

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

CAPTION: D. GRANT PEACOCK,  
Petitioner, v. JACK L. THOMAS  
CASE NO: No. 94-1453  
PLACE: Washington, D.C.  
DATE: Monday, November 6, 1995  
PAGES: 1-50

95 NOV 14 P 3:09

RECEIVED  
SUPREME COURT, U.S.  
MARSHAL'S OFFICE

ALDERSON REPORTING COMPANY  
1111 14TH STREET, N.W.  
WASHINGTON, D.C. 20005-5650  
202 289-2260

IN THE SUPREME COURT OF THE UNITED STATES

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

- - - - -X  
D. GRANT PEACOCK, :  
Petitioner :  
v. : No. 94-1453  
JACK L. THOMAS :  
- - - - -X

Washington, D.C.  
Monday, November 6, 1995

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

DAVID LYNN FREEMAN, ESQ., Greenville, South Carolina; on behalf of the Petitioner.

J. KENDALL FEW, Greenville, South Carolina; on behalf of the Respondent.

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 Respondent.

## C O N T E N T S

1		
2	ORAL ARGUMENT OF	PAGE
3	DAVID LYNN FREEMAN, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	J. KENDALL FEW, ESQ.	
7	On behalf of the Respondent	25
8	ORAL ARGUMENT OF	
9	RICHARD P. BRESS, ESQ.	
10	On behalf of the United States, as amicus curiae,	
11	supporting the Respondent	40
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

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

(11:03 a.m.)

1  
2  
3 CHIEF JUSTICE REHNQUIST: We'll hear argument next  
4 in Number 94-1453, D. Grant Peacock v. Jack Thomas.

5 Mr. Freeman, you may proceed whenever you're  
6 ready.

7 ORAL ARGUMENT OF DAVID LYNN FREEMAN

8 ON BEHALF OF THE PETITIONER

9 MR. FREEMAN: Thank you, Mr. Chief Justice, and  
10 may it please the Court:

11 At issue in this case are two important areas of  
12 the law, one touching on ERISA, the other dealing with the  
13 scope of ancillary jurisdiction of the Federal courts under  
14 Article III of the Constitution.

15 In the ERISA issue, we ask the Court to examine  
16 whether there exists a Federal common law remedy of veil-  
17 piercing or a rule of decision said by the courts below to  
18 arise out of ERISA.

19 The issue of ancillary jurisdiction seeks  
20 examination by the Court of the power of the Federal court  
21 to entertain a separate lawsuit, such as the case now before  
22 the Court, where there is no independent basis of  
23 jurisdiction. The case before the Court was commenced 3  
24 years after a judgment was entered against Tru-Tech.

25 QUESTION: If we were to decide the second

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005



1 question in your favor, would we need to reach the first  
2 question, Mr. Freeman?

3 MR. FREEMAN: Your Honor, you would not, I think -  
4 - the second question being the ancillary jurisdiction --

5 QUESTION: Yes.

6 MR. FREEMAN: -- question? Well, I think I spoke  
7 too quickly there. I believe that you would in fact need  
8 to go back to the ERISA issue and make a decision on whether  
9 you can read into ERISA a common law cause of action, and  
10 that would be the Federal question basis for maintaining  
11 this action in Federal court.

12 QUESTION: If we decided it against you we could  
13 dodge the other bullet, right?

14 MR. FREEMAN: That's the way to put it.

15 QUESTION: That's great.

16 MR. FREEMAN: Yes -- that's the right way to put  
17 it.

18 So -- but I understand the complexity of the  
19 ancillary jurisdiction, and it would be my purpose, unless  
20 the Court should direct me otherwise, to address that first  
21 and then in the time remaining come back, if I may, to  
22 ERISA.

23 In the second suit before the court, the district  
24 court, after trial on the merits, held the petitioner liable  
25 for the Tru-Tech judgment on the basis that there was a

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

1 Federal law cause of action.

2 Now, when it reached the Fourth Circuit, the  
3 Fourth Circuit, without hearing argument, really without  
4 the briefs having addressed the issue, found that the  
5 jurisdiction giving vitality to the case was to be found in  
6 the court's ancillary jurisdiction, and we believe that in  
7 so doing that constituted a mistake which needs to be  
8 addressed in the Court here today.

9 Before moving away from the subject of ERISA, Mr.  
10 Chief Justice, I would want to make one important point.  
11 The district court asserted personal jurisdiction over  
12 petitioner, a resident of the State of Pennsylvania, on the  
13 basis of ERISA's provision for nationwide service of  
14 process. Now, should this Court conclude that there is no  
15 ERISA cause of action to be read into the ERISA statute, we  
16 believe it would be necessary for the Court at a minimum to  
17 remand for a proper determination of personal --

18 QUESTION: Unless -- I assume there's a long arm  
19 statute in South Carolina that could have been used if there  
20 were no ERISA jurisdiction, but if there was a proper -- in  
21 respect of the ancillary jurisdiction of the court.

22 MR. FREEMAN: We do have a long arm statute, Your  
23 Honor, and the -- I don't think it's terribly clear that if  
24 you have ERISA jurisdiction that furnishes a substitute for  
25 appropriate service of process.

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

1           QUESTION:       Well, let's assume no ERISA  
2 jurisdiction, but that there is an independent basis under  
3 Federal common law ancillary jurisdiction of the court to  
4 proceed. I take it that Mr. Peacock would have been subject  
5 to the long arm statute.

6           MR. FREEMAN: He would have been subject to the  
7 long arm statute, and when we attack the subject of  
8 ancillary jurisdiction, and we have to determine under the  
9 argument of the Government which law applies, then it would  
10 make a difference what law is applied, and if, for example,  
11 you should apply the law of fraudulent transfers, then you  
12 would be thrown to a focus which shifts in point of time  
13 from South Carolina to Pennsylvania, where all of the  
14 actions which were involved in that occurred.

15           And I would submit, I think, at the time of  
16 remand, that the appropriate place for trial would be  
17 Pennsylvania, and that the long arm statute, while it might  
18 reach causes of action in South Carolina, would not be  
19 sufficient without sufficient constitutional --

20           QUESTION: In any event, we can't resolve that  
21 question.

22           MR. FREEMAN: Cannot. Cannot.

23           QUESTION: Let me understand -- do I understand  
24 correctly that you are not saying there's no remedy here.  
25 What you're saying is, there is a remedy under State law

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

1 and State court.

2 MR. FREEMAN: Precisely.

3 QUESTION: Before you get off of the remand  
4 necessity to determine personal jurisdiction, why do you  
5 reject out of hand the possibility that in a suit that is  
6 ancillary to another suit, the court's personal jurisdiction  
7 is the same as that in the suit to which the suit is  
8 ancillary?

9 That is, even if this doesn't -- even if this is  
10 not an ERISA case, if it is ancillary to a case in which  
11 there is nationwide jurisdiction, there is also nationwide  
12 jurisdiction in the ancillary suit. Isn't that a  
13 possibility?

14 I mean, I don't know what the answer is --

15 MR. FREEMAN: I don't know what --

16 QUESTION: -- but isn't that something we ought  
17 to look at?

18 MR. FREEMAN: I think it would have to be looked  
19 at, and I don't know what the answer is. I think you would  
20 be required to take a close focus on what nationwide service  
21 of process relates to, and under the statute it relates,  
22 really, to actions under ERISA, so if you can read a cause  
23 of action into ERISA -- probably.

24 But if you're only reading a rule of decision into  
25 ERISA, if you're superimposing it at that level, I think

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

1 it's very problematical that you can read the nationwide  
2 service of process statute in a way that would effectuate  
3 personal jurisdiction under the nationwide service.

4 QUESTION: One quick question on this, because I  
5 know we have other issues. Was Peacock originally served  
6 in the original underlying action under the nationwide  
7 service of process provision?

8 MR. FREEMAN: I'm sure he was. I'm sure he was.  
9 My memory doesn't go entirely to that point, but there was  
10 no question of his jurisdiction at that point.

11 QUESTION: May I ask you why -- let's leave ERISA  
12 out of this entirely, but if what's being charged here is  
13 conduct that frustrates the collection of a Federal  
14 judgment, why shouldn't the conduct that frustrates the  
15 collection of the judgment be considered ancillary to the  
16 case that resulted in the judgment?

17 MR. FREEMAN: I think that's the -- a critical  
18 question for me to deal with, and what I want to say about  
19 that is -- I'll come back to it a number of times, but  
20 basically that supposes that there was a violation of the  
21 court's order by the petitioner in this case, not, as we  
22 maintained, the violation of a State court rule of law,  
23 and --

24 QUESTION: Why does it assume that?

25 MR. FREEMAN: Pardon?

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005



1 QUESTION: Why does it assume that? Why does it  
2 assume there's a violation of the court order rather than  
3 a violation of the State rule of law?

4 MR. FREEMAN: To say that this person should be  
5 held liable in an action which seeks affirmative relief  
6 against him, personal liability, and that you append that  
7 to the first action on ancillary jurisdiction simply because  
8 he had an eye to that judgment in doing what he did, we  
9 think goes farther than this Court's decisions has ever gone  
10 in creating ancillary jurisdiction.

11 QUESTION: In Labette, had the county  
12 commissioners violated the order?

13 MR. FREEMAN: They had not, but the  
14 commissioners --

15 QUESTION: Aren't they in the same boat, then,  
16 as -- I forget the person's name --

17 MR. FREEMAN: Peacock.

18 QUESTION: -- in this case -- Peacock in this  
19 case?

20 MR. FREEMAN: Not at all, and fundamentally in a  
21 different position. The commissioners in Labette were  
22 simply the people who could bring about satisfaction of that  
23 judgment. They were representatives of a public body, the  
24 entity, and in so doing, the directive to them was merely  
25 the means of executing on the judgment, and probably the

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO

1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

1 only means that could be effectuated, whereas --

2 QUESTION: And you're saying Peacock hasn't got  
3 the money.

4 MR. FREEMAN: Whereas in contrast here, what's  
5 sought is not that, but he is being required personally,  
6 not in his representative capacity -- he is being required  
7 to respond in a money judgment in court in a summary  
8 fashion, rather than --

9 QUESTION: Not because he's got the money, but  
10 because of something he did with the money. In other words,  
11 you're saying, the commissioners had the money, and they  
12 could get the money back from the commissioners. That was  
13 the only way to get it.

14 Here, you're saying Peacock doesn't have the  
15 money, and he is being charged with wrongdoing. Is that  
16 the essential difference?

17 MR. FREEMAN: I don't think that's the difference.

18 QUESTION: Then I'm sorry, I'm not following. --

19 MR. FREEMAN: I'm --

20 QUESTION: Maybe I would follow it better if I  
21 let you answer the questions instead of interrupting.

22 (Laughter.)

23 MR. FREEMAN: I'm not sure of that at all.

24 QUESTION: You'd like that better, anyway.

25 MR. FREEMAN: What I am sure of is that the court

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

1 in Labette and the court in Riggs, which is its first cousin  
2 and one that the lower court here relied upon, both treated  
3 the mandamus, the writ of mandamus there as the substitute  
4 for a writ of execution, and in so doing they directed the  
5 people who had the ability to require -- to satisfy the  
6 original order to take that appropriate action, and they did  
7 not seek of them any affirmative release or seek to hold  
8 them personally liable --

9 QUESTION: And that appropriate action was what?

10 MR. FREEMAN: That appropriate action would have  
11 been, I suppose, in that case to have required them  
12 personally to respond in satisfaction of the court's order.  
13 What we believe is involved here --

14 QUESTION: But what was the -- would it have taken  
15 anything out of their own pockets?

16 MR. FREEMAN: No, I don't think that was ever  
17 contemplated in Labette or in Riggs.

18 QUESTION: But it would have taken it out of their  
19 official pockets. I mean, they had control over the money.

20 MR. FREEMAN: In fact, they were being directed  
21 to levy the tax to satisfy the bond.

22 QUESTION: In effect, yes. Yes.

23 QUESTION: They were instructed to toll the public  
24 to respond to the court's judgment.

25 MR. FREEMAN: Right.

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

1 QUESTION: But nothing that involved them --

2 MR. FREEMAN: Right --

3 QUESTION: -- personally.

4 MR. FREEMAN: -- and we believe that that  
5 simply --

6 QUESTION: All right --

7 QUESTION: What if the --

8 QUESTION: Go on.

9 QUESTION: What if the mandamus were brought  
10 against Peacock? Is there any way that this judgment could  
11 be satisfied by a mandamus process against Peacock saying,  
12 get the money back?

13 MR. FREEMAN: Treating him somehow as amenable to  
14 mandamus --

15 QUESTION: Yes.

16 MR. FREEMAN: -- as if he were a public figure.

17 QUESTION: Yes.

18 MR. FREEMAN: I think that would involve precisely  
19 the same thing, that what you're doing is departing from  
20 principles of res judicata, and simply establishing  
21 affirmative liability, personal liability, if you will, in  
22 a way that this Court has not yet --

23 QUESTION: Is there -- well, may I interrupt you?  
24 Is there a way of treating Peacock as, in effect, an agent  
25 or conduit to effect the return of this money without making

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

1 him otherwise personally liable? Could an order issue  
2 against him saying, get the money back? Would that be  
3 effective?

4 MR. FREEMAN: They issue against -- to recover  
5 the --

6 QUESTION: In effect, an equity order against  
7 Peacock, get the money back. Would that be effective, or  
8 would you need more parties in there?

9 MR. FREEMAN: I think you would, at most what  
10 could be done with respect to Mr. Peacock -- he had been  
11 the unpaid chairman of this board for a long while -- would  
12 be to require Tru-Tech, with orders directed against him as  
13 the only person who could respond to it, to cause Tru-Tech  
14 to pay the money back. Now --

15 QUESTION: No, but the money had been paid to a  
16 third party, hadn't it, so that assuming you had a  
17 mandatory -- assuming you had a mandatory injunction against  
18 Peacock saying, get the money back, it is -- I guess it is  
19 possible that with the best will in the world, Peacock would  
20 say, I'd like to, but I can't do it, whereas in Labette the  
21 commissioners could levy the tax. There was no one who  
22 could say them nay, in effect, whereas if Peacock doesn't  
23 have the money, if it's in a third party hand, maybe Peacock  
24 alone can't do the job.

25 MR. FREEMAN: Of course, there would need to be

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005



1 two sides to that lawsuit, obviously, and you wouldn't ask  
2 Peacock to recover the money from himself. It would be an  
3 appropriate point, I think, had the respondent chosen to do  
4 it, to invoke involuntary bankruptcy once he had his  
5 judgment, which would have been a mechanism under which the  
6 estate of the bankrupt Tru-Tech could be placed in the  
7 court's in rem jurisdiction.

8 That's the other line of cases. Attachment is  
9 the prime example, and I suppose levy under the writ of  
10 execution in both the --

11 QUESTION: How about fraudulent conveyances? How  
12 are they handled postjudgment? Is -- suppose it's alleged  
13 that the -- Tru-Tech fraudulently conveyed whatever they had  
14 in the till to Peacock, and then he disbursed it.

15 MR. FREEMAN: Fraudulently transferred it to  
16 Peacock.

17 QUESTION: Right.

18 MR. FREEMAN: He may or may not still have it.

19 QUESTION: Right.

20 MR. FREEMAN: Can he be made amenable under a writ  
21 of execution for the restoration of that, for under  
22 fraudulent conveyance it's part of ancillary conviction.

23 QUESTION: Right.

24 MR. FREEMAN: I would say no, and I would say no  
25 because there what you are seeking at the end of the day is

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

1 to fix liability on a stranger, stranger in the eyes of the  
2 law, to the original judgment, and for that there would need  
3 to be a full-blown trial, going through to the end on the  
4 merits, and the adjudication of his personal -- of  
5 transferee's personal responsibility, not the Government  
6 situs.

7 QUESTION: Well, I mean, to some extent you can't  
8 claim that no new issues must be triable. For example, in  
9 the County Commissioners case, where there's a judgment  
10 against the county and the order going to the commissioners,  
11 the commissioners could raise, for example, as we've had  
12 them raise here, a constitutional objection that the court  
13 cannot require them to impose a tax, or things of that sort.

14 They can raise issues, can't they, even though  
15 it's ancillary, legal issues that are separate and distinct,  
16 and in addition to the legal issues raised in the original  
17 proceeding?

18 MR. FREEMAN: That would be in the areas where  
19 they are not bound by the principles of determining the  
20 first lawsuit.

21 QUESTION: Well, the principle of the first  
22 lawsuit governs, the county is liable, okay, for this money.  
23 The county doesn't have the money, so you get an order to  
24 the commissioners telling them to impose the tax. The  
25 commissioners come in, and they want to argue the court has

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

1 no power to direct the imposition of a tax. We've had  
2 people argue that.

3 MR. FREEMAN: Well, they certainly could not --

4 QUESTION: Unsuccessfully, I'm sorry to say.

5 MR. FREEMAN: They could not relitigate the issues  
6 determined, and I haven't given particular thought to the  
7 issues that they might raise outside the ambit, if you will,  
8 of the original adjudication.

9 QUESTION: Well, Mr. Freeman, in the Dewey case,  
10 which respondents rely on, it was to set aside a fraudulent  
11 conveyance. Now, you're always -- in a fraudulent  
12 conveyance case you're always going to have this question  
13 of the motive of the defendant, did they convey the  
14 property, and can you infer from the price that it was  
15 fraudulent, things that weren't litigated in the first  
16 lawsuit.

17 MR. FREEMAN: Right, and let me say this about  
18 Dewey: Dewey is a totally different situation from the one  
19 we have here, in that it came up from the defendant's side  
20 of the table in the form of a compulsory counterclaim to the  
21 contractual issue before the court, and there, in addition  
22 to the contractual counterclaim, there was a claim by the  
23 defendant, a counterclaim by the defendant to set aside as  
24 a fraudulent conveyance a transfer from the plaintiff to an  
25 affiliate corporation, and we analyze that case as one in

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

1 which there is a common nucleus of issues --

2 QUESTION: But the case was decided long before  
3 the common nucleus phrase was even developed, and it was  
4 decided on the basis of ancillary jurisdiction.

5 MR. FREEMAN: It was. It was, and we think it  
6 has to be rationalized on the common nucleus basis --

7 QUESTION: Well, why isn't it perfectly rational  
8 the way it is?

9 MR. FREEMAN: Without being rationalized?

10 QUESTION: Yes.

11 MR. FREEMAN: Well, I --

12 (Laughter.)

13 MR. FREEMAN: Well, I think there is some argument  
14 for that. If you look at Owen, you see that defendants can  
15 do things that plaintiffs cannot do, and Owen says it's the  
16 posture of the thing that's of great importance, and that  
17 defendants, who are hailed into court, if you will, stand  
18 at risk of losing the adjudication of their claims unless  
19 they're given some broader latitude to raise the issues and  
20 have them adjudicated.

21 QUESTION: Well, isn't Dewey on point in this  
22 respect: I thought your argument was tending to something  
23 like this, that although on ancillary jurisdiction there  
24 are some issues that can be litigated which weren't issue --  
25 which weren't litigated the first time around. They can't

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

1 be issues of tort-like personal liability, and yet in Dewey,  
2 that tort-like personal liability was adjudicated on  
3 ancillary jurisdiction.

4 MR. FREEMAN: It was, and --

5 QUESTION: So if Dewey stands, you cannot defeat  
6 ancillary jurisdiction on kind of tort-like personal  
7 liability as being the dividing line, as marking the point  
8 beyond the outer limit of ancillary jurisdiction.

9 MR. FREEMAN: I believe that we can draw the line  
10 under Owens that would say that the plaintiff, at least,  
11 would not be able to join --

12 QUESTION: And that's the problem here, isn't it,  
13 that it is the plaintiff. The core of ancillary  
14 jurisdiction, as I understand it, is allowing a defendant  
15 who hasn't asked to litigate not to be stuck having to  
16 respond to the plaintiff and then trying to recoup himself  
17 in a separate lawsuit.

18 MR. FREEMAN: Right, and I think that's what the  
19 court was saying in Owens when it said the posture of things  
20 is crucial, and they went on to talk --

21 QUESTION: I think you're better off rationalizing  
22 Dewey.

23 (Laughter.)

24 QUESTION: It did involve a common nucleus of  
25 facts, after all.

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005



1 MR. FREEMAN: It did, and I remember that Your  
2 Honor struggled with that somewhat in a footnote to, I  
3 believe, Finley. I'm always cautious in arguing cases when  
4 I know the justices have struggled with it themselves. I  
5 struggled with it, but I don't think at the end of the day  
6 Dewey is decisive of our situation.

7 QUESTION: Was it diversity, Dewey?

8 MR. FREEMAN: It involved a nondiverse party in  
9 the affiliate that was joined, I believe.

10 QUESTION: Before you get to ERISA, or maybe it's  
11 part of the ERISA argument, too, I take it you would have  
12 no argument, or no objection -- maybe you would -- if during  
13 the course of trial prejudgment -- Peacock's before the  
14 court and the counsel for the plaintiff brings up the  
15 argument, Your Honor, it has come to our attention  
16 Mr. Peacock is in the process of beginning to siphon off  
17 assets of the corporation, and we want an order to tell him  
18 that he may not do that, to preserve your jurisdiction you'd  
19 have no problem with the court issuing that order?

20 MR. FREEMAN: In the course of the trial?

21 QUESTION: Yes.

22 MR. FREEMAN: I think at least in South Carolina  
23 and probably around the world there are procedures for  
24 attachment prior to judgment, and that that would be a  
25 mechanism to be employed that would bring the assets within

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

1 the --

2 QUESTION: No. The court just issues an order.  
3 They say, Mr. Peacock, you're before us, we haven't  
4 adjudicated your connection or your liability in this suit,  
5 but you're before us, and we want to make it clear that  
6 you're violating this court's order if you siphon off any  
7 assets until we issue judgment.

8 MR. FREEMAN: I would resist that with all fervor,  
9 not that my resistance has always carried the day, as this  
10 Court knows, but what would be happening there is that there  
11 would be an injunction doing what an attachment might do,  
12 but an attachment would do it only in the setting of an  
13 ample bond to protect the improvident issuance, and the  
14 simple issuance of a restraining order or an injunction in  
15 the course of a trial before it's final determination would,  
16 I think, prejudice the ultimate issue in the case, and --

17 QUESTION: In other words, the court doesn't have  
18 the power to preserve the assets of the corporation that is  
19 before it when it has also before it the officer who's  
20 taking away the assets?

21 MR. FREEMAN: If the court did it without bond,  
22 would be a problem that I would have. I think the court  
23 has that power, and once it effectuates that power, then it  
24 has the property within the custody of the court, actual or  
25 constructive, so I don't challenge the court's power.

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

1 I challenge the method of execution with the use  
2 of the power without security standards being imposed, and  
3 once it's exercised, then as I see it, it turns the case to  
4 the extent of the assets into an in rem proceedings, which  
5 is different.

6 I think the Government in --

7 QUESTION: Mr. Freeman, before you go on, I mean,  
8 the line you propose is one point at which I suppose we  
9 could draw the line. If you have to go beyond what was  
10 adjudged in the original case and adjudge new tort  
11 liability, it's not ancillary.

12 But we could also adopt another line, and that is  
13 anything, whether by tort or not, that interferes with the  
14 satisfaction of the original judgment is ancillary. Now,  
15 what -- you know, what's wrong with choosing the latter  
16 line?

17 MR. FREEMAN: Well, the Court could draw such a  
18 line, I suppose, but what it would be doing is drawing a  
19 line that I think would be very difficult of effectuating.  
20 It would --

21 QUESTION: What are the horrors that would  
22 entail?

23 MR. FREEMAN: The litany of horrors, as we've  
24 tried to visualize it, is that you would simply be saying  
25 that subject matter jurisdiction is a thing to be determined

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

1 focusing on intent or purpose, and the person who has the  
2 intent to defeat or frustrate a Federal judgment is somebody  
3 who ought, with nothing more, to be hailed into Federal  
4 court under ancillary jurisdiction and required to respond.

5 Subject matter jurisdiction is something to be  
6 determined at the outset of a case before you go forward,  
7 because it cannot be waived, and if it turns, and  
8 traditionally it's turned on objective considerations  
9 instead of subjective ones -- Do you have diverse parties?  
10 Is there the sufficient amount for jurisdiction? Is there  
11 a common nucleus of operative fact? -- those things can be  
12 determined at the threshold of the litigation, and then you  
13 go forward.

14 If you've changed the rules of the game to say  
15 that we're going to let this ride on a determination of  
16 intent, then you have given -- you have opened the door, as  
17 we see it, to a simple allegation -- there's room for  
18 hyperbole in every complaint -- that alleges that the  
19 defendant for the purpose of frustrating the payment of this  
20 judgment secreted or transferred the assets.

21 Those are relevant inquiries in the State court  
22 claim, but once they're allowed to determine the issue of  
23 subject matter jurisdiction, you have created, as we see  
24 it, something that can be raised years later, established  
25 on the basis of complaints requiring in fact a subjective

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

1 determination that only comes at the end of the day in the  
2 lawsuit, and permitting, I believe, a widening of this  
3 Court's jurisdiction that will trouble it for years to come.

4 QUESTION: How about the notion that if you didn't  
5 have this ancillary peg, you would have only a suit not  
6 involving a Federal question, assuming you're right about  
7 the ERISA part of it, between parties who are not diverse,  
8 and you -- the theory would be that the court ought to  
9 spread the ancillary jurisdiction that far without any  
10 signal from Congress to do that just on its own.

11 MR. FREEMAN: I don't think that ancillary  
12 jurisdiction should be extended as far as it was sought to  
13 be extended here.

14 QUESTION: In the question that I asked you, I'm  
15 just not sure what your answer was, about the fraudulent  
16 conveyance, does your answer to me say, because the  
17 transferee is somebody who is not a part of this lawsuit,  
18 that that would have to be a separate suit in a Federal  
19 court --

20 MR. FREEMAN: Yes.

21 QUESTION: -- could not be after the judgment is  
22 rendered latched on to the --

23 MR. FREEMAN: Yes, that's what we said.

24 The one case that comes close to that is the  
25 Empire Lighting case which our friends at the other table

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005



1 have cited. That's a Judge Learned Hand decision, and I'm  
2 always careful to -- with tremendous deference for Judge  
3 Hand. That case, however, turns on a peculiarity of New  
4 York law, and was so recognized by Judge Hand in his  
5 decision.

6 What he said was that under New York law the  
7 fraudulent transfer is absolutely void, and that the  
8 transferee is really not a necessary party to the  
9 adjudication of that matter, and that what was working in  
10 Empire Lighting was an equitable execution against the  
11 assets still deemed in the law to be owned by the  
12 transferor, and it's been treated as -- it's been  
13 rationalized on that distinction by later decisions cited  
14 in our briefs.

15 I will reserve, if I may, the remainder of my  
16 time.

17 QUESTION: Thank you, Mr. Freeman.

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

19 ORAL ARGUMENT OF J. KENDALL FEW

20 ON BEHALF OF THE RESPONDENT

21 MR. FEW: May it please the Court, Mr. Chief  
22 Justice, Members of the Court:

23 It's an honor for me to be here today,  
24 particularly with Mr. Freeman, who is a very fine lawyer  
25 and a good friend, and who tried his first case in 1950 for

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO

1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

1 my father, and the fact that he lost, I've never held that  
2 against him.

3 (Laughter.)

4 MR. FEW: Our friends the amicus in this case have  
5 pointed out to us that there may actually be three bases of  
6 jurisdiction, where we have contended that there are two,  
7 adding that there may be a separate basis for jurisdiction  
8 under --

9 QUESTION: Our rules, Mr. Few, are that amicus  
10 may not inject a separate issue into the case that has not  
11 been raised by the parties.

12 MR. FEW: That certainly takes care of that issue.

13 (Laughter.)

14 MR. FEW: And so we are here to argue to the Court  
15 that there is jurisdiction, that is, power in the Court to  
16 adjudicate this controversy both under ancillary  
17 jurisdiction and under ERISA, and I'd like to start out by  
18 pointing out what I think has been overlooked in the  
19 arguments, and that is that although Judge Traxler, in this  
20 original order on jurisdiction, which is found at page --  
21 beginning at page 54a in the petition for certiorari,  
22 although he did not use the term ancillary jurisdiction, his  
23 analysis as set forth on page 57a is the classic analysis  
24 under ancillary jurisdiction, and therefore we would argue  
25 that a fair reading of Judge Traxler's order would also

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO

1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

1 provide a basis for ancillary jurisdiction. Second --

2 QUESTION: What page was that?

3 MR. FEW: Page 57a, Justice Ginsburg. He says in  
4 the instant action plaintiff Thomas for his class is  
5 attempting to satisfy the judgment rendered by Judge  
6 Anderson in the previous case on the merits of the  
7 plaintiff's breach of fiduciary claim and then, dropping  
8 down, the alleged effect of these preferential transfers is  
9 that Tru-Tech is escaping not only the duties that it has  
10 as a fiduciary, but also the judgment rendered adverse to  
11 it by Judge Anderson, and then it goes on to say, thus, the  
12 present action is an attempt to satisfy the former judgment.

13 The second point I'd like to make is that --

14 QUESTION: Why is it -- you said that that's  
15 classic ancillary jurisdiction.

16 MR. FEW: Under Justice Scalia's opinion in  
17 Kokkonen, as I read it, Justice Scalia says there are two  
18 bases of ancillary jurisdiction. One is the common nucleus  
19 of facts, which I understand must have come up after Rule  
20 69(a), and that the second is, where it is necessary for the  
21 proper functioning of the Court and to vindicate the Court's  
22 authority and carry out the Court's judgment.

23 QUESTION: Was Justice Scalia's the prevailing  
24 one in Kokkonen?

25 MR. FEW: Yes, sir.

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

1           QUESTION: I'm -- well, perhaps Justice Scalia  
2 will clarify this for us, but I thought that he was talking  
3 about pendant jurisdiction and the common nucleus of facts,  
4 which is not --

5           MR. FEW: Well, let me read briefly from Justice  
6 Scalia's opinion in --

7           QUESTION: It's really the opinion for the Court.  
8 I just happened to write it.

9           (Laughter.)

10          MR. FEW: Well, all right. I apologize for that.

11          QUESTION: Well, in any event --

12          MR. FEW: The Court's opinion, having been written  
13 by Justice Scalia.

14          QUESTION: -- my basic concern about the argument  
15 you're making is that, as far as I know, the standard  
16 incidences of ancillary jurisdiction, now called  
17 supplemental jurisdiction, is for a defending party who is  
18 being brought into a lawsuit.

19                 I mean, the standard incidences are the compulsory  
20 counterclaim, bringing in another party on the compulsory  
21 counterclaim, a claim over, under Rule 14 -- it's for  
22 somebody who's brought into court in a defending posture who  
23 then wants to litigate another claim which ordinarily  
24 wouldn't qualify for Federal court jurisdiction, and so the  
25 court says, we recognize that it's unfair to require a party

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

1 to pay out something that that party claims he can recoup  
2 from a third party and make that into two lawsuits instead  
3 of one. That's the standard incidences of ancillary  
4 jurisdiction, is it not?

5 MR. FEW: Justice Ginsburg, that is part of it,  
6 and that's the part that comes under 28 U.S.C. 1367, which  
7 is called supplemental jurisdiction, as I understand it.

8 But as the Court points out in the prevailing  
9 opinion in Kokkonen, and I'm referring to -- well, I'm not  
10 real good at finding page numbers, but it's at page 8 --  
11 page 4 of the court's opinion. I'll find that in just a  
12 minute.

13 Generally speaking, we have asserted ancillary  
14 jurisdiction in the very broad sense of that term is  
15 sometimes used for two separate though sometimes related  
16 purposes: 1) to permit disposition by a single court of  
17 claims that are in varying respects and degrees factually  
18 interdependent, and cases are cited there, and then 2) to  
19 enable the court to function successfully. That is, to  
20 manage its proceedings, vindicate its authority, and  
21 effectuate its judgment, and cases are cited there, as well  
22 as Wright and Miller.

23 And we have cited in support of that proposition  
24 in addition to Kokkonen the Barnett v. United States case  
25 which also went back and quoted the famous case from

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005



1 Mississippi, and I think that was because historically that  
2 came up as a Mississippi case. That is, Watson v. Williams,  
3 where the supreme court of Mississippi in 1858 said that a  
4 court without the power effectually to protect itself  
5 against the assaults of the lawless, or to enforce its  
6 orders, judgments, or decrees against the recusant parties  
7 before it would be a disgrace to the legislation and a  
8 stigma upon the age which invented it.

9 QUESTION: Mr. Few, if that's your position, then  
10 why did you say in your brief that you recognize that the  
11 petitioner's argument might be tenable if we were dealing  
12 here with just a contract claim or a tort judgment?

13 MR. FEW: I'm not --

14 QUESTION: There would similarly be the  
15 undermining of the Federal judgment.

16 MR. FEW: I'm not certain that we said that in  
17 our brief, but if we did, of course we did, but I don't  
18 think that we meant to say that.

19 I think that the jurisdiction, ancillary  
20 jurisdiction, if we take away from a court the power to  
21 protect itself from the lawless invasion of others, we take  
22 away the court, respect for the court --

23 QUESTION: So then imagine that there are 40,000  
24 cases in the Federal courts every year where plaintiff sues  
25 a defendant corporation, and let's say in 20,000 the

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

1 plaintiff obtains a money judgment against the corporation,  
2 and let's say in 3,000 the corporation might be insolvent.

3 Now, what a plaintiff does when he has a judgment,  
4 he is a judgment creditor against the corporation, and I  
5 imagine that there are dozens of things that might happen  
6 to that corporation's property. It might go into bankruptcy  
7 court. An officer may decide to pay himself. An officer  
8 may decide to pay another debt.

9 To my knowledge, those vast matters of State law,  
10 sometimes Federal preferences, sometimes fraudulent  
11 conveyances, sometimes violations of other duties of  
12 officers to corporations, to my knowledge those matters have  
13 not become subject to Federal jurisdiction except in the  
14 bankruptcy courts, where they should be.

15 I haven't found a case to the contrary, and I  
16 don't see how by accepting this case and agreeing with you  
17 I could avoid bringing into Federal court the thousands of  
18 State law cases that involve the rights of judgment  
19 creditors against the corporate officers or other third  
20 parties, so what's the answer to that?

21 MR. FEW: My answer to that is that there would  
22 be very few cases in which you would have the facts that  
23 you have here, as found by the Federal district court, where  
24 the district court found there was a specific intent on the  
25 part of Mr. Peacock to undermine and defeat this particular

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

1 judgment.

2 QUESTION: There are always -- a fraudulent  
3 conveyance, I take it, is a case where a creditor has a  
4 claim against a corporation or a person, and that person or  
5 the officer decides to prefer his friends or his family to  
6 the rightful creditor.

7 Now, how would you distinguish that -- and indeed,  
8 this is a perfect example. You bring a thing called a veil-  
9 piercing cause of action. I never heard of such a thing.  
10 I mean --

11 MR. FEW: I would take issues with Your Honor's  
12 statement that there are no authorities to support  
13 ancillary --

14 QUESTION: I didn't say there weren't. I said I  
15 hadn't found any, which is --

16 MR. FEW: All right. Well, we have cited a number  
17 of them, the Dewey case --

18 QUESTION: The Dewey case is a case which would  
19 be ancillary today. It was absolute common nucleus of fact.  
20 A sues B for judgment on a contract. B replies saying your  
21 coal was no good and give me damages from what you already  
22 delivered. They want to bring into it, that case, the  
23 company that was the successor company.

24 QUESTION: He's rationalizing it, Mr. Few.

25 MR. FEW: Yes, I --

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

1 (Laughter.)

2 QUESTION: Well, they --

3 MR. FEW: I would then cite Swift & Company  
4 Packers v. -- I'm not real good at pronouncing non-English  
5 words, not too good with English words, sometimes --

6 QUESTION: Mr. Few --

7 QUESTION: I haven't read that one. Which is  
8 that?

9 QUESTION: -- you will concede that there's a  
10 difference between bringing into a lawsuit prejudgment this  
11 kind of counterclaim that was involved in the case you were  
12 -- the Dewey case, or having a case involving a race, a  
13 thing that's in the court and the court has to decide the  
14 interest in that thing. Then there's a judgment.

15 I think what Justice Breyer's asking you, and if  
16 he's not, I will certainly ask you, do you have any  
17 authority for the exercise of ancillary jurisdiction after  
18 the judgment is rendered to then have a sideshow on the  
19 theory that the judgment is being undermined? Give me an  
20 example of a postjudgment --

21 MR. FEW: Well, I think that there are a number.  
22 I think that the Krippendorf case is, I believe, and I think  
23 the Swift case --

24 QUESTION: Which one --

25 MR. FEW: Krippendorf is cited in a number of our

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

1       briefs. I'm not sure we've got it cited in ours, but it's  
2       one of the cases that is cited, and I have it here, but I  
3       think there are a number of cases that have been cited in --  
4

5                QUESTION: That's the ones that I want, exactly  
6       that, because the ones you think -- I haven't read the Swift  
7       one. I did read quite a few of the ones that were cited,  
8       but not all of them.

9                MR. FEW: Yes, sir. There were I think about five  
10       boxes full of cases that were cited.

11               QUESTION: No, no -- I mean, probably if you had  
12       one you'd say look, here are the facts right here, and the  
13       one that seems a most likely cite are ones which seem fairly  
14       readily distinguishable, at least to me, so the one that's  
15       the best for you is which?

16               MR. FEW: Well, I think I'm going to receive some  
17       assistance on this from our arguing amicus for the United  
18       States, but I believe that --

19               QUESTION: I thought Empire was the best actually,  
20       to tell you the truth, and Empire seemed to be one in which  
21       Judge Hand was going on the peculiar fact of New York law  
22       that they treated a fraudulent conveyance as if it was  
23       something they called an equitable execution.

24               MR. FEW: In that case, I will cite that case back  
25       to you, but I would argue that it should not -- it should

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005



1 not, from the perspective of respect for thou, Federal  
2 courts be the determining factor that the interference took  
3 place before or after the judgment.

4 In all cases, it would appear to us that the court  
5 should have the power to protect itself, and particularly  
6 after the judgment has been entered.

7 QUESTION: You see, my concern, which I'll go back  
8 to for a second, is a totally practical one. It could  
9 federalize State fraudulent conveyance law in terms of  
10 giving courts jurisdiction to enforce it. You could do the  
11 same thing about breaches of obligation of corporations in  
12 this area, et cetera.

13 You have done it when you go into bankruptcy  
14 court, and since you have that remedy in bankruptcy court,  
15 which you can use if you want, I was awfully nervous about  
16 a holding that would federalize the rest of it, and that's  
17 why I -- that's why I raise this. I want to get your  
18 response. It's not to --

19 MR. FEW: Going back to the Chief Justice  
20 Marshall's opinions in 1825 and coming forward to the Riggs  
21 case, it has been -- always been the rule as long as the  
22 question has been addressed here the Federal court has  
23 jurisdiction until the action is satisfied. There are three  
24 ways, as have been pointed out by amicus, that the question  
25 can arise.

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO

1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

1           1. The judgment debtor may have an asset that is  
2 removed from his possession but the title has not been  
3 removed, and in that case the remedy would be to require  
4 the person who has the possession to bring it back in. The  
5 second case would be where there has been a conveyance where  
6 the title has actually been removed, and in that case it  
7 would be to bring that party in and require -- set that  
8 transaction aside, and the third case, as here --

9           QUESTION: Mr. Few, are you saying that the  
10 Federal court, after a judgment has --

11           MR. FEW: Yes.

12           QUESTION: -- been rendered as part of its  
13 ancillary jurisdiction can exercise jurisdiction over a  
14 third party, the transferee, and that's all part of this  
15 ancillary jurisdiction?

16           MR. FEW: In those three instances that I have  
17 mentioned, all of those, if the purpose of those  
18 transactions is to defeat the jurisdiction of the court,  
19 then the court to vindicate its authority and carry out its  
20 decree would have ancillary jurisdiction --

21           QUESTION: Do you have any, apart from reading  
22 what you read, where a judgment creditor --

23           MR. FEW: Yes, ma'am.

24           QUESTION: -- can then sue someone who is not  
25 diverse, and there's no Federal claim, who is the alleged

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

1 transferee of property from the judgment debtor as part of  
2 ancillary jurisdiction?

3 MR. FEW: I believe that the Swift & Company case  
4 is one such case. The Dewey case is one in which the  
5 parties bringing the suit --

6 QUESTION: None of those cases were cases where  
7 the judgment creditor, after getting the judgment, then  
8 brings an ancillary lawsuit against an alleged transferee,  
9 and we have that litigation decided by the same Federal  
10 court. None of those cases involved a suit by the judgment  
11 creditor against someone who was alleged to have assets that  
12 were siphoned away from the judgment debtor.

13 MR. FEW: Well, I think I'll take issue with Your  
14 Honor's statement but without being able to specifically  
15 call your attention to the case at this particular time.  
16 I hope that Mr. Bress will be able to do so and if not,  
17 perhaps I can get that information to the Court.

18 QUESTION: Mr. Few, let me ask you --

19 MR. FEW: Yes, sir.

20 QUESTION: -- when would it be that someone who  
21 derives a fraudulent conveyance from an insolvent company  
22 which numbers among its debts some judicial judgments, when  
23 would it be that such a person would not have an intent to  
24 frustrate the court's judgment? Wouldn't that always be the  
25 case --

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

1 MR. FEW: There are many -- there are many --

2 QUESTION: -- whenever there's a fraudulent  
3 conveyance of a bankrupt who has a judgment against them,  
4 which most bankrupts do.

5 MR. FEW: I think, Justice Scalia, that there  
6 would be --

7 QUESTION: Wouldn't it always be not only -- not  
8 only allegeable, but wouldn't it always be true? You know,  
9 when you accept a fraudulent -- you're frustrating all of  
10 the creditors, aren't you?

11 MR. FEW: I think that there's a very strong  
12 burden under the applicable law here to prove what we have  
13 proved in this case, and there are many instances where a  
14 businessman who is in control of a corporation that is  
15 insolvent makes a transfer that is in -- is a good faith  
16 business judgment on his part.

17 QUESTION: I mean, what does it take to prove it?  
18 It seems to me all you have to do is ask the fraudulent  
19 transferee, did you know this corporation had outstanding  
20 judgments against it? Yes, I did.

21 And in taking that fraudulent transfer, didn't  
22 you -- didn't you intend to take the money for your own use  
23 and deprive all of the creditors of the corporation,  
24 including these judgment creditors? Yes, I did.

25 MR. FEW: In the majority, the vast majority of

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

1 instances, there is going to be a good and sufficient  
2 consideration flowing back to the company, and if they are  
3 in a position to prove that, then that would defeat the  
4 claim.

5 QUESTION: Well, that's true. I'm just saying,  
6 it seems to me that all fraudulent conveyances are really  
7 sucked into this thing, and --

8 MR. FEW: I think that you're right to the extent  
9 that the issue is there.

10 QUESTION: Well then, what about -- I'm worried  
11 as well -- you see, workers. I mean, suppliers. There are  
12 thousands of people all over the country who might get some  
13 money. They might just be employees of the company.

14 They suddenly end up with some money from the  
15 company, and then, leaving this case aside, a judgment  
16 creditor could suddenly haul those people into Federal court  
17 in some place and all of a sudden they'd be adjudicating the  
18 law of fraudulent conveyances and all these other things.  
19 That's the underlying concern that I have.

20 MR. FEW: I think my --

21 QUESTION: And the answer to that is what?

22 MR. FEW: My answer to that is that it would be  
23 much more important that the court have the power to  
24 vindicate its judgment and to act against those who would  
25 lawlessly undermine its judgments intentionally, as was held

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005



1 here.

2 QUESTION: Thank you, Mr. Few.

3 MR. FEW: Thank you very much.

4 QUESTION: Mr. Bress, we'll hear from you.

5 ORAL ARGUMENT OF RICHARD P. BRESS

6 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

7 SUPPORTING THE RESPONDENT

8 MR. BRESS: Mr. Chief Justice, and may it please  
9 the Court:

10 I'll be happy to address some of the case law --

11 QUESTION: Well, I'd like to know where you think  
12 the line should be drawn. It has to be drawn somewhere to  
13 avoid sweeping too much into Federal court jurisdiction  
14 under this ancillary theme, and where do you think the line  
15 has to fall?

16 MR. BRESS: Your Honor, I was about to address  
17 that, and if I might address that in the context of just  
18 setting out our affirmative position, and I'll make it  
19 short.

20 In our view, the result in this case does not  
21 require any sort of expansion or drawing of new lines. It  
22 really flows from long-settled law, really from four  
23 principles.

24 The first principle is that a court retains  
25 Article III jurisdiction over a case until its judgment in

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

1 that case is satisfied.

2 The second principle is that a court has the  
3 power, under the All Writs Act, to enforce and prevent the  
4 frustration of its judgments.

5 The third principle is the court has the power to  
6 enforce its judgments against the party or its privy, and  
7 the fourth principle -- and this was conceded by petitioners  
8 in their brief at pages 36 and 37 -- is that this ancillary  
9 jurisdiction does not depend on a common nucleus of  
10 operative facts. In fact, it predates that doctrine by -  
11 - well, certainly more than 50 years.

12 Now, in order not to find ancillary jurisdiction  
13 in this case, this Court would have to depart from those  
14 principles, and in our view such a --

15 QUESTION: Mr. Bress, apart from principles, I do  
16 not know of any case of the kind that Justice Breyer's been  
17 asking about and that I've been asking about, and I do know  
18 where ancillary jurisdiction starts, and it starts with  
19 cases like Swift, where there's somebody in the defendant  
20 posture, and the court says, we're going to allow that  
21 defendant to bring in somebody else on the counterclaim, to  
22 bring in someone on the claim over. That's the core of  
23 ancillary jurisdiction, as Congress confirmed in 1367.

24 MR. BRESS: Your Honor, I would -- first, I'd just  
25 like to take issue with the notion that that's the core of

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

1 an ancillary jurisdiction. That's the core of pendant  
2 jurisdiction. Ancillary jurisdiction, the original  
3 incarnation of it, was the power of a court to enforce by  
4 writ of execution against the very defendant before it the  
5 judgment that it has obtained.

6 Now, I do have cases, though, that address your  
7 question and Justice Breyer's question. One such case would  
8 be *Pierce v. United States*. Now, that case involved a  
9 penalty that had been obtained against a corporation, a  
10 civil penalty that had been obtained by the Government  
11 against a corporation, and the corporation had distributed  
12 the property up to, or out to its shareholders, and it was  
13 held in that case that it was merely supplemental or  
14 auxiliary to go after those shareholders to pay the civil  
15 penalty.

16 Another such case, and this case I must  
17 acknowledge was not cited --

18 QUESTION: Excuse me, did the court have  
19 jurisdiction in rem in that case, or was it just --

20 MR. BRESS: There's no holding it had jurisdiction  
21 in rem in that case. The property certainly wasn't before  
22 the court. The property was in the hands of the  
23 shareholders.

24 QUESTION: But it was assumed that the  
25 shareholders could pay over and, in fact, going against

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

1 Peacock is not on all fours with that, because Peacock  
2 hasn't got the money.

3 MR. BRESS: Actually, Peacock does have the money,  
4 Your Honor. There was a misconception, I think, that came  
5 up during petitioner's argument. I don't think you quite  
6 understood what petitioner was saying. Petitioner had --  
7 in this case, Peacock. I'll use that name, had -- the  
8 allegation is that he had taken the money to himself, and  
9 there's some dispute as to how much money it is, but the  
10 allegation is that he took the money for himself, not that  
11 he paid it out to a third party.

12 QUESTION: Well then, I stand corrected. I  
13 thought he had paid it --

14 MR. BRESS: No.

15 QUESTION: -- to a third party. I'm sorry.

16 MR. BRESS: Another case that I'd like to bring  
17 up at this point --

18 QUESTION: Isn't the claim for more money that  
19 the corporation had at the time of the judgment?

20 MR. BRESS: Yes, it is, Your Honor, and that's a  
21 function --

22 QUESTION: Well, how can that be?

23 MR. BRESS: This is not a fraudulent conveyance  
24 case, Your Honor. This is a case where Mr. Peacock is being  
25 held liable because at law he is considered to be the --

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

1 QUESTION: Because he has committed a tort.

2 MR. BRESS: No. Because under standard principles  
3 of law that cut across many areas of law, he is considered  
4 by virtue of his actions and his own --

5 QUESTION: By virtue of his actions. You can call  
6 it not a tort, but in fact the veil will not be pierced, as  
7 we say, unless he has acted wrongfully, and that  
8 distinguishes the case you just mentioned, where these  
9 individuals who had received the payout from the  
10 corporation, the money was returnable whether or not they  
11 had acted wrongfully in receiving it. The court was sort  
12 of following the res.

13 I'm not sure I agree with the outcome of the case,  
14 but it differs from a case in which you have to demonstrate  
15 some wrongdoing on the part of those shareholders.

16 MR. BRESS: Your Honor, I would submit that it is  
17 actually a closer nexus to the underlying case, because for  
18 whatever reason -- and it does have to do with wrongdoing,  
19 and also how the shareholder has treated the corporation in  
20 its relations to the corporation.

21 The theory in this case is that the alter ego is  
22 the corporation for purposes of law, and it's no different  
23 in that respect, and I think --

24 QUESTION: But that's the problem that I've had  
25 with the briefs on this side. There is no such thing, to

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO

1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005



1 my knowledge, as a cause of action called piercing the  
2 corporate veil. That's just what Justice Scalia said.

3 This case does not lie on the principle that  
4 Mr. Peacock was the alter ego of the corporation for  
5 purposes of violating ERISA, so what you have here is, you  
6 have a valid judgment that has nothing to do with Peacock.

7 Now you're trying to enforce the judgment. At  
8 that point, you don't need the corporate veil theory. Or  
9 maybe you do, or maybe you don't, but the question is, what  
10 is it that either the corporation or Mr. Peacock did wrong,  
11 and I take it what's wrong is that they transferred some  
12 assets to a person who didn't deserve them as much as did  
13 the judgment creditor.

14 Now, if that isn't the case, I don't understand  
15 it --

16 MR. BRESS: All right --

17 QUESTION: -- and if it is the case, I don't  
18 understand how the cases you cite are relevant.

19 MR. BRESS: All right. Your Honor, this case  
20 could have been brought under pure fraudulent conveyance  
21 theory. It was not. Now --

22 QUESTION: Well then, what was the theory?

23 MR. BRESS: The theory of this case is, Your  
24 Honor, as I was about to say, is really indistinguishable  
25 from collection of a judgment that you've already obtained

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO

1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

1 against a successor corporation.

2 Now, in some States -- I'll grant that in some  
3 States net recovery will be limited to the number of assets,  
4 or amount of assets that's been transferred to the  
5 successor, but that is not universally the case.

6 QUESTION: Well, I don't know of any principle of  
7 law that allows a person who holds a judgment against Jones  
8 to collect it against Smith in the absence of some kind of  
9 rule of law that says, what, like a fraudulent conveyance  
10 or some other thing.

11 MR. BRESS: Well, the rule of law in this  
12 instance, Your Honor, says that a corporate alter ego stands  
13 in the shoes of the corporation in the same way that a  
14 successor corporation stands in the shoes of the -- a  
15 successor corporation stands in the shoes of a corporation.

16 QUESTION: Where did this particular rule of law  
17 come from? What is its source? Is it Federal common law?  
18 Is it State law? What is it?

19 MR. BRESS: All right, first, Your Honor -- and  
20 I will answer that right at this moment, but first, that  
21 issue is not presented in this case, because the court of  
22 appeals held that this result would obtain either under its  
23 Federal common law standard or under South Carolina law.

24 QUESTION: Well, Mr. Bress --

25 MR. BRESS: It's our view that it's South Carolina

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

1 law.

2 QUESTION: South Carolina law. So you're urging  
3 that there's ancillary jurisdiction whenever a controlling  
4 shareholder of a small corporation is alleged to have  
5 siphoned off assets that would thwart the collection of a  
6 Federal judgment. That's the broad --

7 MR. BRESS: We're alleging that there's ancillary  
8 jurisdiction. However, there is discretion -- the court  
9 retains discretion because execution is an equitable  
10 function to hold back from exercising that jurisdiction, and  
11 in some of the instances, or in some of the examples that  
12 Justice Breyer suggested, the ancillary cause of action may  
13 become so attenuated from what the Federal court of appeals  
14 did it primarily does --

15 QUESTION: Why do you say execution is an  
16 equitable function? I never understood -- there are  
17 equitable remedies for collecting debts, but I'd understood  
18 execution is just a very straightforward issuance of a legal  
19 writ.

20 MR. BRESS: Well, execution can include not only,  
21 Your Honor, a legal writ, it can include attachment, it can  
22 include garnishment --

23 QUESTION: Those are both another prototypical  
24 examples of writs -- garnishment, execution, attachment.  
25 Why do you say they're equitable?

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

1           MR. BRESS: Because, Your Honor, in the cases of  
2     Dunn v. Clark, I believe, and also in Dewey itself, the  
3     Court spoke of an exercise of equity in support of  
4     collecting a legal judgment, and I'd like to address Dewey  
5     before it gets too late, because I think there's been some  
6     misunderstanding about it.

7           Dewey would fall under pendant jurisdiction if  
8     the claim was against -- the counterclaim had been just  
9     against the plaintiff. However, joined with that there is  
10    a claim against a third party defendant for fraudulent  
11    conveyance.

12           QUESTION: Wasn't it more than that? It was for,  
13    in fact, having this coal that didn't live up to the  
14    standards.

15           MR. BRESS: No, it was for fraudulent conveyance,  
16    Your Honor, it really was, and because of that, it really  
17    is no different than if it had just been a claim by a  
18    plaintiff where you are joining a claim against the person  
19    to whom the fraudulent conveyance has been made. The case  
20    really can't be distinguished in that sense.

21           As another matter that I'd like to address --

22           QUESTION: But the Federal rules do distinguish  
23    between what a defendant can enlarge and what a plaintiff  
24    can. In a diversity case, the defendant is allowed to have  
25    a claim over against a nondiverse party. The plaintiff, if

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

1 the plaintiff is nondiverse, can't turn over and sue that  
2 party.

3 MR. BRESS: Your Honor, here we're not looking at  
4 what the Federal rules will permit. We're really talking  
5 about the jurisdiction of the Federal courts, and something  
6 quite important. I mean, this is isn't -- you know --

7 QUESTION: But that was based on some notion that  
8 you ought not enlarge Federal jurisdiction except for a very  
9 good reason.

10 MR. BRESS: This isn't an enlargement of Federal  
11 jurisdiction, Your Honor. The principles that I've stated  
12 up front control this case. It's been alleged by petitioner  
13 that this is an enlargement.

14 QUESTION: Well, you have said that every Federal  
15 judgment that has been alleged to have been collected by a  
16 controlling shareholder in a corporation then becomes a  
17 Federal case, even though the claim arises under State law  
18 and there's no diversity.

19 MR. BRESS: Your Honor, we have, but that is not  
20 an enlargement or change in the law. That has always been  
21 the law, and the Court retains the discretion to refrain  
22 from exercising such jurisdiction when it becomes too  
23 attenuated.

24 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bress.

25 The case is submitted.

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005



1                   (Whereupon, at 12:03 p.m., the case in the above-  
2 entitled matter was submitted.)  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

**ALDERSON REPORTING COMPANY, INC.**

(202)289-2260 (800) FOR DEPO  
1111 FOURTEENTH STREET, N.W. SUITE 400 / WASHINGTON, D.C. 20005

## 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:*

*D. GRANT PEACOCK, Petitioner,*  
*v. JACK L. THOMAS.*

*CASE NO. : 94-1453*

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

BY *Ann Marie Federico*-----

(REPORTER)