

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: JOHN HANCOCK MUTUAL LIFE INSURANCE
COMPANY, Petitioner v. HARRIS TRUST AND
SAVINGS BANK, AS TRUSTEE OF THE SPERRY
MASTER RETIREMENT TRUST NO. 2

CASE NO: No. 92-1074

PLACE: Washington, D.C.

DATE: Tuesday, October 12, 1993

PAGES: 1-54

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JOHN HANCOCK MUTUAL LIFE :

4 INSURANCE COMPANY, :

5 Petitioner :

6 v. : No. 92-1074

7 HARRIS TRUST AND SAVINGS BANK, :

8 AS TRUSTEE OF THE SPERRY :

9 MASTER RETIREMENT TRUST NO. 2 :

10 - - - - -X

 Washington, D.C.

 Tuesday, October 12, 1993

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States at
15 12:59 p.m.

16 APPEARANCES:

17 HOWARD G. KRISTOL, ESQ., New York, New York; on behalf of
18 the Petitioner.

19 CHRISTOPHER WRIGHT, ESQ., Assistant to the Solicitor
20 General, Department of Justice, Washington D.C.; as
21 amicus curiae, supporting the Petitioner.

22 LAWRENCE KILL, ESQ., New York, New York; on behalf of the
23 Respondent.

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1 PROCEEDINGS

2 (12:59 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 92-1074, John Hancock Mutual Life Insurance
5 Company v. the Harris Trust and Savings Bank.

6 Mr. Kristol.

7 ORAL ARGUMENT OF HOWARD G. KRISTOL

8 ON BEHALF OF THE PETITIONER

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

11 This case arises out of the purchase by a
12 purchase -- the purchase by a pension plan of an insurance
13 policy to provide guaranteed annuities to plan
14 participants and beneficiaries. Under the provisions of
15 the contract, the premiums paid are paid into John
16 Hancock's general account and become part of Hancock's
17 general corporate assets. The fundamental issue in this
18 case is whether Hancock's general corporate assets are
19 also to be considered assets of the plan.

20 Hancock unquestionably exercises authority and
21 control over the management of its own corporate assets.
22 If any of those assets are also deemed to be plan assets,
23 then Hancock would be a fiduciary under ERISA and under
24 ERISA's fiduciary rules would be required to manage its
25 corporate assets, or at least a part of them, solely in

1 the interest of the plan's participants and beneficiaries.

2 Congress specifically addressed contracts issued
3 by insurance companies to pension plans in ERISA section
4 401(b)(2), and that section can be found at page A-94 of
5 the Appendix to the Petition. It is referenced there as
6 29 U.S. Code section 1101(b)(2).

7 In substance, that section states that in the
8 case of a guaranteed benefit policy issued to a plan, the
9 contract itself is a plan asset, but the insurance
10 company's assets are not plan assets.

11 The Second Circuit concluded in this case, the
12 GAC 50, the contract in issue, is, in part at least, a
13 guaranteed benefit policy within the meaning of section
14 401(b)(2), and that Hancock is not a fiduciary to the
15 extent that guaranteed benefits have already been
16 purchased by the trustee under the contract. That court
17 went on to hold, however, that Hancock should be
18 considered to be a fiduciary with respect to what the
19 court referred to as the contract's free funds.

20 QUESTION: The contract's what?

21 MR. KRISTOL: Free funds, Your Honor.

22 QUESTION: Free funds.

23 MR. KRISTOL: Free funds.

24 Hancock and the Government take the position
25 that Hancock is not a fiduciary at all with respect to its

1 corporate assets because Harris Trust, as the plan
2 trustee, has at all times had the right under GAC 50 to
3 purchase additional guaranteed benefits to the full extent
4 of the contract's so-called free funds. The contract in
5 its entirety, therefore, is a guaranteed benefit policy
6 under section 401(b)(2).

7 QUESTION: Or -- well, that's not quite
8 accurate. Isn't -- what you could say with entire
9 accuracy is to the extent the contract provides for
10 benefits, it provides for guaranteed benefits.

11 MR. KRISTOL: No, I'm not sure I would agree
12 with that formulation, Justice Scalia.

13 QUESTION: Well, what is in the free fund may
14 not ultimately be used to provide benefits at all, right?
15 It's up to --

16 MR. KRISTOL: That is correct. Well, I think
17 that they would ultimately --

18 QUESTION: So, it is not -- it is clearly not
19 providing guaranteed benefits. But on the other hand, if
20 it's not providing guaranteed benefits it's providing no
21 benefits at all.

22 MR. KRISTOL: No, I don't agree with that,
23 Justice Scalia. I think that the contract itself, all of
24 the funds held under the contract, whether they stay with
25 John Hancock or are ultimately taken out of the contract

1 by the plan trustee, would ultimately be used for benefits
2 for participants and beneficiaries.

3 QUESTION: Guaranteed benefits?

4 MR. KRISTOL: Not necessarily, no. This
5 contract not only provided that the plan could purchase
6 additional guaranteed benefits to the full extent of the
7 contract's free funds, but it also provided other
8 possibilities as well at the option of the plan trustee.
9 And among those options, of course, was the ability to use
10 the so-called free funds to purchase or to provide
11 so-called nonguaranteed benefits.

12 QUESTION: Let me ask you, if I may, a
13 complementary question. Does John Hancock, in issuing
14 policies to plans like this, ever issue anything that
15 might be called an insurance contract that does not
16 provide for some guaranteed benefit?

17 MR. KRISTOL: My view of it, Justice Souter,
18 would be that if it's called an insurance contract, it
19 would necessarily have guaranteed benefits of some sort.

20 QUESTION: At least within the meaning of the
21 statute, yeah.

22 MR. KRISTOL: Within -- well, yes, within the
23 meaning of the statute.

24 QUESTION: Yeah. If that is the case, then,
25 then the exception the -- "to the extent" of language,

1 whatever it means, will never have any operative effect,
2 will it?

3 MR. KRISTOL: No -- no --

4 QUESTION: Because it will always be tagged
5 onto -- I mean it will always refer to a contract to which
6 the disputed amounts are tagged on to some level of
7 guaranteed benefit.

8 MR. KRISTOL: No, I don't -- I don't think
9 that's correct, Justice Souter. I can envisage a contract
10 that would provide in its entirety, as this one does, for
11 guaranteed benefits in the way that I've described it,
12 that also could provide within the same contract that the
13 plan trustee could use the free funds to pay nonguaranteed
14 benefits. And I could visualize, though I don't believe
15 any such contract has ever existed, that it would provide
16 for variable benefits.

17 QUESTION: So that would at least distinguish it
18 from the argument that you're making here. I see your
19 point, yeah.

20 MR. KRISTOL: That is correct, Your Honor.

21 QUESTION: And how would the statute be
22 construed in the instance that you put where with free
23 funds the insurer may purchase guaranteed benefits or
24 variable benefits? What result under the statute?

25 MR. KRISTOL: The result is --

1 QUESTION: Does the exemption apply?

2 MR. KRISTOL: The -- well, the result is the
3 same. The only thing that Congress required in 401(b)(2)
4 is that the contract --

5 QUESTION: Does the insurer have the benefit of
6 the (2)(b) exemption in the case that I put?

7 MR. KRISTOL: The (2)(b) exemption, referring to
8 401(2)(b).

9 QUESTION: Yes.

10 MR. KRISTOL: I don't -- I don't know that I
11 would characterize it as an exemption. But the answer is
12 that the John Hancock would not be a fiduciary with
13 respect to any of the assets held under the contract.

14 QUESTION: So as long as one of the options is
15 to purchase guaranteed benefits, that gives the company
16 the safe harbor that it seeks here.

17 MR. KRISTOL: If -- yes, if you want to use that
18 term, that's correct. So long as the contract provides
19 for guaranteed benefits either immediately or at some time
20 in the future at the option of the plan trustee, then the
21 contract in its entirety is a guaranteed benefit policy
22 even though the contract might also provide options to the
23 plan trustee to use the so-called free funds to provide
24 nonguaranteed benefits.

25 And also in the example that Justice Souter

1 asked me about, suppose there was a contract that also
2 said the trustee could use these funds to provide variable
3 annuities.

4 QUESTION: Well, then all an insurance company
5 needs to do to get the safe harbor, if we can call it
6 that, is to just include guaranteed benefits as one of the
7 options and it's home free.

8 MR. KRISTOL: Well, the insurance company, of
9 course, is entering into a contract with a fiduciary, the
10 plan trustee. And the contract, if it provides for
11 guaranteed benefits to the full extent of the book value
12 of the contract, yes, that contract is a guaranteed
13 benefit policy irrespective of the other options.

14 QUESTION: As a practical matter -- I think you
15 may already have answered this for me, Mr. Kristol, but as
16 a practical matter do you know of any instances in which
17 your company, at least, has issued a policy in these
18 circumstances without providing for some guaranteed
19 benefit option for the use of the free funds?

20 MR. KRISTOL: To the extent that I'm familiar
21 with insurance contracts, meaning contracts that provide
22 for guaranteed benefits, the answer, of course, is they
23 provide somewhere --

24 QUESTION: By definition, you're saying, yeah.

25 MR. KRISTOL: -- Somewhere. But I assume that

1 there are contracts that are issued that don't provide for
2 any guaranteed benefits.

3 QUESTION: But if we are going to -- if we're
4 going to follow the definition of insurance contract as
5 you're using it and as we all assume the statute is using
6 it, then -- well, no, maybe I misunderstood your answer.

7 Is it necessarily the case that there could be
8 an insurance contract -- I'm sorry, I'm saying this badly.
9 Couldn't you have an insurance contract that simply made
10 no provision for the purchase of any guaranteed benefit or
11 additional guaranteed benefit with the free funds?
12 That's -- that would be an insurance contract within the
13 meaning of the statute, wouldn't it?

14 MR. KRISTOL: If the free funds portion was not
15 available to use -- to be used for additional guaranteed
16 benefits, which is the situation you're positing.

17 QUESTION: Yeah, yeah.

18 MR. KRISTOL: I would think that to that extent
19 the contract -- to that extent -- the contract provides
20 guaranteed benefits to the extent of the guaranteed
21 benefits that have been purchased. Because, by
22 definition, the balance of the funds under the contract
23 are not available for that purpose. I should like to add,
24 though, I don't think any such contract exists.

25 QUESTION: Okay.

1 QUESTION: What is the converse of a guaranteed
2 benefit policy?

3 MR. KRISTOL: I think for all practical
4 purposes, Mr. Chief Justice, it's a separate account
5 contract, a variable annuity contract. That is, I believe
6 that the definition which is a functional description of a
7 general account contract deals with the -- one half of the
8 universe of the contracts issued by insurance companies.
9 They're either general account contracts and they provide
10 guaranteed benefits, not necessarily in their entirety but
11 typically, and the other hand variable annuity contracts.

12 QUESTION: Does that mean -- when you say a
13 guaranteed benefit, that doesn't necessarily mean a fixed
14 amount, does it?

15 MR. KRISTOL: It means, in the pension context,
16 that the benefits payable to plan participants are fixed
17 in amount by the plan.

18 QUESTION: Fixed at a dollar amount.

19 MR. KRISTOL: Fixed at a monthly dollar amount
20 typically, that's correct. It --

21 QUESTION: And then the other half of the world
22 is variable?

23 MR. KRISTOL: The other half of the world would
24 be separate account contracts, some of which provide for
25 variable annuities, and then there's a whole variety of

1 other kinds of separate account products.

2 QUESTION: Mr. Kristol, there's reference in the
3 briefs to the period between '77 and '82 and what is the
4 nature of the benefits paid between those years? Were
5 they, in fact, nonguaranteed, or were they fixed? What
6 were they?

7 MR. KRISTOL: They were fixed but nonguaranteed,
8 Your Honor.

9 QUESTION: No question in your mind about that.

10 MR. KRISTOL: That's correct. The plan
11 provided, as I understand it, only for fixed benefits.
12 And then under this contract, to the extent that the plan
13 trustee purchased guaranteed benefits under the contract,
14 then the monthly benefits to those retirees were
15 guaranteed by the general account of John Hancock.

16 As to any other retirees, for example those that
17 the plan trustee might decide that they wanted to pay the
18 monthly benefit using money available to the plan, there
19 was the -- this 1977 amendment which permitted the plan
20 trustee to use funds held by John Hancock in this contract
21 to pay those monthly benefits, but the benefits were never
22 guaranteed by John Hancock. Of course, when they were
23 paid they were paid.

24 QUESTION: But there's also comment to the
25 effect that the decision below would wreak havoc. The

1 Seventh Circuit adopted the Second Circuit's rule a decade
2 ago. Is there anything that that case has wreaked havoc
3 on the insurance industry in the Midwest?

4 MR. KRISTOL: No, Your Honor, it has not. And I
5 think that's largely because that decision -- in that
6 decision the Seventh Circuit itself quizzed -- questioned
7 the correctness of the decision on the motion for
8 reconsideration. It was decided on a motion to dismiss in
9 the district court, and I think what the Seventh Circuit
10 did was decide that a claim under ERISA had been stated,
11 and I think they even doubted that by the time they ruled
12 on the motion for reconsideration.

13 QUESTION: Do we have any followup to that
14 Peoria case? It was -- the 12(3)(6) was overturned and
15 when it went back to the district court, is there any
16 followup?

17 MR. KRISTOL: Justice Ginsburg, I don't know
18 what the followup is. There's no other reported decision
19 and I, frankly, don't know what happened to the case.

20 QUESTION: Do I understand your position to be
21 that this statute that Congress passed, that the meaning
22 of it is essentially the same as if the Senate bill, which
23 was very clear, had passed, that there's practically no
24 difference?

25 MR. KRISTOL: I think, for all practical

1 purposes, that's correct, it would not have any
2 difference.

3 QUESTION: Mr. Kristol, could I followup on the
4 various hypotheticals that you -- do I understand you to
5 say that if there were guaranteed benefits and the free
6 funds were to be used exclusively to provide contingent
7 benefits -- that is benefits the amount of which or even
8 the existence of which would depend upon whether the free
9 funds were available or not, you would still call that a
10 guaranteed benefit plan?

11 MR. KRISTOL: Justice Scalia, I'm not sure I
12 quite understand the example, but I think I can say
13 plainly what I mean in relation to the statute, that if
14 the contract provides that the entire book value of the
15 contract can be applied by the plan trustee to provide
16 guaranteed benefits which would be fixed guaranteed
17 benefits, the contract in its entirety is a guaranteed
18 benefit policy within the meaning of this section of
19 ERISA.

20 QUESTION: Now, take my hypothetical. There are
21 guaranteed benefits which the insurer -- the insurer
22 guarantees, fixed amount of benefits. In addition,
23 however, if the plan generates more money, that is if the
24 free funds are available for the purpose after paying off
25 the guaranteed benefits, there will be additional benefits

1 paid, but those benefits are contingent upon the free
2 funds being available.

3 MR. KRISTOL: That isn't a construct I'm aware
4 of. I'm having trouble, Your Honor --

5 QUESTION: Well, I know, I just made it up. I
6 just want you to tell me whether you think that is a
7 guaranteed benefit plan or not? As I understand your
8 theory, it is. You're saying so long as some benefits are
9 guaranteed, it doesn't matter what the rest of the money
10 is being used for, even if they're being used for
11 contingent benefits.

12 MR. KRISTOL: I hope I didn't leave that
13 impression.

14 QUESTION: Well, that's how -- that's where you
15 left me.

16 MR. KRISTOL: If the plan trustee has a right to
17 provide additional guaranteed benefits, in our view the
18 contract in its entirety is a guaranteed benefit.

19 QUESTION: That wasn't my hypothetical. Please
20 take my hypothetical.

21 MR. KRISTOL: You made reference to a guaranteed
22 plan. The plan in this case provided for fixed benefits.

23 QUESTION: That's right. The plan says --

24 MR. KRISTOL: In your --

25 QUESTION: -- There will be these benefits and

1 they pay the insurance company and the insurance company
2 says, yes, for this amount of money we will provide those
3 fixed benefits. In addition, if there's -- you know, if
4 our investments turn out to be very good and there's --
5 and there are sufficient funds in the free fund to cover
6 it, we will pay additional benefits.

7 MR. KRISTOL: Yes, that -- that is a description
8 of GAC 50. As the free funds under the contract grew, the
9 plan trustee, of course, had more funds available to pay
10 his nonguaranteed benefits. That doesn't change the
11 analysis under the statute.

12 QUESTION: Well, I thought -- but doesn't -- it
13 depends on the option being in the hands of the plan
14 trustee and not the insurance company, doesn't it?

15 MR. KRISTOL: The option would always be in the
16 hands of the trustee, if there's an option.

17 QUESTION: But if there were no -- if there were
18 a case in which the only option for the use of the free
19 funds, written right into the contract, was to provide
20 variable annuities, then it would take it out of your --
21 the rule that you're urging us to adopt here?

22 MR. KRISTOL: No. That's a difficult question,
23 but the answer is no. So long as the free funds can be
24 used to purchase guaranteed benefits, then it is a
25 guaranteed benefit in its entirety within the meaning of

1 the statute.

2 QUESTION: No, I'm sorry, I just didn't state my
3 point clearly enough. If the -- if the provision were
4 that free funds may be used only for the purpose of
5 purchasing variable annuities, then you would be outside
6 the rule that you're urging us to adopt here?

7 MR. KRISTOL: That is correct.

8 QUESTION: Okay.

9 MR. KRISTOL: And if the contract in part
10 provided for the use -- for that purpose and some portion
11 of the free funds could not be used for guaranteed
12 benefits under this contract, then to the extent that
13 language would come into play.

14 QUESTION: Then different result.

15 QUESTION: I understand your brief to represent
16 that for variable benefits under State insurance laws in
17 all the States you can't use general account contracts?

18 MR. KRISTOL: That's correct, Your Honor.

19 QUESTION: So it's a hypothetical that State law
20 prevents from being a reality.

21 MR. KRISTOL: Well, State law would require that
22 if variable benefits were to be paid, variable annuity
23 benefits, they would have to be paid out of a separate
24 account.

25 QUESTION: Under your interpretation of the

1 statute, how do you treat the phrase "to the extent?" Do
2 you just ignore it?

3 MR. KRISTOL: No, Your Honor. In answering the
4 question that I believe Justice Souter posed, to the
5 extent that language refers to -- in using the case that's
6 involved here -- the free funds, if all of the free funds
7 can be used to purchase guaranteed benefits, then the
8 contract in its entirety is a guaranteed benefit policy.
9 If some of the assets can be used to purchase guaranteed
10 benefits but not all of the assets, that's when the "to
11 the extent," that language comes into play.

12 QUESTION: I will be candid to say I don't
13 understand why you're not reading "to the extent that"
14 simply to mean if. Because you're saying if it is a
15 contingency in the contract that free funds may be used at
16 the -- to -- in part, at least, to purchase further
17 guaranteed benefits, that's the end of the inquiry. And
18 it seems to me that's reading the phrase to mean if.

19 MR. KRISTOL: No, that's not correct. I'm not
20 reading it as if because I didn't say, "if in part." All
21 of the free funds have to be available to be used to
22 purchase additional guaranteed benefits --

23 QUESTION: Oh, but all the funds may be
24 available, but if the trust -- if the person exercising
25 the option may use all of those available free funds but

1 chooses to use only a portion of them, you would have us
2 adopt the rule of construction, as I understand it, that
3 you say governs this case.

4 MR. KRISTOL: That is correct, Your Honor.

5 QUESTION: Of course, if the free funds under
6 the contract could just be returned to the plan, the plan
7 trustee use it as he would, he could always buy a
8 guaranteed contract, couldn't he, if you're in the
9 insurance business?

10 MR. KRISTOL: If the -- that is correct,
11 Justice. If he withdrew the funds --

12 QUESTION: So it wouldn't have to even mention
13 the possibility of doing it, as long as the plan trustee
14 had the power to buy insurance from you.

15 MR. KRISTOL: To buy additional guaranteed
16 benefits to the full extent of the contract's --

17 QUESTION: And that option would always be there
18 because you're in the insurance business.

19 MR. KRISTOL: If the plan took the money out of
20 the contract?

21 QUESTION: Sure. And then said I'd just like to
22 buy your policy. And you fix the price, as I understand
23 it. He doesn't -- yeah.

24 MR. KRISTOL: Well, it's a negotiated price.

25 QUESTION: Would you explain one thing to me I

1 have trouble understanding? What is the status of the PAF
2 fund? That's not a segregated fund, is it?

3 MR. KRISTOL: No. The PAF isn't a fund at all.
4 It doesn't -- it's not assets. Neither are free funds
5 asset or funds. The PAF --

6 QUESTION: But they're separately accounted for
7 on the company books, are they?

8 MR. KRISTOL: The PAF is merely a term that
9 refers to the book value of the contract as reflected on
10 the books of the company.

11 QUESTION: And that can be ascertained at any
12 point in time, what the PAF is at a particular point in
13 time.

14 MR. KRISTOL: That is correct, Your Honor.
15 May I reserve, Your Honor --

16 QUESTION: I think there's nothing to reserve.
17 Thank you, Mr. Kristol.

18 MR. KRISTOL: Thank you.

19 QUESTION: Now, Mr. Wright, we'll hear from you.

20 ORAL ARGUMENT OF CHRISTOPHER J. WRIGHT

21 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

22 SUPPORTING THE PETITIONER

23 MR. WRIGHT: Mr. Chief Justice, and may it
24 please the Court:

25 Many questions have been raised. If I can

1 respond first to Justice Ginsburg's question about whether
2 our position would be any different if the Senate bill had
3 been passed. I think it came out that our position would
4 be different.

5 The Senate bill very clearly provided that
6 general account assets are not plan assets. The
7 conference committee rewrote the provision in its present
8 form, and we believe that it made the following modest
9 change. It provided that to the extent that a general
10 account plan could be used to provide variable benefits,
11 something that is -- that was and is highly unusual, that
12 to that extent it would not be a guaranteed benefit
13 policy.

14 QUESTION: Mr. Kristol said more than that. He
15 said it can't exist as a matter of State law, that it's
16 prohibited in all 50 States.

17 MR. WRIGHT: Well, there's one important
18 exception which is illustrated in the 1978 advisory
19 opinion that we've referenced, that's the College
20 Retirement Equities Fund in New York. Since 1952 it has
21 provided variable annuities out of a general account, and
22 in 1978 it went to the Department of Labor for
23 confirmation that it was not a fiduciary. Because the
24 Department had earlier said, somewhat echoing the language
25 of the Senate bill, that general account assets are not

1 plan assets.

2 When the Department in 1978 was faced with the
3 example of CREF, the College Retirement Equities fund, and
4 realized that there was this exception under which
5 variable annuities could be paid from general account
6 contracts, it then recognized that, no, CREF was a
7 fiduciary in that circumstance.

8 And if I could take 1 minute to explain why --
9 why that Labor thought that that was an important
10 distinction and why Congress might well have thought that
11 was an important distinction, I'd really like to explain
12 that. If variable annuities are paid, then the amount
13 that pensioners receive depends on how the general account
14 is performing. It seems clear that Congress would want an
15 insurance company to be a fiduciary in that circumstance.
16 It's different with gen -- with group annuity contracts
17 paying fixed benefits like those here.

18 The pensioners have been promised fixed
19 benefits. In the case of those pensioners whose benefits
20 have already been guaranteed, they will receive monthly
21 payments for the rest of their lives from John Hancock, no
22 matter how long they live and no matter how the general
23 account performs.

24 QUESTION: Mr. Wright, you said -- as I heard
25 you say it, you said that it does not constitute a

1 guaranteed benefit policy if the free funds could be used
2 to purchase variable annuities.

3 MR. WRIGHT: Well, let me phrase it another way.

4 QUESTION: Now, I don't think that's -- that is
5 not what Mr. Kristol said, as I understood what he said.

6 MR. WRIGHT: Well, I think we're in agreement
7 here, but our -- all one, the money, some of it is --

8 QUESTION: That's what I want to test.

9 MR. WRIGHT: -- Our agreements are greater here,
10 certainly. Our position is that to the extent that the
11 funds are available to provide fixed benefits, it's a
12 guaranteed annuity policy. We would say that to the

13 QUESTION: Right. provided, it's a guaranteed

14 MR. WRIGHT: To the extent that they're
15 available to provide variable benefits, they're not. And
16 if I could continue -- if I could -- what's the status

17 QUESTION: Well, wait -- suppose -- that's the

18 QUESTION: What if either option is available?

19 QUESTION: That's right. Suppose the plan can
20 take the money out of the -- out of the free funds and
21 it's its option. It can use that money to buy fixed or
22 contingent benefits, either one. the money is available

23 MR. WRIGHT: I think there are actually two very
24 opti -- variable benefits could be paid instead. That

25 QUESTION: Under your test, that would not be a

1 guaranteed benefit plan, but Mr. Kristol thinks it is a
2 guaranteed benefit plan.

3 MR. WRIGHT: I think there are actually two
4 different very good hypotheticals here, and let me explain
5 that both of them are different than what's going on in
6 this case.

7 Hypothetical one, the money, some of it is --
8 and let me say that both of these are hypotheticals.
9 There is no State law that I know of that would allow
10 either of these. Hypothetical one, the money is used to
11 some extent to provide fixed benefits and to some extent
12 to provide variable benefits. We would say that to the
13 extent that fixed benefits are provided, it's a guaranteed
14 annuity plan. To the extent variable benefits are
15 provided, it's not.

16 QUESTION: Well, what's the -- what's the status
17 before they decide what to do with the money? What's the
18 status of the free funds?

19 MR. WRIGHT: Um, this is a separate hypothetical
20 where --

21 QUESTION: That's right, but --

22 MR. WRIGHT: -- Where all the money is available
23 to provide fixed benefits. But at the -- at someone's
24 option, variable benefits could be paid instead. That
25 is -- again, let me say that this is a hypothetical that

1 hasn't occurred, and I think that it's a situation where
2 the Department of Labor would be unhappy with the
3 conclusion that it thinks flows from the language of the
4 statute.

5 QUESTION: Well, but I take it the fund always
6 has to exist before the option can be exercised. You have
7 to characterize the status of the free fund the moment
8 it's created.

9 MR. WRIGHT: Right. But in -- and --

10 QUESTION: Well, let me say that --

11 QUESTION: And what Justice Souter's asking, in
12 effect, is we should have a test to know.

13 MR. WRIGHT: Well, in this case --

14 QUESTION: Simply based on the options available
15 to the parties, what the status of this fund is.

16 MR. WRIGHT: Well, in this case it's easy.
17 Variable benefits could never be paid. The free funds,
18 while they were in the general account, were always
19 available to provide fixed benefits. If the free funds
20 were withdrawn, as some of them were, they still -- let me
21 note at the outset that when they revert to Harris Trust
22 they are, of course, plan assets, and the Harris Trust is
23 a fiduciary with respect to them. And all Harris Trust
24 can do with them is pay fixed benefits to Unisys
25 employees. There is no variable option here.

1 QUESTION: I thought --

2 QUESTION: Well --

3 QUESTION: -- In this case, from the period '77
4 to '82, that some nonguaranteed benefits were paid.

5 MR. WRIGHT: That's right. But let me make
6 clear those weren't variable benefits.

7 Here's what happens when because Unisys
8 employees have been promised fixed amounts, if Hancock --
9 if Harris Trust can't get the money from Hancock, it has
10 to go to its other investments or it has to go back to
11 Unisys, but it has to pay those benefits. Now the
12 so-called nonguaranteed benefits that were paid for a
13 brief period were nothing more than fixed -- fixed monthly
14 defined benefits paid to certain pensioners.

15 The only reason they're called nonguaranteed is
16 because with respect to those pensioners Hancock did not
17 promise to pay them for the rest of their lives no matter
18 how the general account performed. Hancock merely wrote
19 them monthly checks at Harris Trust's request.

20 QUESTION: Harris had to pick up the difference?

21 MR. WRIGHT: When John Hancock stopped paying
22 them, Harris Trust had to start paying them. So the
23 pensioners --

24 QUESTION: Well, the statute says nonguaranteed.
25 It doesn't say nonvariable, it says nonguaranteed. It's

1 enough that they're not guaranteed.

2 MR. WRIGHT: While the money was in Hancock's
3 general account it was always available to provide
4 guaranteed benefit at Harris Trust's option.

5 QUESTION: But they weren't, in fact, paying
6 them during part of the period.

7 MR. WRIGHT: That's right. They weren't all
8 used that way, but it always provided for them. And let
9 me say, there's a difference between provided for and
10 committed to. Congress didn't say that only money that's
11 committed to the purchase of fixed benefits renders it a
12 guaranteed benefit policy. It says provides for, and we
13 believe that that means that a fund of money that's
14 available to be used in the future to provide fixed
15 benefits makes it a guaranteed benefit policy.

16 QUESTION: You're saying provides for benefits
17 means something other than provides benefits.

18 MR. WRIGHT: Yes. And it means something
19 different than committed to pay benefits as well.

20 QUESTION: So if guaranteed benefits may be made
21 but need not be made, it has provided for them.

22 MR. WRIGHT: We think that's right.

23 QUESTION: And the whole fund is provided for so
24 long as guaranteed payments may be made.

25 MR. WRIGHT: That's correct, Your Honor. And

1 while we have some difficult hypotheticals, let me say
2 that --

3 QUESTION: Why does that serve the purpose that
4 you're concerned about, which is not to let the insurer
5 play with the -- play with the assets of the pensioners?

6 MR. WRIGHT: Well, what the Secretary of Labor
7 is concerned about would be if Hancock's management of the
8 fund directly affected the amount insured -- I'm sorry,
9 that pensioners received. That's what the Secretary
10 believes that Congress was most concerned about. And
11 since that's not a possibility here, this is a guaranteed
12 benefit policy.

13 The hypothetical you've come up with, which
14 doesn't exist, is one that would definitely trouble the
15 Secretary of Labor, if there was a way variable benefits
16 could get paid out of these policies. It hasn't arisen
17 yet.

18 Let me say that it's Harris Trust's
19 interpretation of what Congress did that's implausible
20 here. They have the conference committee dramatically
21 restructuring the way pension plans and insurance
22 companies do business without hinting that that's what
23 they're doing, without allowing a transition period.

24 It's the Secretary's view that adoption of the
25 Second Circuit's approach would lead insurance companies

1 to segregate pension plan assets into separate accounts.
2 They'd have to move billions of dollars of assets into
3 separate accounts. Congress allowed up to 10 years in
4 transition periods for some other provisions of ERISA to
5 take effect, yet here Harris Trust says Congress required
6 all these billions of dollars of assets to be moved and
7 didn't give them any time to do it. And --

8 QUESTION: If they were going to do that, they'd
9 do it in a conference report, don't you think?

10 MR. WRIGHT: If they were going to say it?

11 QUESTION: If they were going to do something so
12 unusual, they would do it in a conference committee,
13 wouldn't they?

14 MR. WRIGHT: I don't think Congress meant to do
15 it, Your Honor.

16 Thank you.

17 QUESTION: Thank you, Mr. Wright.

18 Mr. Kill, we'll hear from you.

19 ORAL ARGUMENT OF LAWRENCE KILL

20 ON BEHALF OF THE RESPONDENT

21 MR. KILL: Mr. Chief Justice, and may it please
22 the Court.

23 In the case of an insurance carrier, the statute
24 tells us exactly what is covered and what is not covered.
25 It is not necessary to go beyond the statute. The statute

1 does not define plan assets except in the case of an
2 insurance carrier. And in the case of an insurance
3 carrier, the definition of plan assets is anything other
4 than a guaranteed benefit policy.

5 We all agree that guaranteed benefits are
6 exempt. Our position is that variable benefits or
7 variable payments to a plan are plan assets and subject to
8 ERISA's fiduciary duty rules. The language of the statute
9 is an effort by Congress to make certain that the
10 traditional or standard annuity -- where pension funds are
11 given to a carrier in exchange for a promise to pay
12 specified benefits at a specific time in the future.
13 Congress was exempting the traditional standard annuity.

14 In Peoria, Jude Posner makes that analysis and I
15 think it follows from a reading of the statute.
16 Guaranteed benefits are exempt; everything else is within
17 the four corners of the statute. The definition of
18 fiduciary is functional, and you look at a person's
19 activities.

20 The activities here by Hancock are specified in
21 a contract which is labeled guaranteed benefits,
22 nonguaranteed benefits. Two different distinct promises
23 are made and were made in 1977. The payment of guaranteed
24 benefits has nothing to do with this case. The payment of
25 nonguarantees has everything to do with this case.

1 It was understood that Hand could -- Hancock
2 would invest pension funds in order to -- in order to
3 create money for the payment of nonguaranteed benefits, if
4 sought by the plan. In this case the plan demanded that
5 Hancock use the excess funds for the payment of
6 nonguaranteed benefits and Hancock said no.

7 In 1982 they turned off the spigot and said we
8 can't use it. Can we have it back? No. What can we do
9 with it? Nothing. Until 1988 when the nonguaranteed
10 portion had risen from \$18 million to in excess of \$55
11 million, the plan was frustrated in its ability to use
12 those excess funds.

13 In 1988, Hancock finally agreed to a plan
14 amendment which allowed us to withdraw almost \$55 million
15 of free funds -- a term coined by Hancock, not the trust.
16 Under that amendment we could withdraw it without
17 suffering the penalty of contract termination and the
18 repurchase of annuities and, in effect, convert the
19 contract into a deferred annuity contract.

20 Now, the question as to whether the \$55 million,
21 when in the possession of Hancock, was not free funds but
22 the moment it was transferred it became free funds. Now,
23 Hancock's position in this case is a resurrection of the
24 Senate bill, plain, simple resurrection of the Senate
25 bill.

1 The DOL recognizes that that does not make any
2 sense and Congress must have something else in mind. And
3 as a guess, and they say it's a guess, they sought to
4 close a large loophole. That is the sale of variable
5 annuities out of the general account.

6 QUESTION: They say they have the example of
7 CREF having such a case.

8 MR. KILL: CREF is not even an insurance
9 carrier. There's no evidence in the legislative history
10 or otherwise that Congress was even aware of that
11 particular problem.

12 QUESTION: They say that CREF came to them with
13 a request for -- to -- a ruling.

14 MR. KILL: In 1978 after the enactment of ERISA.
15 And they issued an advisory opinion which in -- which is
16 very supportive of the position that we take before this
17 Court. To the extent that the insurance carrier invests
18 funds which create a variable return which can be used by
19 the plan for nonguaranteed benefits, it is a plan asset
20 and Hancock is subject to the fiduciary rules.

21 QUESTION: Mr. Kill --

22 MR. KILL: In addition, except for that one
23 example at the birth of ERISA and today it's illegal in
24 all 50 States to sell variable annuities out of general
25 accounts. So that doesn't make any sense at all.

1 QUESTION: Mr. Kill, can I just clear up on
2 factual. Now, you were referring to the period after
3 1977. What about the period between 1968 and 1977?

4 MR. KILL: The period between '68 and 1977, the
5 only contractual arrangement was for the payment of
6 nonguaranteed benefits -- excuse me, payment of guaranteed
7 benefits. And --

8 QUESTION: Could the '67 -- after the '67.

9 MR. KILL: After '68, although the conversion
10 from a deferred annuity into a -- what they call an IPG
11 contract changed the relationship of the parties in that
12 it became an investment contract and really not an
13 insurance contract.

14 QUESTION: But isn't it after the '68, or '67
15 amendment effective '68, that you acquired the right to
16 have free funds generated that would not be used for
17 guaranteed benefits?

18 MR. KILL: Between '68 and '6 -- and '77, when
19 an employee retired he was entitled automatically to
20 guaranteed benefits. The purpose of the '77 amendment was
21 twofold, to sort of freeze the population -- not require
22 the fund to request any further guarantees at all. And
23 since 1977 the fund has not requested any further
24 guarantees.

25 QUESTION: Would you agree that during the

1 period between '68 and '77 they were within the safe
2 harbor completely?

3 MR. KILL: No, Your Honor, I would not agree. I
4 think it's clear in light of the '77 amendment. The
5 reason for the '77 amendment was the results --

6 QUESTION: I know. And I'm trying to find out
7 what your position is about '68 to '77.

8 MR. KILL: The results during the period '68 to
9 '77 was creating on an annual basis what Hancock call free
10 funds and we call admitted excess. An amount over and
11 above the amount they need, using the contract
12 assumptions, to guarantee the benefits. These free funds
13 were sitting there and were not available for any purpose.
14 During '68 through '77 at times Hancock allowed a rollover
15 or a roll out in 1977, for example, of some of the free
16 funds to prevent the excess funds from increasing.

17 But the problem had reached the point of the
18 continued growth of free funds that Hancock in 1977 agreed
19 that the free funds now can be used to pay nonguaranteed
20 benefits because the trustee was very unhappy, as a
21 fiduciary, seeing pension funds in the possession of
22 Hancock which cannot be used for benefit enhancements.

23 QUESTION: Well, let me ask the -- try to get
24 the question a little different. When, in your view, did
25 the insurance company incur an obligation to have

1 separate -- separate segregate funds for your benefit?

2 MR. KILL: Well, one, I think -- and that gets
3 to the -- sort of the havoc that was mentioned. We don't
4 agree with that at all. What we have is a general
5 account. We already have segmentation. We already have,
6 and they've had since 1982, separate lines of business
7 where they do segregate.

8 QUESTION: It seems to me you can answer my
9 question with a date. I'm asking you when, in your view,
10 they had an obligation to create separate segregated funds
11 for your benefit?

12 MR. KILL: Well, I do not think they have an
13 obligation to create segregated funds.

14 QUESTION: Ever.

15 MR. KILL: That's my difficulty. They have an
16 obligate -- have a general account, we agree. General
17 account stands for --

18 QUESTION: Do you think the fiduciary can
19 commingle the funds that are held for your benefit with
20 its general funds?

21 MR. KILL: Yes, as long as they segment. And
22 segmentation is a tool that the insurance companies use
23 for asset allocation. They actually -- they actually
24 allocate assets to different segments. They have a
25 pension segment, they have a life segment, they have a

1 casualty segment. Each has different investment policies.
2 It's still commingled, but they tag assets.

3 QUESTION: But do you think accounting in the PA
4 fund was an adequate compliance with their --

5 MR. KILL: Excuse me, Your Honor?

6 QUESTION: Do you think the accounting that they
7 did provide in the PA fund, or whatever they called it,
8 was an adequate compliance with their fiduciary
9 obligations to you?

10 MR. KILL: I think with seg -- not the mere
11 accounting function. I think with segmentation where they
12 allocate specific assets and so the standard of investment
13 is consistent with ERISA's prudent man rule, then I think,
14 yes, they would be in compliance with ERISA and their
15 obligations to the trustee.

16 It is not the fact of the general account that
17 creates any problem. The --

18 QUESTION: That's a lot more than mere
19 allocation. I mean that is mere allocation and separate
20 investment treatment, isn't it?

21 MR. KILL: It is because they have different
22 lines of business.

23 QUESTION: And isn't -- isn't that really what
24 Justice Stevens was getting at when he was speaking of the
25 need to segregate funds?

1 MR. KILL: It's a form of segregation, it's a
2 form of segmentation.

3 QUESTION: Well, but it's not enough. It's not
4 enough. You say they have different lines of business.
5 ERISA doesn't guarantee that you treat this line of
6 business separately. It says that the fiduciary shall
7 discharge the following duties with respect to a plan
8 solely in the interest of the participants and
9 beneficiaries.

10 That means that he would have -- the insurance
11 company would have to identify funds that are solely in
12 the interest not of this whole line of all insureds from
13 all companies who have contingent benefits, but in -- your
14 contingent beneficiaries they would have had to guarantee.

15 MR. KILL: And that is exactly what they do
16 through segmentation.

17 QUESTION: Fund by fund or line of business by
18 line of business?

19 MR. KILL: Contract by contract and line of
20 business by line of business, assets are allocated. And
21 the standards applied by Hancock with respect to the
22 pension lines of business, which could be the ERISA lines
23 of business, are consistent with the higher standards that
24 ERISA demands to act solely in the interest of the plan.

25 QUESTION: Well what do you mean when you say

1 assets are allocated?

2 MR. KILL: They're tagged, identified.

3 QUESTION: Well, I mean a particular -- say --
4 supposing the John Hancock owns a building somewhere.
5 Does that mean that that particular building is allocated
6 to some phase of its business?

7 MR. KILL: It may be, Your Honor.

8 QUESTION: And well -- it may be, but that
9 wouldn't necessarily be.

10 MR. KILL: It would be -- it would be up to
11 Hancock, as a fiduciary, to establish standards which
12 comply with ERISA's prudent man rule. ERISA's does not
13 require that you invest in A or B.

14 QUESTION: Well, no, I was asking you about
15 existing practice, not what would happen. You -- your --
16 I thought you said right now assets are segmented.

17 MR. KILL: They're -- they are segmented, that
18 is our understanding. It's in the undisputed facts in
19 this case that Hancock, since at least 1982, has had a
20 policy of segmentation.

21 QUESTION: Okay. Then I want to know what
22 segmenting means.

23 MR. KILL: Segmenting means identifying
24 particular assets.

25 QUESTION: Like a building.

1 MR. KILL: Like a building.

2 QUESTION: And doing what with it?

3 MR. KILL: And the income generated and expenses
4 attributable to that asset are allocated to that line of
5 business.

6 QUESTION: To your fund?

7 MR. KILL: To our fund.

8 QUESTION: Your particular fund.

9 MR. KILL: Eventually to our fund.

10 QUESTION: Not eventually. Immediately
11 allocated to your fund.

12 MR. KILL: Not -- no, Your Honor.

13 QUESTION: They're not.

14 MR. KILL: No.

15 QUESTION: No, just to a casualty line of
16 business or the life line of business or the pension line
17 of business.

18 MR. KILL: First to the pension line of the
19 business and then through Hancock's investment generation
20 method, which looks at the year in which contributions
21 were made, it eventually is allocated to the particular
22 contract.

23 QUESTION: You mean a building will actually
24 come to be allocated to some particular contract?

25 MR. KILL: A real estate investment of any

1 magnitude may very well be permissible with respect to one
2 line of business --

3 QUESTION: Well you say very well be
4 permissible, but I want the facts. And if you don't know
5 them, for heaven's sakes say so. I mean, I don't know.
6 I'm trying to find out.

7 MR. KILL: My understanding is -- and I don't --
8 do not know the specific investments, is that Hancock has
9 separate investment standards and policies. With respect
10 to the pension line of business it will engage in certain
11 investments which are consistent with the necessity to
12 provide security because we are dealing with pension
13 funds. But I cannot tell you the specific assets
14 involved.

15 QUESTION: But different funds may have
16 different needs. For example, the employees in your fund
17 may all -- you say they haven't had annuants for a while.
18 They may all be approaching the age -- well, you'll only
19 need the money for another 10 years so it would pay to
20 liquidate this piece of real estate if this were the only
21 fund you're talking about.

22 Whereas if you have a general allocation of this
23 real estate to simply contingent funds, not just your fund
24 but a lot of other ones, it might pay to retain the real
25 estate. Now as I read ERISA, that real estate has to be

1 dealt with in the interest of your fund's beneficiaries,
2 not funds in general but your fund's beneficiaries.

3 MR. KILL: Well, the Department of Labor, in
4 interpreting ERISA, has authorized and approved pooled
5 separate accounts, which is commingling the funds
6 allocable to many many different plans. The Department of
7 Labor has even authorized banks under -- banks to
8 commingle pension funds and nonpension funds. They -- the
9 fiduciary is still obligated to maintain the standards of
10 ERISA. And the language of --

11 QUESTION: Without examining the funds at all.
12 Just these are pension funds without examining whether the
13 funds have exactly the same kind of beneficiaries and
14 exactly the same kind of needs?

15 MR. KILL: Well, I think the -- the Department
16 of Labor, through its regulatory process, oversees exactly
17 what fiduciaries are doing. They must make annual
18 reports. Pursuant to 5500, the Department of Labor
19 requires annual reports which identify the investments
20 that are made. It is a system under which the fiduciary
21 has the obligation and the Department of Labor does not
22 sit there day in, day out, and determine what investments
23 are appropriate.

24 Now, if I may, the issue of the statute, because
25 I think while there are certain problems that may result

1 in the event that the Court decides that assets in the
2 general account -- because they're used to create
3 additional funds for the payment of nonguaranteed benefits
4 or plan assets, I think we have to look at the statute.

5 The phrase "to the extent" is a phrase of
6 limitation. The phrase "to the extent" is not only used
7 in the statute regarding guaranteed benefit policies, but
8 is used with respect to fiduciaries. You can be a
9 fiduciary to the extent you provide certain activities and
10 you can be a nonfiduciary with respect to other activities
11 regarding the same assets. If it's used in the statute,
12 it ought to be given the same meaning. To --

13 QUESTION: This language does not say
14 "provides." It says "provides for."

15 MR. KILL: Provides for benefits. It doesn't
16 say "provide for the purchase of benefits." It doesn't
17 say "provide for the purchase in the future of benefits."
18 The --

19 QUESTION: And it doesn't say "provides
20 benefits."

21 MR. KILL: The argument "provide for," first of
22 all, was not even raised in the Second Circuit by John
23 Hancock. But --

24 QUESTION: Well, we're here to do our best to
25 interpret the statute correctly.

1 MR. KILL: I understand. It was raised first in
2 the Third Circuit by Mack Boring. Now, Mack Boring
3 decided that variable annuities payable to a plan do not
4 trigger ERISA's fiduciary responsibilities as long as any
5 benefits -- and it substituted for the words "to the
6 extent" the word "if." If any benefits are guaranteed, no
7 matter how minuscule, the entirety of the contract is
8 immune. It ignored the words "to the extent."

9 Well, the words "to the extent" are used not
10 only in the statute, they're used in the conference report
11 where the conference committee was describing the amount
12 that it believed should be subject to the guaranteed
13 benefit policy exception and the funds that should be
14 subject to ERISA.

15 And the conference report does not speak just
16 solely in terms of benefits. It speaks in terms of
17 payments, payments to plans. Now, here we have a defined
18 benefit plan, but the money to pay the defined benefits
19 comes from investment managers such as John Hancock.
20 That's what they were hired for, and they would provide
21 the funds from which the benefits may be enhanced.

22 Let me answer the "provide for," because I think
23 this Court, Justice Harlan, answered that question in SEC
24 v. United Benefit, where we had a similar annuity option
25 purchase facility. And Justice Harlan stated -- in trying

1 to determine the investment and insurance components of a
2 single contract, he said you look at the features. Even
3 with that facility, until there's a purchase of annuities
4 it remains an investment contract subject to the
5 securities laws.

6 QUESTION: Well, now what bearing would that
7 decision construing another statute have on this one?

8 MR. KILL: The "provide for" language is used by
9 John Hancock and the Department of Labor to argue that as
10 long as we have the option to buy. And what I'm saying is
11 even if we had the option, it's still not a guaranteed
12 benefit policy until we exercise the option. We shouldn't
13 be a captive and be required to exercise the option.

14 Moreover, the amount available for benefits,
15 these nonguaranteed benefits, as to which we can exercise
16 the option in the future depends solely and entirely on
17 the investment experience of this contract. The risk is
18 solely borne by the policyholder.

19 QUESTION: Mr. Kill --

20 MR. KILL: Hancock does not have any risk.

21 QUESTION: I guess it would be -- would have
22 been quite impossible for this text to have read "provides
23 benefits" rather than "provides for benefits," because the
24 contract never provides benefits. The policy never
25 provides benefits. It would have to read "the policy or

1 contract provides for benefits." I don't really see that
2 the word "for" gets you a whole -- a whole distance along
3 the line. The only logical way to say it is "provides for
4 benefits."

5 MR. KILL: It -- "provides for benefits" means
6 the standard annuity. You provide now, in the present
7 tense, for benefits.

8 QUESTION: The contract never provides benefits,
9 does it?

10 MR. KILL: The contract with the carrier
11 provides for a guarantee of benefits.

12 QUESTION: Right. It does not provide benefits.

13 MR. KILL: It does not provide for benefits. It
14 doesn't directly provide for benefits. Hancock is a
15 guarantor. They said defined benefit plan and Hancock, in
16 effect, guarantees the benefits. It does pay the benefits
17 because the plan, under the contract, has the right to ask
18 Hancock to pay the benefits. So Hancock does pay the
19 benefits.

20 Now, the "provide for," if I may, it doesn't say
21 provide for the purchase or provide in the future. And
22 even if this is an -- even if this is an option available,
23 there's no price. There's an illusory promise. What
24 price?

25 Hancock can unilaterally set the price. This

1 statute cannot mean that you would immunize the entirety
2 of a contract which can't -- contains no guaranteed
3 benefits and just an option, an annuity option, without
4 more -- without price. The price can be unilaterally set
5 by Hancock in the future at any time. So what we have
6 here is the amount is uncertain and the price is
7 uncertain.

8 And moreover, as a fiduciary, Hancock should not
9 be in the position of compelling us to use nonguaranteed
10 benefits to purchase nonguaranteed -- funds available for
11 nonguaranteed benefits to purchase guaranteed --

12 QUESTION: Mr. Kill, the fact that the -- the
13 fact the guaranteed points aren't settled doesn't seem to
14 me to necessarily answer it. Supposing you had a -- the
15 original version of the arrangement, they provided nothing
16 but guaranteed policies pursuant -- and even if they could
17 change the rates, and even if you could change the amount
18 you purchased, it would still be within the safe harbor.

19 Suppose there was nothing contemplated other
20 than guaranteed ---

21 MR. KILL: Well, that's the original. That
22 isn't part of it. Because the reason for the enactment of
23 ERISA --

24 QUESTION: Yeah, but I'm saying in it's original
25 form could not the price change and the amount you

1 purchase change?

2 MR. KILL: In the original form there were
3 prices set in the contract.

4 QUESTION: Forever?

5 MR. KILL: Not forever. Until 1973, it was the
6 fixed price.

7 QUESTION: And who changed it in 1973? It's up
8 to them, I assume.

9 MR. KILL: Hancock -- Hancock has the right
10 after 1973.

11 QUESTION: And if the price goes too high,
12 you'll just buy your insurance elsewhere.

13 MR. KILL: We can't because we can't use the
14 free funds to buy insurance elsewhere.

15 QUESTION: No, no, no. Forget the free funds
16 for a moment. I'm just assuming they had nothing but a
17 guaranteed -- guaranteed contracts covered -- as they did
18 originally. You could vary the amount. You didn't have
19 an exclusive requirement that you buy all your insurance
20 from them, did you?

21 MR. KILL: Absolutely not. We did not.

22 QUESTION: So the price -- both the price and
23 the quantity covered by the contract were variable even
24 though it was within the safe harbor.

25 MR. KILL: No what the -- the difference is in

1 that in 1974 Congress decided to enact ERISA to assist
2 trustees such as this one from the abuses of an insurance
3 carrier maintaining funds for its own purposes far in
4 excess of the amount necessary for those guaranteed
5 benefits.

6 Now, prior to '77, there were excess funds
7 and -- but when an employee retired, yes, the guarantees
8 were automatically -- they -- automatically guaranteed.
9 But the excess funds were growing.

10 QUESTION: Well, interest rates were going up.
11 I assume insurance companies made money.

12 MR. KILL: And we couldn't use the excess funds.

13 QUESTION: You're not saying they're not
14 entitled to make a profit?

15 MR. KILL: They are entitled. This is -- this
16 is not Hancock's profit. We have a contract and it's
17 allocated to a pension administration fund and they have a
18 liability that matches the amount of assets they hold.
19 The only difference is that we cannot use the amount
20 that's in excess of the amount necessary, computed by
21 Hancock, for nonguaranteed benefits.

22 We couldn't use it between '68 and '77, but
23 because of ERISA -- and the terminology is the same. In
24 the 1977 amendment it speaks of guaranteed benefits and it
25 speaks of nonguaranteed benefits and it says -- it uses

1 the phrase in the contract, "to the extent that Hancock
2 guarantees benefits, it has responsibility. Otherwise,
3 the risk is solely that of the policyholder."

4 And that is -- that is the essence of the -- our
5 understanding of the cases that have considered ERISA.
6 It's who bears the risk. Until there is a purchase, the
7 risk is entirely, 100 percent, on the plan. If the amount
8 of money is not sufficient to pay the nonguaranteed
9 benefit when a person retires, Hancock doesn't bear the
10 risk. We must make a contribution or the contract would
11 be terminated. So the risk, until there is an acquisition
12 of a guaranteed benefit, is entirely on the plan. Once
13 Hancock assumes the risk, that is the money, that is the
14 funds that are outside the purview of ERISA.

15 Now, the statute also uses the word "benefits"
16 and there's been a lot of stress, but doesn't that mean
17 that anything else -- can we ignore variable payments to
18 the plan? This Court has held that the protection of the
19 plan is equally important. Not only the protection of
20 participants and beneficiaries, they are protected through
21 the plan.

22 The conference committee uses the word "payments
23 to a plan." Those are the funds, the money that becomes
24 eventually the benefits that are paid to the participants
25 and beneficiaries. If Hancock's interpretation is

1 accepted, that if the benefit -- if they guarantee a
2 single benefit in a contract, that the entirety of the
3 contract is immune, that means every defined benefit plan
4 in the United States funded in part by insurance companies
5 is outside the protections of ERISA. And that, I submit,
6 is a more unconscionable result than the parade of
7 horrors that has been used and grossly exaggerated
8 before this Court.

9 QUESTION: Mr. Kristol, I think, had to say that
10 Congress really didn't do anything different from what was
11 in the Senate bill. And if that's so, you lose.

12 MR. KILL: If that is so, we would lose because
13 Mr. Kristol's interpretation is the enactment of a Senate
14 bill immunizing general accounts as a category.

15 QUESTION: And that's what he says. They made
16 some changes and the Department of Labor has told us that
17 that change took care of a case which, in reality, is not
18 likely to occur. But if what Congress did do -- we have a
19 clear Senate position. Everyone agrees the Senate was
20 clear, general account is out. And then Congress did
21 something and no one is actually -- is entirely clear what
22 Congress did.

23 And then we're left with the Department of
24 Labor's at least current interpretation is clear, whatever
25 wavering there may have been. Isn't the Court bound to

1 respect the Department's construction?

2 MR. KILL: Well, you know, there are at least
3 four reasons why this Court should not grant deference to
4 the Department of Labor. One, it's fundamentally in
5 conflict with the statute. The Department admits it does
6 not have the power to grant an exemption from ERISA's
7 fiduciary responsibility rules.

8 QUESTION: You're not claiming that the statute
9 has a plain meaning, are you?

10 MR. KILL: Yes, Your -- yes, I am, Your Honor.
11 I think the statute, on its face, has been twisted all out
12 of context. All it -- all it says is a guaranteed benefit
13 policy is a policy to the extent it provides for benefits,
14 the amount of which is guaranteed.

15 QUESTION: You're saying that to the extent that
16 plainly doesn't mean "if."

17 MR. KILL: Exactly, Your Honor. That is -- that
18 is the exact point. If I could only add, because a
19 question arose --

20 QUESTION: And so it would be you taking on both
21 the panel of the Third Circuit that didn't agree that the
22 statute had that plain meaning, and the Department of
23 Labor.

24 MR. KILL: Well, the Third Circuit, I think,
25 interpreted the phrase "to the extent" using the word "if"

1 instead, and then said variable annuity -- perfectly
2 candid -- are not protected by ERISA, and then stated that
3 "provide for" means as long as you have some right at any
4 time in the future, that's sufficient for the court to
5 determine that this is a guaranteed benefit policy.

6 But if I may finish the answer, because 75-2,
7 upon which the Department seeks deference through today,
8 so-called settled expectations, is not factual.

9 First of all, they issued advisory opinions that
10 are fundamentally in conflict with Interpretive Bulletin
11 75-2. They told the Second Circuit they did not have a
12 position; that it was very important, very complex.
13 They've even told the court that our interpretation of the
14 statute has some merit and that it concededly has
15 advantages.

16 QUESTION: Yeah, but their point was -- their
17 point was that the statute is ambiguous.

18 MR. KILL: And they said that it concede -- that
19 our interpretation has some merit. And all I'm
20 suggesting, that that if that is the case and the statute
21 is ambiguous, I would imagine that the trustee
22 representing the pension plan should prevail because the
23 purpose of ERISA --

24 QUESTION: But that's exactly when we defer to
25 agencies, when a statute has more than one plausible

1 meaning. I think, and Justice Stevens told us, that we
2 are to defer to the Agency's position as long as is it is
3 a plausible reason -- reading even if not the most
4 plausible.

5 MR. KILL: Well, I think general deference is
6 part of our jurisprudence. But you look at the
7 thoroughness, the reasoning, the consistency, and the
8 persuasiveness. In light of the history, I think that the
9 DOL has not established any of these elements. They -- as
10 late as last year telling the Second Circuit they did not
11 have a position.

12 And what is the position today? The position
13 today is fundamentally inconsistent with IB 75-2, upon
14 which they rely. They said -- IB 75-2 was intended to
15 give a blanket exemption, like the Senate bill, to
16 insurance companies. Today they stand up and say no, this
17 was intended to cover variable annuities sold out of
18 general accounts, even though that's illegal in all 50
19 States. But those are two inconsistent positions. The
20 DOL has not made a consistent position.

21 They have, in fact, supported the trustee on
22 numerous occasions in advisory opinions and in other ways.
23 And if you read their brief, except for the bottom line
24 they're very supportive of Harris Trust. They point out
25 that our position has merit, that it would protect

1 pensioners, it would protect plans against -- it said
2 added significant -- significant is their word -- legal
3 protections to protect plans against losses. That is what
4 ERISA is all about.

5 So the history of the Department's
6 interpretation of this statute has been ambiguous. not the
7 statute. And I dare say today their interpretation is
8 fundamentally at odds with the meaning of the statute. It
9 just doesn't make any sense.

10 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Kill.

11 The case is submitted.

12 (Whereupon, at 1:59 p.m., the case in the
13 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:

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY.

v. HARRIS TRUST AND SAVINGS BANK,

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

BY Ann Mari Federico

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