

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: LOCAL 144 NURSING HOME PENSION

FUND, ET AL., Petitioners v.

NICHOLAS DEMISAY, ET AL.

CASE NO: 91-610

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WASHINGTON, D.C. 20543

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 LOCAL 144 NURSING HOME PENSION :

4 FUND, ET AL. :

5 Petitioners :

6 v. : No. 91-610

7 NICHOLAS DEMISAY, ET AL. :

8 - - - - -X

9 Washington, D.C.

10 Monday, January 11, 1993

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:02 a.m.

14 APPEARANCES:

15 HENRY ROSE, ESQ., Washington, D.C.; on behalf of the
16 Petitioners.

17 RONALD E. RICHMAN, ESQ., New York, New York; on behalf of
18 the Respondents.

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

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in Number 91-610, Local 144 Nursing
5 Home Pension Fund v. Nicholas Demisay.

6 Mr. Rose.

7 ORAL ARGUMENT OF HENRY ROSE

8 ON BEHALF OF THE PETITIONERS

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

11 The genesis of this action occurred when the
12 respondent employers withdrew from the petitioner
13 multiemployer pension and welfare benefit plans. In this
14 action, those withdrawing employers seek to require the
15 petitioner benefit funds to transfer a portion of their
16 plan assets to new benefit plans which are not parties to
17 this action which were established after the withdrawal of
18 those withdrawing employers.

19 The district court granted petitioners' motion
20 for summary judgment. However, the Second Circuit
21 reversed and held that a fair portion of the reserves
22 reflecting contributions made to the Greater Funds on
23 behalf of the Southern Employees should be reallocated to
24 the Southern Funds.

25 What is extraordinary and erroneous is that the

1 court below held that section 302(c)(5) of the Labor
2 Management Relations Act, 1947, was the controlling law
3 and that it required the transfer of assets. 302(c)(5)
4 says nothing about transfers of assets, nor does its
5 legislative history even mention such transfers.

6 The court below has not only misread section
7 302(c)(5) but has misread and misapplied -- failed to
8 apply -- this Court's decision in United Mineworkers v.
9 Robinson. The focus of 302(c)(5) is specific. In the
10 words of this Court in Robinson, 302(c)(5) was meant to
11 protect employees from the risk that funds contributed by
12 their employers for the benefit of the employees and their
13 families might be diverted to union purposes, or even to
14 the private benefit of faithless union leaders.

15 There's no such allegation in this case. With
16 particular reference to the requirement in 302(c)(5) that
17 a benefit plan be maintained for the sole and exclusive
18 benefit of employees, this Court stated that its plain
19 meaning is simply that employer contributions to employee
20 benefit trust funds must accrue to the benefit of
21 employees and their families and dependents to the
22 exclusion of all others, and especially pertinent for the
23 instant action, this Court specifically concluded in
24 Robinson that nothing in 302(c)(5), quote, places any
25 restriction on the allocation of the funds among the

1 persons protected by 302(c)(5).

2 Even the narrow holding in Robinson is
3 applicable here. That is, that the Federal courts have no
4 authority under section 302 to review for reasonableness a
5 collectively bargained term of an employee benefit plan.

6 That describes the present case. The collective
7 bargaining agreements to which the respondent employers
8 were parties are clear that the terms of the trust
9 agreements are incorporated by reference, and those trust
10 agreements prohibit the payments that the Second Circuit
11 has ordered.

12 It is submitted that the trustees in this case
13 certainly breached no fiduciary duties in administering
14 the trust in accordance with their trust agreements.

15 QUESTION: Mr. Rose, if they had done so, would
16 there have been a remedy against them under 302 -- under
17 302(e)?

18 MR. ROSE: If the trustees had transferred
19 assets?

20 QUESTION: Yes. If they had transferred -- not
21 just transferred it, but had transferred assets to a union
22 official.

23 MR. ROSE: To a union official --

24 QUESTION: Right.

25 MR. ROSE: Yes.

1 QUESTION: So you -- it's your --

2 MR. ROSE: To a union official, that would
3 have --

4 QUESTION: You see, I'm not sure what your
5 theory of the operation of 302(c) and 302(e) -- what you
6 theory is.

7 Does it not operate at all, once the trust is
8 established -- so long as you establish a trust which on
9 its face meets the requirements, that's the end of the
10 application of 302, or does it continue to have some
11 application, at least if you violate the term of the trust
12 by turning over the money to union officials?

13 What's your theory?

14 MR. ROSE: Justice Scalia, our position is that
15 section 302(c)(5) does not regulate the transfer of plan
16 assets whatsoever.

17 QUESTION: Whatsoever, so long as the trust
18 is -- complies with the statute on its face. I mean, on
19 its face the trust has to comply with the statute.

20 MR. ROSE: That is correct.

21 QUESTION: But so long as it does on its face,
22 if the officer -- if the trustee violates the trust, and
23 surreptitiously conveys money to union officials, you
24 think you can only get at that under ERISA.

25 MR. ROSE: There -- it might constitute criminal

1 activity, also. It might constitute a criminal violation
2 either under State law or under Federal law independently,
3 but you're right, I would relegate that to a regulation
4 under ERISA, clearly.

5 QUESTION: So the subsection 302 regulates
6 solely the conduct of the employer in making the payment
7 in the first place.

8 MR. ROSE: That is its focus, absolutely.

9 As we've noted, the section 302(c)(5) requires
10 employer contributions to be for the sole and exclusive
11 benefit of employees, but those are for the employees of
12 all of the contributing employers, and that is precisely
13 what the petitioner funds have done.

14 QUESTION: I don't understand why it wouldn't
15 violate subsection -- Justice Scalia's hypothetical
16 wouldn't violate 302(c)(5). Because the funds were not
17 held in trust for the purposes specified in the statute,
18 but were given to the union official as a bribe, they
19 wouldn't comply with the statute.

20 MR. ROSE: Oh, I think that -- I'm sorry, I
21 think that would violate it. The money would have to be
22 used for the benefits of contributing employers.

23 QUESTION: The statutory restrictions, and if it
24 goes beyond that and it's a payoff to the union leader,
25 why then, it would violate the statute.

1 MR. ROSE: Yes, I think that is correct. That
2 would be a criminal violation under 302, yes.

3 QUESTION: Mr. Rose, there is a mechanism, is
4 there not, whereby plan assets and corresponding
5 liabilities could be transferred to a new plan, is there
6 not?

7 MR. ROSE: There is under ERISA, yes, Your
8 Honor. Yes.

9 QUESTION: But the procedures for that were not
10 followed here, I take it.

11 MR. ROSE: They clearly were not followed. With
12 regard to the pension plan here, the ERISA provisions are
13 very clear. The ERISA provisions bar a transfer unless
14 certain statutory conditions are met. One of them is
15 review by the Pension Benefit Guarantee Corporation. This
16 was not done.

17 Furthermore, such a transfer is at the
18 discretion of the transferor plan, and clearly the
19 petitioners did not initiate the proposed transfer, and
20 third, the -- any such transfer would have to be a
21 transfer not only of benefits or of assets, but of
22 liabilities, and there is and there was proposed no
23 transfer of liabilities.

24 There is no contention in this case that the
25 contributions were used for purposes other than benefits

1 or employees of contributing employers.

2 The Second Circuit --

3 QUESTION: Are you done answering that question?

4 MR. ROSE: Yes.

5 QUESTION: Can I jump in there?

6 MR. ROSE: Yes.

7 QUESTION: I'm back to the same problem that you
8 gave one answer to and then took it back. Are you sure
9 you want to stick with your second answer?

10 I don't see how the statute requires anything
11 except that the money be placed by the employer in trust
12 for that purpose.

13 MR. ROSE: Well --

14 QUESTION: If there's a violation by the trustee
15 later, does that necessarily violate the statute?

16 MR. ROSE: Well, Your Honor, I think a strict
17 reading of the statute would come to the conclusion that
18 you are implying. However, this Court has stated in
19 Arroyo and in Robinson that the specific provisions in
20 section 302(c)(5) are enforceable under 302(e).

21 QUESTION: Enforceable against the trustee.

22 MR. ROSE: Yes, and although I think there's
23 some difficulty, logically, coming to it, I don't think
24 that's a difficulty that needs to be reached in this case.

25 QUESTION: Well, except it makes a nice division

1 between this provision of the Labor Relations Act and
2 ERISA a little less neat.

3 MR. ROSE: Yes. Yes, I think that is right.

4 QUESTION: Are they -- criminally, or simply in
5 equity, to enforce the trust?

6 MR. ROSE: Well, section 302 is a criminal
7 statute. However, section 302(e) allows injunctive relief
8 to enjoin a violation of section 302.

9 QUESTION: So it's just equitable enforcement.

10 MR. ROSE: Yes.

11 The Second Circuit has interpreted the solely
12 exclusive language so expansively as to judicially
13 legislate that there must be a reallocation of money in
14 the petitioner funds.

15 Neither the Second Circuit nor the respondents
16 explained how such a mandated reallocation is to be
17 reconciled with this Court's conclusion in Robinson that
18 nothing in section 302(c)(5) places any restriction on the
19 allocation of the funds among the persons protected by
20 section 302(c)(5).

21 QUESTION: Under ERISA, would the trustees -- if
22 they had wanted to, could they have consistently with
23 ERISA transferred some funds and liabilities in this case,
24 this particular case?

25 MR. ROSE: If they had decided that they want to

1 do it, and there was a transfer of liabilities together
2 with the transfer of assets, yes, it may have been
3 possible.

4 QUESTION: You say may. Would it have been
5 consistent with ERISA?

6 MR. ROSE: It would have been clearly consistent
7 with ERISA had they wanted to do it with regard to the
8 pension plan. There's some doubt as to whether that is
9 true with regard to the welfare plan.

10 In the Multiemployer Pension Plan Amendments
11 Act, there is a specific procedure for doing so, and so it
12 clearly could have been done if in their discretion they
13 had wanted to make the transfer of both liabilities and
14 assets. There -- it's not so clear that they can do it
15 in -- without violating the prohibited transactions of
16 section 406 of ERISA with regard to the welfare plan.

17 QUESTION: Thank you.

18 MR. ROSE: There is a specific exception, you
19 see, to 40 -- to the prohibited transaction with regard to
20 the pension plan, but there is none with regard to the
21 welfare plan.

22 It is submitted that attributing to the Congress
23 an intention in 302(c)(5) to regulate the use of benefit
24 plan assets among plan participants is without basis. The
25 best evidence, of course is the language of the statute.

1 As we've noted already in answer to Judge
2 Scalia -- Justice Scalia's question, 302(c)(5) is an
3 exception to a criminal statute. It is not a regulatory
4 statute. It says nothing about the transferring of plan
5 assets, and as we've noted, the legislative history
6 doesn't even mention it.

7 Strongly mitigating against the Second Circuit's
8 expansive interpretation of 302(c)(5) are the dire
9 consequences that would follow. The uncontroverted expert
10 testimony in this record is that the construction of the
11 Second Circuit would undermine the viability of
12 multiemployer plans generally.

13 Contrast such a result with the congressional
14 intention to preserve the financial integrity of
15 multiemployer plans not only by the enactment of 302 but
16 of ERISA and the Multiemployer Pension Plans Amendments
17 Act of 1980. Congress was well aware of the importance of
18 multiemployer plans as a delivery system of employee
19 benefits to some 9 million workers and their families.

20 Further indicating that 302 is not a regulatory
21 act is the fact that from the mid-fifties to the early
22 seventies the Congress and the executive branch became
23 increasingly concerned about the lack of regulation of
24 employee benefit plans, and this concern culminated in the
25 enactment of ERISA in 1974.

1 In the words of this Court in Teamsters v.
2 Daniel, quote, Congress believed that it was filling a
3 regulatory void when it enacted ERISA. ERISA extensively
4 regulates the use of plan assets, including transfers of
5 assets. This is to be expected from a statute which this
6 Court has described as comprehensive and reticulated.

7 ERISA includes at least five provisions that
8 bear on the transfer of assets ordered by the Second
9 Circuit, and each one of them would prohibit the transfer.

10 Thus, we have the anomaly of the court below
11 ordering the trustees of the petitioner funds to violate
12 ERISA and the Court's order would not be a defense to the
13 violation of the prohibited transaction. It is submitted
14 that this result cannot be attributed to congressional
15 intent.

16 The judgment below calls into question basic
17 principles underpinning multiemployer benefit plans. The
18 essence of multiemployer plans is the pooling of risks
19 among many employers and employees.

20 In typical multiemployer plans, employer
21 contributions do not reflect the differences in work force
22 demographics of contributing employers. For example, one
23 employer may have a work force with an average age of 50,
24 and another contributing employer may have a work force
25 with an average age of 30, yet they pay contributions at

1 the same rate.

2 Contributions may be based on hours of service,
3 or ton of coal produced, or percentage of payroll, as in
4 the case of the petitioner funds. Therefore, for example,
5 in a multiemployer health benefit plan, it is inevitable
6 that the value of the health benefits needed by the
7 employees of some contributing employers will exceed the
8 contributions made by their employers. This is made
9 possible because other contributing employers will pay
10 contributions in excess of the value of the benefits
11 received by their employees.

12 But the court below says that when an employer
13 withdraws from the plan, section 302(c)(5) requires that
14 if the assets of the plan have increased during the period
15 of the withdrawal -- withdrawing employer contributing --
16 contributed to the plan, a proportionate share of that
17 increase in assets must be transferred to the plan -- by
18 the plan.

19 According to the court below, the proportion to
20 be paid is the ratio of the contributions of the
21 withdrawing employer to the total contributions. The
22 Second Circuit's mandate could, if taken literally,
23 require that the petitioner funds pay out substantial
24 moneys even if the benefits received by the employees of
25 the withdrawing employers exceeded their contributions.

1 As a plan's obligations grow, normally its
2 assets also grow. Thus, the proportionate share of the
3 plan's assets which the court below would require the plan
4 to pay upon the withdrawal of the withdrawing employer
5 would also grow, and thereby encourage withdrawals and the
6 ultimate demise of the plan.

7 The court below thereby would impose a new
8 obligation which the actuaries and trustees did not and
9 could not take into account when they were projecting the
10 cost of benefits to be provided and other costs in
11 determining the level of contributions needed to cover
12 those benefits.

13 If the plan's assets can be invaded in such a
14 major way as the court below has mandated, where will the
15 money come from to pay for the benefits the plan is
16 obligated to pay in the future?

17 It is to be noted that the Second Circuit's
18 holding is a one-way street. If the plan's assets rise
19 during the participation of the group of withdrawing
20 employers, the petitioner funds must pay out plan assets,
21 but if the plan's assets diminish, apparently no payment
22 to the petitioner funds would be required. No insurance
23 arrangement can survive under a system which requires
24 paying out of gains and absorbing all the losses.

25 It is instructive that the single circumstance

1 where Congress has mandated a transfer of assets from one
2 multiemployer plan to another, that Congress does not
3 define the appropriate amount of assets to be transferred
4 with reference to contributions or reserves.

5 The only situation where Congress has mandated
6 transfer of assets is where employees move from one
7 multiemployer plan to another multiemployer plan as a
8 result of a certified change of collective bargaining
9 representative.

10 In that instance, ERISA requires a transfer of
11 an appropriate amount of assets, and that term is
12 statutorily defined in section 4235(g) of ERISA, which
13 appears in the appendix to the petition at page 48(a) to
14 mean the value of the nonforfeitable benefits to be
15 transferred minus any employer withdrawal liability to the
16 transferor plan.

17 I might add that when it is the transfer of
18 nonforfeitable benefits, which is the same as vested
19 benefits, it is the transfer of the obligation to pay
20 those benefits and therefore it's the same as the transfer
21 of liabilities.

22 In the present case, no vested benefits have
23 been transferred to the respondent's new benefit plans,
24 therefore, even if there had been a certified change of
25 collective bargaining representative in this case, which

1 there was not, since it's the same union representing
2 both -- in both plans, the amount of assets required to be
3 transferred would be zero.

4 The expansive interpretation of 302(c)(5) and
5 the failure of some lower Federal courts to apply this
6 Court's Robinson decision has resulted in unnecessary
7 litigation and uncertainty among plan sponsors.

8 Some Federal courts even assert authority to
9 rewrite the terms of benefit plans when they deem them to
10 be unreasonable. In effect, the Second Circuit has
11 stricken the provisions of the trust agreements barring
12 transfers of assets in this case.

13 In Mahoney v. Board of Trustees, just less than
14 6 months ago, the First Circuit held that a decision by a
15 plan sponsor to increase retirement benefits of retired
16 participants in a lesser amount than the increase for
17 active participants was subject to review by the Federal
18 courts as to whether the decision was arbitrary and
19 capricious. The Robinson decision was not discussed, or
20 even cited.

21 QUESTION: Would that sort of decision be
22 reviewable somewhere under the law of trusts? Would it be
23 reviewable in State court?

24 MR. ROSE: Your Honor, no, I don't believe it
25 would be. Under ERISA, the State law is preempted, and so

1 it would be under ERISA if there was any remedy
2 whatsoever.

3 QUESTION: Well then, you're saying that
4 Congress intended that these trusts be not subject to any
5 of the sort of supervision that other trusts are in
6 court -- you know, the usual arbitrary and capricious
7 standard for trustees.

8 MR. ROSE: Well, Your Honor, I think they are
9 subject to the ordinary trust law, and more. In fact,
10 ERISA is much stricter than traditional trust law.

11 Even under traditional trust law, the courts did
12 not take it upon them -- did not assert the authority to
13 rewrite the basic terms of trust instruments on the basis
14 of a reasonableness test.

15 QUESTION: What entity is it that applies ERISA
16 in reviewing these decisions?

17 MR. ROSE: Well, lawsuits are brought by either
18 the Department of Labor for a fiduciary breach or by
19 private parties.

20 QUESTION: And they're adjudicated in court, but
21 you say pursuant to the provisions of ERISA.

22 MR. ROSE: Under ERISA, absolutely, yes, in the
23 Federal courts.

24 QUESTION: In your view, then, ERISA has
25 superseded traditional common law trusts.

1 MR. ROSE: Yes, Your Honor, it has.

2 QUESTION: Mr. Rose, if we were to decide that
3 section 302(c)(5) did not mandate the transfer of assets,
4 is there any reason why we have to go ahead and decide the
5 ERISA issues or the breach of fiduciary duty question?

6 MR. ROSE: Well, I would suggest, Your Honor,
7 that the -- it would expedite not only the conclusion of
8 this case, because it is so clear that ERISA --

9 QUESTION: Oh, but the courts below didn't
10 grapple with that at all. I mean, it seems to me if
11 you're correct on the interpretation of 302(c)(5), that's
12 enough up here.

13 MR. ROSE: I think technically that is correct.
14 I would hope that the Court would give some guidance
15 beyond that.

16 In -- in Phillips v. Alaska Hotel & Restaurant
17 Employees Pension Fund, the Ninth Circuit recently
18 asserted that even if a pension plan complies with ERISA's
19 minimum vesting standards, the Federal courts have the
20 power to rewrite the terms of the benefit plan to require
21 the plan to adopt a shorter period.

22 I -- Mr. Chief Justice, I would like to reserve
23 the remainder of my time for rebuttal.

24 QUESTION: Very well, Mr. Rose. Mr. Richman,
25 we'll hear now from you.

1 ORAL ARGUMENT OF RONALD E. RICHMAN

2 ON BEHALF OF THE RESPONDENTS

3 MR. RICHMAN: Mr. Chief Justice, may it please
4 the Court:

5 Our position is that the plain language of
6 section 302(c)(5) of the LMRA requires that contributions
7 made by an employer benefit that employer's employees
8 either alone or jointly with, in a pool, as most
9 multiemployer plans are set up, with contributions of
10 other contributing employers.

11 In the language of the syllogism that we used in
12 our brief, A must benefit, or A and B must benefit. Each
13 of the Greater Funds, both the pension and the welfare
14 fund, will violate 302(c)(5) unless there is a transfer
15 because some of the contributions paid by the Southern
16 Employers helped create a pool surplus in each of the
17 Greater Funds. A surplus existed in each of the funds at
18 the time all of the employees of the Southern Employers
19 withdrew from each fund.

20 QUESTION: But all of the Southern Employees
21 didn't in one sense. Those whose pensions had vested and
22 were receiving payments I take it remained with the plan,
23 did they not?

24 MR. RICHMAN: Yes, they did. They --

25 QUESTION: So I don't see how, in light of that,

1 your syllogism works.

2 MR. RICHMAN: Those employees have withdrawn
3 from the plans, but they are entitled to benefit payments
4 that have been earned by them prior to the date of their
5 withdrawal.

6 In other words, they have vested in pension
7 benefits. They have a nonforfeitable right to receive
8 pensions prior to the time that the withdrawal occurred.
9 They will not accrue any additional benefits subsequent to
10 the withdrawal. They will not have the opportunity to
11 receive any benefit from the surplus that has been created
12 by the employer's contributions. Instead, what will
13 happen is they will have their benefits paid out of the
14 liabilities of the plan, those liabilities being
15 calculated as of the date of the withdrawal.

16 QUESTION: But the point is, is that under the
17 statute -- under the statute as you read it, these are
18 still employees of the withdrawing employer.

19 MR. RICHMAN: They are employees of the
20 withdrawing employer, but as we read the statute, all of
21 the contributions that go into these funds must be used
22 for the benefit of the contributing employer either alone
23 or jointly with. Some of these --

24 QUESTION: Well, if that's the way you interpret
25 it, then it seems to me that the extension of your

1 argument is that even if some employees of a particular
2 employer leave, the result would still be to transfer the
3 assets.

4 MR. RICHMAN: No, I -- we think that's a
5 different case, because if some of the employees remain in
6 the fund, they will be earning on the pension side benefit
7 credit. On the welfare side, they will have an
8 opportunity to receive medical and other coverage.

9 The difference is, in our situation, there is no
10 one left who is available to earn a benefit beyond the
11 benefits that are already calculated in the liabilities of
12 the Greater Funds.

13 When only half of the employees leave, the half
14 of the employees that remain in the fund, for example, are
15 still entitled to medical coverage, and they may have many
16 catastrophic events that occur which create significant
17 liabilities for the plan. They are still in the pool, and
18 therefore from our syllogism some of the employees of A
19 are benefiting in the pool with the other contributing
20 employers.

21 We believe that to be distinctly different from
22 our situation, where all the liabilities are fixed, and
23 there is no opportunity at all for the Southern Employees
24 to receive any benefit from the contributions that made
25 up -- that went to make up this surplus.

1 QUESTION: Mr. Richman, doesn't your theory
2 overlook the fact that subsection (5) is couched in terms
3 of money or other thing of value paid to a trust fund
4 established for these purposes? Isn't the reference to
5 paid, as opposed, for example, to money or things of value
6 held -- doesn't that indicate that a violation or not is
7 to be judged with respect to the terms of the fund at the
8 time the money is paid over?

9 MR. RICHMAN: If -- no, we don't believe so. If
10 that were the case, the entire protective value of section
11 302(c)(5) would be essentially eliminated, because once
12 the money went in on Friday, if on Monday a union official
13 ran away with the money, 302(c)(5) would not apply its
14 protective value, which is reflected in the legislative
15 history.

16 QUESTION: Well, how does 302(c)(5) help you if
17 the union official runs away with the money in any case?
18 Aren't we talking about contests about the enforcement of
19 certain terms of trusts, or the enforcement of certain
20 benefits as against trustees and employers, and so long as
21 the terms of the trust and the payments to the trust are
22 made in accordance with trust terms that satisfy the
23 requirements of subsection (5), isn't that all subsection
24 (5) is really trying to get at?

25 MR. RICHMAN: We don't believe so, and this

1 Court has recognized differently. As Mr. Rose pointed out
2 in Robinson, this Court said, it is, of course, clear that
3 compliance with specific standards in the administration
4 of these funds are enforceable under --

5 QUESTION: In other words, it will enforce the
6 terms of the trust --

7 MR. RICHMAN: No, I think the --

8 QUESTION: But you want to do something other
9 than enforce the terms of the trust.

10 MR. RICHMAN: That's correct. We want to
11 enforce compliance with the specific standards in
12 302(c)(5). One of those --

13 QUESTION: But those standards simply refer to
14 money paid in trust, meeting certain requirements set out
15 in subsection (5), and if the money is in fact paid in
16 accordance with those terms, how does subsection (5)
17 provide any other standard by which a court is supposed to
18 do anything?

19 MR. RICHMAN: If that is the interpretation
20 given to subsection (5), then at least a couple of the
21 structural safeguards don't make any sense, because one of
22 the structural safeguards is that the money be held in
23 trust. It doesn't say it must be received by the trust or
24 paid to a trust, it says that it must be held in trust.

25 In addition --

1 QUESTION: Well, I mean, I'm not seeing your
2 point. Let's assume it's being held in trust and you can
3 enforce as against the trustees their obligation to hold
4 it in accordance with the terms of the trust. How is my
5 suggestion subversive of that safeguard?

6 MR. RICHMAN: Because, as I understand your
7 suggestion, once the money is paid in, the trustees no
8 longer have an obligation to follow any of the safeguards
9 of 302(c)(5).

10 QUESTION: Well, the trustees have got an
11 obligation to honor the terms of the trust. I'm not
12 suggesting otherwise.

13 MR. RICHMAN: But they could change the terms of
14 the trust immediately after receipt --

15 QUESTION: How could they do -- I mean, how am I
16 suggesting that the trustees can change the terms of the
17 trust?

18 MR. RICHMAN: Well, the trustees in
19 multiemployer plans generally have the right to, and do,
20 change the terms of the trust all the time.

21 QUESTION: In calculating benefits and so on.

22 MR. RICHMAN: Well, no, that would be the terms
23 of a plan. They change the terms of the trust in terms of
24 governance of these plans, in some cases in terms of
25 objectives, the use of benefits for certain purposes.

1 That happens --

2 QUESTION: Do they have any authority to change
3 the terms with respect to the identification of
4 beneficiaries?

5 MR. RICHMAN: Yes. Not only --

6 QUESTION: They could say -- are you suggesting
7 that they could say well, the employees of the X
8 Corporation will no longer get benefits, even though we
9 received funds expressly for that purpose?

10 MR. RICHMAN: No.

11 QUESTION: They couldn't do that.

12 MR. RICHMAN: No, they couldn't do that, but
13 they --

14 QUESTION: That's the kind of change that's at
15 issue here, isn't it?

16 MR. RICHMAN: But they could, for example, add a
17 category of employees to receive benefits as long as that
18 is done within the jointly with language.

19 Our proposed rule here is really based on the
20 statement in Robinson and statements that appear in Amax
21 and also that appear in the legislative history that the
22 purpose of 302(c)(5), while certainly to fight against the
23 possibility of union corruption, but really the overriding
24 goal is to ensure that the money gets used for the
25 participants and beneficiaries for whom it is contributed.

1 QUESTION: But Mr. Richman, (a) and (b)
2 establish -- of 302 establish the criminal violations.
3 (a) makes it a violation for the employer to pay over, or
4 to agree to pay over, lend or deliver the money, for the
5 benefit of anyone other than his employees, okay. That's
6 (a).

7 (b) does not make it a violation for the
8 recipient to use it for the benefit of anyone except the
9 employees. It doesn't say that at all. It says, it shall
10 be unlawful for any person to request, demand, receive, or
11 accept or agree to receive or accept for any other purpose
12 than the employees.

13 In other words, it is the agreement that it's
14 directed at. It does not make it criminal to go back on
15 what was originally a valid agreement. Isn't that at all
16 significant, that it explicitly criminalizes the agreement
17 but says nothing about violation of the agreement?

18 MR. RICHMAN: It is significant, except that
19 when we get to subsection (c), and particularly (c)(5),
20 which is an exception to the general rule, the statute
21 does more than just say that the contributions need to be
22 paid in.

23 QUESTION: But (c) is an exception from what has
24 been criminalized in (a) and (b). If it hasn't already
25 been criminalized in (a) or (b), you don't have to come

1 within the exception. So if it's not criminal under (b)
2 to go back on what was originally a valid agreement, and
3 although you told the employer you were going to use it
4 for his employees, in fact you use it for something else,
5 you haven't violated (b). You don't need the exception of
6 (c).

7 MR. RICHMAN: If that were the case, then the
8 protective value of all of the provisions in (c), really,
9 they would be eliminated completely.

10 QUESTION: No. Your criticism is not with the
11 protective value of (c). Your criticism is with (b).
12 You're just saying (b) wasn't drawn broadly enough, but
13 Congress drew it as broadly as it wanted to.

14 It made the crime accepting it for a purpose
15 other than the benefit of the employees, or agreeing to
16 accept it for such a purpose. It did not make it a crime
17 to go back on a trust agreement and use it for your own
18 benefit, or for some benefit other than the employees.

19 MR. RICHMAN: No, it -- the -- 302(e),
20 however --

21 QUESTION: (e).

22 MR. RICHMAN: Enables the district courts -- it
23 provides the district courts with jurisdiction to, in the
24 parlance that's been used by at least five or six of the
25 circuit courts, correct structural defects.

1 QUESTION: Well, it says to restrain violations,
2 but it's no violation of this section to break a trust
3 agreement. It's a violation to make a bad trust
4 agreement, but not to break a good one.

5 MR. RICHMAN: Well, in coming back to this
6 Court's statement in Robinson, when the Court said that
7 compliance with the specific standards in
8 administration -- and we believe that that statement was
9 about the specific structural standards in 302(c)(5) -- is
10 enforceable under 302(e), and in fact the Robinson case
11 itself, a unanimous decision by this Court, in that case,
12 if the interpretation of the statute had been that the
13 limitations apply only upon receipt of contributions, the
14 Court, instead of being concerned about whether 302(c)(5)
15 created a reasonableness standard to judge whether certain
16 benefits violated 302(c)(5) or not, would have easily
17 said, we don't have to do that because 302(c)(5) only
18 replies to the receipt of money.

19 QUESTION: Once again, (c)(5) is -- (c) is
20 entitled, Exceptions. It is an exception to the criminal
21 provisions of (a) and (b).

22 Now, if anything here is criminal, it is
23 criminal under (b), and there is no language in (b) which
24 makes it criminal to do anything except to accept the
25 money, or to request the money, or to receive the money,

1 on terms that do not require its use for the employees.

2 That's all that (b) criminalizes, so you don't
3 even have to look to (c), until you first establish that
4 there's been a violation of (b), and I'm asking how you
5 can establish that.

6 MR. RICHMAN: If that were the case, this law
7 was passed more than 25 years prior to ERISA, and we
8 believe that Congress thought that it was creating some
9 safeguards not only with the receipt of money, but that
10 the money would go into these funds, and then it also
11 would be used for the benefit of the employees for whom
12 those contributions were made.

13 And there are a number of statements, which
14 appear in our brief, in the legislative history from the
15 sponsor of this provision which indicate that Congress
16 really thought that it was creating structural safeguards
17 not only for the receipt of the contributions but for the
18 actual use of the contributions and for the actual
19 administration of the plan, and I understand the concern
20 with the language, but to read the language not to apply
21 beyond --

22 QUESTION: Criminal statutes -- I mean, normally
23 we interpret criminal statutes strictly, don't we?

24 MR. RICHMAN: Yes, you do, but this is not being
25 applied in a criminal context, this is applied in a civil

1 context under 302(e).

2 QUESTION: Is it one way for civil purposes and
3 another way for criminal purposes? We don't do that.

4 MR. RICHMAN: No, I -- we believe that under
5 302(e), the Second Circuit correctly remedied this
6 structural defect by ordering a transfer of the fair
7 surplus in the Greater Funds.

8 QUESTION: What, again, is the precise language
9 in (c) that confers the authority on the courts to remedy
10 a structural defect?

11 MR. RICHMAN: That appears in 302(e).

12 QUESTION: Well, all it says is jurisdiction of
13 courts --

14 MR. RICHMAN: To restrain --

15 QUESTION: To restrain violations --

16 MR. RICHMAN: Violations.

17 QUESTION: Of this section. How does that
18 confer any authority to remedy structural defects?

19 MR. RICHMAN: A structural defect that is a
20 violation of one of the specific standards in 302(c)(5),
21 in our case the standard requiring --

22 QUESTION: But I would think a violation of this
23 section would mean something contrary to (a) or (b). I
24 mean, something that doesn't conform to an exception would
25 not necessarily be a violation of the exception -- be a

1 violation of the statute unless it was -- as I think
2 Justice Scalia said, unless it was already illegal under
3 (a) or (b), there would be no violation.

4 MR. RICHMAN: Except that, and again getting
5 back to, really, the same issue that I was talking about a
6 moment ago, if that is the case, then these structural
7 safeguards which we believe that Congress thought it was
8 adopting not only for the receipt of contributions but for
9 the actual administration of the plan and the distribution
10 benefits would be eliminated completely.

11 QUESTION: Well, but really, it would be -- it's
12 quite extraordinary, isn't it, to say that Congress put
13 all of the things that you want to see, or you say should
14 be put to this use, not in a more general statute
15 regulating these sort of agreements, but in an exception
16 to a criminal provision, a rather narrow criminal
17 provision?

18 MR. RICHMAN: I don't understand the concern
19 with the language.

20 QUESTION: That is what we're mostly concerned
21 about here.

22 (Laughter.)

23 MR. RICHMAN: This Court, however, did, in the
24 Robinson case, both in -- by statement and terms of the
25 analysis done by the Court, indicate that it had really

1 adopted what we had been referring to as the structural
2 defect analysis, again because if the Court was not
3 concerned with the actual enforcement of section
4 302(c)(5), then the Court in Robinson would have simply
5 said, we don't need to worry about how benefits are
6 distributed and whether coal miners' wives receive some
7 type of benefit or a different type or a lesser benefit.
8 All we're concerned about is the actual application of
9 this statute to the receipt of the contributions.

10 Another -- if, in fact, the statute is read the
11 way that you're saying it should be read, then a question
12 arises as to the Greater Funds have received contributions
13 subsequent to the withdrawal of the Southern Employees
14 from the Greater Funds.

15 They have received those contributions from 1985
16 right up to the future, and continue to receive those
17 contributions. The receipt of those contributions would
18 be a violation because they are receiving those
19 contributions without actually using contributions, albeit
20 contributions received earlier for the protective purposes
21 of 302(c)(5).

22 QUESTION: I don't really follow your example.
23 are you saying that after the transfer and after
24 withdrawal that the withdrawing employers continue to
25 contribute to the earlier fund?

1 MR. RICHMAN: No. What we're saying --

2 QUESTION: Then I don't know what you were
3 saying.

4 MR. RICHMAN: Okay. The -- after the Southern
5 Employers withdrew from the Greater Fund, their
6 contributions stopped to the Greater Funds. The
7 contributions continued by Greater Employers to the
8 Greater Funds, and those contributions continued from 1985
9 to the present date.

10 Those contributions are going into a fund in
11 which contributions which were made previously are not
12 being used for the sole and exclusive benefit of the
13 contributing employees who made those contributions
14 previously -- in other words, prior to 1985 -- and to read
15 the statute strictly, we'd end up in a situation where the
16 funds continued to receive contributions, have done so for
17 a long period of time, when contributions that were
18 received prior were not being used for the sole and
19 exclusive benefit of the employers who contributed those
20 contributions at that time.

21 QUESTION: I have to confess I have trouble
22 following your example. You'd helped me if you used A and
23 B --

24 MR. RICHMAN: Okay.

25 QUESTION: As you did in your original -- assume

1 A is the employees of the withdrawing employers and B is
2 everybody else in the original fund.

3 MR. RICHMAN: Contributions by A stopped.
4 Contributions by B continues to the fund.

5 QUESTION: Right.

6 MR. RICHMAN: If the statute is read to say that
7 contributions can't come into these funds unless the
8 contributions are used in accordance with -- or the
9 receipt of payment cannot occur unless the --

10 QUESTION: Are you saying that B's contributions
11 are bad because they are used for -- pay some benefits for
12 A's employees even though A is no longer contributing to
13 the same fund, is that what you're saying?

14 MR. RICHMAN: No, almost -- no.

15 QUESTION: Just the opposite.

16 MR. RICHMAN: What we're saying is that
17 contributions by B goes in and they benefit B's employees
18 at a time that contributions by A going in, previous
19 contributions by A, were not used for the benefit of the
20 employees of A, and therefore contributions are coming
21 into a fund, but --

22 QUESTION: Yes, but isn't it true that at the
23 time any one employer made a contribution to either fund,
24 there were employees of that employer who were potential
25 beneficiaries of that fund?

1 MR. RICHMAN: That's correct.

2 We don't believe that ERISA requires a different
3 result here. A transfer pursuant to 302(c)(5) can be
4 accomplished without violating a single rule under ERISA.
5 We can meet the requirements of the transfer rules under
6 1411(b), for example, and that would be an issue that the
7 district court would be able to deal with.

8 Our interpretation does not make section 1415,
9 which is the section that requires mandatory transfer,
10 superfluous. Section 1415 does not say that assets or
11 liabilities, or assets and liabilities will be transferred
12 only if there's a change in collective bargaining
13 representative. In fact, that would violate the position
14 of the Government that these transfers are, in fact,
15 regulated by fiduciary duty obligations pursuant to ERISA.

16 In addition, transfers can occur under 1415 that
17 would not occur under the rule that we're requesting that
18 this Court adopt. They would occur if there is an
19 underfunded plan, for example. Under the LMRA -- under
20 the rule that we're proposing, no transfer would be
21 required if the plan does not have excess or surplus
22 reserves.

23 QUESTION: Mr. Richman, why don't you argue --
24 you are arguing that this transfer is in breach of the
25 trust -- of the valid trust agreement, right?

1 MR. RICHMAN: No. We are arguing that this
2 transfer is in breach of 302(c)(5).

3 QUESTION: Yes, which means that the trust --
4 the trust agreement was valid under 302(c)(5), and this
5 was in breach of it. Is that right?

6 MR. RICHMAN: That's correct.

7 QUESTION: Why don't you argue the opposite --
8 that it is not in violation of the trust agreement, but to
9 the contrary, it is fully in accord with the trust
10 agreement? That means that the trust agreement is invalid
11 under (b), and therefore you would have to apply the (c)
12 exception.

13 MR. RICHMAN: I'm not sure I understand the --

14 QUESTION: In order to get 302 to apply, you
15 have to show that the trust agreement is invalid, so your
16 case ought to be that this payment was perfectly okay
17 under the trust agreement, but that renders the trust
18 agreement invalid under (b), unless the (c) exception
19 applies, which you say it doesn't.

20 Never mind. That's all right.

21 (Laughter.)

22 QUESTION: Well, on the interrelation between
23 (a), (b), and (c), I take it the structure of the statute
24 is that any payment to the trust would be invalid under
25 (a), and that's why (c) is necessary to save it, isn't

1 that correct?

2 MR. RICHMAN: That's correct.

3 QUESTION: So (c) then does control those
4 payments that are valid, and those which are invalid.

5 MR. RICHMAN: That's correct.

6 QUESTION: Thank you.

7 MR. RICHMAN: Thank you.

8 QUESTION: Thank you, Mr. Richman.

9 Mr. Rose, you have 4 minutes remaining.

10 REBUTTAL ARGUMENT OF HENRY ROSE

11 ON BEHALF OF THE PETITIONERS

12 MR. ROSE: Mr. Chief Justice, may it please the
13 Court:

14 My adversary stated to the Court that there was
15 a surplus at the time of the withdrawal of the respondent
16 employers. There is nothing in the record whatsoever to
17 indicate that.

18 QUESTION: What if there was?

19 MR. ROSE: I don't think it would make any
20 difference, Justice White. The --

21 QUESTION: He's not your adversary, Mr. Rose.
22 He's your friend. Your clients are adversaries, you and
23 Mr. --

24 (Laughter.)

25 MR. ROSE: Not these clients.

1 The -- in answer -- in the dialogue just
2 preceding, Justice Scalia suggested that the argument that
3 might be made that the trust might be invalid and thereby
4 bring it within 302. I would suggest that if, indeed,
5 this trust is invalid, then virtually all multiemployer
6 plan trust agreements are invalid, because the key
7 provisions that we're talking about are virtually
8 universal, and we have in this case filed the trust
9 agreements not only of the petitioner funds, but of the
10 respondent new funds, and you'll find similar provisions
11 in there, and you also have in the amicus briefs the trust
12 agreement for the Central States.

13 QUESTION: I didn't say there was no answer to
14 the argument, Mr. Rose. I just said it was an argument
15 that would get you over the (b) problem, anyway -- the
16 subsection (b) problem, which really sticks in my craw.

17 MR. ROSE: It's a difficult hurdle to get over,
18 but that won't do it.

19 QUESTION: Mr. Rose, in response to questions by
20 Justice O'Connor earlier today, she suggested that maybe
21 all we have to do is decide there's -- 302(c)(5) doesn't
22 justify the result below. You said you wanted us to go on
23 to cite something under ERISA. Just exactly what are you
24 asking us to decide, perhaps unnecessarily.

25 (Laughter.)

1 MR. ROSE: Clearly, that ERISA does not require
2 a transfer of assets such as being sought in this case.
3 That is clear from --

4 QUESTION: Because it's the same union.

5 MR. ROSE: For -- there are a number of
6 provisions. It's a prohibited transaction, to transfer
7 assets to a party in interest. The respondent employers
8 are parties --

9 QUESTION: Well, we don't have to say it's a
10 prohibited transaction. You're just saying it's not a
11 mandated transaction under ERISA.

12 MR. ROSE: That is correct. It certainly is
13 not -- there's absolutely clear that it's not a mandated
14 transaction, but it -- in fact, I am arguing that it is a
15 prohibited transaction.

16 QUESTION: We surely don't have to decide that,
17 because if we say 302(c)(5) doesn't justify it, and it's
18 not prohibited by ERISA, why do we have to go on and say
19 what might or might not be mandated?

20 MR. ROSE: You're quite right, you don't have
21 to. I would hope you would.

22 (Laughter.)

23 MR. ROSE: There was a suggestion by my friend
24 that --

25 (Laughter.)

1 MR. ROSE: That the --

2 QUESTION: Mr. Rose, excellent.

3 (Laughter.)

4 MR. ROSE: That the legislative history somehow
5 did talk about the use of the money in the plan, and I
6 would question that that is so. I looked at it very
7 carefully, and I recall none.

8 With regard to the prohibited transaction,
9 though, I would add one point, and that is that this Court
10 has stated in Central States v. Central Transport that the
11 use of plan assets by employers, even temporarily, is a
12 prohibited transaction, and that was in the context of the
13 possibility of a plan not seeking collection of
14 contributions with sufficient expedition, that letting it
15 ride might in fact be a prohibited transaction simply
16 because it is an extension of credit.

17 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Rose.
18 The case is submitted.

19 (Whereupon, at 10:59 a.m., the case in the
20 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

Local 144 Nursing Home Pension Fund, et al., Petitioners v. Nicholas

Demisay, et al.

Case No: 91-610

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

BY *Ann Marie Federico*

(REPORTER)