OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: CURTISS-WRIGHT CORPORATION, Petitioner v.

FRANK C. SCHOONEJONGEN, ET AL.

CASE NO: No. 93-1935

PLACE: Washington, D.C.

DATE: Tuesday, January 17, 1995

PAGES: 1-52

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IN THE SUPREME COURT OF THE UNITED STATES

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CURTISS-WRIGHT CORPORATION, :

Petitioner :

v. : No. 93-1935

FRANK C. SCHOONEJONGEN, ET AL. :

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Washington, D.C.

Tuesday, January 17, 1995

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

LAURENCE REICH, ESQ., Newark, New Jersey; on behalf of the Petitioner.

RICHARD P. BRESS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

THOMAS M. KENNEDY, ESQ., New York, New York, on behalf of the Respondents.

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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 93-1935, Curtiss-Wright Corporation v. Frank C. Schoonejongen.

Mr. Reich.

ORAL ARGUMENT OF LAURENCE REICH

ON BEHALF OF THE PETITIONER

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

The issue in this case is the effect of section 402(b)(3) of ERISA on a plan term included in a governing plan document, a summary plan description, issued by a plan sponsor that had reserved the right to modify, amend, or terminate the plan from its inception as an ERISA plan. It does not concern the right of the plan sponsor to terminate company-paid retiree medical benefits, which the lower courts agreed it has.

Section 402(b)(3) provides simply that every employee benefit plan shall provide a procedure for amending such plan and for identifying the persons who have authority to amend the plan.

In considering the requirements of section 402(b)(3), it should be kept in mind that ERISA applies to a variety of employee benefit plans. Initially, there is

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the dichotomy between pension plans and welfare plans.

Pension plans are subject to a panoply of regulations in part 1 of ERISA that do not affect welfare plans Some pension plans are subject to substantive regulation under title 4 of ERISA that affect only pension plans and not welfare plans. Most pension plans have some concern with Internal Revenue Code requirements that do not affect welfare plans.

In each category, there may be plans that have trustees involved and plans that do not. The presence of a trustee obviously impacts upon the need for -- upon the procedure for amendment, since a trustee may require that amendments be made -- affecting it be made only with its consent.

Some plans are adopted unilaterally by a plan sponsor as a voluntary matter, and other plans are adopted under the provisions of a binding collective bargaining agreement which obviously adds a layer of complexity to the amendment of the plan.

Other plans, both pension and welfare, are single employer plans, and some multiemployer plans. In many cases, multiemployer plans, and even, indeed, single employer plans, will involve regulations under section 302 of the Taft-Hartley Act.

The Curtiss-Wright plan is the very simplest of

all these plans. It is a voluntary, single employer plan unilaterally adopted by the employer, not -- no collective bargaining agreement involved. There is -- and there is no trustee, and as a welfare plan it is subject to no substantive regulation.

As far as the amendment -- requirements for amendment procedure of section 402(b)(3) are concerned, there is nothing in ERISA that intends that a -- indicates an intent that a corporate plan sponsor, which, of course, is a person under section (3)(9) of ERISA, that expressly reserved unto itself the right to amend, specify which of its agents should amend.

Of course, a corporate plan sponsor, being a corporation and a juridical entity, not a -- a legal entity rather than a physical entity, can only act through --

QUESTION: Well, Mr. Reich -- you say Reich, not Reich?

MR. REICH: Yes, Justice.

QUESTION: Okay, Mr. Reich, what do you make of the requirement in section 402(b)(3) that says, not only must there be a procedure for amending the plan, but also a procedure for identifying persons with amendment authority? It's written as though there were two separate requirements.

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MR. REICH: In many cases, there might, indeed, be a need for a procedure for identifying. I would suggest that, since the end result that is obviously intended by Congress is that there be an identification, if the situation is a simple one such as here, it should be sufficient to identify the person.

There should not need to be a procedure merely for saying that the plan sponsor will set forth a procedure for identifying itself as a plan sponsor. It would seem superfluous to utter those words as an incantation when the purpose --

QUESTION: So as applied here, you think its surplusage?

MR. REICH: I'm sorry, I didn't hear the word.

QUESTION: As applied in this case with a single employer voluntary welfare benefit plan, is the identification of the person who has the authority to amend just surplusage? Is that your argument?

MR. REICH: I would think it would be. Here it would be surplusage, since the goal of identification is the goal, and there is no need for a procedure here. In most -- in many cases, there is a need. For example, in a Taft-Hartley plan where you have a joint union and employer administration, and you have the intervention, as I say, of section 302.

QUESTION: A multiemployer plan --

MR. REICH: Particularly a multi --

QUESTION: -- you wouldn't know who would have the authority, unless it was stated.

MR. REICH: It would be questionable. You -- I believe you could state, for example, as 302(b)(5) does provide that, that it will be the trustees, who are supposed to be jointly drawn from the employers who are involved in the plan and the union that is involved in the administration of the plan. It's a bipartite board of trustees in that situation.

QUESTION: Well, Mr. Reich, would you accept the proposition that the -- or the position that in fact there is a procedure in your plan for identifying the persons with authority, and that procedure is implicit in your designation as -- of the company as, in fact, the entity that can amend?

MR. REICH: I would, sir.

QUESTION: And that that carries the implication that the company could amend through the action or authority of its board of directors, so that you in fact satisfy the procedure-identification criterion here?

MR. REICH: I would, Justice Souter, and I would say further that it would not merely be the board of directors, since a corporation may act by whomever the --

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has authority within the corporation for so acting.

QUESTION: In fact, that's why Judge Roth thought you were -- that you struck out, because it wasn't done by the board of directors, isn't that right?

MR. REICH: Well, Judge Roth, there's a distinction -- if you read the footnote, there is a distinction between what Judge Roth said in the footnote and what was derived from that. Judge Roth said the board of directors, or whomever, may act for the company. I would not quarrel with that part of it.

The majority -- and perhaps Judge Roth. It's unclear in the footnote --

QUESTION: Well, why did she come out in the end ruling against you?

MR. REICH: It's somewhat inscrutable. It's not totally clear from the --

QUESTION: May I suggest this as a hypothesis? I mean, don't you think she was assuming that the company would act either through individual -- either through the board, or by individuals designated by the board through a resolution which would be in the corporate records, or by individuals designated by the board through a resolution which would be in the corporate records, or by individuals designated in the bylaws, and apparently there was no indication in the record that this action had been taken

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by anyone in either of those three categories, and isn't that why she held against you on the facts?

MR. REICH: Possibly, but the footnote says that -- refers because it wasn't done by the board of directors. Indeed, authority exists -- "Authority may be implied," as Fletcher, we quote in the brief, states: "Authority may be implied by the position of the individuals, agents of the corporation, not -- "

QUESTION: Well, it does as a matter of general corporation law, but isn't there a problem in this statute in relying upon that kind of identification, because at least it seems to me a likely reading of subsection (3) that by requiring a procedure for identifying the persons with authority, what Congress is trying to get at is, is to provide a means by which somebody who wants to know what the current status of the plan is can determine who to ask and, therefore, unless there is in effect something of record somewhere showing who might be amending this, that it would not satisfy the provisions of subsection (3), even though, under general corporation law, an undesignated individual might have authority to do something.

MR. REICH: Well, there is one -- there is one flaw, and perhaps a second flaw, but one immediate flaw, Justice Souter, in that --

QUESTION: May I compliment you on the way you pronounce "flaw"? I didn't do quite so well earlier this morning.

(Laughter.)

MR. REICH: We have that way in New Jersey, sir.

QUESTION: It rhymes with law -- law.

(Laughter.)

MR. REICH: The term that the Congress used was "persons," and persons is expressly defined in section (3)(9) of ERISA as including a corporation. There is no indication that Congress intended, when it used a word that included "corporation," to require that there be an identification of individuals within the corporation that act for the corporation.

QUESTION: Well, I'll grant you that, but isn't it also the case that if Congress did not want some means of identifying institutionally who could take the action, then Congress wouldn't have bothered to be talking generally about identifying individuals. They simply would have said the plan must designate those persons who can amend.

But by saying the plan must provide a procedure for identifying, it seems to carry the further implication that somebody who wants to know something should be able to know who to ask.

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MR. REICH: Well, that -- there is a gloss of legislative history on this that may suggest, Justice Souter, to the contrary, because when you witness the fact that the predecessor provision of this in H.R. 2 gave the plan administrator the authority in certain limited situations to amend the plan, and this took that and simply allowed the plan to provide for who might amend the plan.

And I would suggest that, as you suggested in an earlier question, that the identification in the plan of the plan sponsor, the company, as the person with the authority to amend, should satisfy the procedure. That must have been -- may have been Justice O'Connor's question, but --

QUESTION: But under the earlier scheme, anybody who wanted to know if there had been an unpublished amendment would know enough to ask -- what was it, the administrator, I guess you said?

MR. REICH: Yes.

QUESTION: Yes -- would know enough to ask the administrator in order to make sure there wasn't something not on the record.

MR. REICH: Yes, but the administrator could have been the company, as it can be and frequently is, under ERISA as enacted, so you get back to the -- it's

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somewhat circular, because you get back to the fact that you ask the company, as the plan administrator, or you ask the company as the plan sponsor. In any event, it is the company.

QUESTION: Well, let's take your theory. Let's assume I am someone who wants to know -- I am the beneficiary, and I want to know what the present state of the plan is. On your theory, whom do I ask? Do I go to the corporate secretary and say, can you tell me whether there is anyone who, under the corporation law of, what, Delaware, in this case, I guess, could be amending this plan without being designated by a vote of the directors, or by some reference in the bylaws?

MR. REICH: Well, there probably could be a variety -- well, the bylaws wouldn't -- probably not be there anyway. They probably could be --

QUESTION: Yes. In that case, how would I find out?

MR. REICH: The person who acts for the administrator is designated in the summary plan description, and that person -- that person could be inquired of to -- as to whether or not there has been an amendment.

In this case, I would suggest that there was no need, and this is the other thing that I alluded to in

response to your earlier question, and that is that this -- this is not some disembodied amendment that we are talking about, some document sitting out there.

This was a term that was incorporated in the document, the SP -- summary plan description that the district court found to be a governing plan document and that the plaintiffs have conceded to be a -- one of the two governing plan documents, the other being the plan constitution that set forth the procedure for amendment by naming the company as the amending authority.

QUESTION: Well, let me step back, if I may. If Congress didn't want to provide for anything more elaborate than the capacity of an inquirer like me to go to the administrator of the plan and say, what does it provide right now, why would it have enacted anything as elaborate as requiring an identification for a procedure for those with authority to amend? Why wouldn't Congress simply have said, the administrator must be available to answer questions about the current state of the plan, or the administrator must have a copy of the current state of the plan at all times?

MR. REICH: Congress did say that.

QUESTION: Then why did it say this, too?

MR. REICH: I think it's basically the outgrowth -- and this is primarily for --

QUESTION: May I -- I'm sorry. May I interrupt you and --

MR. REICH: Yes, of course.

QUESTION: -- ask one question before I lose it? Isn't it the case that there could be an amendment that is not recorded with or filed with the administrator for some period of time, I forget what it is?

MR. REICH: That is correct.

QUESTION: So that if you went to the administrator and said, let me see what you've got, technically the administrator might not have every amendment?

MR. REICH: No, I should retract my agreement. It is not necessarily that the administrator might not have the amendment. It is that the amendment under part 1 of title I of ERISA, under sections 102 and 104, it may -- particularly, in this case, 104, it may be that the plan participants and the Secretary of Labor would not have the amendment for a period of time, up to 19 months.

QUESTION: But the administrator would.

MR. REICH: And the administrator would, particularly where, as here, the administrator and the plan sponsor are one and the same.

QUESTION: And that -- isn't that critical to your case? To what extent do you rely on the Government

agency, one of the agencies intimately involved, the IRS, having precisely the understanding that you have about the meaning of this provision, that it addresses multiemployer plans and not single company plans?

MR. REICH: That is correct, Justice Ginsburg. Whether or not the Internal Revenue Service not being the agency that administers title I of ERISA as opposed to title II and some other aspects of ERISA, it is that understanding, and it has been since the inception of ERISA a clear understanding on the part of --

QUESTION: Did this company do any more thinking about it than simply copy the prototype plan that IRS put out in that respect?

MR. REICH: Well, this wasn't -- this did not adopt the prototype plan, but if it had --

QUESTION: This clause.

MR. REICH: Well, it happens to virtually coincide with the prototype plan. One did not come from the other.

QUESTION: Mr. Reich, if we think that the Third Circuit erred in saying that there was no procedure for amending the plan here, what do we do about the identification issue? Do we remand it to the court below to resolve whether someone had authority to amend it in this instance?

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MR. REICH: That might -- that might be a possibility, but I would suggest that in any event that does not reach basically the second -- the critical issue of remedy, whether or not, assuming arguendo that there was not an adequate procedure, whether or not the Third Circuit -- whether or not there is a remedy of invalidation.

When Congress wanted to make a condition precedent to the validity of an amendment, it did so in a number of instances. Sections 204(g) and (h) of ERISA, section 304(b) of ERISA, section 4220 of ERISA -- there were a number of -- these are among -- there were a number of instances in which Congress expressly made -- imposed some condition on validity.

There is simply no provision in the six carefully crafted provisions of section 502, to quote Justice Stevens in Massachusetts Mutual v. Russell, that suggest that invalidation of a plan provision is at all a possible remedy.

It might -- there might conceivably be some reason --

QUESTION: Well, what if it turned out that in fact no amendment had been adopted? Could the Court so state?

MR. REICH: It was not -- it was not -- it was

in -- there was a provision in the plan description. The plan description was the governing plan document. It was simply a term that was included in this. There had been plan descriptions that -- summary plan descriptions issued on other occasions whenever there was, as here, a change in the insurance carrier. That was the occasion. This was not some disembodied amendment.

QUESTION: I'm just asking, if I may, what if the facts in a given case showed there had been no plan amendment. Do you say that a court lacks the authority to say so?

MR. REICH: Well, it's not that there had been no plan amendment. There was a plan amendment. If you're saying by the authority --

QUESTION: I know that's your position in this case, but what if there had not been, could a court not say so?

MR. REICH: Well, it's not that the court said that there was no plan amendment. It's the court said that there was no plan procedure. It conceded there was a plan -- a plan amendment, but because the plan -- the plan procedure was lacking --

QUESTION: Yes, you're -- that's okay. You're just not answering my question, but that's enough, I think. Your time's up.

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QUESTION: Thank you, Mr. Reich.

Mr. Bress, we'll hear from you.

ORAL ARGUMENT OF RICHARD P. BRESS

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE PETITIONER

QUESTION: Mr. Bress, would you mind enlightening us as to what you think the Court should do if we think the Third Circuit got it wrong with respect to whether it had reserved the right to amend the plan, the company? What do we do with respect to whether there was authority given in this case?

MR. BRESS: If you agree with the Government's position that the Third Circuit got it wrong and there was, in fact, a procedure in this case, we believe that the correct result would be to remand back to the Third Circuit to determine whether the company acted to promulgate the amendment in this case.

And by "the company acted," what I mean is whether the persons or individuals within the company who promulgated the amendment had the corporate authority to do so. If they did not, it was not an action by the company at all.

QUESTION: Does that authority have to be formalized in some way in the Government's view?

MR. BRESS: No, it does not. The authority can

either be express or it can be inferred from circumstance, pursuant to longstanding corporate principles.

QUESTION: So you disagree with Judge Roth and her view in this case on that point?

MR. BRESS: I think it's un --

QUESTION: She seemed to think it had to be by some action of the board of directors.

MR. BRESS: I think it's unclear from footnote 3 what Judge Roth's view was. If that was Judge Roth's view, then I would disagree with it. Because she didn't write a separate opinion, I think it's rather unclear from the text.

QUESTION: I'm not sure --

QUESTION: How could her view be otherwise, though, if she supported the judgment of the court? She concurred in the court's judgment.

MR. BRESS: She may have concluded that in this case it was neither expressly delegated -- the authority was neither expressly delegated to those individuals, or that it was neither expressly delegated nor impliedly delegated. She may have come to that --

QUESTION: How could she have made that conclusion on this record?

MR. BRESS: There was a significant record before the district court regarding the manner in which

the amendment was promulgated. There are facts in that record that seem to cut both ways.

QUESTION: Well, the district court hadn't made any finding on it, and it would be extraordinary for a court of appeals judge to do that in the first instance.

MR. BRESS: I agree with you, Judge Ginsburg, that it would be extraordinary. I just don't know whether Judge Roth did, in fact, make that finding or whether she did not.

QUESTION: Mr. Bress, on your view, why did the statute refer to procedures for identifying those with authority, as opposed simply to requiring procedures for amendment?

MR. BRESS: There will be some circumstances in which it will not be clear who the persons are who have the authority to amend, and let me give an example, because I think that's the best --

QUESTION: You mean, it will not be clear as a matter of corporation law.

MR. BRESS: It will not be clear as a matter of -- well, let me step back from that. We agree with the petitioner that the term "person" includes the term "corporation" and, in fact, because it includes the term "corporation," when Congress intended to refer solely to natural persons, it used the term, "individual," and it

did that scores of times throughout the act. Here, where it used the term "person," we believe it did so intentionally, so that identification of the corporation would be sufficient.

However, there are circumstances, for example, when you've got a standard form plan, that would be a plan that would be promulgated by a banker insurance company and marketed to individual employers. That plan may state that the sponsoring organization, which would be the banker insurance company, would reserve the authority to amend certain of the boilerplate provisions. The more tailored provisions could be amended by the employer.

By specifying the sponsoring organization can amend, one would look to find out -- it's a simple procedure, but one would take the second step of looking to find out who the sponsoring organization was in order to determine the person with the authority to make those particular amendments.

QUESTION: And you would then know enough to go to someone who speaks for the sponsoring organization and say, did you make any changes?

MR. BRESS: Yes, you would, but --

QUESTION: In other words, if you know who the sponsoring organization is, I suppose you can go to its president or its secretary, or somebody who keeps its

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records, and say, did you make any changes with respect to this plan.

MR. BRESS: You could do that, but if I might take a step backwards, we do not --

QUESTION: But isn't that the reason for referring to identification? Isn't there an interest in providing some means by which someone -- by which a beneficiary can find out what his benefits are at any given time?

MR. BRESS: No. We believe that the --

QUESTION: Why not?

MR. BRESS: We believe that the purposes of 402(b)(3) is primarily functional, and that purpose is to make a plan amendable by providing a mechanism or a way that it can be amended, and to delegate the power to amend to an individual. The person --

QUESTION: Are you saying that it was to provide clarity for the plan administrator in these multiemployer situations, rather than to protect beneficiaries? Is that --

MR. BRESS: Yes, although I wouldn't restrict it to simply multiemployer circumstances.

QUESTION: Any circumstance about where there might be ambiguity for the plan administrator, but the --

MR. BRESS: That is our view, Justice Ginsburg,

and we don't believe that that leaves the beneficiaries and participants out in the cold.

The plan fiduciary has an independent duty, under section 404(a) of the act, to perform his or her duties solely in the interests of the participants and beneficiaries, and to administer the plan in accordance with its terms, so the fiduciary will have a duty, given uncertainty, to determine what it is -- who it is that has the ability to amend, and whether they have followed the manner of amendment that that set forth.

QUESTION: Has the IRS modified its prototype plan in response to the Third Circuit's decision?

MR. BRESS: No, it has not. It has not.

I'd like to turn, if I may, to the second question presented in this case, which is whether, if the Court were to determine that the procedure in this case was not sufficient, that would mean that the amendment was therefore invalid.

When a plan makes clear that the plan can be amended by the plan sponsor, it would be odd in our view to interpret that document to be unamendable simply because it lacked a detailed description of the manner of amendment.

It would be far more natural, in our view, to recognize the effectiveness of the amendment if the person

identified has clearly manifested its or his intention to change the plan. That's the approach that was used under the common law of trusts, and it is an approach that in our view is consistent with Congress' basic intention, which is that plans be amendable.

Further, it's an approach that is consistent, in our view, with the interests of participants and beneficiaries.

When you have a circumstance such as in this case, where it's clear that the plan can be amended, and it's clear that the plan -- that the plan sponsor has said that the plan has been amended, the harm suffered by the participants and beneficiaries, if they've suffered harm, has been from the substance of the amendment, not from the failure to provide a procedure.

It would be inconsistent, we believe, with Congress' intent that beneficiaries and participants be able to rely on the terms of the document as written to invalidate the plan under these circumstances.

That leaves, of course, the question of whether ERISA itself prohibits amendments in the absence of a plan procedure. We do not believe that it does.

The harm caused by the failure to have a procedure is the failure to provide guidance to the fiduciaries. The fiduciaries will, in the ordinary

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course, simply go to the employer in that kind of a circumstance and request further guidance, more detailed procedures.

In the unlikely event that the corporation or sponsor were to refuse, ERISA provides a tailored remedy. Under section 502(a)(3), the fiduciary can enjoin the employer to provide a more specific procedure.

Because ERISA provides that remedy, it need not be read to provide a remedy of invalidation, or to require a procedure for amendment as a condition precedent to amendment. We agree with petitioner that the act cannot honestly be read -- that 402(b)(3) should not be read to provide -- to serve as a condition precedent, because there are various other provisions in the act in which Congress has made clear its intention to have a condition precedent when it wanted to.

Finally, we believe that reading 402(b)(3) as a condition precedent is inconsistent with the approach to 402 more generally. The failure to have a written plan does not mean that no plan exists. The failure to provide a procedure for establishing a funding policy does not mean that there is no funding policy, or that the plan no longer has a requirement to fund.

Similarly, we would advocate that the failure to have a procedure for amendment in the written document

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does not mean that a procedure does not exist, nor does it mean that the procedure has not been followed.

If there are no further questions --

QUESTION: Thank you, Mr. Bress.

MR. BRESS: Thank you.

QUESTION: Mr. Kennedy, we'll hear from you.

ORAL ARGUMENT OF THOMAS M. KENNEDY

ON BEHALF OF THE RESPONDENTS

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

I'd like to take this Court briefly through the process of how we got here, both to assist you in answering your questions, and to help frame the statutory issues posed.

This plan had its origin in a pre-ERISA retiree benefit plan maintained by Curtiss-Wright Corporation for its nonunion retirees. In 1976, at the time ERISA was adopted, the plan created two documents, a trust and a plan constitution. That trust appears at Joint Appendix 23 of the record, the constitution at Joint Appendix 34.

The record reflects formal acts taken to effectuate both of those documents. At Joint Appendix 33, the trust agreement was executed by a corporate vice president, it was dated, and the signature was attested by

the secretary of the corporation.

Similarly, 6 months later when the plan constitution was adopted to comply with ERISA, the record reflects at Joint Appendix 40 an execution by a corporate vice president, a dating, and an attestation by the corporate secretary.

Seven years later, when this corporation acted to deprive the plaintiff class of their benefits, nothing like that type of procedure was followed. Instead, through an act of casual redrafting -- and we direct the Court's attention to the findings of the district court, particularly at page 38 of the appendix to the petition -- there were no formal procedures followed in any respect in connection with the adoption of the term under which these benefits were denied.

The court went further and found no informal procedures were followed either. Instead, an act of casual redrafting had the effect of denying petitioners the benefits which they had been led to believe would be theirs for their lives.

QUESTION: You use the phrase, casual redrafting, Mr. Kennedy. What officials participated in the redrafting, which you say was casual?

MR. KENNEDY: The term "casual" is taken from the findings of the district court, Your Honor.

QUESTION: Well, what was the district court thinking about, do you think --

MR. KENNEDY: The district court --

QUESTION: -- since I wasn't there?

MR. KENNEDY: The district court, Your Honor, was referring to the fact that at trial the company representatives testified to a 3-year process in which drafts of a proposed summary plan description were reviewed at various points by various officials and there was not even -- they were not even able to establish at the trial who had been responsible for initiating the particular language which resulted in the deprivation of these benefits.

It would be difficult to imagine a process more lacking in any procedural basis than what was gone through in this instance to deprive the plaintiffs of these fundamental benefits. An attorney in the company legal department, one of their personnel managers, both testified that they had been responsible for inserting this language into galley sheets that came back from the printers in connection with the --

QUESTION: I'm not sure you have any grievance for all of that. I mean, you acknowledge that if the plan said an amendment may be made -- shall be made by the company, its procedure shall be it will be drafted by an

attorney in the counsel's office, by the youngest attorney, the youngest and most inexperienced attorney in the counsel's office, that would be okay, as far as you're concerned, right? That's not your grievance.

MR. KENNEDY: The grievance, Your Honor, is that the lack of a procedure meant that the individuals who inserted this language into this plan never recognized or were aware that an effective amendment was being made.

QUESTION: Well, maybe there's no effective amendment, but that's a question of corporate law. I mean, is that your argument, that the corporation has not effectively acted, and therefore there is no amendment? We can send it back to have that -- in fact, that's been the suggestion, that we send it back to have that determined.

MR. KENNEDY: We have several problems with that approach, Your Honor. In our view, it ought to be a Federal question under 402(b)(3) of the act of when sufficiently solemn steps have been taken to effectuate a change in an employee benefit plan.

QUESTION: And yet even on your own reading, that would not be required. I mean, as Justice Scalia said in his hypo, if there is a clear designation of the youngest attorney in the department as the individual to make the amendment, I presume that on your own reading of

subsection (3), that would be satisfactory.

MR. KENNEDY: Yes, it would, and --

QUESTION: So how, then -- why, then, do you argue that somehow as a matter of law, of Federal law, we should read a corporate governance requirement into the statute?

MR. KENNEDY: Because if we are reading a corporate governance requirement, it's stemming from a legal default by Curtiss-White Corporation as plan sponsor. They did not act to make the youngest attorney in the legal office the individual empowered to create amendments.

QUESTION: But they did put in a provision that coincides with the prototype plan put out by the IRS as a model, and it's a little hard then to come down on a company for following a form or coming up with a form that coincides with a form that a Government agency puts out as meeting the requirements of the statute.

MR. KENNEDY: Well, even Hall of Famers strike out occasionally, Your Honor, and in this case, the Internal Revenue Service does not appear to have followed either the language or what we regard as the expressed intent of Congress, and we think it's significant that the Internal Revenue Service has no special regulatory authority for issues arising under title I of ERISA. That

is under the Department of Labor.

QUESTION: Well, Mr. Kennedy, what if the effect of -- on your clients of this casually drafted -- had been exactly the opposite. What if it has given them some very substantial benefit, but upon examination it turned out that it was just done by a couple of inexperienced lawyers in the general counsel's office, would that make the amendment which benefited them equally invalid?

MR. KENNEDY: The amendment would be invalid as an effective reordering of plan terms.

Now, going one step further, to the extent a plan sponsor were to issue to employees representations that there had been an increase in benefits, there might well be reliance interest by the recipients of those promises that would allow them to be enforced, but not as an amendment to the plan, but under more equitable doctrines which would entitle, on theories of detrimental reliance, plan participants to enforce terms under those circumstances. It would not, however, be an effective amendment of the plan.

We recognize that this is a two-edged sword, and that Congress intended, from our perspective, in the curious wording of this particular statute, to accomplish two very important goals. The first is a gatekeeper function, and this particular section has two parts of it.

The first is that there has to be a procedure for amending such plan.

Now, in our view, that, as we said, is a gatekeeper. It allows anyone to determine when the plan has been effectively amended, and we would direct you to the other fiduciary sections of ERISA, which in our view make clear that only an effective amendment can, in fact, be enforced by a plan administrator.

402(a)(1), as an example, provides that a plan has to be not only established, but maintained pursuant to a written instrument. To be maintained pursuant to a written instrument, it has to be amended validly, or the original written instrument continues.

404(a)(1)(D) provides that plan administrators are to enforce the written terms of a plan only insofar as they are consistent with the terms of this title. An amendment which has not been adopted pursuant to a 40(b)(3) procedure is not consistent with the terms of this title.

QUESTION: May I ask you, in following up on your adversary's -- the Government's last remark, what about an amendment to this plan which created a procedure for making amendments? Would that be valid?

MR. KENNEDY: It would for this reason, Your Honor, and we recognize it sounds anomalous to suggest

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that a plan cannot be amended, but yet that could be accomplished, and I'll explain to you our reasoning, and what we believe was probably the Third Circuit reasoning.

Everyone in this case acknowledges that one of the possible steps that a participant can take if a plan lacks an amendment procedure is to go to court and obtain an order under 502(a)(3) compelling the sponsor to adopt the plan amendment.

In our view, a plan sponsor has an inherent right to bring its plan into compliance with the express terms of ERISA. That would not extend to an inherent right to accomplish amendments that are in its own financial self-interest and are not directed at complying with ERISA.

A procedure which -- or, rather, a recognition that plan sponsors can add an amendment procedure really only says to them that yes, if you notice you're out of compliance with ERISA, there's no need to wait till a participant drags you into court and compels you to accomplish that which you should have done originally, at the time the plan was created.

QUESTION: Does that mean that any -- say there are other provisions of the plan that did not satisfy ERISA completely, and no amending procedure, they could make amendments to cure other defects in the plan, I take

it, then?

MR. KENNEDY: Well, I think in our view the sensible procedure would be to first enact the amendment procedure and then accomplish the other goals through it.

QUESTION: But what if they didn't realize they -- say this case hadn't been decided, but they realized they didn't have the proper funding provisions, or something like that, or their benefits didn't comply with certain things, could they make amendments to just bring the plan in conformity with the statute, even though there's no amendment procedure in the plan?

MR. KENNEDY: Well, as the Solicitor General pointed out, Your Honor, other courts have enforced ERISA plans, though they be unwritten, and though they be without a funding procedure, the theory being, I think, twofold. The first is that when there is something mandated by the statute, the law will presume it to be there. The second, that these types of situations would be construed in favor of plan participants and against plan sponsors.

So my answer is yes, in my view, a plan sponsor could, consistent with the statute, take such actions as are necessary to bring it into compliance with the act, which would not, of course, authorize the amendment which took place in this case, which had nothing to do with plan

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qualification.

The statute provides -- we find this interesting -- in a number of instances, 403(b)(2) is an example, 404(d)(2)(A) for another --

QUESTION: May I just back up for one moment? You used the word "casual," and I was looking at the page -- the district court didn't say casual, unless I'm looking at the wrong place. He said, routine --

MR. KENNEDY: Your Honor, I apologize. You are right --

QUESTION: -- and I suppose that's the argument that a corporate acts -- if this action was done in the routine way that corporate actions are taken, it should be okay. At least that was your opponent's argument, that a corporation is a person, and a corporation acts in this instance in the routine way that a corporation acts in instances generally, so I don't see anything negative in the district judge's use of the word "routine."

MR. KENNEDY: Your Honor, the -- we understood it to be negative, and I apologize to the Court if I substituted a word which you regard as having other and pejorative consequences.

We understood by "routine" to have meant "casual," in view of the fact that there was testimony at the trial that there was an informal procedure available

to amend the plan, and even that was not followed, so that this was not a situation where typical, predictable, expected, established corporate routines were followed, and therefore it gave the amendment legitimacy. The district court found that this amendment was invalid, and not subject to respect, because it was adopted in a manner which was not consistent.

QUESTION: The district said it was invalid because there was no clause that provided for -- you prevailed on your statutory argument, but as far as what the corporation did, I don't get anything from this page saying it was casual. It was just done as a matter of routine, not done pursuant to a provision that says, this is the person who has authority to amend, this is the procedure for amending.

I thought that was your argument, that in order to make an amendment, you must have a plan procedure for both identifying the person who amends, and the procedure for amending.

MR. KENNEDY: Yes, Your Honor.

QUESTION: It was not done that way. Instead, it was done in the routine way that a corporation acts.

MR. KENNEDY: Your Honor, we were -- my argument was based on the following sentence in the district court opinion, which is on page 38-A:

"However, the court has also considered in this case the testimony of Mr. DuBois, who was a company personnel manager, which suggests that there may have been an unwritten procedure for amending the plan involving the submission to a certain executive committee which he described. However, as the defendant admits, even those procedures were not followed in the case of the 1983 amendatory language."

The court then goes on to hold that the language in fact was added through routine redrafting, which we understood to have been a comment suggesting the lack of appropriate procedure under which this language was added, rather than a suggestion that some form of corporate expected behavior had occurred.

QUESTION: Well, isn't -- didn't the evidence show that the amendment was drafted by the corporate director of benefits and labor counsel and then approved by the executive vice president?

MR. KENNEDY: The record certainly shows that the amendment was drafted by the corporate labor counsel and the manager of benefits. There is a disagreement in this record as to whether the record effectively shows that it was approved by the executive vice president, and --

QUESTION: Well, did the district court make any

finding?

MR. KENNEDY: No, he did not, Your Honor.

QUESTION: He did not? The district court didn't think it necessary to make a finding on that question?

MR. KENNEDY: No. He pointed out, Your Honor, that the reference to the executive vice president was the reference to the fact that there was a de facto committee which met on these things. The district court conclusion was that there had been no de facto compliance with these procedures. The informal procedures internal to the company had not been followed. That was the district court view, and --

QUESTION: What harm has this caused you, unless it be the harm that the amendment was not effectively adopted by the corporation? Let's leave that question aside. Perhaps they didn't adopt it at all, but assuming it was adopted, I could see how your client would have suffered harm if the amendment was not incorporated into the plan, so that your client didn't know anything about it, and didn't know where to go to find out about it, but in fact it was incorporated into the plan, wasn't it?

MR. KENNEDY: It was placed into the summary plan description, and I'd like to just draw a distinction between the plan and the summary plan description.

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QUESTION: Right.

MR. KENNEDY: The summary plan description in this case, at Joint Appendix 53 and Joint Appendix 55, provides that in the event of conflict between the plan and this document called the summary plan description, the plan itself will control, so that there is a question about whether inserting the language within the summary plan description actually was effective to accomplish anything, though in our view, our participants were harmed by the insertion of this language in the following manner.

QUESTION: You don't think that you would be up here arguing for your clients that if something had been inserted into that summary of the plan and in fact had not been adopted by the corporation, the corporation would nonetheless be bound to pony up that particular benefit? Don't you think that would be the result?

MR. KENNEDY: But Your Honor, on theories of detrimental reliance, and not on a theory that had accomplished an effective plan amendment --

QUESTION: Well, but --

MR. KENNEDY: -- which is a very important difference.

QUESTION: Whatever the difference is, if that detrimental reliance works in one direction, why doesn't it work in the other? I mean, it seems to me no harm, no

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foul. You --

MR. KENNEDY: In our view, Your Honor --

QUESTION: Assuming it's been properly adopted, which is another question. We can send it back to find that. If it has been properly adopted, what harm has been done to your clients? It was there in the summary of the plan.

MR. KENNEDY: If the plan were properly amended to set forth this term, then we would not be here, so it's difficult to speculate as to what harm there would be.

This is a question about whether the amendment was effectively adopted. The lack of a procedure caused a separate cognizable harm to my clients in the following respect. They were deprived of their right, anticipated, in our view, by Congress, to have the decision on these critical benefits made by an informed fiduciary aware that an amendment in fact was occurring.

It's significant here --

QUESTION: What is the source of that right?

MR. KENNEDY: In our view, the source of that right is the requirement that a specific procedure be inserted in the plan.

QUESTION: But a moment ago you agreed that, in fact, if the procedure had specified that the junior counsel in the corporation could amend the plan, that

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would be valid.

MR. KENNEDY: Even were that true, Justice Souter, the junior counsel would be, then, a fiduciary. If it were up to him or her to make such an amendment, they would be aware that an amendment in fact was occurring, and they might recognize the decades of representations made to the members of the plaintiff class that they would receive these benefits for life.

That decision, to make an affirmative change in the terms of the plan, rather, to enforce what the corporation may have improperly understood was part of its plan, is a substantive right.

QUESTION: Mr. Kennedy, are you saying --

MR. KENNEDY: A procedural one, yes --

QUESTION: Are you saying that every change, at least every change that doesn't favor the plan beneficiaries, that would ever be made in any plan that followed the IRS prototype on the amendment clause, that all of those changes would be no good, and so to know what the plan contained, you'd have to go back to the very first plan document, which would not be what the beneficiaries get routinely?

Is that the effect of your argument, that any change made that is not favorable to the beneficiaries from day one, is no good?

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MR. KENNEDY: Your Honor, though I think we could accept a de minimis rule as a matter of judicial common sense, any substantive plan change made, to be effective has to comply with the stated procedure under section 402(b)(3).

QUESTION: Every change that is made that isn't favorable to the beneficiary is no good?

MR. KENNEDY: Under our interpretation of 402(b)(3), that is correct.

Under the interpretation by Judge Roth --

QUESTION: So how many -- thinking of this plan, how many changes have been made since it was installed that didn't favor beneficiaries --

MR. KENNEDY: This plan, very few, Your Honor.

QUESTION: -- that would be no good?

MR. KENNEDY: This plan, very few. We are not aware of any. This was a hospitalization, for the most part, plan, providing for 80 percent reimburse --

QUESTION: But this would not be the only one. In fact, nobody would know what the current plan is, because you'd have to go back and check every change and then cancel out all the ones that were detrimental.

MR. KENNEDY: There may be a burden on a plan sponsor from the ruling we advocate, but it is a burden placed on them by Congress.

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QUESTION: How about the beneficiary to know what the plan contains? They get these summary statements that says, this is your plan.

Now, under your interpretation, they don't have any clue what their plan is, because there are a lot of things in it now that are no good.

MR. KENNEDY: Your Honor, let me remind you of this. Every party to this appeal recognizes that if a plan has a stated procedure, and it is not followed in connection with the adoption of an amendment, that amendment is invalid, and even if it appears in the summary plan description, does not work an effective change to the terms of the plan.

If that is true, then that same risk of uncertainty is present whenever a plan has complied with Congress and in fact adopted a procedure, because even if it were to be the junior person in the corporate law department, if the changes were being made by the executive vice president to the corporation not securing the --

QUESTION: But isn't the risk much larger that when you have an interpretation, even if not a Government agency that we would defer to has put out a plan to the public, that the likelihood is that many people have adopted plans with that provision in it, so we would have

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a whole -- not only this company's plan, but a whole set of plans where the beneficiaries would have no idea at the moment of what their plan contained?

MR. KENNEDY: Your Honor, obviously there's a risk involved, but let me suggest to you that that risk, which was certainly remarked upon by the petitioner in their threat-of-litigation argument, is ameliorated by a number of factors. The first is that there is a statute of limitations here which would prevent participants from going back more than 6 years to complain of amendments supplied to them that had not been properly adopted.

Within that 6-year period, since at least 1990, the Third Circuit in the Frank and Hozier cases has made it quite clear that plans that persisted in adopting amendments not pursuant to a 403(b) procedure were at risk of having rendered themselves unamendable, and if a plan sponsor has proceeded to continue to maintain itself out of compliance with ERISA, and is harmed by this, it's a self-inflicted wound in our opinion. There's been ample notice to them that this was a congressional directive, and it was entitled to be respected.

QUESTION: At the moment, I'm thinking that your -- they're arguing that, look, this just means you have to have a procedure and you have to know who's going to do it, and so the company says, yes, we have a

procedure.

We're not quite certain what it is. I mean, it's ambiguous as to whether it's the office boy or the president of the board of trustees, but there is a procedure, and the company can do it, that's who. Not the trustee, not the beneficiaries, but the company, so we've complied.

You get more out of this -- read the statute stronger, because you're reading it as an information requirement, whether it's to give the trustee information, to give the beneficiaries information, to give somebody else.

Now, is there anything in the history of it or the position of this that suggests it's an information requirement rather than just trying to make certain there is some kind of a plan, and somebody can work the plan -- work the amendment?

MR. KENNEDY: Yes, in our view --

QUESTION: What is it?

MR. KENNEDY: -- there is, Your Honor.

When initially adopted, H.R. 2, the original ERISA statute that passed the House of Representatives, provided that plan administrators shall be deemed to have the authority to amend their plans, and gave no indication that there should be further disclosure either to

participants or fiduciaries as to how that should be done or who should do it.

That was specifically rejected by Congress when it did adopt the current provision of 402(b)(3), and the conference report that accompanied the adoption of ERISA, though it is brief, states clearly that every employee benefit plan shall have a procedure for amending it.

QUESTION: Well, maybe they perhaps meant that it needn't necessarily be the administrator who can amend it. Maybe the administrator with others. Maybe the beneficiaries. Maybe the workers. Maybe altogether. Maybe the trustee.

Is there -- I mean, as you say it, it doesn't sound like they want information to be given.

MR. KENNEDY: Well, we coupled that, Your Honor, with the requirement set forth in ERISA that all plan documents be disclosed upon request to participants.

When you understand that Congress recognized, in drafting these fiduciary requirements, that every plan document was subject to disclosure, a requirement that there be a specific procedure in our view is consistent with that disclosure obligation, and as the Third Circuit held, was a critical term to allow people to know how and by whom settled expectations could be changed.

The -- I'd like to address the distinction

between procedural defaults which arise under the reporting and disclosure sections of the act and procedural defaults that arise under fiduciary sections.

A number of courts have held that in order for a participant to obtain benefits in a situation in which there has been a default in the obligation to distribute a summary plan description and so forth, in order to obtain recovery, the participant must demonstrate a detrimental reliance upon the information that was made available to them.

In our view, that's inappropriate when the default was not a reporting and disclosure obligation in section 102, but a far more fundamental section directly within the fiduciary sections of ERISA. The requirement that plan administrators adhere to plan terms only insofar as they comply with ERISA in our view suggests that a plan amendment which is not consistent with the statute cannot be enforced.

The Solicitor General has argued that the appropriate response this Court should make to the Third Circuit decision is a remand. I'd like to address the type of standards that ought to be utilized by this Court should that option be accepted.

It seems to me there's a difference between saying, as a bright line rule, that in order for a plan

amendment to be adopted, if there is no procedure set forth in a plan, only the highest body in the corporation can undertake that amendment, in this case the corporate board of directors. That is what we understand Judge Roth to have been deciding.

The position of petitioner, Curtiss-Wright, would allow notions of corporate law which go well beyond that to be utilized by this -- by a reviewing court in determining whether there had been some type of adoption by the corporation, and in our --

QUESTION: Why is it you say that only the corporate board could adopt this?

MR. KENNEDY: In our view, State -- the purpose of State law should be only to identify the highest decisionmaking authority within the sponsoring entity, and that Federal law should determine as to whether that entity has appropriately made an effective amendment.

QUESTION: Why should that be?

MR. KENNEDY: Because otherwise, Your Honor, you get into the realm of postamendment conduct as constituting the validation process, as Curtiss-Wright in fact has argued here. They suggest in their brief that one of the reasons the corporation should be deemed to have adopted this amendment is that they fought it in court for 7 years, and Congress, in our view by requiring

a procedure, was clearly focusing on pre --

QUESTION: But you're building a great deal on the requirement of a procedure, that State corporation law be totally superseded.

MR. KENNEDY: Well, Your Honor, the definition of procedure, after all, in Black's Law Dictionary, is the mode of effectuating a legal right, as opposed to the legal right itself.

That requirement that a procedure be stated in our view, given its natural reading, does require that the plan set forth the mode of accomplishing a procedure for amendment.

QUESTION: What if this plan had said, the company pursuant to New Jersey corporate law?

MR. KENNEDY: Then, Your Honor, in our view, the question would be whether the amendment had been valid under New Jersey corporate law, but the fact that a plan sponsor can self-describe that form of legal test, which is what Congress intended, doesn't mean that in the case of a default under the statute, leaving out any type of procedure, this Court should extend to them the full range of corporate law in making that determination.

QUESTION: What if the board of directors of the corporation had adopted a resolution which says, amendments of all plans, contracts, and other documents to

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which this corporation is a party may be made by the least experienced, youngest lawyer in the general counsel's office? So the board has specified that this is the way -- would that satisfy you, or do you insist that this is nondelegable by the board of directors?

MR. KENNEDY: In a situation in which the plan specifically provides that the board of directors --

QUESTION: Not the plan. Not the plan. Not the plan. The plan just says what this plan says, and you say, well, only the board of directors can do it. Well, what if the board of directors has adopted a provision which says, all amendments can be made by the general counsel?

MR. KENNEDY: If there were express action of the board of directors to designate an amending authority --

QUESTION: Right.

MR. KENNEDY: -- in our view it would be within Judge Roth's --

QUESTION: That's okay.

MR. KENNEDY: -- concurrence.

QUESTION: Okay. Now, there isn't such an explicit resolution by the board but, in fact, from time immemorial all amendments have been made, with the knowledge of the board, by the general counsel.

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MR. KENNEDY: In our view that --

QUESTION: That would not suffice.

MR. KENNEDY: In our view, that stretches the term "procedure" which Congress required be -- to its breaking point, and reads it out of the statute to the point where all a plan sponsor need do is to state whether --

QUESTION: Mr. Kennedy --

MR. KENNEDY: -- failure --

QUESTION: -- a lot of these amendments are a product of negotiation between the union and the company, and I presume a collective bargaining agreement doesn't have to be approved by the board of directors to be valid, but you'd say one incidental feature, we're going to raise the pensions from $90 a month to $92.50, that would have to be approved by the board of directors?

MR. KENNEDY: Your Honor, I'm a union lawyer, and I know full well, when I negotiate a contract with a company, that that change to that pension plan hasn't become effective until the plan has been amended to set forth that change, even if we've got a collective bargaining agreement over here which says that the company's going to do it.

QUESTION: Right.

MR. KENNEDY: Unions and companies don't

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negotiate the terms of single employer plans. At least, they --

QUESTION: Well, they sometimes do.

MR. KENNEDY: They negotiate about those terms, but the effective act of bringing about the change in the plan to reflect the collective bargaining agreement is an amendment of the plan by the proper amending authorities, which would not include the union.

In our view, this statute is plainly set forth. It does no more than require a plan sponsor to obey the terms of the law when taking away critical health care provisions for section -- sectors of our population that are least able, really, to respond to these kinds of changes, and we would suggest that the proper benefit --

CHIEF JUSTICE REHNQUIST: Thank you --

MR. KENNEDY: Thank you.

CHIEF JUSTICE REHNQUIST: -- Mr. Kennedy.

The case is submitted.

(Whereupon, at 12:05 p.m., the case in the above-entitled matter was submitted.)

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CURTISS-WRIGHT CORPORATION, Petitioner v. FRANK C. SCHOONEJONGEN, ET AL.

CASE NO.: 93-1935

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

BY Ann Mari Federico

(REPORTER)