

**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: LOCKHEED CORPORATION, ET AL. Petitioners v.

PAUL L. SPINK

CASE NO: 95-809

PLACE: Washington, D.C.

DATE: Monday, April 22, 1996

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

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 95-809, Lockheed Corporation v. Paul Spink.

5 Mr. Krischer. Is that the correct pronunciation
6 of your name?

7 MR. KRISCHER: It is, Your Honor.

8 ORAL ARGUMENT OF GORDON E. KRISCHER

9 ON BEHALF OF THE PETITIONERS

10 MR. KRISCHER: Mr. Chief Justice, and may it
11 please the Court:

12 This case presents two issues. The first
13 involves whether Lockheed Corporation breached a fiduciary
14 duty when it amended its pension plan to provide an
15 incentive for employees to early retire and included as
16 one of the eligibility criteria of that amendment the
17 requirement that employees who were voluntarily retiring
18 sign a release of employment-related claims.

19 There's no dispute that that amendment that
20 Lockheed adopted complies with the minimum benefit
21 accrual, minimum vesting, and minimum participation
22 standards required by ERISA, and there's also no doubt
23 that whether participants, employees who took advantage of
24 this increased retirement benefit, did so voluntarily,
25 which is to say, they voluntarily did it.

1 It was not -- it was a new benefit. No employee
2 who opted to choose this increased pension benefit had to
3 give up anything he or she was otherwise entitled to prior
4 to the existence of this benefit.

5 The second issue also raised by Mr. Spink in
6 this because of his unique circumstances goes to whether
7 the amendments made to the Internal Revenue Code, the Age
8 Discrimination in Employment Act, and ERISA by OBRA 1986,
9 the Omnibus Budget Reconciliation Act of 1986, should --
10 whether Congress intended that those changes be applied
11 retroactively.

12 QUESTION: Mr. Krischer, may I ask you to
13 clarify something in regard to the first question? In
14 your petition for certiorari you asked whether the Ninth
15 Circuit correctly held that a pension plan sponsor can be
16 liable for breach of fiduciary duty under ERISA when it
17 amended the plan. Then, in the merits brief you say when
18 the pension plan sponsor and plan fiduciaries may be held
19 liable, blah, blah, blah, and you appear to be raising
20 some additional questions in the merits brief.

21 MR. KRISCHER: Well, I don't -- I believe it's
22 the same question that's being raised, Justice O'Connor,
23 because what the Ninth Circuit held -- it didn't make a
24 big distinction between the plan sponsor and the
25 retirement plan committee that would pay the benefits to

1 eligible employees. The district --

2 QUESTION: Well, certainly the Solicitor
3 General's brief suggests there may be substantial
4 differences in answers to the two questions, and I just
5 wondered whether we should confine ourselves to what you
6 raised in the original cert position --

7 MR. KRISCHER: I think --

8 QUESTION: -- and look to whether the plan
9 sponsor was acting in a fiduciary --

10 MR. KRISCHER: The first point, Your Honor,
11 there are petitioners in this case, including the
12 individuals who are on the retirement committee as well as
13 the executives of Lockheed, who were sued in their
14 executive capacity because they adopted or had the company
15 adopt the amendment.

16 But you're correct, the Solicitor General has
17 raised, really for the first time, a distinction possibly
18 between implementation of a lawfully amended plan with a
19 lawful amendment on the one hand and whether actually
20 adopting the amendment on the other are separate issues.

21 Now, in this case the Ninth Circuit didn't make
22 that distinction and, indeed, I think respondent in their
23 opposition doesn't make that distinction. They call it a
24 false distinction, because whether it's analyzed as a
25 question of plan implementation or whether it's analyzed

1 as a question of plan amendment, the key issue in this
2 case on the first issue is, does it violate any
3 substantive requirement of ERISA --

4 QUESTION: Well, excuse me, I thought that
5 wasn't it. I thought the question was whether it violated
6 a fiduciary responsibility. It is entirely possible that
7 the plan sponsor might violate no fiduciary responsibility
8 and yet violate some substantive bar to that particular
9 amendment, and I thought we only had the first question in
10 front of us.

11 MR. KRISCHER: The -- well, I think both -- if
12 you certainly want to limit yourselves to the first
13 question, the Court can do it, but I believe that both
14 questions should subsume --

15 QUESTION: Was there --

16 MR. KRISCHER: -- and the overall question is --

17 QUESTION: It depends on how you want to argue
18 the case. If you want to argue the case that the reason
19 we should find for you on the first question is that the
20 settlor is not a fiduciary, then our answer will not
21 answer the second question.

22 Now, I suppose there are other bases on which we
23 could answer the first question. I suppose we could say
24 even if he is a fiduciary the provision is not violative.
25 If we answered it that way, you would -- whether we

1 explicitly address the second question or not, you would
2 implicitly answer the second question.

3 MR. KRISCHER: Well, I think that's what we're
4 suggesting, Justice Scalia.

5 QUESTION: Yes, well, not really. I think most
6 of your brief went to the fiduciary point --

7 MR. KRISCHER: Well --

8 QUESTION: -- and the fiduciary point is not
9 going to answer this second question, but do you have an
10 argument that even if the settlor were a fiduciary the
11 adoption of this provision would not have been unlawful?

12 MR. KRISCHER: Yes, Your Honor. The adoption of
13 the provision by itself was not unlawful because it was a
14 settlor function, but even if -- even if it were not a
15 settlor function, the substantive provision of this
16 amendment doesn't constitute a prohibited action under
17 ERISA section 406.

18 Now, what the district court held, and really no
19 one has taken issue with this in the Ninth Circuit
20 decision or under the petitions here, and it held at page
21 31a of the petition, and I will -- appendix 31a of the
22 petition, and the nub of this case is held up in the third
23 line: indeed, the sole fiduciary duty implicated by the
24 amendment was the duty owed to defendant stockholders.

25 The court views the subsequent payment of

1 enhanced benefits to selected participants as merely the
2 defendant's adherents in his role as plan administrator
3 for the terms of the lawfully amended plan.

4 Now, what the Ninth Circuit held is, the whole
5 scheme, amending the plan and paying benefits, that whole
6 entire scheme is a violation of ERISA section 406, because
7 it -- what has happened, the plan has been amended,
8 employees have volunteered to retire, and they are now
9 receiving the benefits.

10 And what the Solicitor is suggesting is that a
11 plan fiduciary who is complying -- there's no doubt that
12 the fiduciaries that are paying the benefits are complying
13 with the terms of the plan, so what is the fiduciary to do
14 if the question remains open, which the Ninth Circuit
15 didn't really leave open --

16 QUESTION: That was the district court opinion
17 you were quoting from, not the court of appeals.

18 MR. KRISCHER: That is correct, and the Ninth
19 Circuit didn't quarrel with that and didn't differ on that
20 point.

21 The Ninth Circuit did hold, though, that the
22 adoption of the amendments created a significant benefit
23 for Lockheed, and that adoption of the amendments
24 anticipated payment of benefits pursuant to the amendment
25 constituted a prohibited transaction, because the court

1 was aware -- both the district court and the court of
2 appeals were fully aware that benefits are being paid, and
3 those employees that qualify for the benefits because they
4 met the eligibility criteria are, in fact, receiving
5 benefits right now.

6 QUESTION: And if that point is sound, it is
7 sound regardless of whether, in the act of amendment
8 Lockheed was acting as a fiduciary or not, isn't that
9 correct?

10 MR. KRISCHER: It purported -- the Ninth
11 Circuit, Your Honor, purported not to decide that
12 question, but in essence --

13 QUESTION: That's right, but I mean, that
14 question -- the answer to -- all I'm getting at is the
15 answer to that question is not going to be dictated by
16 whether we determine that Lockheed was acting as a
17 fiduciary in making the amendment. Isn't --

18 MR. KRISCHER: That's correct.

19 QUESTION: Okay.

20 MR. KRISCHER: That's correct.

21 QUESTION: Mr. Krischer --

22 QUESTION: What is --

23 QUESTION: I'm sorry.

24 QUESTION: What is the normal trust law? I set
25 up a trust, 14 grandchildren, I'm the settlor, \$1,000 a

1 month to each. I amend it, as I reserve the power to do,
2 give \$4,000 to Mary provided Mary gives me her apartment
3 in Palm Beach. Can the -- is that under ordinary trust
4 law, the fiduciary can carry that out or not?

5 MR. KRISCHER: It depends, I think, on the trust
6 instrument, but I think --

7 QUESTION: Oh, no, no, I mean, it -- assume
8 normal --

9 MR. KRISCHER: I think yes. Yes, Your Honor.

10 QUESTION: So in other words, you're saying
11 under ERISA they can say, give away the entire corpus,
12 settlor amends it, says, give it all to John Smith,
13 provided John Smith gives me his separate company.

14 MR. KRISCHER: Well, I don't think that under
15 ERISA that can be done.

16 QUESTION: Why not?

17 MR. KRISCHER: Because there are other
18 requirements under ERISA that state what the minimum
19 participation funding investing standards are.

20 QUESTION: They're all with them. I mean, what
21 they're saying is, look, what this is is, they've given
22 away the body, or a share thereof, in return for a promise
23 that has nothing to do -- nothing whatsoever to do with
24 any ERISA purpose, any labor piece, any anything.

25 They have to sign away other claims they have

1 against the company that have nothing to do with anything.
2 It says, others, and that's their claim. So what's the
3 merits of that claim?

4 MR. KRISCHER: Mr. Justice Breyer, I agree that
5 that claim is presented her, but the merits of the claim
6 are that there is no bright line other than in 406 that's
7 drawn, and that's the prohibited transaction rule. An
8 employer --

9 QUESTION: So you're saying they can give
10 away -- they can give away the whole shebang.

11 MR. KRISCHER: I'm -- yes, Your Honor. I'm
12 saying that an employer, when it adopts a pension plan or
13 increases benefits in a pension plan does so in its self
14 interest, and unless it violates the minimum
15 participation, vesting, or benefit accrual standards, or
16 it constitutes a prohibited transaction, which we contend
17 benefit payments are not, paying benefits pursuant to the
18 terms of the plan is not a prohibited transaction,
19 otherwise plans wouldn't pay benefits.

20 QUESTION: So --

21 QUESTION: He can terminate the plan if there's
22 no contractual commitment to continue it, can't he, the
23 employer?

24 MR. KRISCHER: Yes, Justice Scalia.

25 QUESTION: He can terminate it entirely.

1 MR. KRISCHER: He can terminate it at any time.
2 He has to follow the ERISA guidelines as to how the assets
3 are allocated. It can be terminated at any time. It can
4 be increased at any time.

5 What the employer is doing is making a promise.

6 QUESTION: Can you have any conditions on it?
7 Let's say in the initial plan, when it first comes up, the
8 employer says, I'm going to make these retirement benefits
9 available to any and all workers who will agree that they
10 will relinquish any claims of any kind that they now or
11 hereafter should have against the company. Would that be
12 permissible?

13 MR. KRISCHER: The first part of that, Ms.
14 Justice Ginsburg, would be. The first part, meaning you
15 can condition entry into the plan on raising -- releasing
16 present claims, so that you say only those who are
17 eligible to get this new benefit. I am promising a new
18 benefit only to those that release present claims.

19 But future claims, ERISA would preclude that,
20 and the reason ERISA would preclude future claims is, once
21 the benefit is established and in place, it has to meet
22 the minimum participation benefit accrual investing
23 standards So to have that condition as part of the plan
24 in the future to defeat or defease vested claims or
25 benefit accrual, I don't think the employer could do

1 that --

2 QUESTION: What provision is that you're talking
3 about?

4 MR. KRISCHER: -- but that's not done here.

5 QUESTION: What are these vested provisions that
6 are going to be violated by that commitment?

7 MR. KRISCHER: Well, for example, if -- there's
8 a rule in ERISA in title I, the vesting rules, that
9 indicate that for the -- generally, that an employer has
10 to vest in the benefit within a 5-year period, and if --

11 QUESTION: Well, he's vested. He's given up --
12 he has now committed to give up all those future claims.
13 He's done what was requested. Why does that prevent his
14 vesting?

15 MR. KRISCHER: Well, I don't -- it may not
16 prevent vesting, but it may make it subject to
17 defeasement.

18 I'm not sure, as a State law matter, someone can
19 in fact waive future claims. I mean --

20 QUESTION: No, but assuming he can. That's a
21 totally different question, but if he can, I don't see why
22 that's any different under ERISA from what's at issue
23 here.

24 Now, maybe they're both okay, but you're telling
25 me one is different. I want to know why it's different.

1 MR. KRISCHER: They are not different if you can
2 assure the Internal Revenue Service and the Department of
3 Labor and courts that you are not linking vesting or
4 benefit accrual to some future event. If you are not, in
5 fact, linking them to some future event, then I think it
6 is perfectly lawful to do that.

7 QUESTION: And your position is that's okay
8 because he doesn't have to set up this plan anyway, and he
9 can terminate it at any time, so he can make it
10 conditional on anything that isn't criminal.

11 MR. KRISCHER: That's --

12 QUESTION: And I assume that giving up your
13 claim against an employer is not criminal.

14 MR. KRISCHER: It is not criminal, and, indeed,
15 the courts as a matter of public policy favor settlement
16 of claims.

17 QUESTION: Mr. Krischer, you just said --

18 QUESTION: Well, what the employer is doing --

19 QUESTION: -- something about State law. You
20 said, maybe giving up future claims would be something
21 impermissible under State law.

22 Suppose State law says, employer agreements that
23 require employees to relinquish any and all claims, even
24 past. That's against the State public policy, and we
25 don't allow it. That's the State law. What about the

1 validity of such a term in a plan?

2 MR. KRISCHER: The term in the plan would still
3 be a valid term. It may be the particular release is not
4 enforceable in State or Federal courts. We have that
5 situation right now because the plan -- the release that
6 employees in this case were asked to sign if they wanted
7 this increased benefit released all claims related to
8 employment, but in California, an employee cannot release
9 a Worker's Compensation claim unless it's approved by the
10 Worker's Compensation Appeals Board.

11 If Lockheed thought that by getting a release
12 signed here it was relieving itself of Worker's
13 Compensation claims, it's wrong, and it was not, and the
14 fact that Lockheed was wrong doesn't prevent these
15 employees from continuing to get their benefits. The only
16 requirement was that they sign a release. There's no
17 requirement that it be enforceable or valid in all courts
18 for all purposes.

19 QUESTION: Well, what about Federal claims? You
20 explain that the State can protect its workers, say, with
21 tort claims, unemployment, but what about, say, title VII
22 claims, because this waiver would include race
23 discrimination claims as well as tort claims, or Worker's
24 Compensation claims. What about the Federal claims?

25 MR. KRISCHER: I believe that if the release is

1 otherwise enforceable under those substantive provisions,
2 it is enforceable and this provision is not unlawful, and
3 indeed, the Internal Revenue Service has regulation --

4 QUESTION: But then you're making a distinction
5 between Federal claims and State claims who's saying the
6 State can protect the workers despite the plan provision,
7 but as far as Federal claims is -- there's no protection.

8 MR. KRISCHER: No, the Federal Government could
9 protect them, too, as, in fact, it has under the Age
10 Discrimination Act, for example. The Age Discrimination
11 Act, in order to have a valid waiver of age discrimination
12 claims, the release has to have certain recitations and be
13 in a certain format. If this release doesn't meet that
14 format, then age discrimination claims will not be waived.

15 All I'm suggesting is that the requirement of a
16 release --

17 QUESTION: Maybe the release is unenforceable.

18 MR. KRISCHER: -- is independent of whether it's
19 enforceable.

20 QUESTION: May I ask you kind of a more basic
21 question? Can we assume some trans -- I know you take the
22 position that requirement of the release is not requiring
23 a prohibited transaction, is that --

24 MR. KRISCHER: That's correct.

25 QUESTION: Now, supposing the amendment did

1 require compliance -- performance of a prohibited
2 transaction. Would it be permissible to make the
3 amendment?

4 MR. KRISCHER: Our position is, it would be
5 permissible to make the amendment. The amendment itself
6 may be unlawful. The act of amending the plan is not a
7 fiduciary act, but if a plan, for example, required the
8 pension plan committee to make imprudent investments, the
9 making of that investment would be a prohibited
10 transaction and separately challengeable, but that is
11 apart from the design of the plan. What an employer
12 does --

13 QUESTION: So then your position -- I want to be
14 sure. Your position is the same as the Government's,
15 except you take the position that performing the amendment
16 would not be a prohibited transaction, whereas they say it
17 would be.

18 MR. KRISCHER: Well, I don't -- that's correct,
19 Mr. Justice Stevens, but I don't think that the Government
20 goes that far. They're not saying this will be a
21 prohibited transaction. They're saying, they don't know,
22 that some releases might be okay, and some releases might
23 not be okay, and they don't draw a line. All parties here
24 have suggested a line be drawn.

25 QUESTION: What's the line? That's my --

1 MR. KRISCHER: Well, we suggest that the line be
2 drawn that's already been drawn by Congress in the Statute
3 under 406, and that is, if it's a benefit payment, a
4 payment of benefits to a participant required by the plan,
5 that is not a prohibited transaction.

6 QUESTION: No matter what the condition?

7 MR. KRISCHER: That is not a transaction at all.

8 QUESTION: No matter what the condition, even if
9 the condition was that the beneficiary must agree that he
10 won't rent his house to a certain class of persons, or
11 something, something totally unrelated to the plan?

12 MR. KRISCHER: As an academic matter, that's
13 correct, Your Honor, but you know, these pension plans are
14 set up in the real world, involving real concerns of
15 employees, and I --

16 QUESTION: I understand, but your view is that
17 nothing that the pension plan authorizes can be a
18 prohibited transaction?

19 MR. KRISCHER: That goes too far. Nothing that
20 the pension plan authorizes, but payment of benefits
21 pursuant to the lawful terms of the plan would not violate
22 406. I'll give you a --

23 QUESTION: Pursuant to the lawful terms --

24 QUESTION: There are two different things that
25 are going on here. One is, there's the distinction

1 between acting as a fiduciary and making the payment,
2 acting as a settlor and making the -- forgetting that
3 distinction for a moment, and turning to the language of
4 406(a)(D), why isn't this a transfer for the benefit of a
5 party in interest?

6 I take it that's what we're -- I take it that's
7 the statutory phrase that we're --

8 MR. KRISCHER: That is, Your Honor. It's on
9 page 37a.

10 QUESTION: Why isn't this for the benefit of the
11 employer, and when you're answering that, distinguish this
12 hypothetical.

13 Suppose the employer said, you may take early
14 retirement, you may get an enhanced benefit, if you lend
15 us back the money at 3 percent for 10 years?

16 MR. KRISCHER: Responding to the first question,
17 and then the hypothetical, if I might, everything an
18 employer does with respect to its promise as to what the
19 benefit level will be is in the employer's self-interest.

20 Asking for a release is indistinguishable on
21 that basis under the prohibited transaction rules from
22 settling a strike, from requiring as a condition of
23 increased benefit a covenant not to compete, other kinds
24 of things employers do that --

25 QUESTION: Or the basic condition of continuing

1 to work for the employer. The quid pro quo for the plan
2 is always something of interest to the employer, so if
3 giving the employer a quid pro quo, your argument goes,
4 were to violate this provision, every plan violates this
5 provision, because the employer never gives his money away
6 for free. He at least says you've got to work for me for
7 10 years to get it.

8 MR. KRISCHER: You're correct. Correct, Justice
9 Scalia, and I think that underscores my point that
10 everything that's in the plan when it was amended or set
11 up, in terms of benefit payments, is in the employer's
12 self-interest. The answer to the --

13 QUESTION: So would you answer --

14 MR. KRISCHER: -- if I might --

15 QUESTION: -- the second half of his question?

16 MR. KRISCHER: I'd like -- the second half of
17 the hypothetical, that pushes the line, and that is
18 difficult. I acknowledge that it's difficult, but if what
19 you've described is really a kickback scheme so that an
20 employee really is getting a pension benefit and kicking
21 it back to the employer, that is unlawful under the
22 benefit accrual and participation provisions of ERISA and,
23 Your Honor, it may be -- it may be a Federal crime. I
24 mean, if --

25 QUESTION: Well, but, can you --

1 MR. KRISCHER: -- what you're doing --

2 QUESTION: Is it a violation of this section?
3 That's what I'm interested in.

4 MR. KRISCHER: It is not a violation of this
5 section.

6 QUESTION: Why isn't it for the benefit of a
7 party in interest?

8 MR. KRISCHER: The party in interest here --
9 there are two parties in interest. One, respondent will
10 argue Lockheed is a party in interest because it's the
11 employer.

12 The other person that's a party in interest
13 here, the Government has argued in its brief, or
14 suggested, are employees, that under the Government's
15 theory it would be unlawful to ever pay a plan benefit to
16 an employee while they're an employee, because while
17 they're an employee they're a party in interest, and the
18 only reason you pay benefits to -- that's the purpose of
19 the plan.

20 QUESTION: Why isn't this a kickback?

21 MR. KRISCHER: It is not a kickback because --
22 for several reasons.

23 Those employees that thought they had claims, no
24 one was required to sign a release who didn't want to.
25 Those employees who thought they had claims, like Mr.

1 Spink, just simply didn't sign a release. It was entirely
2 voluntary.

3 Secondly, this is a release of potential claims.
4 What the employer was trying to accomplish here was an
5 early retirement program and not be sued by a number of
6 ex-employees who may have second guesses, or Monday-
7 morning quarterbacking about whether they've made that
8 decision.

9 So admittedly the complaint as pleaded below is
10 a release of all employment-related claims, but that's
11 what employers do when they sever a relationship with, in
12 the most part, long-term employees, because in order to
13 qualify for this benefit, most of the employees who
14 qualified were long-term.

15 But I admit that you can think of scenarios, but
16 there are other things that employers may wish to
17 accomplish from their benefit plans. For example --

18 QUESTION: My problem is that I could think
19 of -- my problem is not that I can't think of scenarios.
20 My problem is that I don't know how you distinguish the
21 scenarios, how you distinguish the kickback from every
22 other quid pro quo. What characterizes something as a
23 kickback?

24 MR. KRISCHER: If it's a sham transaction, I
25 suppose. Title --

1 QUESTION: What do you mean, sham? He really
2 wants to get the employee to waive all future causes of
3 action.

4 MR. KRISCHER: Well --

5 QUESTION: Or he really wants to get the
6 employee to promise to make him a loan at 1 percent.

7 MR. KRISCHER: If --

8 QUESTION: That's not sham.

9 MR. KRISCHER: No. As long as it is part of the
10 promise the employer made to the employee, and the
11 employee is getting the benefit promised by the plan, we
12 submit it is not a prohibited transaction. Congress
13 didn't deal with that in the 406 rule.

14 QUESTION: Do you say it's not a prohibited
15 transaction, or do you say it's not a prohibited
16 transaction unless it is expressly prohibited, or unless
17 it is prohibited by some substantive section of ERISA?

18 MR. KRISCHER: It is not a prohibited
19 transaction under 406 because it's not specifically
20 mentioned, and it may not be a prohibited transaction, but
21 it may otherwise be unlawful under another provision of
22 ERISA. For example --

23 QUESTION: So you're saying, once we're in a
24 situation in which the question is whether the payment of
25 the benefit is lawful, you simply look to some other

1 source of law, you don't look to this section.

2 MR. KRISCHER: That's correct, and one such
3 other section is -- would be section 403 -- I'm sorry,
4 section 1054(g), which is -- which specifically says an
5 amendment to a plan may not cut back benefits.

6 So that if an employee is entitled to \$1,000 a
7 month benefit and the employer amends the plan to say,
8 we're cutting back the benefit to \$500, 1) the amendment
9 may be itself unlawful and challenged and the employer can
10 be sued, and 2) the fiduciary, by paying the lower
11 benefit, may be breaching a fiduciary duty to follow a
12 substantive provision of ERISA, but 406, the prohibited
13 transaction section, is not violated because it is not a
14 prohibited transaction.

15 It is not one of those enumerated transactions
16 that are listed in 406, which was supposed to be, under
17 this Court's decision of the Keystone Consolidated case, a
18 bright line test. Now, the Government's suggestion --

19 QUESTION: Well, what does that language in 406
20 cover, then, when it says that you can't pay it to a party
21 in interest, you can't -- you can't transfer to or use by
22 or for the benefit of a party in interest any assets of
23 the plan. What does that apply to?

24 MR. KRISCHER: That would be giving a loan to
25 Lockheed, taking money out of the plan and giving it to a

1 participant in violation of the terms of the plan, doing
2 something with the assets that are different than paying
3 benefits.

4 QUESTION: Discretionary acts. Its application
5 is limited to discretionary acts, which are not provided
6 for in the plan, which are not expressly authorized in
7 the plan. Isn't that what you're saying?

8 MR. KRISCHER: Well, in part we are saying that.
9 We have made the argument that, indeed, paying the
10 benefits here under this circumstance doesn't involve a
11 discretionary act at all. It is just simply paying the
12 benefit that someone had earned.

13 The -- I see my time is up.

14 QUESTION: Thank you, Mr. Krischer.

15 Mr. Bress.

16 ORAL ARGUMENT OF RICHARD P. BRESS

17 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

18 MR. BRESS: Mr. Chief Justice, and may it please
19 the Court:

20 We agree with petitioners that the court of
21 appeals erred on both questions presented in this case,
22 although our reasoning differs from theirs on several
23 related issues.

24 As to the first question, Lockheed's conduct in
25 amending the plan did not violate ERISA's prohibited

1 transaction rules, because in amending the plan Lockheed
2 acted as plan sponsor, or settlor, not as a fiduciary.
3 That is a sufficient and, we believe, the appropriate
4 basis on which to reverse the judgment of the court of
5 appeals --

6 QUESTION: It may be sufficient, but not very
7 helpful. I mean, if you're running a plan, it's not very
8 helpful to know that, I mean, this can't be done, and we
9 say, well, maybe it can't be done, but if it can't be
10 done, this is not the reason it can't be done. There may
11 be some other reason.

12 I don't think that's why we took the case. I
13 really thought we were going to try to clarify the law for
14 the businesses out there that have these plans, so why
15 should we take the narrower ground if there's a broader
16 ground that does clarify the law?

17 MR. BRESS: Well, Your Honor, with respect, the
18 petition for certiorari argued that there was a conflict
19 in the circuit only on the question of whether an
20 amendment can be an act itself that violates section 406,
21 so presumably that was the ground on which the Court took
22 certiorari.

23 QUESTION: But that would just defer the
24 essential question. That would defer -- the essential
25 question is, can you give enhanced benefits for early

1 retirement with this kind of condition and waiver of all
2 employment-related claims, and that one, as far as your
3 brief went, you refused to give an answer to it. You said
4 that's still open.

5 MR. BRESS: That is correct, Your Honor. We --
6 that issue is not one on which we or the lower courts have
7 to this point given significant thought, at least before
8 this case arose, and for that reason, that's one of the
9 reasons I believe that this Court should decide the
10 question that was actually argued in the cert petition,
11 and while this other matter is a broader matter, perhaps
12 of greater concern, the Court may well fair better by
13 allowing that issue to percolate some in the lower courts.

14 QUESTION: But it seemed to me that the Ninth
15 Circuit wasn't making that distinction, that it was really
16 answering the second question against the plan, against
17 Lockheed.

18 MR. BRESS: I believe, Your Honor, that the
19 Ninth Circuit answered both questions against -- against
20 Lockheed.

21 QUESTION: So if we send it back, then they say,
22 well, we answered both questions, so our answers still
23 stand.

24 MR. BRESS: The one issue that the Ninth Circuit
25 has not dealt with so far, Your Honor, is, assuming that

1 the amendment of the plan is itself a lawful act, whether
2 implementation of that amendment is -- is therefore lawful
3 or tends to be unlawful, petitioners have argued at points
4 in this case that, given a lawful amendment,
5 implementation can't be unlawful because it can't be
6 unlawful for the fiduciary to pay benefits in accordance
7 with the terms of the plan.

8 QUESTION: But they've said, I take it, that
9 everyone now would concede -- I don't want to concede for
10 them if they don't really want to -- that you have a plan,
11 a certain amount's earmarked for vested benefits, somehow
12 there's some extra cash around, and the settlor has
13 amended it so that it says, take all the extra cash and
14 give it to Smith, who happens to be one beneficiary,
15 provided he gives to me, the settlor, his house, his car
16 and a lot of other things that have nothing to do with it.

17 All right. Now, I take it, that ought to be
18 unlawful, but I don't know where in the law is it that
19 makes that unlawful.

20 MR. BRESS: All right, let me turn to that,
21 then, Your Honor --

22 QUESTION: And not for the settlor, but I'm now
23 an administrator, for the first time come to this act. I
24 just happen to walk in the building, and there I happen to
25 read the document, and lo and behold, I see this in it.

1 Do I follow it?

2 MR. BRESS: Okay. As a matter of plain
3 language, Your Honor, when a fiduciary authorizes the
4 payment of enhanced pension benefits in return for an
5 employee's waiver of all claims as to the employer, the
6 fiduciary is causing the plan to engage in a transaction
7 that constitutes a use of plan assets for the benefit of
8 the employer. That is --

9 QUESTION: As a matter of plan -- as a matter of
10 plain language, the fiduciary does that whenever he pays
11 out the benefits only if the employee continues to work
12 for the employer. I mean, there's always a quid pro quo,
13 and if you count the quid pro quo as being covered by this
14 provision, every plan would be invalid.

15 MR. BRESS: Your Honor, we agree with you
16 entirely that it would similarly fall within the plain
17 language --

18 QUESTION: Right.

19 MR. BRESS: -- to pay benefits in return for an
20 employee's services.

21 QUESTION: Right.

22 MR. BRESS: However, it's very clear within
23 ERISA that that's what Congress was talking about. You've
24 got -- whether you're talking about the definition of a
25 participant, which is an employee or a former employee,

1 whether you're talking about how plans are set out, there
2 are employer plans or employee organization plans.

3 When you look at the participation, vesting, and
4 accrual rules in sections 202, 203, and 204 of ERISA, you
5 see years of service, you see average compensation for
6 years of service. These are concepts that go all through
7 ERISA, so you can say, then, that applying section 406 in
8 context, where you've got services being rendered and in
9 return you're paying benefits, would frustrate the entire
10 purpose of the act.

11 It's a far different thing, however, to say 406
12 shouldn't be given its plain reading because Congress
13 anticipated and, indeed, intended to encourage --

14 QUESTION: You're going to give it the narrowest
15 meaning that will allow the act to have some function? I
16 mean, why is settling up when you leave the company all of
17 the controversies between you and me that exist at that
18 date, why is that so unrelated to the employer's business?

19 MR. BRESS: We're not saying that it's unrelated
20 to the employer's business, Your Honor, and we're
21 certainly not saying that ERISA says anything about an
22 employer's right to use its own money to buy a waiver of
23 claims against it any more than ERISA prohibits its
24 employer to use its own money to buy the employee's house
25 or car.

1 All we're saying is that it's doubtful that
2 Congress intended to permit, indeed, to encourage
3 employers to use plan assets for that purpose. Congress
4 was well aware --

5 QUESTION: Why is it, in your view, that this is
6 a lawful amendment of the plan? Why does the language
7 does not apply here? What is the test that you're
8 proposing, the rule that we're to follow?

9 MR. BRESS: Your Honor, our view is that the
10 amendment itself, the act of amending, was not unlawful
11 under section 46 because, while amending the plan,
12 Lockheed was not acting as a fiduciary.

13 QUESTION: Beyond that, why does 40 -- I take it
14 beyond that you agree with Lockheed as well.

15 MR. BRESS: No. No, Your Honor, we do not agree
16 with Lockheed. We have taken the position that to the
17 extent that the employer is calling for a waiver, for
18 example, of prior defamation claims, sex discrimination
19 claims, toxic tort claims, things of that sort, that it is
20 a violation.

21 QUESTION: It is a violation.

22 QUESTION: How do you get that distinction out
23 of section 50 -- 406?

24 MR. BRESS: Well, out of section 406, Your
25 Honor, what we take from there is that you've got a

1 prohibition that is very strict, it's written in very
2 broad language, it's in fact in a catchall provision.

3 In this Court's decision in Keystone, the Court
4 looked at 406 generally and opted for a broad
5 interpretation consistent with Congress' desire to protect
6 plan assets, so what we're saying is, you apply 406 by its
7 terms except where it's very clear elsewhere in the act
8 that Congress didn't mean for you to apply it in that
9 context.

10 For example, you couldn't apply 406 to prohibit
11 a payment of advanced benefits in return for an employee's
12 services because that's what -- very clearly what the act
13 is about, but when you go outside --

14 QUESTION: They don't actually pay enhanced
15 benefits for services. They're paying enhanced benefits
16 for retirement.

17 MR. BRESS: Well, that's correct, Your Honor.

18 QUESTION: When they make the payment, the
19 person is no longer an employee.

20 MR. BRESS: I wasn't speaking to this case, but
21 that is correct, Your Honor, and what we would say to that
22 is that pension benefits generally have served dual
23 purposes. One is to attract and retain employees and the
24 other is to encourage retirement.

25 QUESTION: The promise of benefits attracts the

1 employee, but not the payment itself, because at the time
2 the payment is made the person is a former employee.

3 MR. BRESS: That --

4 QUESTION: Unless it's a disability benefit, and
5 then they're paid when they're not working.

6 MR. BRESS: That is correct, Your Honor, and we
7 take the position that the promise itself --

8 QUESTION: But the promise isn't covered by
9 406(D). It's -- the payment is covered.

10 MR. BRESS: Well, Your Honor, we would take the
11 position that the promise would be covered in the
12 following context, and that's that if you take the
13 position that it's only the outflow of cash --

14 QUESTION: Right.

15 MR. BRESS: -- then a fiduciary could pledge
16 plan assets, guarantee debts with plan assets, agree to
17 loans with plan assets, and all of that would be --

18 QUESTION: You say the quid pro quo is sucked
19 into that. That's the use of the plan assets includes
20 whatever you should get for a quid pro quo --

21 MR. BRESS: That is correct, Your Honor.

22 QUESTION: -- except you want to make an
23 exception for --

24 MR. BRESS: Well, we don't want to make an
25 exception.

1 QUESTION: Yes, but your --

2 MR. BRESS: We're just carving as narrow
3 exception out of section 406 as the act logically permits.

4 QUESTION: But your pledge examples are all fit
5 within the word transfer, but the promise of future
6 benefits doesn't

7 MR. BRESS: Well, we're talking about a use of
8 plan assets, Your Honor, not a transfer here, and under
9 section 406(a)(1)(D) a use of plan assets is included.

10 I would note here, by the way, because I think
11 it's important, that this is not a free market transaction
12 we're talking about. ERISA provides tax subsidy that
13 exceeds \$52 billion a year to encourage employers to pay
14 pensions to employees, and it should not lightly be
15 presumed that Congress intended to extend that tax subsidy
16 to cover purchases of all claims against the employer or,
17 indeed, employer's houses or cars.

18 If I may, I'd like to turn to the second
19 question presented in this case, the OBRA 1986 issue.

20 QUESTION: On the first issue, what you're
21 saying, they're buying the releases with tax-benefitted
22 dollars, otherwise they'd have to pay for them with
23 their --

24 MR. BRESS: That is correct, Your Honor --

25 QUESTION: -- with funds that don't --

1 MR. BRESS: -- so the taxpayer is essentially
2 subsidizing this transaction.

3 Thank you.

4 QUESTION: Ms. Traber, we'll hear from you.

5 ORAL ARGUMENT OF THERESA M. TRABER

6 ON BEHALF OF THE RESPONDENT

7 MS. TRABER: Thank you, Mr. Chief Justice, and
8 may it please the Court:

9 Mr. Spink challenges two distinct practices
10 which together resulted in a benefit to him of \$85 a month
11 after 11 years of service with Lockheed. Lockheed tries
12 to justify these two practices by ignoring the plain
13 language of the statute.

14 Let me first turn to the 406 issue, the language
15 of which is at page 8 of our brief. The first issue is
16 whether or not Lockheed was a fiduciary. It's our
17 position that an amendment which directs the plan
18 administrator to violate ERISA is a fiduciary act, and
19 that nothing in ERISA or the common law supports the
20 artificial distinction that Lockheed has made. Under
21 the --

22 QUESTION: Where is this statutory section? You
23 just referred us to a page in your brief.

24 MS. TRABER: Yes, Your Honor. It's at the end
25 of the first full paragraph on page 8, which is the

1 language of 406 on which we rely here.

2 The common law carve-out for the settlor
3 function simply does not encompass any kind of amendments
4 which violate the law. Under common law, whether you are
5 creating a trust or amending it, you could not put into
6 place an illegal provision, so the carve-out does not
7 apply here.

8 So -- and further, under 404(a)(1)(D), the plan
9 administrator has a fiduciary duty to follow the terms of
10 the plan unless they violate ERISA. A plan sponsor who
11 directs a plan fiduciary to violate that term inserts
12 itself into the fiduciary --

13 QUESTION: So you're saying that ERISA, at least
14 that section, incorporates all of the other legal
15 prohibitions against what a trustee can do?

16 MS. TRABER: In 404(a)(1)(D), yes, absolutely.
17 It says that the fiduciary -- the plan administrator --
18 that's not the language on page 8, Your Honor. I don't
19 want to mislead you -- that -- it says that a plan
20 administrator, as opposed to a sponsor may not implement
21 any terms of the plan which violate ERISA, and so
22 therefore what I'm saying is that where a plan sponsor
23 orders the plan fiduciary to violate that term, they're
24 inserting themselves into fiduciary conduct.

25 QUESTION: But are you saying it's a violation

1 of ERISA for a plan to adopt a provision that would, say,
2 be contrary to a State law for a trustee?

3 MS. TRABER: I -- I -- we haven't addressed
4 that, Your Honor.

5 QUESTION: So you don't need to make that point
6 for your argument here.

7 MS. TRABER: No, Your Honor, and 4(a)(1)(D)
8 addresses plan terms that violate ERISA specifically. The
9 further question isn't really presenting here.

10 QUESTION: So you're not relying on any
11 proposition that, because this might have violated some
12 other law, it's bad. Your argument's self-contained
13 within ERISA.

14 MS. TRABER: That's correct, Your Honor.

15 The plan terms here also support our argument
16 that this was a fiduciary act. In this particular case,
17 the amendment itself inserts Lockheed into plan
18 administration by asking -- by having Lockheed collect the
19 releases, and draft them, and provide a list to the
20 administrator of who has met the eligibility requirements,
21 so every aspect of this amendment indicate Lockheed's
22 invasion into the sphere of plan administration.

23 QUESTION: May I ask you if the portion of
24 section 406 -- 404 on which you rely is quoted in any of
25 the papers?

1 MS. TRABER: Yes, it is, Your Honor.

2 QUESTION: And do you know where?

3 MS. TRABER: There are quotations to many
4 statutes in the papers, Your Honor. I believe --

5 QUESTION: But you place particular reliance on
6 404, that's why --

7 MS. TRABER: Yes. I believe it is quoted in our
8 argument with regard to the amendment.

9 (Pause.)

10 MS. TRABER: I -- Your Honor, I don't find
11 exactly where it is cited in our brief.

12 I believe it is discussed in addition in the
13 brief of the Solicitor General with regard to why it is
14 if -- on a separate matter why implementation of an
15 illegal plan amendment is also illegal under ERISA, but I
16 don't see it here. I apologize.

17 I'd like to also look -- direct the Court's
18 attention, which is discussed in our brief in a footnote
19 on --

20 QUESTION: The section you're talking about is
21 404 --

22 MS. TRABER: 404(a)(1)(D), Your Honor. 405 also
23 supports our position in that it directs --
24 405(c)(2)(A)(ii) says that a named fiduciary violates -- a
25 named fiduciary can violate 404(a)(1) if it establishes a

1 written procedure which is improper with respect to
2 designating someone who can take over the obligations of
3 that named fiduciary, so there -- it isn't true that
4 there's no provision in ERISA which actually imputes
5 fiduciary standards and fiduciary duties with regard to an
6 amendment.

7 I'd like to --

8 QUESTION: Is it permitted for the plan to
9 require that the employee who is receiving severance
10 benefits and payments from the plan release the plan from
11 all further liability?

12 MS. TRABER: Your Honor, that is not a
13 prohibited transaction, because the plan is not a party in
14 interest.

15 QUESTION: So that is permitted.

16 MS. TRABER: As far as I understand, at least
17 under 406.

18 QUESTION: But most of these things do give
19 enormous amounts of money and the employer's pocket. If
20 he settles a strike, if he gets people to retire early,
21 there are lots of instances where, as you've read in the
22 SG's brief, to enter into a perfectly reasonable -- make a
23 perfectly reasonable provision in the plan, it sounds
24 reasonable, to give subset A of employers more money --
25 employees more money, and in return, they do something for

1 the employer.

2 That happens every day of the week, and so how
3 do you interpret the language there to allow that and to
4 forbid something else? What's the line?

5 MS. TRABER: The only way to interpret the
6 language, which was passed with the overriding purpose of
7 protecting pension benefits, and which says in its most
8 literal form that plan assets may not be used by a party
9 in interest or to benefit a party in interest, is to
10 interpret that language extremely broadly and to only
11 carve out uses or benefits which are necessary incidents
12 of running a pension plan.

13 QUESTION: Well, it's not necessary to settle
14 the strike. I mean, perhaps it isn't necessary. It just
15 happens that the workers want it.

16 MS. TRABER: Well, Your Honor, perhaps it's a
17 more difficult issue, but I believe that the issue of
18 settling a strike is very similar to attracting employees
19 at the outset.

20 If you have higher benefits, the employees of
21 your competitor may leave that competitor and come to work
22 for you. If you increase your benefits, the people on
23 strike may say, we'll come in off the strike because we've
24 been provided with pension benefits that are increased,
25 and therefore we're not going to have --

1 QUESTION: What I'm asking --

2 MS. TRABER: -- the same beef about wage claims.
3 Excuse me.

4 QUESTION: What I'm actually worried about is,
5 this seems very complicated to me. Maybe it shouldn't. I
6 don't see what the line is. I'm not certain it's been
7 argued below. I don't even see in the record what the
8 document is that we're talking about or how it should be
9 interpreted. Should we decide --

10 MS. TRABER: The release itself, Your Honor?

11 QUESTION: Yes, I mean the release itself.
12 Should we decide this, or should we send it back?

13 MS. TRABER: Well, I believe that the court
14 below decided that because of the breadth of the release
15 and because the release was not an incidental benefit of
16 running a pension plan that --

17 QUESTION: We're just doing this on a complaint
18 or something, aren't we?

19 MS. TRABER: Yes, it's a 12 --

20 QUESTION: They didn't even argue that. We
21 don't even know what the reasons -- I'm nervous about it.

22 MS. TRABER: That's absolutely correct. It's a
23 12(b)(6) motion, Your Honor. The entire complaint was
24 dismissed on a 12(b)(6) motion by the district court.

25 QUESTION: Ms. Traber, in that light, could you

1 tell me what you think the Ninth Circuit thought it was
2 leaving over in footnote 5 to its opinion? It apparently
3 thought that there were a number of questions that it need
4 not address in view of its position on the amendment being
5 impermissible.

6 MS. TRABER: I --

7 QUESTION: It's on 14a of the --

8 MS. TRABER: I believe, if it's the footnote
9 that I think you're referring to, Your Honor, I believe it
10 was leaving open -- it was leaving open the separate
11 claims of whether there was a separate violation of ERISA
12 404 and 403, and also -- it was leaving open the issue
13 of -- it was leaving open the issue -- I believe what it
14 decided here was that there -- although it may have been
15 inartfully drafted, I believe what it decided here was
16 where there's an amendment that directs a violation of
17 406, then that is a -- constitutes fiduciary conduct and
18 results in prohibited transaction, but it was leaving open
19 the broader issue as to whether an amendment which directs
20 a violation of 404 or 403, which it decided not to reach,
21 would have been a prohibited -- or, excuse me, violations
22 of those provisions.

23 The only thing that is actually before the Court
24 in the most narrow sense is whether or not a 404 -- excuse
25 me, a 406 violation has been -- has occurred here as a

1 result of this. I would state --

2 QUESTION: Ms. Traber, how would it fit into
3 your scheme if the employer offered early retirement to
4 people but said, on the other hand, I don't want you
5 working for my competitors, so if you retire and commit
6 yourself not to take the knowledge that you've acquired
7 from my business and work for competitors for a certain
8 period of time, and if you make that commitment, you can
9 get this early retirement. Would that be okay?

10 MS. TRABER: It's our position that they could
11 do that with their own assets paid out of corporate
12 coffers. They could not do that with plan assets because
13 that additional covenant not to compete, so to speak,
14 would be additional -- a benefit which does not benefit
15 the plan, does not benefit participants, but only benefits
16 the party --

17 QUESTION: Well, it benefits participants by
18 inducing the employer to make a plan provision that
19 otherwise wouldn't be made.

20 I mean, every time we say there's another -- you
21 know, another quid pro quo that the employer can't get,
22 you're inducing employers to have that fewer -- that fewer
23 plans.

24 MS. TRABER: Well, Your Honor, the statistics on
25 that that are quoted in the brief really don't bear that

1 out. The statistics in the GAO report say that only 28
2 percent of any employers who've done early retirement
3 plans have attached waivers to them, and most of the
4 employers say that the reason they don't attach waivers is
5 because it increases morale both for the remaining
6 employees and for the retiring --

7 QUESTION: What if you just had a brand-new plan
8 that Justice Scalia provided, not a plan -- not an
9 amendment to an existing plan, would there be anything
10 wrong with those conditions?

11 MS. TRABER: Well, Your Honor, I think that's a
12 much more difficult question, because it doesn't deal with
13 assets that are already held in trust, and I believe on
14 separate issues that's a violation of the
15 nonforfeitability provisions that Mr. Krischer discussed
16 with regard to vesting provisions.

17 QUESTION: Well, then you really do discourage
18 employers. I mean, here you have an employer who's going
19 to set up a new plan and offer benefits to employees, and
20 you say that most of the benefits he would like to offer
21 make the plan invalid.

22 MS. TRABER: Your Honor, if -- I think Congress
23 was trying to draw a very bright line with regard to
24 assets that are held in trust and receive immense tax
25 advantages. For example, the tax advantages that flow

1 from holding these assets in trust are many.

2 First of all, the dollars that are put into the
3 plan are much less than the dollars that the employer can
4 pay out down the road, so because the income of the trust
5 is not taxable, they can actually provide greater benefits
6 than they would otherwise be able to pay.

7 Further, they -- if you have -- it increases the
8 ability of the employer --

9 QUESTION: Yes, but that argument applies
10 equally to a provision in the original plan or to an
11 amendment after the plan's been in effect for a while.

12 MS. TRABER: I think the -- would that apply to
13 either? The analysis --

14 QUESTION: Your argument does, yes.

15 MS. TRABER: Yes. The analysis of what Congress
16 was trying to protect would apply to either.

17 I think the most difficult question, Justice
18 Stevens, is whether, when the employee retires and the
19 plan administer -- in a new plan, under Mr. Chief
20 Justice's hypothetical when the employee retires in a new
21 plan that's been created with this provision, so long as
22 it only goes to claims prior to the plan, the issue is
23 whether, when the benefits are paid out in exchange for
24 looking at the tally and seeing whether or not the release
25 was signed and whether or not there is an exchange, that

1 violates the law.

2 But that's a -- and I don't think that our
3 standard necessarily addresses that, but I think that's a
4 much more difficult question.

5 QUESTION: But I don't --

6 QUESTION: I'm surprised you say it's more
7 difficult. I don't see why, if the provision is unlawful,
8 why it's only unlawful if it's an amendment, whereas it
9 would not be unlawful in the original document.

10 MS. TRABER: Well, I -- as I said --

11 QUESTION: I just have trouble understanding why
12 that is so.

13 MS. TRABER: Well, as I said, I believe under
14 our standard it is unlawful, because of that exchange --

15 QUESTION: In the -- even if it were in the
16 original instrument?

17 MS. TRABER: Yes, Your Honor.

18 QUESTION: I think that's your argument. I may
19 have missed something.

20 MS. TRABER: Yes. Yes, Your Honor, it is.

21 QUESTION: What is the standard? I mean,
22 Congress must, for example, have -- wants employers to
23 give people -- pay \$2,000 extra money, if you retire
24 early. That must be okay.

25 MS. TRABER: That's okay, so long as it's out of

1 the corporate coffers.

2 QUESTION: What does that mean, out of? A
3 retirement agreement by an executive is 14 pages long in
4 small print, has 3,867 normal provisions in it, okay?

5 MS. TRABER: Yes.

6 QUESTION: Now, which are those are okay and
7 which aren't? How do I know?

8 MS. TRABER: There are --

9 QUESTION: How do I know if it isn't normal to
10 have an anticompetition agreement when an executive
11 scientist retires, or whether it's abnormal, or whether
12 it's expected, whether you could never get it without it?
13 How do I know --

14 MS. TRABER: Well, I think the way -- I think
15 Congress provided an explicit procedure for doing that.
16 Under 408, the -- well, first of all, in the legislative
17 history Congress said, we want this to be broad. We
18 recognize it encompasses beneficial transactions, and that
19 it is extraordinarily broad.

20 If someone wants an exemption from it because a
21 particular transaction is, in fact, beneficial, or wants
22 an exemption that would relate to an entire class of
23 transactions, the option that they have under 408(a) is to
24 go to the Department of Labor and seek an exemption, and
25 that's where the flexibility is in the statute, and that's

1 what Congress said the provision was to be.

2 QUESTION: Has the Department of Labor ever
3 written anything that would help us with this that you've
4 come across?

5 MS. TRABER: With regard to this particular
6 issue? I don't -- not that I'm aware of with respect to
7 this particular issue, Your Honor.

8 QUESTION: But it would be your position that if
9 a company has a standard retirement agreement with its
10 employees that all employees when they retire sign and if
11 they sign they get -- I don't know, they get a termination
12 benefit, and if an ERISA plan refers to, you know, you can
13 get increased ERISA benefits if you retire pursuant to the
14 normal retirement procedures of the company, if any of
15 those retirement procedures in the standard form of the
16 company that's even used apart from ERISA, if any of those
17 include anything other than working for the company, the
18 ERISA retirement thing would be bad.

19 MS. TRABER: Oh, no, Your Honor. No, Your
20 Honor.

21 QUESTION: Oh, you can --

22 MS. TRABER: Their welfare -- if I understand
23 your hypothetical, their welfare benefit --

24 QUESTION: My hypothetical is that the condition
25 is not in the ERISA plan, but it is incorporated by

1 reference.

2 MS. TRABER: But there's a plan --

3 QUESTION: It says, if you retire in good
4 standing and sign the ordinary retirement agreement that
5 the company has, okay, and that's a standard agreement
6 that it's had for years, would a reference to that in the
7 ERISA plan make the retirement benefit invalid?

8 MS. TRABER: If the benefits paid out are
9 conditioned on -- if the benefits paid out of the trust
10 are conditioned on that type of waiver, yes, it would.

11 If they are separate -- if an employer, which some
12 employers do, created an early retirement plan with plan
13 assets and then separately say, and in addition we'll give
14 you \$1,000 if you sign this waiver, that's fine, but the
15 plan assets are to be held inviolate. That's why Congress
16 passed 406, and that's what the plain language means.

17 If it may please the Court, I would like to turn
18 briefly to the issue of OBRA. The -- we -- I'd like to
19 make three main points with regard to that issue. First
20 of all, Spink's -- Mr. Spink's overclaims attack a
21 discriminatory plan provision that was put into place in
22 1990, and --

23 QUESTION: Where do we find the text of OBRA,
24 Ms. Traber?

25 MS. TRABER: Oh, I'm sorry, Your Honor. It's on

1 pages 26 to -- the key provisions are on pages 26 to 27 of
2 our brief.

3 QUESTION: Thank you.

4 MS. TRABER: And the two acts that are being
5 attacked are the discriminatory plan provision which
6 created -- which Lockheed created in 1990, and its
7 application to him when he retired in June of 1990.

8 The events at issue, therefore, occurred more
9 than 4 years after the date of OBRA's passage, and
10 therefore this is simply not an issue of retroactivity.

11 Turning to -- looking at the plain meaning of
12 the benefit accrual provisions which are set forth here,
13 the provisions, Your Honor -- may it please the Court, the
14 provisions that I'm referring to are in the last paragraph
15 on page 26 and beginning at the top of the page and into
16 the indented portion on page 27 for your reference.

17 All of these provisions refer to an employee's
18 benefit -- rate of benefit accrual and are referenced and
19 applied only to employees who have 1 hour of service with
20 any of the applicable plan years.

21 It's clear from a textual reading of these
22 provisions that they were intended to apply equally to all
23 employees during those plan years and so long as they were
24 employees during those years.

25 Now, Lockheed, by relying on the proposed

1 regulation, and the Solicitor General, concede that for
2 people who were participants before OBRA all years of
3 service must be considered in the benefit accrual
4 calculation, and it is to be remembered in this entire mix
5 that this is a case involving a defined benefit plan where
6 the antecedent events of service, of salary levels, and of
7 various other factors that are included do not have any
8 clear significance until the date of retirement, when a
9 particular benefit formula under the plan is applied to
10 them.

11 It's not a contributory plan. It is a plan
12 which is a defined benefit plan, and that's why the
13 Solicitor General says that there is a requirement of
14 including all years of service for current employees and,
15 in fact -- but what they take issue with is our
16 interpretation of reduction in the rate of benefit
17 accrual.

18 But I would direct the attention of the Court to
19 the proposed regulations, and you will find there that
20 they did not take the same position with regard to the
21 interpretation of reduction of rate of benefit accrual in
22 their regulations. On the contrary, they said that any
23 limitation which directly or indirectly depended on age
24 would constitute a breach of that. That's our position as
25 well.

1 They also said that if there were new benefits
2 which were denied in part on age --

3 QUESTION: The --

4 MS. TRABER: -- or were provided -- I'm sorry.

5 QUESTION: You're going so fast I'm having great
6 difficulty following you.

7 You're saying now that the Department has been
8 inconsistent?

9 MS. TRABER: Yes, Your Honor. The Department
10 has taken the position in this Court that the phrase,
11 reduction in the rate of benefit accrual, means only
12 something that goes over time. That is --

13 QUESTION: Where did they take the position you
14 think is inconsistent?

15 MS. TRABER: The position that I believe is
16 inconsistent is in the proposed regulation itself, which
17 is section 1.411(b)-2(b)-2-ii.

18 (Laughter.)

19 MS. TRABER: And in other aspects -- they also
20 say that --

21 QUESTION: Well, but has the proposed regulation
22 been adopted?

23 MS. TRABER: No, Your Honor. My -- our point is
24 that -- is that they have taken inconsistent positions
25 here, but that the position that we have taken indicates

1 that -- is consistent with the proposed regulation to the
2 extent that it goes to the broader reading by the
3 Department, by IRS, to interpret the terms of the plan.

4 What they go further and do is carve out an
5 exception which is nowhere in the statute. Congress --

6 QUESTION: May I interrupt you there? Why isn't
7 the, what you call the exception built into 9204(b)?

8 MS. TRABER: Your Honor, because --

9 QUESTION: Which refers, in speaking of
10 application, not only to plan years beginning on or after
11 January 1, 1988, and only with respect to service
12 performed on or after such date.

13 MS. TRABER: Because you -- if you look at the
14 legislative history, particular at --

15 QUESTION: Well, before -- I -- it's not that I
16 don't want to hear about legislative history, but what
17 about just the plain meaning of those terms?

18 MS. TRABER: The plain meaning of the statute is
19 that that, but only with respect to years of service,
20 relates to the provision it is intended to implement,
21 which is a repeal and an application of a delayed
22 retirement age, and the only counting that is done under
23 those two limited statutes is a calculation of a delayed
24 retirement age.

25 That's a very significant factor. That means

1 that when they passed it in October of 1986, if you apply
2 the 2-year delay before the effective date, and then you
3 apply the delayed retirement age, there -- under 206(a) of
4 ERISA a plan with respect -- had the option under OBRA not
5 to pay a person like Mr. Spink any benefits until 1993,
6 because under -- they could delay the delayed -- the
7 normal retirement age by 5 years, and then they -- and
8 under 206(a) they need not pay any benefits until the date
9 of the normal retirement age at the latest. There are a
10 series of dates, but that is the latest.

11 So basically -- and Congress in the legislative
12 history said, we recognize that there is an issue about
13 cost of funding.

14 QUESTION: Well, you're saying that's one thing
15 that it could cover, but by its text it covers much more
16 than that. I mean, by its text it says the amendments
17 made only apply to plan years beginning after January, on
18 or after January 1, and only with respect to service
19 performed on or after such date.

20 MS. TRABER: And Your Honor, there's --

21 QUESTION: I mean, that's pretty clear.

22 MS. TRABER: There's no necessary relationship,
23 though, between those participation statutes and the
24 benefit accrual statutes. As we demonstrated in our
25 brief, benefit accrual calculations can include all manner

1 of provisions. There are baseline minimum calculation
2 standards that need to be met, but the formula itself can
3 be -- can partake of various factors, service, excess
4 salary -- it can be a plain lump sum at the end of a -- or
5 a percentage of salary without regard to years of service.

6 So it is -- there's nothing in the statute to
7 indicate that these two provisions, 9203 and its effective
8 date, were designed to be superimposed on separate
9 provisions, 9201 and 9202, which has a separate effective
10 date. Lockheed did not answer many of the questions
11 raised in our brief, including why are there two effective
12 date provisions if Congress intended this separate
13 provision, which is only a couple of lines down from the
14 other one, to apply to the other provisions?

15 It's just -- they're trying to carve out an
16 exception in the statute that doesn't exist there, and on
17 pages 4024 and 25 of the U.S. Code and Congressional and
18 Administrative News in 1986 which deals with OBRA,
19 Congress said we recognize there are funding issues, and
20 therefore we're going to implement the delayed
21 retirement -- excuse me, the delayed normal retirement
22 age. They didn't say, and there can be other things you
23 can do to deal with the funding issues.

24 Under funding statutes, under ERISA generally,
25 the funding for those benefits don't begin until the

1 effective date. They wouldn't have done for Lockheed.

2 Thank you, Your Honor.

3 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Traber.
4 The case is submitted.

5 (Whereupon, at 2:00 p.m., the case in the above-
6 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:

LOCKHEED CORPORATION, ET AL. Petitioners v. PAUL L. SPINK
CASE NO: 95-809

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

BY Ann Marie Federico
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