUESTION: May I just ask one thing to be sure  
18 I'm right? Under 502(a)(3), it's for violations of a plan  
19 or a provision of this subchapter. Of course, this is a  
20 violation of the subchapter we're talking about, and what  
21 is the section of the subchapter?

22 MR. MANN: It's -- it's section 404. Section  
23 404 establishes the --

24 QUESTION: 404 is what is the -- is the duty-  
25 creating section that was violated.



1 MR. MANN: Right. It's the duty of care for  
2 fiduciaries. But as I was explaining, in considering  
3 the --

4 QUESTION: That is only a duty on the  
5 fiduciaries. Where -- where is the duty created on the  
6 part of the nonfiduciaries? I mean you have a section  
7 409(a) which creates a duty on the part of fiduciaries.  
8 It gives a cause of action. Where -- where is the section  
9 that would be the equivalent creating a duty and a cause  
10 of action with respect to nonfiduciaries. It just isn't  
11 there, is it?

12 MR. MANN: Okay. There are -- there two answers  
13 to that. The first answer is if you look at section  
14 502(a)(3), and in particular at 502(a)(3)(b)(i), this is  
15 on page 1a of the appendix to our brief, the -- the relief  
16 is to redress the violation. And we submit that in  
17 determining what is appropriate equitable relief to  
18 redress the violation, you should look to what relief was  
19 available before ERISA was passed under principles of  
20 equity, which includes relief against not only the  
21 fiduciary, but against a third party.

22 The second point, which is very important, is  
23 that section 502(1)(1)(a), (1)(1)(b), makes it a violation  
24 of ERISA for another person to knowingly participate in a  
25 breach. So at least in this type of situation, the party

1 has violated ERISA because, if nothing else, he's violated  
2 section 502(1)(1)(b).

3 QUESTION: Thank you, Mr. Mann.

4 Mr. Frankel, we'll hear from you.

5 ORAL ARGUMENT OF STEVEN H. FRANKEL

6 ON BEHALF OF THE RESPONDENT

7 MR. FRANKEL: Mr. Chief Justice, and may it  
8 please the Court:

9 As you now have heard, the petitioners' and the  
10 Solicitor General's argument is based on two fundamental  
11 premises. First, that equitable relief includes money  
12 damages. And second, unless the 1989 amendment to the  
13 statute is read to provide that equitable relief includes  
14 money damages, it will be rendered, in essence, a nullity.  
15 I will demonstrate why neither of those premises can be  
16 sustained, since they violate ERISA's language and are  
17 inconsistent with its structure.

18 One of the first things each of us learned as  
19 law students is that equitable relief does not include  
20 money damages. Yet petitioners' and the Solicitor  
21 General's interpretation turns to the --

22 QUESTION: Well, do you say it never -- it  
23 never includes money -- it never includes a remedy  
24 which -- which is -- is a recovery of money.

25 MR. FRANKEL: No, I do not say that, Justice

1 White.

2 QUESTION: So -- so you're going on damages,  
3 d-a-m-a --

4 MR. FRANKEL: Money damages.

5 QUESTION: Well --

6 MR. FRANKEL: And --

7 QUESTION: -- Can you get -- but you can get a  
8 money judgment on -- in equity.

9 MR. FRANKEL: You can get a money judgment in  
10 equity, Justice White. But ERISA did not adopt lock,  
11 stock, and barrel, the exclusive jurisdiction of common  
12 law equity courts. At common law, equity courts had  
13 exclusive jurisdiction over trust cases, and they were  
14 able to award both legal and equitable remedies because  
15 they had the exclusive jurisdiction over those cases.

16 ERISA, while influenced by the common law of  
17 trusts, only selectively incorporated certain of those  
18 principles.

19 QUESTION: You're saying, in essence, that the  
20 word equitable relief does not mean all relief that a  
21 court of equity in these circumstances could give.

22 MR. FRANKEL: That is correct, Justice Scalia.

23 QUESTION: That there's a difference between  
24 equitable relief and the relief which a trust -- court  
25 supervising a trust, which happens to be a court of

1 equity, can provide.

2 MR. FRANKEL: That's absolutely correct.

3 QUESTION: Well, do you think you can find in  
4 ERISA an intention to narrow the meaning of, quote,  
5 equitable relief, unquote?

6 MR. FRANKEL: Yes. Yes, I can, Justice White.  
7 And let me try to show that to you by contrasting what  
8 Congress provided for in assessing the liabilities of  
9 fiduciaries under section 409 with the relief provided for  
10 in section 502(a)(3), which does not apply to fiduciaries.

11 409 first says that a fiduciary is personally  
12 liable for making good to the plan any losses that the  
13 plan sustains as a result of a breach, restoring profits  
14 to the plan made through use of plan assets, and shall be  
15 subject to such other equitable or remedial relief as the  
16 court deems appropriate. Conspicuously absent from  
17 section 502(a)(3) are any mention of the so-called make-  
18 whole remedy or any mention of the term remedial relief.

19 QUESTION: Who -- who can sue to enforce 409?

20 MR. FRANKEL: Plan participants and fiduciaries,  
21 as well as the Secretary of Labor.

22 QUESTION: Under -- under what provision does  
23 the Secretary of Labor sue?

24 MR. FRANKEL: Under section 502(a)(2). Section  
25 502(a)(2) says that plan participants, fiduciaries, and



1 the Secretary of Labor can sue for appropriate relief  
2 under 409, which is the fiduciary provision.

3 QUESTION: And what about section (5), (a)(5)?

4 MR. FRANKEL: Section (a)(5) gives the Secretary  
5 of Labor the right to seek injunctive and other  
6 appropriate equitable relief, just as section 502(a)(3)  
7 gives plan participants the right to seek injunctive --

8 QUESTION: So the only part of -- the only part  
9 of section (a) that -- that provides for recovery of money  
10 from a fiduciary is (a)(2).

11 MR. FRANKEL: That's correct. And money  
12 damages, make-whole relief, can only be obtained from  
13 fiduciaries, not against nonfiduciaries like Hewitt.  
14 ERISA was enacted to establish standards of conduct,  
15 obligation, and responsibility for fiduciaries. And in  
16 certain carefully circumscribed areas, it dealt with  
17 nonfiduciaries as well.

18 But what ERISA did, and really the fundamental  
19 distinction around which this whole statute is crafted, is  
20 the distinction that ERISA draws between fiduciaries and  
21 nonfiduciaries.

22 QUESTION: Mr. Frankel, am I -- am I correct --  
23 I don't recall whether you made the argument, I guess I  
24 should have asked the other side, but they have very  
25 little time left.

1           In -- it would not have been -- it would not  
2     have been necessary to mention the Secretary -- in (a)(2),  
3     which says that the Secretary, a participant, or a  
4     beneficiary or fiduciary can sue under 409(a), it wouldn't  
5     have been necessary to mention the Secretary in -- in  
6     1132(a)(2) if (a)(3) and (a)(5) mean what the Government  
7     says it means.

8           MR. FRANKEL: That is absolutely correct,  
9     Justice Scalia.

10          QUESTION: Because (a)(5) would automatically --  
11     if it included all relief, legal as well as equitable, the  
12     Secretary would have all the power he needed under --  
13     under (5) and he wouldn't have to have been given anything  
14     under (2).

15          MR. FRANKEL: That's correct.

16          To contrast what ERISA did with fiduciaries as  
17     to what existed at common law, I think it's important to  
18     note that at common law only trustees were in a fiduciary  
19     relationship with a trust and its beneficiaries. Under  
20     ERISA, on the other hand, not only are the trustees in a  
21     fiduciary relationship with the trust, but ERISA deems any  
22     person who exercises any discretion or control over a plan  
23     or its assets to also be a fiduciary.

24          What it does is it greatly expands the universe  
25     of accountable persons who can be liable for plan losses

1 under the statute for a breach of fiduciary duty. What it  
2 does, on the other hand, is work a concomitant reduction  
3 on the relief that can be obtained from nonfiduciaries.  
4 And that is --

5 QUESTION: May I just -- may I just get one  
6 thing clear in my mind. Do you agree that the pleadings  
7 here allege a cause of action against the -- I mean if  
8 they were named as parties to, I know they're not. But if  
9 the fiduciaries with whom the actuary is alleged to have  
10 conspired were parties, would -- would there be a -- would  
11 a cause of action have been stated against them under the  
12 statute, seeking relief in the nature of recoupment to the  
13 trust of the amount that was lost?

14 MR. FRANKEL: I do not believe that it was  
15 properly alleged in this case, and we did make that  
16 argument to both courts below. They nevertheless  
17 construed the complaint as if it contained allegations of  
18 a breach of fiduciary duty, as well as a knowing  
19 participation in it.

20 QUESTION: And if the -- if the complaint is in  
21 proper form, would you concede that, under the statute,  
22 that complaint would state a cause of action?

23 MR. FRANKEL: The complaint against the  
24 fiduciary?

25 QUESTION: Yes.

1 MR. FRANKEL: Yes it would, Your Honor.

2 QUESTION: So the only issue is -- is whether it  
3 also states a cause of action against a knowing  
4 participant --

5 MR. FRANKEL: That's correct.

6 QUESTION: -- In the -- who is not himself a  
7 fiduciary.

8 QUESTION: Well what do you about -- what do you  
9 do about 502(1), then?

10 MR. FRANKEL: 502(1) only gives the Secretary of  
11 Labor the power to assess fines.

12 QUESTION: Well, I know, but it's measured  
13 by -- by the applicable -- by 20 percent of the applicable  
14 recovery amount, which is the amount recovered from a  
15 fiduciary or other person ordered by the court.

16 MR. FRANKEL: There are at least two forms of  
17 equitable relief which would provide the Secretary and the  
18 action that the Secretary brings under (a)(5) with a  
19 monetary recovery, though not one for monetary damages.  
20 One is an action for restitution. If in bringing the  
21 action under (a)(5) and the other person is being sued  
22 for -- for improper conduct in connection with holding  
23 onto plan assets, the Secretary --

24 QUESTION: Well, what if there's -- what if --  
25 what if the other person is the person who got sued here?



1 MR. FRANKEL: The -- the Secretary would not be  
2 able to assess a civil penalty against Hewitt  
3 Associates --

4 QUESTION: Why?

5 MR. FRANKEL: -- Under these circumstances.

6 QUESTION: Why?

7 MR. FRANKEL: Because there is no amount under  
8 (a) (5) which could be awarded as appropriate equitable  
9 relief. There's no equitable remedy that would provide  
10 the Secretary, or the plan in this circumstance, with a  
11 monetary recovery, as both the Ninth Circuit and the  
12 district court below found.

13 QUESTION: May I -- may I question that in this  
14 respect? Supposing the action were against the fiduciary  
15 itself, or himself or herself? Then the recovery would be  
16 in amount of the underfunding or whatever it might be.  
17 That would be appropriate equitable relief against the  
18 fiduciary, would it not?

19 MR. FRANKEL: I disagree, Justice Stevens. I do  
20 not believe that that would be appropriate equitable  
21 relief. It would be make-whole relief that's set forth in  
22 section 409 as specific relief that can be assessed  
23 against a fiduciary. But --

24 QUESTION: Under 402. It would be assessable  
25 against the fiduciary under -- under -- under -- section

1 2, rather.

2 MR. FRANKEL: Under -- it would be assessable --

3 QUESTION: Plus --

4 MR. FRANKEL: -- 502(1), section 2, that's  
5 correct.

6 QUESTION: Yep.

7 QUESTION: And so you think the Congress allowed  
8 this make-whole recovery against the fiduciary not as  
9 equitable relief but as --

10 MR. FRANKEL: As --

11 QUESTION: But they called it something else.

12 MR. FRANKEL: They called it. They  
13 specified --

14 QUESTION: Immediately.

15 MR. FRANKEL: -- Precisely what could be  
16 recovered against a fiduciary in section 409 and said that  
17 type of relief can only be recovered against fiduciaries  
18 for the benefit of the plan. What it said in section  
19 502(a)(3) is that, as to anyone else who might violate the  
20 provisions of the statute, the only relief that could be  
21 obtained is injunctive and other appropriate equitable  
22 relief.

23 And that is the -- that is where ERISA crafts  
24 the distinction between fiduciaries and nonfiduciaries.  
25 Congress recognized that plans would interact with

1 professional service providers. And while it had in  
2 earlier drafts considered making actuaries fiduciaries  
3 under the statute, it chose not to do so.

4 QUESTION: Let me -- may I just back up a  
5 little. Let's go to common law for a second and take the  
6 example that the Solicitor General suggested of poor  
7 investment, negligence in making investments in conspiracy  
8 with an investment broker. The two of them together are  
9 just stupid or what -- they commit the fiduciary  
10 obligation. As I -- as I remember it, at common law  
11 the -- they could be jointly and severally liable.

12 MR. FRANKEL: That is correct, Justice Stevens,  
13 at common law.

14 QUESTION: And that would be equitable relief at  
15 common law.

16 MR. FRANKEL: That is not what ERISA adopted.  
17 What ERISA adopted was an expansion of persons --

18 QUESTION: I understand your theory that they  
19 made more people fiduciaries and therefore -- thereby --

20 MR. FRANKEL: And --

21 QUESTION: -- Eliminated the participants with  
22 the fiduciaries.

23 MR. FRANKEL: No. They did not eliminate --

24 QUESTION: The professionals.

25 MR. FRANKEL: -- The participants. What they

1 did is limit the relief that could be obtained against a  
2 person other than a fiduciary to equitable or injunctive  
3 relief.

4 QUESTION: Well, but as long as you say  
5 equitable you're still picking up the --

6 MR. FRANKEL: Well --

7 QUESTION: The common law precedent that I  
8 suggested.

9 MR. FRANKEL: Well, with regard to the common  
10 law precedent, ERISA does not adopt that common law  
11 precedent within the contours of either the structure or  
12 the language that Congress chose. In number 1 in 409 and  
13 number 2 in 502(a)(3), what Congress did was make a  
14 rational decision that allocates liability in accordance  
15 with responsibility, making the fiduciary the one who is  
16 responsible for plan losses, but cut off the monetary  
17 relief that could be obtained from nonfiduciaries,  
18 professional advisors, of -- of money or property they  
19 might have obtained from the plan.

20 QUESTION: So you --

21 MR. FRANKEL: If they had their hand in the  
22 plan's till, they could be required to disgorge that  
23 money. That was not the circumstance here.

24 QUESTION: Your argument for your construction  
25 of 502(a)(3), that appropriate equitable relief doesn't



1 include the sort of relief that a beneficiary could have  
2 gotten from a trustee in a court of equity, is based on  
3 what section 409(a) does set out as to what can -- what  
4 the -- can happen to a fiduciary.

5 MR. FRANKEL: Yes. By having included  
6 specifically in 409, Chief Justice Rehnquist, what could  
7 be obtained from a fiduciary, and failing to include those  
8 words in section 502(a)(3), that omission is the clearest  
9 manifestation that the relief available under 409 is not  
10 available under 502(a)(3).

11 QUESTION: But --

12 MR. FRANKEL: Otherwise, Congress would have  
13 said so.

14 QUESTION: But why -- why should the language in  
15 409(a) narrow what would otherwise be the ordinary  
16 construction of appropriate equitable relief in (a)(3).  
17 If that is the -- the ordinary construction of equitable  
18 relief, that you could get some sort of make-whole relief  
19 if you were a beneficiary, from a trustee, from a court of  
20 equity.

21 MR. FRANKEL: What -- what ERISA does, Chief  
22 Justice Rehnquist, is adopt certain principles from trust  
23 law, not all of trust law. And what it said with regard  
24 to fiduciaries was what's said in 409. 502(a)(3) is not  
25 limited in terms -- to the terms of what parties can be

1 sued under that provision.

2 And what I'm trying to show is that by setting  
3 forth what relief could be obtained against fiduciaries  
4 and not setting forth what relief, other than appropriate  
5 equitable or injunctive relief, could be obtained against  
6 nonfiduciaries under 502(a)(3), that Congress was making a  
7 distinction between the relief available from fiduciaries  
8 and specific -- specifically set it forth and, in  
9 contrast, limited the relief that could be assessed  
10 against nonfiduciary parties.

11 QUESTION: Well, I guess -- is it true that  
12 if -- if 502(a)(3) means what the Government says it  
13 means, you would not have needed 409(a) --

14 MR. FRANKEL: That's correct.

15 QUESTION: -- At all? If it includes -- if --  
16 if -- if 502(a)(3) includes all the equitable relief in  
17 the sense of whatever trust -- whatever courts of equity  
18 remedying breaches of trust could give in the past, you  
19 wouldn't have had to have 409(a). Because all of that  
20 stuff that's recited in 40 -- 409(a) is nothing more than  
21 standard trust remedies for breach of trust.

22 MR. FRANKEL: That's absolutely correct, Justice  
23 Scalia. Indeed, as the Ninth Circuit in the Nieto case,  
24 which underlied the decision in our case, recognized, that  
25 if that interpretation were adopted, 409 would be rendered

1 unnecessary surplusage.

2 QUESTION: Mr. Frankel, you were giving us,  
3 quite some time ago, two examples of monetary but not --  
4 of equitable relief which was monetary but not damages,  
5 and you gave one example as restitution. What's your  
6 second example?

7 MR. FRANKEL: The second example is that when a  
8 fiduciary and a party in interest engaged in a prohibited  
9 transaction under the statute, that is proscribed by 406,  
10 the remedy for that is correction of the transaction.  
11 Basically, putting the plan back into the position it  
12 would have been in had the transaction essentially not  
13 taken place.

14 QUESTION: Can either of those forms of monetary  
15 relief be recovered under ERISA against a nonfiduciary?

16 MR. FRANKEL: Yes, they can, Your Honor.

17 QUESTION: The second one could not, I presume.

18 MR. FRANKEL: They would be -- they would be the  
19 forms that I can identify of appropriate equitable relief,  
20 that would provide plan participants or the plan with a  
21 monetary recovery.

22 QUESTION: But again -- but against a  
23 nonfiduciary.

24 MR. FRANKEL: Against a nonfiduciary.

25 QUESTION: May I just ask you this question

1 about whether there's redundancy between 409 and 502. Is  
2 it not correct that 409 is a duty-defining section, as is  
3 404 and 496, whereas 502 is the provision that identifies  
4 the parties who may seek relief and the like? And you  
5 read 502, if I understand you correctly, as saying a civil  
6 action may be brought against a fiduciary.

7 MR. FRANKEL: Well, Justice Stevens --

8 QUESTION: But those words aren't there.

9 MR. FRANKEL: -- What 502(a)(2) says is that a  
10 plan participant, fiduciary, or the Secretary of Labor --

11 QUESTION: Right.

12 MR. FRANKEL: -- Can bring a suit for  
13 appropriate relief under 409. 409 says that a plan  
14 fiduciary who breaches his fiduciary obligations to the  
15 plan is personally liable, and that's why there's the  
16 interaction between the two provisions.

17 QUESTION: But it doesn't say -- 409 doesn't  
18 identify the universe of prospective plaintiffs.

19 MR. FRANKEL: It does and it only identifies  
20 fiduciaries.

21 QUESTION: Well, those are defendants. I said  
22 doesn't -- it doesn't identify plaintiffs.

23 MR. FRANKEL: Well, it says plan participants.

24 QUESTION: That's 502.

25 MR. FRANKEL: Well, 409 doesn't say that.



1 QUESTION: That's right.

2 MR. FRANKEL: But 502(a)(2) does.

3 QUESTION: But one can look at the scheme as  
4 saying 409 is -- 4 in general, 404, 5, 6, defines the  
5 various duties of the trustee, and 502 defines the various  
6 remedies available to parties who may sue either on behalf  
7 of the plan or themselves.

8 MR. FRANKEL: Justice Stevens, I'd -- I'd  
9 respectfully disagree. Section 404 sets forth the duties  
10 which an ERISA fiduciary owes to the plan. Section 409  
11 sets forth the liabilities of a fiduciary who breaches his  
12 obligations.

13 QUESTION: Right, yeah.

14 MR. FRANKEL: Section 502(a)(2) gives the  
15 parties identified the right to bring a civil action for  
16 relief under section 409, the liability provision.

17 QUESTION: Is it -- is it correct that -- that  
18 you read 502 as saying a civil action may be brought  
19 against a fiduciary?

20 MR. FRANKEL: That is correct.

21 QUESTION: And that qualifies everything that  
22 follows --

23 MR. FRANKEL: That is correct.

24 QUESTION: That's interesting. I hadn't noticed  
25 before, but nothing in the statute identifies either the

1 potential defendants who may be sued or may not be sued.  
2 It just simply says who can sue.

3 MR. FRANKEL: I would agree with you that  
4 section 502(a)(2) doesn't identify the defendants who --  
5 (a)(3) does not identify the defendants who could be sued.  
6 But I think when you read 502(a)(2) with section 409, that  
7 it's plain that only fiduciaries could be the target of  
8 502(a)(2) actions.

9 QUESTION: I understand your argument.

10 QUESTION: Of course, you know, if you want to  
11 be rigorously logical, I suppose you -- you would say that  
12 409(a) creates rights of action for -- against the  
13 fiduciary and there is nothing creating rights of action  
14 against nonfiduciaries. So you would say that (3) doesn't  
15 even allow any equitable relief against nonfiduciaries  
16 period. But that's a --

17 MR. FRANKEL: That is --

18 QUESTION: -- That's even a more bitter pill to  
19 swallow. No, you're -- you're saying that at least you  
20 can get equitable relief.

21 MR. FRANKEL: That's correct, Justice Scalia.

22 QUESTION: Well, I'm saying if you were  
23 rigidly -- rigidly logical, and I would say reckless.

24 (Laughter.)

25 QUESTION: You would -- you would probably argue

1 that you can't get anything from nonfiduciaries here.

2 MR. FRANKEL: We don't agree with that position,  
3 Justice Scalia.

4 QUESTION: I didn't think you did.

5 MR. FRANKEL: In fact, what your position really  
6 is is that what the petitioners and the Solicitor General  
7 are asking this Court to do is to take the words that  
8 appear in 409 and imply them into 502(a)(3). That  
9 position cannot be sustained, since it will result in  
10 destroying a carefully comprehensive structure that  
11 Congress crafted. It will destroy the distinction between  
12 fiduciaries, on the one hand, and nonfiduciaries on the  
13 other hand.

14 QUESTION: But you are willing to imply into --  
15 into 502(a)(3) the cause of action that's set forth in  
16 409(a), just not the remedies.

17 MR. FRANKEL: That -- that -- that is not our --  
18 our position, Justice Scalia. Our position is that the  
19 issue presented to the Court is what kind of relief can be  
20 obtained against a nonfiduciary. What cause of action  
21 that may account for is really irrelevant.

22 I should note, however, that our amici did make  
23 a powerful argument that no knowing participation cause of  
24 action exists under the statute. We don't take a position  
25 on that because our focus is on the relief that is

1 available against a nonfiduciary.

2 With regard to the balance that ERISA struck, I  
3 just want to make a couple of points. Like all statutes,  
4 ERISA was the result of a balance that was struck by  
5 Congress. They sought to protect and promote the  
6 interests of plan beneficiaries and participants on the  
7 one hand, but they also, Congress, wanted to encourage the  
8 voluntary formation of employee benefit plans without  
9 unduly increasing costs.

10 Now while plan fiduciaries retain professional  
11 service providers, as the plan fiduciaries in this case  
12 retained Hewitt, the issue is where does the line get  
13 drawn between fiduciaries and service providers. ERISA  
14 provides that answer. ERISA says that a plan professional  
15 service provider is not a fiduciary, so long as the  
16 service provider exercises his normal professional  
17 functions and does not exercise any discretion or control  
18 over the administration or -- administration of a plan or  
19 its assets.

20 Here, the courts below found that Hewitt was not  
21 a fiduciary. What petitioners are asking this Court to do  
22 is to impose fiduciary liability on Hewitt, even though  
23 it's been determined as a matter of law that Hewitt was  
24 not a fiduciary.

25 QUESTION: May I state what I understand to



1 be -- I didn't understand from the briefs, quite frankly,  
2 but in response to my last question to Mr. Mann, he said  
3 the provision of the subchapter that they said was  
4 violated was 404. And that -- you then read 502(a) is  
5 saying "A civil action may be brought by a participant,"  
6 and so forth, "to enjoin any act or practice that violates  
7 any provision of this subchapter," namely 404, "and to  
8 obtain," blank, blank, blank, "appropriate equitable  
9 relief."

10 Now, why can't that -- why can't "appropriate  
11 equitable relief" in such an action include conspirators  
12 with the fiduciary?

13 MR. FRANKEL: For two reasons. One --

14 QUESTION: Ignoring 409 entirely.

15 MR. FRANKEL: Ignoring -- ignoring 409. What --  
16 what -- what ERISA says is that a person is either, in  
17 essence, a fiduciary or not a fiduciary. And given that  
18 ERISA expands the universe of fiduciaries, it says that  
19 only fiduciaries can be held liable for losses sustained  
20 by the plan, while working a concomitant reduction on what  
21 relief can be obtained from nonfiduciaries.

22 And to accept a conspiracy or other theory, one  
23 would have to conclude that by conspiring with the plan  
24 fiduciaries, then in essence --

25 QUESTION: The became a fiduciary.

1 MR. FRANKEL: -- That they became a fiduciary.

2 QUESTION: Well either you have to conclude that  
3 or conclude that Congress meant by the words appropriate  
4 relief, relief that would have been appropriate under  
5 common law precedents.

6 MR. FRANKEL: That is a possible interpretation.  
7 That is one with which we strongly disagree.

8 QUESTION: You disagree, of course.

9 MR. FRANKEL: And I think the whole structure of  
10 the statute shows that Congress didn't decide to take the  
11 common law of trusts and the exclusive jurisdiction of  
12 equity courts and import that into ERISA.

13 QUESTION: What is your position on the  
14 preemption question that Justice Kennedy asked earlier?  
15 Does a cause of action remain against the actuary at --  
16 under State law, or has it been preempted?

17 MR. FRANKEL: That -- that issue has not been  
18 presented to this Court before, as to whether actions  
19 against nonfiduciary service providers are preempted.

20 QUESTION: Do you have a position on the  
21 question -- I know it hasn't -- and I know it isn't before  
22 us, but it affects our thinking.

23 MR. FRANKEL: However, this Court may conclude  
24 if it holds, as we think it should, that money damages are  
25 not encompassed with appropriate equitable relief, that it

1 would agree with the district court in this case, in an  
2 appropriate case, that professional malpractice claims or  
3 common law tort claims against nonfiduciary service  
4 providers may not be preempted by ERISA.

5 QUESTION: Well, Mr. Frankel, is it -- we have  
6 ERISA cases coming out our ears these days.

7 (Laughter.)

8 QUESTION: And I'm glad to find that there's a  
9 section here that is crystal clear.

10 (Laughter.)

11 QUESTION: Or at least allegedly so.

12 (Laughter.)

13 QUESTION: Mr. Frankel, clarify your last  
14 answer. You -- you are of the position that any -- any  
15 common law State action against nonfiduciaries based on  
16 trust obligations are precluded.

17 MR. FRANKEL: I believe that that is a -- is --  
18 would be consistent with existing law, although --

19 QUESTION: The only thing you're conceding is  
20 that there may be some tort claims against them or some  
21 extra trust claims remaining.

22 MR. FRANKEL: Extra trust claims. I mean, what  
23 obligations are imposed by the statute on fiduciary --  
24 nonfiduciary service providers? I think there would a  
25 strong argument that claims based on that would be

1 preempted.

2 QUESTION: Of course, the question will be  
3 whether that action relates to an ERISA plan, the way this  
4 Court's been construing this.

5 MR. FRANKEL: I -- I agree with you, Justice  
6 Stevens. However, whether common law tort claims or other  
7 claims against nonfiduciary service providers fall within  
8 the conspicuous breadth of ERISA's preemption clause is  
9 really a matter that Congress may ultimately have to  
10 decide. If, for example, this Court were to conclude in  
11 an appropriate case that such common law claims against  
12 nonfiduciaries would be preempted and would leave people  
13 without a place to go to get the money damages they might  
14 otherwise be entitled to, but with which they cannot  
15 obtain it under ERISA.

16 If there are no further questions, I have  
17 nothing further. Thank you.

18 QUESTION: Thank you, Mr. Frankel.

19 Mr. Sigman, you have 2 minutes remaining.

20 MR. SIGMAN: The case -- we submit the case,  
21 Your Honor.

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

24 (Whereupon, at 2:52 p.m., the case in the  
25 above-entitled matter was submitted.)



## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:* Case No. 91-1671

William J. Mertens, et al., Petitioners v. Hewitt Associates

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BY *Lona M. May*

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