

ORIGINAL

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PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

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CAPTION: VARIETY CORPORATION, Petitioner v.
CHARLES HOWE, ET AL.

CASE NO: No. 94-1471

PLACE: Washington, D.C.

DATE: Wednesday, November 1, 1995

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 VARIETY CORPORATION, :

4 Petitioner :

5 v. : No. 94-1471

6 CHARLES HOWE, ET AL. :

7 - - - - -X

8 Washington, D.C.

9 Wednesday, November 1, 1995

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:00 a.m.

13 APPEARANCES:

14 FLOYD ABRAMS, ESQ., New York, New York; on behalf of
15 the Petitioner.

16 H. RICHARD SMITH, ESQ., Des Moines, Iowa; on behalf of the
17 Respondents.

18 EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,
19 Department of Justice, Washington, D.C.; on behalf of
20 the United States, as amicus curiae, supporting the
21 Respondents.

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

2 (11:00 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 94-1471, Varsity Corporation v Charles Howe.

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

7 ORAL ARGUMENT OF FLOYD ABRAMS

8 ON BEHALF OF THE PETITIONER

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

11 This is an ERISA case, and I think it's useful
12 at the outset to make clear what the case is not about.

13 This case does not involve any breach by Varsity
14 of any promise it made in any of its ERISA documents, or
15 with respect to the nature and scope of any ERISA plan.
16 There was no dispute in any of the judicial opinions below
17 about the proposition that the official ERISA plan
18 documents did not provide for vested or lifetime welfare
19 benefits, and there was a ruling, from which certiorari
20 has not been sought from counsel for the plaintiffs in
21 this case, that there was no entitlement to benefits in
22 this case under section 502(a)(1)(B), the benefits section
23 of ERISA.

24 The questions before this Court, then, are not
25 whether benefits were due, or whether ERISA was violated

1 because in some way there were improper misrepresentations
2 made about plan documents.

3 QUESTION: Well, Mr. Abrams, in your view, if
4 you prevail here, would the respondents have some sort of
5 remedy for these rather obviously fraudulent statements?

6 MR. ABRAMS: If we were to prevail in this
7 court, respondents would have the following potential
8 remedies. They have a case pending in the Federal court
9 in Iowa in which they purport to assert, and we will
10 oppose it, of course, certain common law claims which they
11 maintain are not preempted under ERISA, claims of nonfair
12 dealing, claims of constructive dismissal.

13 QUESTION: And your position is that those
14 claims are preempted?

15 MR. ABRAMS: Actually, we have not argued that
16 those claims are preempted. It is not our position that
17 those claims are preempted. They also have a claim for
18 fraud, and fraudulent misrepresentation and the like. We
19 believe those claims are preempted, but -- so they have
20 those potential claims.

21 There are two claims as to which the district
22 court ruled against us on, as to which the court of
23 appeals did not reach, and which are not before this Court
24 because they weren't reached, a section 510 claim under
25 ERISA, and an estoppel claim under ERISA.

1 QUESTION: Did those go to the group to whom no
2 misrepresentations were made but who were under a plan --
3 unknown to them, they are placed under some other plan in
4 another entity that proves insolvent?

5 Mr. Abrams, there was one footnote in your reply
6 brief that I must say took me aback, and that was the one
7 that said that, surely these people who were transferred
8 from one entity to another without a word of notice,
9 surely they have no complaint because no misrepresentation
10 was made to them. It was just done without even giving
11 them any notice, any opportunity to say no.

12 MR. ABRAMS: There's no provision in ERISA, and
13 there is no provision in any contract in this case,
14 providing for notice. We had an absolute right to
15 terminate these individuals.

16 QUESTION: But this wasn't a terminate.

17 MR. ABRAMS: It was -- what happened here in
18 fact was a termination and --

19 QUESTION: Let me ask you this --

20 MR. ABRAMS: Yes.

21 QUESTION: -- so we can be very clear that we're
22 talking about the same, not entirely hypothetical case.
23 Employees work for a company under a plan, and they
24 retire, and while they are in retirement, the trustee --
25 we're dealing with a single employer plan -- takes that

1 plan, duplicates it, identical plan, puts it in another
2 entity, which is tottering on the brink of bankruptcy, and
3 then when these people claim their benefits tells them,
4 oh, sorry, you're no longer under the entity that was able
5 to pay for your benefits.

6 MR. ABRAMS: That is absolutely what you cannot
7 do under a pension plan.

8 With respect to health benefits, since you have
9 an absolute right to terminate, a right which was reserved
10 explicitly here and which the law assumes any --

11 QUESTION: But when you terminate, don't you
12 have to give people notice so that they can find other
13 insurance?

14 MR. ABRAMS: This is not a case involving an
15 alleged failure of disclosure. This is not a disclosure
16 claim by them.

17 QUESTION: I'm not asking you about disclosure.
18 I'm asking if --

19 MR. ABRAMS: If they're --

20 QUESTION: -- we're in the termination mode, if
21 you terminate a plan, don't you have to give the
22 beneficiaries notice that they're being terminated so that
23 they can get alternate protection for themselves?

24 MR. ABRAMS: If they're entitled to benefits, it
25 is our position the place to go is the benefits section of

1 ERISA. That is what it is there for.

2 QUESTION: Are you -- I just -- if you tell me
3 that that's what your position is and that's what the law
4 is, that there is nothing in the whole of ERISA that stops
5 an employer from putting people under an umbrella that is
6 going to be swiftly bankrupt without telling them, that
7 there's nothing in ERISA that stops that, and moreover,
8 because ERISA is preemptive, these people have nothing to
9 complain about --

10 MR. ABRAMS: Well, what I'm --

11 QUESTION: Is there nothing in ERISA -- what
12 happened here with respect to the ones --

13 MR. ABRAMS: Yes.

14 QUESTION: -- who were already retired, where
15 they got no notice of this transfer --

16 MR. ABRAMS: Retirement, as I understand it, is
17 not a vesting point under ERISA. Retirement has no more
18 clarity for ERISA purposes than any time when they were
19 employed, or after they ceased to be employed. If it is
20 true that my client had an absolute right to cancel these
21 people, to terminate these people, to alter the plan of
22 these people without telling them, without their consent,
23 and that is, as I understand it, ERISA law --

24 QUESTION: So you're saying that the Employees
25 Security -- Income Security Act allows an employer to do

1 this. The misrepresentations, then, are beside the point.
2 They don't have to say anything.

3 MR. ABRAMS: The misrepresentations, indeed, are
4 beside the point with respect to these people. The
5 misrepresentations are entirely irrelevant with respect to
6 these people. There people had no --

7 QUESTION: So that Congress, when it set up the
8 Employee Retirement Income Security Act, gave employees no
9 security against what happened here, against waking up one
10 morning and find that they have no coverage because they
11 are now under some umbrella that they never heard of.

12 MR. ABRAMS: No more protection than waking up
13 some morning and finding they have no coverage at all.
14 These employees were paid for 22 months. Suppose --
15 because the new company paid them. Suppose they'd not
16 been. Suppose what had happened here --

17 QUESTION: All right, I think I have your
18 answer.

19 MR. ABRAMS: Sorry.

20 QUESTION: They don't have to get any notice so
21 that they can get - that ERISA simply allows this to
22 happen, and that's --

23 MR. ABRAMS: That is my position, and that
24 ERISA --

25 QUESTION: Mr. Abrams --

1 MR. ABRAMS: Yes.

2 QUESTION: -- does it require, however, that the
3 health plan be terminated or amended as opposed to simply
4 moving people around to another company? Does it require
5 some action by the plan manager?

6 MR. ABRAMS: It does require some -- something
7 has to happen, Justice O'Connor. I mean, a real act.

8 QUESTION: What this looks like is that what
9 happened was something that had the result of causing the
10 plan not to be funded, but it was not technically an
11 amendment or a termination of the health plan, am I
12 correct?

13 MR. ABRAMS: It was not technically an amendment
14 to the health plan itself. What it was --

15 QUESTION: Or a termination of it.

16 MR. ABRAMS: What it was -- I believe it was a
17 term --

18 QUESTION: There was no --

19 MR. ABRAMS: Sorry.

20 QUESTION: There was no action taken by Verity
21 saying, as of date X, we terminate this plan. It was done
22 very indirectly, in a sense.

23 MR. ABRAMS: It was done in a purchase agreement
24 as between Verity and MCC, which explicitly provided for
25 the termination by Verity, then Massey-Ferguson, if its

1 obligations, and the taking over of those obligations by
2 the new company.

3 QUESTION: But you don't -- sorry.

4 MR. ABRAMS: I'm sorry.

5 QUESTION: You don't necessarily have a right in
6 the questionnaire, when they say, what happens to my
7 benefits and pensions, to say, they'll stay the same, the
8 company has a bright future, and your benefits are quite
9 secure.

10 I mean, that might be to mislead them, I take
11 it, in respect to their decision about whether to stay
12 with the company and have a plan, or go to a new one, and
13 I thought this case is about whether those statements are
14 fraudulent in -- where you didn't think they were true, in
15 respect to a pension plan information, and that is a cause
16 of action there. In fact, it's a breach of fiduciary
17 obligation, arguably, right?

18 MR. ABRAMS: The second issue in this case is
19 just what you've described. Is what you've described a
20 breach of fiduciary obligation, or is it, because it is
21 not a part of plan administration --

22 QUESTION: And if it is a breach of fiduciary
23 obligation, then why can't the person whose duty was
24 breached bring an action, because isn't there an
25 obligation that a fiduciary under ERISA has the same

1 obligations as a fiduciary at common law, and those
2 obligations run to the beneficiaries, and so forth.

3 MR. ABRAMS: I would reverse the questions, but
4 those are indeed the questions, and the first of them, as
5 we see it, is, is there a cause of action here at all? Is
6 there an individual cause of action which can be brought
7 by somebody, or his or her or a group's own relief, as
8 opposed to a plan's relief.

9 Now, this Court has not addressed that question
10 directly. It has addressed the section of ERISA which is
11 next to (a)(3). It's addressed (a)(2).

12 QUESTION: Mr. Abrams, in that respect, a plan
13 is only helped by having a lot of people drop out of it so
14 the plan has assets, so there's a dysjunction there. The
15 people who have brought this action are the people who
16 were injured. The plan isn't injured by having fewer
17 people to cover. So these people are claiming that we
18 have an injury because of what this trustee did.

19 MR. ABRAMS: Right.

20 QUESTION: And are you saying, again, that ERISA
21 does not protect these employees, it only protects plans?

22 MR. ABRAMS: I am saying that ERISA does not
23 provide a private cause of action for an individual on his
24 own behalf to assert --

25 QUESTION: Yes, I could see --

1 MR. ABRAMS: -- breach of fiduciary duty.

2 QUESTION: If the plan is a stand-in for the
3 individual -- in many situations, it is. If the plan gets
4 the relief, then the beneficiary will get the relief. But
5 here, it doesn't work that way. It's -- the plan hasn't
6 been deprived of any assets.

7 MR. ABRAMS: That will always be the case. That
8 will always be the case when an --

9 QUESTION: Then there's always going to be the
10 potential for a hiatus in recovery, because the plan is
11 going to do very well by getting rid of these people. The
12 plan as a plan has no obligation, I suppose, to claim any
13 harm, and the individuals, on your theory, can't sue.

14 MR. ABRAMS: Well, what the individuals can sue
15 for --

16 QUESTION: Isn't that correct?

17 MR. ABRAMS: Subject only, Justice Souter, to
18 the proposition that an individual can sue for loss of
19 benefits. That is precisely -- I mean, the whole
20 structure of ERISA is arranged so that the first provision
21 of civil remedies --

22 QUESTION: He would sue -- on your theory, he
23 would sue -- the fiduciary and require the fiduciary to
24 pay him benefits month --

25 MR. ABRAMS: If he's --

1 QUESTION: -- by month?

2 MR. ABRAMS: Yes.

3 QUESTION: That's -- that's --

4 MR. ABRAMS: Yes.

5 QUESTION: -- what his remedy is?

6 MR. ABRAMS: If he has improperly been deprived
7 of benefits, the claim he should make, the claim ERISA
8 sends him to, is a claim for lost benefits, and if he is
9 not entitled to lost benefits under ERISA, you've already
10 held in Russell that he cannot claim under subpart (2),
11 which is a plan-oriented claim, so this Court has found,
12 with respect to fiduciary obligations.

13 The question here, then, is can the individual
14 sue under subpart (3) for the same thing he cannot sue for
15 under subpart (2), breach of fiduciary obligations.

16 QUESTION: Well, Mr. Abrams, under subpart (3),
17 it must mean something. It does say that a participant or
18 a beneficiary can bring a civil suit to enjoin an act or
19 practice violating the law or the terms of the plan, or to
20 obtain other appropriate equitable relief, whatever that
21 is. Does that mean, for instance, that the people who
22 were transferred without their knowledge from the original
23 plan to the new corporation could, perhaps, at least bring
24 a suit to enjoin that action and require that they be
25 returned to the original plan?

1 MR. ABRAMS: Not, we think, for breach of
2 fiduciary duty. They can bring the action, and we have
3 not argued to the contrary, under section 510.
4 Section 510 of ERISA does allow an employee who is wrongly
5 discharged to seek back pay, reinstatement, and the like.

6 That action can be brought through (a)(3), but
7 the reason, as we see it, that the (a)(3) cannot be used
8 to seek fiduciary responsibility is all the potential for
9 duplication overlap and inconsistency --

10 QUESTION: Well, perhaps not to seek damages,
11 certainly. That seems to be limited, as the Court has
12 described in Russell, but is there anything left under (3)
13 by way of a right to get an injunction, or some kind of
14 equitable order?

15 MR. ABRAMS: We read section 409 to be the
16 exclusive place to get an injunction. Of course you can
17 get an injunction under 409, but it's a plan that can get
18 an injunction under 409.

19 As we understand 409, it is the remedy Congress
20 chose to deal with breaches of fiduciary obligation, and
21 all breaches.

22 QUESTION: I can understand that very well with
23 respect to plans. Assets have been managed, assets have
24 dwindled, and so we build up the plan.

25 I don't understand that -- it's certainly no

1 remedy for people who have the complaint that these people
2 have. You said that they could sue for benefits
3 wrongfully withheld, but there are no benefits wrongfully
4 withheld on your theory that they're under this new
5 umbrella, and it's too bad the umbrella, that company's
6 gone bankrupt.

7 MR. ABRAMS: My theory is not just that they had
8 a new umbrella, but that they never had entitlement to
9 benefits, never for a moment had entitlement to benefits.

10 QUESTION: They had an entitlement to notice of
11 termination if that's what happened.

12 MR. ABRAMS: If they had an entitlement to
13 notice of termination, they certainly received that when
14 they were told that they were part of a new company.

15 If the problem here --

16 QUESTION: They weren't told.

17 MR. ABRAMS: They were told --

18 QUESTION: They weren't told.

19 MR. ABRAMS: -- when they were told they weren't
20 getting any more benefits.

21 QUESTION: Oh.

22 MR. ABRAMS: I'm saying, they received benefits
23 for the entire period. There was no hiatus here. There
24 was no period when Massey-Ferguson plan was going on and
25 the new company was out there and they didn't get

1 benefits.

2 QUESTION: But after they stopped getting
3 benefits, in answer to my earlier question you said, well,
4 they can sue for benefits, and now you're saying, but
5 they're not entitled to any benefits.

6 MR. ABRAMS: Yes, it is my position --

7 QUESTION: So the practical matter is, there's
8 nothing to sue for. There is no alternative --

9 MR. ABRAMS: What I'm --

10 QUESTION: -- to what they're claiming now.

11 MR. ABRAMS: What I'm saying is that they did
12 sue for benefits. They lost. They should have lost.
13 There's no petition for certiorari pending --

14 QUESTION: So that get's back, I guess, to my
15 question, and that is for the particular claim that is
16 being made here, there is no remedy. There is in fact a
17 gap in the possibility of recovery, because the plan is
18 doing fine. It could care less that it has to pay fewer
19 benefits, and the individuals, on your theory, have
20 nothing that they can recover for. End of issue.

21 MR. ABRAMS: That certainly is our position,
22 Justice Souter.

23 QUESTION: Well, your position -- yes.

24 MR. ABRAMS: That's -- that's the position that
25 we took below and now. Now --

1 QUESTION: It's even more than that, not just
2 that there's no remedy. You say there's been no right
3 violated, that 1109 establishes a fiduciary duty to the
4 plan but not to the individual members of the plan. You
5 say there's no fiduciary duty of these individuals that's
6 been violated.

7 MR. ABRAMS: That is our --

8 QUESTION: It's not just that it's been violated
9 but there's no remedy for it. You say there's been no
10 violation --

11 MR. ABRAMS: We believe --

12 QUESTION: The duties as set forth in 1109.

13 MR. ABRAMS: Yes. Now, 404, of course --

14 QUESTION: Or 1104.

15 MR. ABRAMS: -- which they're relying on either
16 leads into 409 or should be viewed, they maintain,
17 separately. It's our view that 404 is a part of a scheme.
18 404 imposes, sets forth the prudent -- "the prudent man
19 standard of care."

20 QUESTION: Under your view of 404, Mr. Abrams,
21 does the fiduciary have an obligation to refrain from
22 giving fraudulent information to a person who requests
23 information about the future of the plan and the
24 advisability of the participant remaining in the plan?

25 MR. ABRAMS: If there were false information

1 given of that sort, then if we were to lose on point 1 --
2 that is to say, if there is a -- an individualized cause
3 of action here, we agree we should lose on point 2 on
4 that.

5 I mean, one still has to address the first
6 question of whether they have a claim at all for
7 individualized relief, but if they do, then I agree that
8 the answer to your question is, that would, indeed,
9 constitute a brief of fiduciary obligation. Now --

10 QUESTION: May I ask one technical question?

11 MR. ABRAMS: Yes.

12 QUESTION: You do not dispute, as I understand
13 it, that the relief granted in this case was "equitable"
14 within the meaning of subparagraph (2)?

15 MR. ABRAMS: That's correct. That's not
16 something that we've raised.

17 QUESTION: But you argue it's not appropriate.

18 MR. ABRAMS: We do not argue that.

19 Now, the first question, then, is, is there a
20 cause of action? Does 409 mean what we think it means?
21 Are we correct in our overview that 409 should be read as
22 the culmination of these various sections of ERISA,
23 including section 404, and if that is correct, as we
24 maintain it is, if that's correct, then we think that
25 there should be a ruling of this Court that there's no

1 individualized cause of action.

2 QUESTION: Mr. Abrams, if both readings, yours
3 and the one that's being put forward by the other side, if
4 both are plausible, do we take into account at all what
5 was the underlying purpose of the entire ERISA that's
6 expressed in its very title -- employee security?

7 If we're in equipoise between your
8 interpretation and the other side's, shouldn't we look at
9 the underlying purpose of this whole scheme,?

10 MR. ABRAMS: I think it's entirely appropriate
11 to look at the underlying purpose, but I would disagree
12 that that is the only underlying purpose.

13 ERISA, as this Court has indicated, was the
14 result of a bundle of compromises, and not all the
15 compromises were made in favor of the members of the
16 participants in ERISA plans.

17 QUESTION: Well, certainly not, but the
18 overarching purpose --

19 MR. ABRAMS: The overarching purpose of welfare
20 benefits, as opposed to pension benefits, was at one and
21 the same time to encourage employers to offer and to
22 perpetuate what they need not offer and need not
23 perpetuate --

24 QUESTION: But for the purpose --

25 MR. ABRAMS: -- which is welfare plans.

1 QUESTION: -- of providing employees with
2 security.

3 MR. ABRAMS: Yes. With the view that if you
4 allow employers to cut off plans, if you allow employers
5 to do all sorts of things impossible and illegal with
6 respect to pensions, that you'll wind up with more plans
7 and more benefits, but I do not agree that ERISA in this
8 area, in the welfare area, can properly be read as simply
9 designed to assure more security for individuals, except
10 in the sense that I've said it. It was to do it --

11 QUESTION: I didn't ask you that. I didn't ask
12 if every call in the statute is in favor of the employees.
13 I asked you if we are in the situation of saying, we read
14 your brief and your interpretation of these provisions,
15 and we read the other side, could we use --

16 MR. ABRAMS: You certainly can use the purpose
17 of ERISA, and I would add to that, the structure of ERISA.
18 You really have to look, in our view, at how ERISA was
19 crafted, what this Court said was the carefully crafted
20 nature of ERISA, and the interrelationship of the
21 sections.

22 Does it make sense to say that what Congress
23 intended, in what the Court has said was a very thoughtful
24 and careful creation of this, that what Congress meant to
25 do is to have two lines, sometimes quite inconsistent,

1 with respect to the breach of fiduciary duties, have only
2 one section of law which defines when you commit a breach
3 of fiduciary duty, when you do not commit a breach of
4 fiduciary duty, what is it that you're supposed to do
5 about fiduciary duty, which applies only to plans, for
6 Congress not to have adopted any other section for
7 individuals.

8 Well, we think that the way to make sense of
9 ERISA if you're in equipoise, or even if you're not, the
10 way to make sense of it is to read it all, and that we
11 think when you read it all that that's the way that you
12 should read it.

13 Now, if we're wrong on that, then you reach the
14 second issue, and then you reach the issue of whether this
15 is a matter of plan administration. It's not an open
16 question that employers that are on ERISA plans are
17 permitted at one and the same time to think of their own
18 benefits, their own interests, and the interests of those
19 who are in ERISA plans. That's a proposition of
20 longstanding.

21 The question here, the narrow, legal question
22 is, when my client made various statements designed to
23 persuade people to join MCC, the new corporation, was
24 that -- is that fairly reasonably described as a part of
25 plan administration. We don't think it is, and --

1 QUESTION: And that goes also for the group that
2 was --

3 MR. ABRAMS: Yes.

4 QUESTION: -- not told anything.

5 MR. ABRAMS: Yes. I mean, I think basically
6 it's the same -- you have to address the same question, is
7 it plan administration for everyone, because if it's not
8 plan administration, you're not acting in a fiduciary
9 capacity.

10 The Court has made clear that you are acting --
11 that things which would be unthinkable for a trustee of a
12 will, say, who is supposed to be thinking only of the
13 interests that the trustee is serving, are entirely
14 appropriate with respect to ERISA.

15 QUESTION: It seems to me that on this part of
16 your argument what you're saying is, is that the
17 defendants below are wearing their corporate executive
18 hat --

19 MR. ABRAMS: Yes, Your Honor.

20 QUESTION: -- and not their fiduciary hat.

21 MR. ABRAMS: Yes, Your Honor.

22 QUESTION: But if they mislead, and they then
23 mislead about the participation in the plan, the solvency
24 of the plan, the future of the plan, and so forth, it
25 seems to me the very fact that they're misleading helps us

1 to determine which hat that they're wearing, because the
2 employee has the justified expectation that he or she will
3 receive accurate information about the plan whenever the
4 fiduciary talks, no matter what his hat is.

5 MR. ABRAMS: I agree with that, Justice Kennedy,
6 and they did. There is no claim here that they received
7 inaccurate information about the plan. The brief amicus
8 curiae of the United States, for example, makes very
9 clear, and very honorably, although we disagree with them,
10 that the one statement made to the individuals about the
11 plan was true, that the plan would be the same after, as
12 it was before, that there would be no changes in the plan
13 terms after as before.

14 All the allegations of falseness and of false
15 statements, every single one of them, relates not to
16 statements about the plan, but as to why you should join
17 the new company, and the good qualities of the new
18 company, and looking forward to a bright future, et
19 cetera, and that is indeed one of the reasons why we
20 maintain that this is not plan administration, whatever
21 plan administration is.

22 QUESTION: Well, except that isn't there sort of
23 a common sense of plan administration that the plan is
24 going to be better administered for those whom it will
25 benefit if it has fewer people to benefit, and therefore

1 there is a good administrative objective, I suppose, in
2 theory, in simply reducing the plan's liabilities.

3 And if these statements were made about the new
4 corporation and its rosy future and so on for the purpose,
5 or in part for the purpose of causing this exodus out of
6 the old plan and the reduction of the old plan's
7 liabilities, why doesn't that fit within a concept of
8 administrative purpose?

9 You make it easier for the old plan to pay its
10 benefits because you've got fewer benefits to pay.

11 MR. ABRAMS: At some level of abstraction
12 everything, or almost everything, can relate to the plan
13 that relates to the company. A healthier company has a
14 healthier plan. A plan with fewer people in it has more
15 money to spend, and the like.

16 We think that when the representations that are
17 involved are, we think you should go to the new company
18 because it has a bright future, we think that you ought to
19 go to the new company because it will be a good company,
20 that that -- it tortures the language, with all respect,
21 of plan administration to say that that is plan
22 administration.

23 I mean, we --

24 QUESTION: Well, I don't think we know whether
25 it tortures it or not unless we first answer the question,

1 and I guess it's the question which was behind one of
2 Justice Ginsburg's questions to you, should we read the
3 concept of plan administration, if in doubt, in a more
4 expansive or a less expansive way, and her suggestion was
5 that there is an overarching object in the statute which
6 would be a good reason for reading it in an expansive way
7 which would bring these acts within the concept of
8 administration, and I guess your answer is going to be the
9 same as to her, there is no overarching scheme by which
10 you can make that choice.

11 MR. ABRAMS: Yes, Your Honor, that would be my
12 answer, and I would give the rest of my answer as well
13 about the nature of ERISA as a whole, the nature of
14 welfare benefits, the schema about welfare as opposed to
15 pension benefits and the like.

16 I'd like to save the rest of my time.

17 QUESTION: Very well, Mr. Abrams.

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

19 ORAL ARGUMENT OF H. RICHARD SMITH

20 ON BEHALF OF THE RESPONDENTS

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

23 Let me respond to some of the things petitioner
24 has argued. This is not a termination case. They do not
25 have an inherent right to terminate. They must proceed

1 under the terms of the plan, and that has not been done.

2 Section 404 subparagraph (d) makes it a
3 fiduciary duty that they proceed under the terms of the
4 plan. The plan that they were on with MF, Inc., the
5 viable plan continues today, and they've taken no action
6 under the terms of the plan.

7 In fact, the MCC plan they've taken no action.
8 What happened, it was a self-funded plan. The self went
9 bankrupt.

10 Secondly --

11 QUESTION: I think his point was simply when
12 you're dealing with a statute that permits termination,
13 it's very hard to think that somehow employees have been
14 deprived of statutorily required security by not being
15 given notice of the transfer to a new company. Under the
16 statute they could have been terminated.

17 They -- you know, it's sort of hard to talk
18 about their deprivation of some security that the statute
19 assured to them. The statute allowed them to be
20 terminated completely.

21 MR. SMITH: The statute did, Justice, and they
22 could have been, and they chose not to do that to further
23 their own interests.

24 As the district court found under facts that are
25 not challenged on the appeal, there were practical reasons

1 why petitioner did not want to proceed under the plan, and
2 they used these people in an improper, unlawful way, and
3 the fact that they could do it lawfully should not be
4 justification for permitting them to do it unlawfully.

5 QUESTION: It's justification for saying that
6 you cannot reasonably argue that they have been deprived
7 of some security interest which the statute guarantees to
8 them.

9 MR. SMITH: That's correct, if I understand it,
10 and that moves us to what our (a)(1)(B) claim was. We
11 have not been denied benefits under our (a)(1)(B) claim.
12 Our (a)(1)(B) claim was a security claim.

13 We took the position that our retirement
14 benefits contractually vested on retirement under the
15 section 7.4 of the plan. We read it, we thought you could
16 read it that way, and the court held we were wrong, but
17 the court neither at the district court nor at the circuit
18 court level has found that we were not entitled to
19 benefits under (a)(1)(B).

20 What we're trying to do is to be restored to the
21 viable plan that we removed ourselves from due to the
22 fraudulent misrepresentations. We want to get restored to
23 that plan, and then --

24 QUESTION: But you don't argue that you were
25 guaranteed any benefits under that plan, do you? I take

1 it your position is not that you were guaranteed benefits
2 of which you were deprived, but that you simply had
3 benefits of which you were fraudulently deprived.

4 MR. SMITH: Exactly, Justice. We did argue it
5 under other theories, but not under breach of fiduciary
6 duty. we argued it and lost, but we do not argue it here.
7 It's not part of our breach of fiduciary duty claim.

8 Our breach of fiduciary duty claim is not
9 attacking plan documents. We don't attempt to change or
10 circumvent any of those term plans. All we're trying to
11 do, again because we were fraudulently removed from the
12 viable plan, to get restored so we can have relief in
13 accord with those plan documents.

14 The other thing that I -- there's no record, but
15 since it came in in petitioner's argument about our State
16 court claim, that's based on the terminated class which we
17 lost on in the district court, and seeking a common law
18 actions for wrongful termination, and I was surprised to
19 hear that they do not claim that that's preempted, because
20 they removed it to Federal court on the basis of
21 preemption. I don't think it has any bearing on our case
22 here today.

23 QUESTION: Mr. Smith, what is your response to
24 the argument that as to the 10 plaintiffs who never worked
25 for MCC, that no misrepresentations were made to those

1 individuals in connection with the transfer of their
2 coverage to MCC, so there's no basis for affirming the
3 decision below, your opponent argues, with respect to that
4 belief, because they weren't told anything.

5 MR. SMITH: I --

6 QUESTION: No misrepresentations were made to
7 them.

8 MR. SMITH: Justice, I agree with the first
9 part. There were no representations of any nature made to
10 them, but that's not justifications that they have no
11 relief. That's justification for once you get by the
12 first question, petitioners have advanced no reason or
13 make no argument to deny the 10 individuals, because
14 clearly it's a breach of fiduciary duty under section
15 404(d) for them to proceed to unilaterally, without
16 informing them, without their consent, to transfer
17 responsibility for their benefits to an entity that the
18 district court found they knew was going to go bankrupt.

19 So our position is that if we prevail on the
20 first question for review, we're home free with regard to
21 the 10 individual plaintiffs, because they've not advanced
22 any argument why there was not a breach of fiduciary duty.

23 I would like to direct attention to the first
24 question for review, and as you know, it is our position
25 that if the petitioners are right in their interpretation

1 of 502(a)(3), there is a tremendous gap in this well-
2 crafted scheme that the courts recognized that Congress
3 devised for enforcement and remedies, and that gap is, as
4 has been pointed out here this morning, that you have no
5 remedy for breaches of fiduciary duties that results in
6 harm to participants or beneficiaries but no losses to the
7 plan, and that takes out practically all of the breaches
8 of fiduciary duty relating to administration.

9 QUESTION: Yes, but I mean, indeed, except, of
10 course, any breaches of fiduciary duty that result in loss
11 of benefits to the individual, which he can recover for
12 under (a), (a)(1)(B).

13 Certainly that covers a large number of breaches
14 of fiduciary duty, doesn't it?

15 MR. SMITH: Well, it would -- assuming it
16 constitutes a breach of contract that you could under
17 contract principles recover (a)(1)(B), but Justice,
18 there's many other things -- in fact, one of the most
19 fundamental things about administration is determining who
20 is a participant that has a right to make claims under
21 (a)(1)(B), and you have these --

22 QUESTION: Mr. Abrams' argument is not to deny
23 that there are not individual rights that one would
24 ordinarily have against a trustee, which are eliminated
25 here, but rather to say their elimination is part of the

1 scheme of the statute, just as the ability of the employer
2 to simply terminate unilaterally, which is extraordinary,
3 is part of the statute. It was cost-benefit analysis. We
4 want to make these schemes easy and cheap for the employer
5 to manage so that more employers will establish them. Why
6 isn't that a plausible argument?

7 MR. SMITH: Justice, it's just not common sense
8 that if Congress intended the exclusive remedy for private
9 harm to participants and beneficiaries to be under
10 (a)(1)(B) on contract principles, why would they make
11 administration a fiduciary activity, why would they make
12 it fiduciary conduct, why would they incorporate in
13 section 404 duties out of the common law that run directly
14 to beneficiaries, and having done all that, why would
15 they --

16 QUESTION: Where does it say that run directly
17 to beneficiaries? I mean, the argument Mr. Abrams makes
18 is that 404 just establishes the standard of care, but
19 that it's 409 which says to whom you are liable for breach
20 of your fiduciary duty --

21 MR. SMITH: For -- where we --

22 QUESTION: -- because that's the title of 409.

23 MR. SMITH: That's correct. If we're talking
24 about titles, we'd prefer to go back to the subchapter
25 which says, Protection of Employee Benefit Rights, if the

1 Court's going to focus on titles, but where we differ from
2 Mr. Abramson, or petitioner's counsel on that is, 404 sets
3 up the duties.

4 His position is that 409 limits what -- where
5 you can have liability for breaches of those duties.

6 I don't know that they dispute -- in fact, I
7 think they argue that duties were incorporated out of
8 common law. They try to argue that the remedies were not
9 incorporated, which again just doesn't make sense.

10 If Congress had intended 409 to be the exclusive
11 means of remedies for breach of fiduciary duty, they could
12 have said so, and they do not.

13 QUESTION: May I ask this: do you contend that
14 the breach of fiduciary obligations that you have proved
15 in this case, or alleged, were violations of duties
16 defined in 404?

17 MR. SMITH: Correct.

18 QUESTION: So you do say that 404 is the source
19 of the fiduciary duty.

20 MR. SMITH: Correct.

21 QUESTION: All right. But then, may I ask this
22 question. If your reading of subsection (a) of 502(a)(3),
23 I should -- mean, is correct, would the plaintiffs in the
24 Russell case have been able to prevail if they had pleaded
25 under this section rather than just under subparagraph

1 (2)?

2 MR. SMITH: Yes, and I'm pausing -- I know
3 Mertens was a nonfiduciary. I think Russell was a
4 fiduciary, so yes, I think they could have for equitable
5 relief.

6 QUESTION: But they were suing for damages
7 there.

8 MR. SMITH: I don't think they could have
9 recovered damages under 502(a)(3).

10 QUESTION: So one of the keys to your case is
11 that you contend here you're getting equitable relief.

12 MR. SMITH: Correct.

13 QUESTION: And that's what distinguishes
14 Russell.

15 MR. SMITH: That's right, and we can only obtain
16 equitable relief under 502(a)(3). We --

17 QUESTION: And we have no issue before us here
18 as the case comes to us about whether what you did recover
19 fits that description.

20 MR. SMITH: Correct. They have not brought that
21 to you. We --

22 QUESTION: It looks a lot like damages.

23 MR. SMITH: Justice Hanson at the circuit level
24 in the dissent had some thoughts along that line and
25 wanted it sent back to have a better record developed on

1 that.

2 Our position is, as you know from the briefs,
3 that you should follow the number 1, what you've said is
4 the cardinal rule of statutory construction, and that is,
5 when the language used by Congress is plain, you should
6 assume Congress means what they said and said what they
7 mean, and judicial inquiry should stop there, and we think
8 the language of 502(a)(3) is clear.

9 Petitioners say, but when you read it in the
10 context of the entire act, there's a conflict between it
11 and 409. There is not. You have to read language into
12 409, that language being that it is exclusive. It doesn't
13 say that. Or language that says you can only find -- have
14 plan-based relief and not individual relief. It doesn't
15 say that.

16 They say, but the Russell decision puts that
17 language in there. It does not. The Russell court made
18 clear that 502(a)(3) had not been urged upon it in that
19 case.

20 QUESTION: But there is some -- certainly some
21 language in Russell that suggests the plaintiffs wouldn't
22 have fared any better under 502(a)(3).

23 MR. SMITH: Well, that's correct, and the
24 concurring opinion points that out, that it's broader than
25 it needs be, but I think that can be explained by the

1 argument that was being presented to get a private cause
2 of action under 409, where they were focusing on -- they
3 recognized it said, losses to the plan, so they focused on
4 the catch-all at the end that said, other equitable or
5 remedial relief, and they said that means that Congress
6 wanted to have private cause of actions there, and I
7 believe it was in that context that the Court used that
8 broader language as it did.

9 QUESTION: In any event, we do have a
10 footnote 5 --

11 MR. SMITH: Correct.

12 QUESTION: -- that says that exclusively that
13 we're not passing on that question.

14 MR. SMITH: That's right.

15 With regard to the second question for review, I
16 was pleased to hear petitioner say that this isn't a
17 disclosure case. This is a duty of honesty case. While
18 this Court may choose to speak to a broader duty, all
19 that's required to affirm in this case is to find that
20 when an employer administrator of a plan exercises its
21 discretion to speak to its employee participants about
22 administration plan benefits, it has a duty to be honest,
23 and that's not a burdensome duty.

24 There's been a lot of concerns raised in
25 petitioner and amici's brief about the burden this is

1 going to place on employers. This is not a clairvoyance
2 case. That simple minimal rule that the circuit could be
3 affirmed on doesn't require clairvoyance to speak about
4 future events. Here, the district court --

5 QUESTION: I don't see -- I mean, what they're
6 contesting is whether it is part of the administration of
7 the plan. I don't see how it becomes more administration
8 if you lie and less administration if you tell the truth,
9 or less administration if you just remain silent. I mean,
10 it --

11 MR. SMITH: We --

12 QUESTION: The point is, was this part of the
13 administering of the plan.

14 MR. SMITH: You're exactly right, and we don't
15 base it being fiduciary conduct and that they were acting
16 as a fiduciary because they lied, although I think that
17 could be a legitimate basis.

18 QUESTION: Why?

19 You've just undone what you just conceded.

20 MR. SMITH: Well --

21 QUESTION: How can the fact that you're lying
22 cause it to be administration when if you were telling the
23 truth it wouldn't be administration?

24 MR. SMITH: Justice, that two hats doctrine,
25 they always have both hats in their hand. They put one on

1 to speak as an employer as a nonfiduciary, but they're
2 lying in a manner that they -- it's reasonably foreseeable
3 that the participants are going to act on it to their
4 detriment. They hear that as a fiduciary. They have a
5 duty to put the other hat on and say, participants, you're
6 not being told the truth, but that's not our case, of
7 course, because the district court found --

8 QUESTION: Well, I worry that it's your case. I
9 mean, this is an enormously important issue. Every
10 employer who runs a single employer plan is going to be at
11 risk with respect to everything he says in the operation
12 of his business, because he is a trustee at all times, and
13 he is subject to lawsuits by people saying, well, when you
14 made this representation you had a trustee's obligation.

15 I think we need an absolutely clear line, and if
16 the line is going to be something like, well, if you're
17 lying it somehow moves closer to administration, I don't
18 know how an employer would know how to behave.

19 MR. SMITH: For purpose of affirming, I do -- we
20 do not urge the rule that it be based on lying. It's
21 based on whether or not they're talking about plan
22 administration or plan benefits. That should be the rule,
23 and when they do, they're acting as a fiduciary, and they
24 have a duty to be honest.

25 In this case the unchallenged factual findings

1 are that they were talking about benefits, they were
2 talking about plan administration. Given those findings,
3 it necessarily has to be that they were acting as a
4 fiduciary.

5 QUESTION: What were those findings based on? I
6 mean, I thought we had the words that they said.

7 MR. SMITH: You have the words that they said --

8 QUESTION: And what were those words --

9 MR. SMITH: They said --

10 QUESTION: -- that you're relying on?

11 MR. SMITH: -- your benefits will continue
12 unchanged.

13 QUESTION: That's true. That's not what you're
14 suing on.

15 MR. SMITH: Well, it certainly is. They did not
16 remain unchanged.

17 QUESTION: The plan benefits were changed? The
18 plan benefits were --

19 MR. SMITH: No, we didn't -- if I said plan
20 benefits, I misspoke, because we agreed we're not
21 attacking the plans. We're talking about administration
22 and benefits, and we told -- not talking about plan terms,
23 but we're talking about benefits continuing in the future
24 with this new corporation which had such a bright future
25 and excitement they had about how it was going to do.

1 QUESTION: I'm sorry, I don't mean to -- I
2 thought that there is a piece of paper, questions and
3 answers, what happens to my plan benefits, pension, et
4 cetera? Answer: when you transfer to MCC they will stay
5 the same, et cetera.

6 And then at the bottom of the page it says we
7 are very optimistic, our company has a bright future, we
8 are, et cetera.

9 So it comes in a context, I thought your point
10 was. The question: what happens to my benefits? When
11 you answer that question, you are answering in your
12 capacity as administrator.

13 MR. SMITH: Exactly, Justice --

14 QUESTION: I mean, I --

15 MR. SMITH: -- and it was in the four documents
16 that was presented to them --

17 QUESTION: The misrepresentation is not that the
18 new piece of paper on which the new plan is written has
19 the same words as the old piece of paper. Your claim is
20 that the misrepresentation was, you're going to continue
21 to enjoy them with the same probability or expectation
22 that you would enjoy them if you remained under the old
23 plan. That's the nub of your claim, isn't it?

24 MR. SMITH: That's exactly right, and it's in
25 that context and in the context that in the short, brief

1 meeting they said, you need to sign this today to transfer
2 so you be sure those benefits will not be interrupted.

3 QUESTION: But the question on that point is
4 simply that the ponit about the Massey Combines Corp.
5 comes in response to the next question and on a separate
6 page, so is he still answering with his hat as the
7 fiduciary?

8 MR. SMITH: That's correct.

9 QUESTION: Oh, I'm -- that's not correct, that's
10 a question.

11 (Laughter.)

12 MR. SMITH: You're asking that if, when they
13 switch over to talking about the business matters, that
14 they're still talking about, and I say yes, that's true,
15 they're still talking as a beneficiary. You have to set
16 this in the context of the factual findings, unchallenged,
17 that they wanted to rid themselves of these without
18 exercising their right of termination, and they had a
19 second and dual purpose of, they wanted to persuade their
20 lenders that they had an up and going viable entity, and
21 in that setting, where they talked about the benefits and
22 then talked about the prospects of the entity that was
23 going to be the source of the funds to fund this self-
24 funded plan, that was all, in our judgment, fiduciary
25 conduct, and again, --

1 QUESTION: But it was because -- I think you're
2 saying it would have been very odd -- it would have been
3 unreasonable for employees to say, oh, now that he's
4 talking about the rosy future, he's not making any
5 statement that might be relevant to my decision about
6 joining the new plan.

7 MR. SMITH: That's --

8 QUESTION: Isn't that the nub of what you're
9 saying?

10 MR. SMITH: That's correct.

11 QUESTION: Thank you, Mr. Smith.

12 Mr. Kneedler, we'll hear from you.

13 ORAL ARGUMENT OF EDWIN S. KNEEDLER

14 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
15 SUPPORTING THE RESPONDENTS

16 MR. KNEEDLER: Thank you, Mr. Chief Justice, and
17 may it please the Court:

18 First, just to put in context the nature of the
19 fiduciary breach claim here, we think it is precisely as
20 Justice Souter stated it.

21 The statement that plan benefits will remain
22 unchanged might have accurately described the plan on
23 paper, but a plan in the real world consists of more than
24 just the paper the document is written on. It consists of
25 the funds that will be available to pay the benefits, and

1 in this case it's the same, analytically, as if the
2 welfare benefits were paid out of a separate corpus, and
3 it would take \$50 million to fund the benefits, but the
4 employer had only put \$1,000 into it.

5 If the employer said, your benefits will remain
6 unchanged, and the plan looked the same on paper, that
7 would not be a fully accurate description to the employees
8 who were being induced to leave a secure plan to go to an
9 unsecure plan to say that their benefits have remained
10 unchanged.

11 So this was quite clearly a representation about
12 the current status of the benefit plan.

13 QUESTION: But that's not the point. The point
14 is whether it is not undertaken, whether it is of interest
15 to people who were in the plan, whether it would affect
16 their actions in the plan, the issue is whether it -- the
17 representation is made in the administration of the plan.

18 MR. KNEEDLER: Yes. Now, I --

19 QUESTION: That's the issue.

20 MR. KNEEDLER: I understand that. I was simply
21 trying to describe what the nature of the
22 misrepresentation was, but by the same token, when an
23 employer wearing two hats is asked to describe what the
24 employees' benefits will be under the current plan, this
25 is not a statement of an intent to amend the plan in the

1 future. This is a statement of what employees' benefits
2 are or will be under the current plan. This is a
3 statement of current plan benefits availability.

4 In that situation we think it's quite clear that
5 the employer is speaking in a fiduciary capacity, or at
6 least would be understood by the reasonable employees in a
7 meeting such as this, where the employer through all of
8 the communications constantly referred to the benefit
9 consequences of the switch, that the employer -- employees
10 were being spoken to about their benefits, which is after
11 all a classic administrator responsibility under the act.

12 It is the administrator of the plan that is
13 responsible for disclosing documents to plan participants,
14 these summary plan description and notice of material
15 modifications, so that the employees would have been used
16 to, and in fact in this case did receive their
17 communications about plan benefits --

18 QUESTION: But not --

19 MR. KNEEDLER: From the employer.

20 QUESTION: It's certainly not his duty to
21 disclose the financial health of the company, is it?

22 MR. KNEEDLER: Not -- certainly not as a general
23 matter.

24 QUESTION: And anticipated future prospects for
25 the company.

1 MR. KNEEDLER: No. Our position is not that
2 that's true as a general matter. In the Borst case, for
3 example, where the employer is not speaking to the
4 employees but speaking in another context, there's
5 certainly no duty to disclose, but where the employer is
6 having a meeting face-to-face with the employees, asking
7 them to switch from one arm of the company to another, and
8 talking about the benefit consequences of that, we believe
9 that that is plan participation, where the viability of
10 the company is the same as saying there won't be funds
11 available to pay the benefits.

12 QUESTION: He's administering the plan when he
13 does that.

14 MR. KNEEDLER: When he is speaking to the
15 employees about what's going to happen to them under the
16 plan --

17 QUESTION: Which plan is he administering? He's
18 administering the first plan when he makes the
19 misrepresentation, isn't he?

20 MR. KNEEDLER: We frankly think he's
21 administering both plans.

22 QUESTION: He's administering both.

23 What if you assume -- just assume for the sake
24 of argument that he's administering the first plan. I
25 threw out a suggestion which Mr. Abrams said was -- really

1 relied on too high a level of generality of the concept of
2 administration.

3 What's your theory of the administrative
4 character of -- with respect to the first plan in making
5 statements intended to induce people to leave that plan?
6 How does that relate to administration, on your theory?

7 MR. KNEEDLER: Well, I think ordinarily, when an
8 administrator has people sign up or exit a plan, it may be
9 incident to leaving employment, but it's typical fiduciary
10 responsibility for -- to handle the paperwork coming and
11 going from a plan, and that's what we think would have
12 been happening here, that the fiduciary under the existing
13 plan would have been describing or been understood by the
14 employers to be describing the benefit consequences of
15 leaving one plan run by MF and joining another plan,
16 essentially run by MF, so we think that the employer was
17 really wearing an administrative hat under both plans at
18 the time it was speaking.

19 QUESTION: Mr. Kneedler --

20 MR. KNEEDLER: Yes.

21 QUESTION: How do you interpret what is it,
22 501(a)(3)? Do you think that the Russell case somehow
23 pointed the way to a more limited meaning?

24 MR. KNEEDLER: No, we don't. First of all, the
25 Court in footnote 5 of Russell specifically noted that the

1 employee -- that the participant there was not suing under
2 502(a)(3). It was suing under --

3 QUESTION: If they had, could they have
4 recovered?

5 MR. KNEEDLER: Not the damages that were being
6 sought there. That was straight compensatory damages, and
7 we think that's significant in looking at the operation of
8 502(a)(3).

9 Since Russell was decided, this Court held in
10 Mertens that other appropriate equitable relief does not
11 include compensatory damages, so the relief available
12 under 502(a)(3) is considerably more limited than what
13 would be available for compensatory damages claimed in
14 Russell or under section 409 of the plan on behalf of the
15 plan, so we think that that explains the differences
16 between 502(a)(2) and 502(a)(3).

17 QUESTION: But if you were starting on that
18 you'd say, look, 404 says a fiduciary has obligations to
19 participants and beneficiaries. It doesn't speak of
20 obligations to a plan.

21 MR. KNEEDLER: That's correct.

22 QUESTION: A trustee has obligations to the
23 fiduciaries and participants.

24 MR. KNEEDLER: Yes.

25 QUESTION: Then when you looked at the remedial

1 part it would look as if (1) is somewhat special. You sue
2 under (1) to get benefits.

3 MR. KNEEDLER: Right.

4 QUESTION: You sue under (2) where there's a
5 breach of fiduciary obligation, and you sue under (3) for
6 some other thing.

7 MR. KNEEDLER: Well, you sue under --

8 QUESTION: And so what they're worried about is,
9 they're saying Russell blocks (2), and (3) never covered
10 it.

11 MR. KNEEDLER: That's what they're saying, but
12 we think that's --

13 QUESTION: Well, isn't it easier to say (2) does
14 cover fiduciary --

15 MR. KNEEDLER: No, I think --

16 QUESTION: -- and 409 covers certain obligations
17 to individuals?

18 MR. KNEEDLER: 409 -- no, 40 -- excuse me, 404
19 covers obligations to individuals.

20 QUESTION: I know that. I'm saying (2) covers
21 fiduciaries, breaches of fiduciary relationship, but some
22 of those breaches of fiduciary relationship to individuals
23 like this case where not covered elsewhere may be picked
24 up, too, and not blocked. I mean, it's Russell. I'm
25 still trying to get you to talk about Russell and the

1 relationship to (3).

2 MR. KNEEDLER: Well, it's possible that the
3 concluding clause in 409 could have been understood to be
4 available to individuals to sue, but the Court concluded
5 that that --

6 QUESTION: Blocked in Russell by other things in
7 the act. Blocked in Russell by the fact that there's a
8 whole scheme of how you get --

9 MR. KNEEDLER: For benefits. That's exactly
10 right, and we think that's significant, but the Court does
11 not have to revisit Russell, because 502(a)(3) provides
12 for equitable relief for violation of any provision of
13 title I, any violation of any provision of title I. That
14 by its terms includes section 404.

15 QUESTION: And what they're worried about there,
16 the amici, is if we say that, we open the thing up to
17 suits in every case where a beneficiary is deprived of an
18 operation, or whatever, and then they bring -- come in
19 under (3) and they sue, you see, you breached your
20 fiduciary obligation to me. That's worried about, that
21 interpretation.

22 MR. KNEEDLER: Well, but because the remedy
23 under 502(a)(3) is limited by virtue of Mertens, there
24 will be a self-limiting principle applicable there.

25 Where you have an intentional misrepresentation,

1 as there was here, where the employer stands to gain --

2 QUESTION: Yes, but look, somebody comes in, my
3 heart operation, give me an injunction. Trustee: hey,
4 this doesn't require it. Person: you breached your
5 fiduciary obligation in not giving me my heart operation.
6 Injunction, please.

7 MR. KNEEDLER: No --

8 QUESTION: And that's the kind of thing they're
9 worried --

10 MR. KNEEDLER: No, I don't think there's any
11 inconsistency at all with the benefit provision, because
12 the employer -- the employer pays benefits under the act
13 either because they're covered or they're not covered. If
14 the employer has authority under a group to interpret the
15 plan, then that would be reviewed under an abuse of
16 discretion standard. That abuse of discretion is the
17 ambit of the fiduciary's -- fiduciary responsibilities.
18 There would be no separate claim under 502(a)(3).

19 QUESTION: Wait, I don't understand that. Why
20 not? I mean, it seems to me the suit would lie. I mean,
21 if you're saying that they might lose because you'd have
22 to give deference to the trustee's interpretation --

23 MR. KNEEDLER: What I meant to say is, there
24 would not be an inconsistent result. It would be the same
25 result, because the fiduciary standards would be the same

1 under each.

2 QUESTION: Oh, sure, but I think what Justice
3 Breyer is concerned about, as I am, is simply the volume
4 of litigation that is going to arise --

5 MR. KNEEDLER: But in that situation --

6 QUESTION: -- when you allow individual suits.

7 MR. KNEEDLER: In that situation, if you get
8 exactly the same relief, it wouldn't increase the
9 litigation at all.

10 If I could say, petitioner's theory is that
11 somehow 502(a)(1), (2), (3), (4), (5) are airtight
12 compartments, and there's no overlap. That's not true.
13 All you have to do is look at (a)(1) and (a)(3), both of
14 which refer to violations of the plan.

15 (a)(1) refers to specific violations with
16 respect to not paying benefits, but 502(a)(3) also
17 includes other violations of the plan, and we're saying
18 the same thing here with respect to fiduciary obligations.

19 502(a)(2) specifically covers personal liability
20 and other equitable relief for the fiduciary to the plan,
21 but that doesn't detract from the fact that 502(a)(3) also
22 covers any violation of the act which includes the
23 fiduciary responsibility provisions.

24 Under petitioner's theory, the injunctive suit
25 that Justice O'Connor referred to wouldn't even lie. The

1 10 people who were transferred to the new plan would not
2 even have an action for injunctive relief to restore them
3 to the old plan.

4 QUESTION: Mr. Kneedler, could I ask you the
5 question that the Chief Justice started out -- started the
6 argument with? In your view, if your opponent prevailed
7 in this case, would their State law actions that they
8 described be preempted?

9 MR. KNEEDLER: Well, we think that the
10 preemption question has to be considered in connection
11 with the availability of the remedies under section 502,
12 as the Court suggested in Russell, and --

13 QUESTION: But what's your answer to my
14 question?

15 MR. KNEEDLER: If the cause of action lies here,
16 there would not be preemption. If the cause of action
17 does not -- excuse me, there would be preemption. If the
18 cause of action does not lie under ERISA, then we think
19 there should be a broader ambit of claims for fraudulent
20 misrepresentation.

21 QUESTION: And there would not be preemption,
22 you think.

23 MR. KNEEDLER: Yes, for misrepresentations about
24 benefit where that's an inducement for an employment
25 change.

1 QUESTION: Thank you, Mr. Kneedler.

2 Mr. Abrams, you have 2 minutes remaining.

3 REBUTTAL ARGUMENT OF FLOYD ABRAMS

4 ON BEHALF OF THE PETITIONER

5 MR. ABRAMS: I'd like to return to Justice
6 O'Connor's observation earlier, when you said that it
7 looked a lot like damages.

8 It's perfectly true that we have not put at
9 issue here, and it's not before the Court whether this is
10 equitable relief or not. The district court basically
11 gave the class a choice of either taking a lump sum in
12 damages for everything, or reinstatement and the like.

13 It looks a lot to us -- and both of them look a
14 lot to us like benefits. It is the award of benefits, and
15 that -- and it is instinct in that award of benefits.
16 That's what they'll be getting if we lose this case, is
17 that there's at least a potential conflict with subpart
18 (1), or at least an overlap with subpart (1).

19 We think subpart (1) is supposed to deal with
20 benefits. We think that there is a clarity to the
21 statute. Sure, there's some overlap, but this Court has
22 praised Congress occasionally for crafting this with
23 special care and the like.

24 Subpart (1) is the benefit section, and it is
25 the case that if we lose here that, in the ordinary

1 course, any well-advised plaintiff will sue under subpart
2 (1) and (3), under (1) for saying, I didn't get benefits,
3 under (3) for saying, you breached your fiduciary
4 obligations in not awarding me benefits, and we think
5 that's not an appropriate way to interpret what Congress
6 meant, nor do we think it's appropriate to interpret the
7 breadth of section 409 in such a narrow way as has been
8 suggested today.

9 I read, in conclusion, the first line of section
10 409(a), any person who is a fiduciary with respect to a
11 plan who breaches any of the responsibilities obligations,
12 or duties, et cetera, as the start of it.

13 We think that section 409 was Congress' effort
14 to deal with "liability for breach of fiduciary duty" and
15 unless this Court is to revisit Russell -- and we
16 understand full well Russell doesn't govern here. You
17 said it didn't govern. But unless you are to revisit
18 Russell, it is the logic, it is the sense of Russell, and
19 of 409, and of the statute as comprehensively viewed, that
20 there cannot be recovery here.

21 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Abrams.

22 MR. ABRAMS: Thank you, Your Honor.

23 CHIEF JUSTICE REHNQUIST: The case is submitted.

24 (Whereupon, at 12:02 p.m., the case in the
25 above-entitled matter was submitted.)

CERTIFICATION

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

VARITY CORPORATION, Petitioner v. CHARLES HOWE, ET AL.

CASE NO.: 94-1471

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BY *Don Mari Federico*

(REPORTER)