

ORIGINAL

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PROCEEDINGS BEFORE

**THE SUPREME COURT**

**OF THE**

**UNITED STATES**

CAPTION: BAY AREA LAUNDRY AND DRY CLEANING  
PENSION TRUST FUND, Petitioner v. FERBAR  
CORPORATION OF CALIFORNIA, INC. AND STEPHAN  
BARNES

CASE NO: 96-370 *e.f.*

PLACE: Washington, D.C.

DATE: Monday, November 10, 1997

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IN THE SUPREME COURT OF THE UNITED STATES

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BAY AREA LAUNDRY AND DRY :  
CLEANING PENSION TRUST FUND, :  
Petitioner :  
v. : No. 96-370  
FERBAR CORPORATION OF :  
CALIFORNIA, INC. AND :  
STEPHAN BARNES :

- - - - -X  
Washington, D.C.  
Monday, November 10, 1997

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
1:00 p.m.

APPEARANCES:  
MARSHA S. BERZON, ESQ., San Francisco, California; on  
behalf of the Petitioner.  
EDWARD C. DUMONT, ESQ., Assistant to the Solicitor  
General, Department of Justice, Washington, D.C.; on  
behalf of the United States, as amicus curiae,  
supporting the petitioner.  
WILLIAM F. TERHEYDEN, ESQ., San Francisco, California; on  
behalf of the Respondents.

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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 96-370, the Bay Area Laundry and Dry  
5 Cleaning Pension Trust Fund v. Ferbar Corporation of  
6 California.

7 Ms. Berzon.

8 ORAL ARGUMENT OF MARSHA S. BERZON

9 ON BEHALF OF THE PETITIONER

10 MS. BERZON: Mr. Chief Justice, and may it  
11 please the Court:

12 The 1980 ERISA amendments set up a complicated,  
13 complex scheme for assuring the long-run stability of  
14 multiemployer plans, pension plans, when employers for  
15 many perfectly valid reasons, legal reasons, cease making  
16 contributions to the plans.

17 That scheme requires that some but not all  
18 withdrawing employers make withdrawal liability payments  
19 in amounts that are dictated by the statute under a  
20 periodic payment scheme that can extend for as long as 20  
21 years, and that is also largely dictated by the statute.

22 The question before the Court in this case is  
23 when a cause of action to collect one or more of those  
24 unpaid withdrawal liability payments accrues under the  
25 1980 act.

1           The answer to that question in our view is  
2 rather simple and straightforward, and it depends on two  
3 fundamental principles of statute of limitations law. The  
4 first, and on this point I don't think there's any dispute  
5 among the parties, is that ordinarily a limitations period  
6 runs from when a cause of action accrues, and in this  
7 statute that's made quite explicit by 1451(a), and that  
8 means when the plaintiff can first file a lawsuit, not  
9 before.

10           The statute here so states in 1451(a) that  
11 the -- there's a cause of action -- in 1451(f), I'm sorry,  
12 that the limitations period runs from when the cause of  
13 action arose.

14           The second principle, and here the consensus  
15 among the parties I think somewhat collapses, is that a  
16 plaintiff's right to file suit ordinarily is triggered by  
17 some breach of duty by the potential defendant as defined  
18 by the relevant legal rules.

19           Here that's the 1980 act, and the rules that it  
20 sets up for determining when the defendant, potential  
21 defendant, the employer in this case, is required to make  
22 payments, so unless one knows when the employer has  
23 breached a legal obligation one really can't make a  
24 sensible decision about when the statute of limitations  
25 starts to run.

1           That is, there has to be a situation in which a  
2 court could issue a corrective order in favor of the  
3 plaintiff and against the defendant in order for a cause  
4 of action to accrue, so the limitations decision is really  
5 the flip side of a set of understandings about what  
6 obligations, duties, and rights the statute sets up to  
7 begin with and can't be looked at in isolation.

8           QUESTION: Does interest run on withdrawal  
9 liability?

10          MS. BERZON: Interest runs on withdrawal  
11 liability payments, but in an odd way that was described  
12 by this Court in Schlitz. That is, once the demand has  
13 been made, once there has been an assessment and a demand  
14 and a stated period in which the payments have to be made,  
15 then interest runs on payments --

16          QUESTION: So interest would not run from the  
17 date of withdrawal.

18          MS. BERZON: It doesn't run from the date of  
19 withdrawal, and if the fund does not assess the withdrawal  
20 for some period of time it runs only, as described by this  
21 court in Schlitz, as if the payment was made on the first  
22 day of the date following withdrawal no matter when  
23 they're actually made, even if it the demand isn't to make  
24 them until sometime later.

25          So to apply these general principles to this

1 case, there are really three factors that are the most  
2 important. The first is that the withdrawal itself is not  
3 a violation of any legal obligation, ceasing to make  
4 contributions is not the violation of any legal  
5 obligation, and that the date of withdrawal is often  
6 determined after the fact by a set of events that occur  
7 after what is later decided to be the date of withdrawal.

8 So the date of withdrawal is really a datum in a  
9 bunch of calculations, and not a date on which an employer  
10 is supposed to do anything, and what that means for  
11 purposes of the limitations inquiry here is that if the  
12 fund had tried to sue the employer on the date of  
13 withdrawal they would have been summarily dismissed from  
14 their lawsuit because no demand had been made for payment  
15 and the employer had no obligation to pay anything.

16 The second critical factor is that the employer  
17 does violate the statute once it fails to pay any  
18 withdrawal liability payment on the schedule that is set  
19 by the fund in the demand letter, again largely prescribed  
20 by the statute. That is the schedule and the amount both.

21 So what we have here is sort of like a -- any  
22 bill, like a telephone or a credit card or a legal bill or  
23 a hospital bill in which there is a liability that is  
24 incurred regarding facts that occur on a certain date,  
25 but until you get a bill that requires you to make a



1 payment there's no obligation to pay, no obligation that  
2 has been breached, and no potential lawsuit until that  
3 date.

4 And this rule is a rule that, although the  
5 employer in this case seems to take issue with it, is one  
6 that has been understood by hundreds of courts over  
7 hundreds of years, including this Court in a series of  
8 cases including Rawlings v. Ray and others. That is that  
9 ordinarily when you're dealing with a debt a cause of  
10 action accrues on a date that there is an obligation to  
11 pay the debt, and --

12 QUESTION: So under your view, I mean, there  
13 would be a separate cause of action for each instalment  
14 payment.

15 MS. BERZON: Well, that's correct as well,  
16 although it was the third point that I was going to make,  
17 and --

18 QUESTION: And that means that in theory it  
19 could continue on for 26 years or so.

20 MS. BERZON: There are two things to be said  
21 about that. One is that the reason, of course, why it is  
22 possible that there could be suits for failure to pay,  
23 make payments for a long period, is because Congress  
24 allowed a long period in which these payments to be made.  
25 In other words, Congress could have required that the

1 payment be made up front, but in fact, and largely for the  
2 benefit of employers and so as not to require them to make  
3 huge payments immediately --

4 QUESTION: And I suppose if there's an early  
5 default the plan's sponsor could accelerate the balance.

6 MS. BERZON: Correct. This provision has an  
7 express permissive acceleration clause which says that the  
8 plan's sponsor may accelerate upon a default as defined in  
9 the statute.

10 The statute defines default in a particular way  
11 so that there needs to be a notice, first, of delinquency  
12 and then 60 days from that notice before a default could  
13 be declared.

14 QUESTION: So under your theory the statute of  
15 limitations in this case would have started to run 6 years  
16 after the nonpayment of the first instalment.

17 MS. BERZON: On the first instalment, and on  
18 each instalment as it came due, because the debt was not  
19 in fact accelerated and because of the additional fact  
20 that under the more specific aspects of the statutory  
21 scheme it actually could not have been accelerated because  
22 although, as I said before, there is a permissive  
23 acceleration clause, it was not operative during the  
24 relevant periods in this case, and it wasn't operative  
25 because first it was too early, that is, the 60 days had

1 not run at any period of time outside --

2 QUESTION: Ms. Berzon, you keep mentioning the  
3 60 days, but as I understand it, that's -- that has never  
4 been passed on by any court. We have a decision from the  
5 court of appeals that we are reviewing that puts you out  
6 of the ball park entirely because it dates the time from  
7 the withdrawal.

8 MS. BERZON: That's correct.

9 QUESTION: The argument that you made in your  
10 brief about the 60-day period as I understand it was not  
11 passed on by any court below, so you may be wrong, or you  
12 may be right about it, but you are asking us to take a  
13 first view of that question, which ordinarily we don't.

14 MS. BERZON: Let me see if I can understand.  
15 There are two different time or issues that you might be  
16 referring to.

17 One is the question which, while not passed on  
18 by the court below because of the view it took that the  
19 date runs from withdrawal, has been addressed by other  
20 courts of appeals, that is, by the Third Circuit and by  
21 the Seventh Circuit, which is a purely legal issue, and  
22 that is, if one agrees that the limitations period runs  
23 from missed payments, not from the date of withdrawal,  
24 does it run as it would under the common law with respect  
25 to instalment payments generally --

1                   QUESTION: Why should we reach that question  
2 when the court we're reviewing hasn't reached it? We  
3 don't know what position they would take if they hadn't  
4 gotten the first thing wrong, if they hadn't used the  
5 withdrawal date, and you're arguing -- that's your basic  
6 proposition. If the court of appeals is right about that,  
7 that's the end of the case.

8                   If they're wrong about that, then there are  
9 further issues that other courts of appeals have addressed  
10 but this one never reached.

11                  MS. BERZON: That's true. I would argue that  
12 this is an area in which some guidance and certainty is of  
13 some use to the practitioners and to the funds, and there  
14 is, I would say -- the issue is certainly presented by the  
15 facts of the case, and the overall issue of when the  
16 statute of limitations runs or begins to run and in what  
17 manner is presented by the case.

18                  QUESTION: But if you're right about the 60  
19 days, so your whole thing would be timely, this other  
20 question about each instalment is academic in your case  
21 because it wouldn't matter.

22                  MS. BERZON: It's --

23                  QUESTION: The whole thing would be timely.

24                  MS. BERZON: If -- then I think that you are  
25 assuming a second issue, other than the time by -- than

1 the periodic-payment-by-periodic-payment issue, and that  
2 is whether or not the first payment -- this lawsuit was  
3 timely with respect to the first payment, and we do argue  
4 that it was timely with respect to the first payment,  
5 and --

6 QUESTION: Yes, and if you're right about that,  
7 that -- the rest of it doesn't matter because you're in  
8 under the wire.

9 MS. BERZON: That's true. There is some dispute  
10 as to whether that's the case, and if you accept our  
11 position that even as to the first missed payment this  
12 suit was timely, because the earliest that we could have  
13 required it to be paid was at the end of a 60-day period  
14 from the demand --

15 QUESTION: Yes, and that's something that you  
16 have urged and that has not been passed on by any other  
17 court, so I understand that the first question is  
18 certainly before us, but I don't understand that anything  
19 else is because it hasn't -- we would be acting as a court  
20 of first view, not a court of review.

21 MS. BERZON: All right, but that is separate  
22 from the issue of whether we necessarily prevail without  
23 deciding that question, and the answer is we do not  
24 necessarily prevail because of the schedule here, and  
25 perhaps I can clarify that.

1           We filed suit here on February 9, 1993. That  
2 was within the 6-year period from the date on which the  
3 demand letter required the entire withdrawal liability to  
4 be paid if the employer so choose -- chose under the  
5 prepayment option.

6           It was within 6 years of the date on which we  
7 understand the statute to have permitted the first payment  
8 to have been required, also 60 days, but the demand letter  
9 actually said February 1, 1987, so the only argument on  
10 which we possibly do not prevail on the entire debt -- and  
11 here we're talking about a difference of \$345 -- is if one  
12 views the lawsuit as not timely from the date of the first  
13 missed payment, because we said in our demand letter that  
14 it was due on February 1, although in our view that was a  
15 legal error. Actually it was due on February 10, if  
16 that's at all clarified.

17           So there are views of this case on which it does  
18 matter whether the limitations period runs on a  
19 instalment-by-instalment basis, and other views on which  
20 it doesn't matter.

21           QUESTION: But if you're right about even the  
22 first payment, that you were timely, then why should we  
23 get to the question of instalment or not?

24           MS. BERZON: Well, if I'm right on the first  
25 payment being timely then you don't need to. I'm saying

1 that's in some dispute. That question is in some dispute.

2 If I can go briefly to what I understand --

3 QUESTION: Is -- am I correct in understanding  
4 that the option that you think is correct is not any of  
5 the four that you listed in your cert petition, because  
6 you said your -- first is the withdrawal date, second the  
7 date when the payment becomes overdue, you're not relying  
8 on that, then for each payment due, on the date the  
9 payment becomes overdue unless the plan's sponsor elects  
10 to evoke the statutory provision on acceleration or some  
11 other date, at some other date you think is right, is when  
12 the demand --

13 MS. BERZON: No. Actually we believe that it is  
14 for each payment due on the date that the payment becomes  
15 overdue, unless the plan's sponsor elects to invoke --

16 QUESTION: And -- but when does it become  
17 overdue, when it was not paid, or when you made a further  
18 demand?

19 MS. BERZON: When it was not paid is when that  
20 particular payment is not due, but that --

21 QUESTION: Well, then you're not in time for the  
22 first payment.

23 MS. BERZON: I sort of hate to get side-tracked  
24 on it, because it's a \$345 problem.

25 QUESTION: Right.

1 MS. BERZON: But we would maintain, and do in  
2 the briefs, that there is a view of the statute on which  
3 we were timely with respect to the first payment.

4 QUESTION: But the view of the statute is it did  
5 not -- you could not have sued on the date it became  
6 overdue if you didn't -- you couldn't have sued until  
7 he --

8 MS. BERZON: No, the view of the --

9 QUESTION: -- read the demand letter.

10 MS. BERZON: -- statute is that the statute  
11 required us to wait 60 days to collect the first missed  
12 payment, and that when we said that it was due on  
13 February 1 we were in error. It couldn't have been that  
14 date. It really had to be February 10.

15 QUESTION: But was it not overdue on the first  
16 date?

17 MS. BERZON: No. We would maintain on that view  
18 that it couldn't have been overdue.

19 QUESTION: It was not overdue until 60 days  
20 after the date you --

21 MS. BERZON: Of the demand.

22 QUESTION: -- it was supposed to have been made.

23 MS. BERZON: That's correct.

24 QUESTION: Okay.

25 MS. BERZON: And that is the view on which



1 every -- we are timely with respect to the -- every --  
2 each and every payment, but as I say, that is really in  
3 some ways the least important problem here, because --

4 QUESTION: Well, maybe it isn't important in  
5 this case, but you're saying it is certainly in the laws  
6 of some importance to people who practice in this area.

7 MS. BERZON: Right, exactly, and if you were to  
8 conclude that we were right about that, then you really  
9 wouldn't have to decide the payment-by-payment issue, and  
10 if you were not, then you would have to go on to decide  
11 whether, although the first missed payment had -- was  
12 gone, every other payment was within the time period, as  
13 any instalment contract lawyer would, you know, quickly  
14 conclude.

15 I want to just very briefly, before reserving  
16 the rest of my time, to comment on one issue that the  
17 employer here has harped on quite frequently, and that is  
18 the contention that on our view of the statute, that is  
19 that it can -- the limitations period cannot possibly run  
20 from the date of withdrawal, that there is some  
21 fundamental problem because then we are -- we can  
22 indefinitely delay assessment, and the plain answer to  
23 that is that the Congress did deal with that problem. It  
24 dealt with -- saw the timeliness issues here as two  
25 different ones, one dealing with the timeliness of the

1 demand and one dealing with the timeliness of the lawsuit.

2 With respect to the timeliness of the demand,  
3 the statute specifically provides that that has to be done  
4 as soon as practicable. That is an enforceable provision  
5 of the statute like any other provision of the statute,  
6 and does not at all lead to the kinds of problems that the  
7 employer suggests.

8 QUESTION: In this case, in the complaint didn't  
9 you ask to accelerate the entire amount?

10 MS. BERZON: We -- in the alternative. There  
11 were --

12 QUESTION: Doesn't that amount to an election of  
13 the option to --

14 MS. BERZON: The --

15 QUESTION: Maybe that's not going to bar you  
16 anyway, but --

17 MS. BERZON: I -- it doesn't seem to me to  
18 amount to an election of the option for two reasons, first  
19 because it was a fourth cause of action which was simply  
20 for all the missed payments and a future injunction, and  
21 secondly because it was later in interrogatories in the  
22 case, which are not in the record before the Court, agreed  
23 that in fact that acceleration was improper.

24 It was improper both because it was too early  
25 and because there was a pending arbitration in the case,

1 and under the PBGC's rules you cannot accelerate while  
2 there's a pending arbitration.

3 So even if one viewed the complaint as an  
4 attempt to accelerate, it was an ineffective attempt to  
5 accelerate, an invalid attempt to accelerate.

6 Thank you. I'd like to reserve the remainder of  
7 my time.

8 QUESTION: Very well, Ms. Berzon.

9 Mr. DuMont.

10 MR. TERHEYDEN: It's Mr. Terheyden, Your  
11 Honor -- oh, I apologize, to Mr. DuMont, and to the Court.

12 ORAL ARGUMENT OF EDWARD C. DUMONT  
13 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE  
14 SUPPORTING THE PETITIONER

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

17 This is a statutory collection action, and it  
18 may be helpful to return for a moment to the words of the  
19 statute at issue, which are reprinted at page 17a of the  
20 petitioner's brief.

21 29 U.S.C. section 1451(a)(1) gives a cause of  
22 action to a plan fiduciary -- I'm eliding some material --  
23 a plan fiduciary who is adversely affected by the act or  
24 omission of any party under this subtitle who may bring an  
25 action for appropriate legal or equitable relief.

1           Now, our basic submission, along with that of  
2 petitioner's, is quite simple, first, that the only  
3 relevant adverse effects under the subtitle, under the  
4 statute, arose not from respondent's withdrawal from the  
5 plan, but from its failure to pay withdrawal liability on  
6 the schedule prescribed by the statute.

7           QUESTION: Why don't you take the position that  
8 counsel for the petitioner does that the 60-day rule with  
9 respect to the first payment actually makes the date of  
10 adverse consequence the date upon which it could have been  
11 demanded -- the date upon which it could have been  
12 collected rather than the date upon which they demanded  
13 the payment to be made?

14           MR. DUMONT: We -- that is a conceivable reading  
15 of that section of the statute. We don't think it's the  
16 best reading.

17           We think that the statutory section is best read  
18 to give that 60 days as a terminus before which the plan  
19 must make the payment due, but I think if you look at  
20 normal practice, from what I understand from the PBGC, and  
21 also the reported cases make this fairly clear, the normal  
22 practice is for plans to set a date that is within the 60  
23 days but is not actually the sixty-first day from the date  
24 of demand.

25           And that makes a lot of practical sense, because

1 what you -- what the plan often wants to do is make the  
2 payment due on the same day that the payments normally  
3 were due before the withdrawal, or on some day that's  
4 convenient for accounting purposes, as opposed to being  
5 tied to a specific thirtieth or sixtieth day from the date  
6 of demand, which would unduly constrain either the date  
7 you want to send the notice or the date that you set the  
8 payment to be due, so we think the best reading is --

9 QUESTION: But would -- if they sued on the  
10 stated day, which was before the sixty-first day, would  
11 they be subject to a motion to dismiss?

12 MR. DUMONT: We believe the payment is due on  
13 the day that is specified in the schedule --

14 QUESTION: So the answer is no?

15 MR. DUMONT: The answer is that suit would be  
16 timely if it was before the sixty-first day, but after the  
17 day that the payment was due under the schedule.

18 QUESTION: Well, so you're saying that even  
19 though the schedule set forth a date before the sixty-  
20 first day, suit would be timely 6 years after the sixty-  
21 first day, and that there was a failure to pay?

22 MR. DUMONT: No. The suit would have to be  
23 filed within 6 years of the day specified in the plan's  
24 schedule as the day the first payment was due, is our  
25 position, which is not the position the petitioners are

1 taking.

2 QUESTION: So you are rejecting their 60-day --  
3 under your reading of the statute, the first -- they sued  
4 too late to recover the first payment, is that --

5 MR. DUMONT: That's correct, which is why in our  
6 view of the way the statute is best construed it is  
7 necessary for the Court to reach the question passed on by  
8 the Seventh Circuit, which is, was there only one cause of  
9 action and therefore when the first payment was missed was  
10 there a sort of automatic acceleration back to that point,  
11 so that if you missed the first payment you missed  
12 everything.

13 QUESTION: Then you think that 60-day is so  
14 clearly wrong on the petitioner's part that it shouldn't  
15 be something that we should remand to the court of  
16 appeals, which never considered it?

17 MR. DUMONT: I think it's perfectly within this  
18 Court's options to reject the rule that the Ninth Circuit  
19 came up with, which was running from the date of  
20 withdrawal, and to leave all the other issues for  
21 resolution below.

22 That would not be what we would think was the  
23 most appropriate outcome, and we think there are several  
24 questions that are fairly presented and fairly subsumed  
25 within the question, and that the Court could usefully

1 make clear for the benefit of the bar, but certainly it  
2 would be proper for the Court merely to resolve the narrow  
3 question you suggest.

4 QUESTION: This 60-day dispute for purposes of  
5 the present case is only relevant as to the first payment,  
6 but the issue, the issue of whether the 60 days is what  
7 counts or not, applies to every payment set under this  
8 scheme, doesn't it? It's not just the first payment.

9 MR. DUMONT: That's correct. I'm sorry, which  
10 60 days, now, are we talking about there?

11 QUESTION: Well, that's what I'm -- as I read  
12 the statute, it says the failure of an employer to pay any  
13 overdue withdrawal liability payment, any payment, not  
14 just the first, within 60 days after the employer receives  
15 written notification from the plan's sponsor that the  
16 payment is overdue. Isn't that the 60-day provision  
17 you're talking about?

18 MR. DUMONT: Well, no. That is a different 60-  
19 day provision --

20 QUESTION: Okay.

21 MR. DUMONT: -- which is the 60 days --

22 QUESTION: Now, which one are you talking about  
23 here?

24 MR. DUMONT: We are talking about 1399(c)(2).

25 QUESTION: Give me the U.S. Code cite, would

1 you?

2 MR. DUMONT: It's -- U.S. Code is 29 U.S.C.  
3 1399(c)(2), and it's on page 15a of the petition -- of the  
4 blue brief -- which says the withdrawal liability is --

5 QUESTION: Where in the blue brief?

6 MR. DUMONT: Page 15a.

7 QUESTION: (c)(2). I have it.

8 MR. DUMONT: (c)(2).

9 QUESTION: Good.

10 MR. DUMONT: Withdrawal liability is payable --  
11 this is the actually payable part -- in accordance with  
12 the schedule set forth by the plan, beginning no later  
13 than 60 days after the date of the demand, notwithstanding  
14 any request for review or appeal. This is part of what  
15 goes into the pay-now-dispute-later feature of the  
16 statute, which we think is quite important.

17 QUESTION: Well now, why wouldn't --

18 MR. DUMONT: The 60 days that I believe you were  
19 referring to --

20 QUESTION: Yes.

21 MR. DUMONT: -- is the 60 days that is  
22 incorporated in the definition of default, which is on the  
23 next page, page 16a, really carrying over from 15a, that  
24 default means failure of an employer to make, when due,  
25 any payment if the failure is not cured within 60 days,



1 and our submission there, which is fairly important, is  
2 that that default -- the definition of default is relevant  
3 for only one thing, and that is whether or not the plan is  
4 entitled under the statute to accelerate the entire  
5 remaining unpaid liability.

6 QUESTION: I see. I see. I see.

7 MR. DUMONT: And that is quite different from  
8 the question of whether a particular payment or set of  
9 payments are overdue.

10 QUESTION: You're saying it is a default, but  
11 not a default within the meaning of the provision of the  
12 act that allows acceleration.

13 MR. DUMONT: Right. A missing of the first  
14 payment, yes, is exactly right. It's an overdue -- it's a  
15 delinquency rather than a default.

16 QUESTION: May I just inquire, to be sure I  
17 understand what you're saying, the provision on page 15a,  
18 the (c)(2) provision, that 60 days in your view merely  
19 sets an outer limit on the time -- on when the payment can  
20 become due. That -- when the plan may request payment.  
21 It must fix a date within that 60-day period.

22 MR. DUMONT: The one on 15a --

23 QUESTION: Yes.

24 MR. DUMONT: -- (c)(2). That's right. It  
25 only -- our position is, it's for the protection of the

1 beneficiaries, essentially. It allows the plan some  
2 flexibility in setting the beginning of the schedule, but  
3 it sets an outer limit past which they may not go. They  
4 must make the first payment due within that first 60 days,  
5 so it's really not for the protection of employers at all.  
6 It's for the protection of the beneficiaries.

7           Really, in sum we have only four points to make,  
8 first that accrual, as is the general rule everywhere,  
9 follows the right to sue, and here the right to sue under  
10 the statute arises not from withdrawal, as the Ninth  
11 Circuit held, but from the failure to make a statutory  
12 payment when due under the statute, and that's the only  
13 thing the plan could ever have sued for, and that's all  
14 they sued for here.

15           The further consequences of that we think follow  
16 from a routine application of principles of -- general  
17 principles of law under the statutes of limitations and  
18 acceleration law, and all of these rules I think  
19 importantly work together to support Congress' fundamental  
20 purpose here in this entire scheme, which is to protect  
21 beneficiaries of these plans by strengthening and  
22 stabilizing the multiemployer pension plan system by  
23 ensuring, to the extent possible, a steady flow of even  
24 payments on which the plan can count, and with full  
25 provision for protecting the employer after an arbitration

1 and after any determination of defenses on the merits by  
2 making a refund available.

3 All we are talking about here is interim  
4 payments while a dispute on the merits goes forward. The  
5 statute makes quite clear that those are due and payable  
6 now, and this action is timely to collect them.

7 QUESTION: Is there an argument that the suit on  
8 the merits shouldn't go forward because an arbitration  
9 request, demand had been made and not responded to? How  
10 does that play into this?

11 MR. DUMONT: When I speak of a dispute on the  
12 merits, I refer to a dispute before the arbitrator.

13 It is true that in the complaint, as a response  
14 to the complaint in this case, the employer raised an  
15 affirmative defense that there had been a failure to  
16 respond to the request for arbitration, and we think that  
17 is not well-taken, but certainly the court on remand could  
18 consider that.

19 We think the right result would be for it to go  
20 to arbitration and have all of the employer's objections  
21 to any particulars of the assessment here handled in  
22 arbitration between the parties.

23 QUESTION: One minor question. I'm thinking of  
24 the first payment -- oh, well, forget it. I'll ask the  
25 other -- I'll ask --

1 QUESTION: Thank you, Mr. DuMont.

2 Mr. Terheyden.

3 ORAL ARGUMENT OF WILLIAM F. TERHEYDEN

4 ON BEHALF OF THE RESPONDENTS

5 MR. TERHEYDEN: Mr. Chief Justice, and may it  
6 please the Court:

7 Under petitioner's interpretation of the statute  
8 of limitations in this case the trust fund would have  
9 absolute and final control over the commencement of the  
10 statute of limitations, over the running of the statute of  
11 limitations. Moreover, under their theory they would in  
12 effect ask the Court to extend what is now a minimum 6-  
13 year statute of limitations to some 26-plus years, and we  
14 submit that Congress could not and did not intend such a  
15 result.

16 We believe that -- Your Honors, that the plain  
17 words of the statute, the plain reading of the --

18 QUESTION: But the extension to 26 years would  
19 be only for the last \$350.

20 MR. TERHEYDEN: No. I think what they're  
21 saying, that there are these individual statutes of  
22 limitations for each monthly payment.

23 QUESTION: Right.

24 MR. TERHEYDEN: Which would allow them to, if  
25 they wanted to wait till year 18 and sue for 6 years prior

1 to that, they could do.

2 QUESTION: Well, they've pretty well conceded  
3 that if we don't read the statute that one way they lose  
4 the first payment. I don't know why they wouldn't lose 59  
5 payments if they waited another appropriate number of 59  
6 months.

7 MR. TERHEYDEN: Well, I think that's one of  
8 the -- you know, the fundamental issue here, one of the  
9 fundamental issues is, can they divide this up into  
10 separate statutes --

11 QUESTION: Right.

12 MR. TERHEYDEN: -- of limitations, or if they  
13 miss that first payment --

14 QUESTION: And if they can, is one of the --  
15 then your 26-year statute of limitations applies to only  
16 \$350, not to the entire amount.

17 MR. TERHEYDEN: I suppose that's one way of --

18 QUESTION: Well, how is -- I mean, I thought it  
19 was -- I have a 30-year mortgage, all right, and if I miss  
20 the 358th payment, which I guess would be in the year  
21 2020, if I'm around, then I guess they could sue for that,  
22 and what they're saying is your interpretation would mean  
23 they're free to pay it or not.

24 I mean, the bank would -- I think -- I don't  
25 think the bank would be very happy if I took that view.

1 I'd say, I'm not going to pay you the 358th payment. Sue  
2 me. Unfortunately, the statute of limitations began to  
3 run when I took out the mortgage.

4 I mean, what kind of a law would that be, and  
5 why would Congress want such a law?

6 MR. TERHEYDEN: Well, I don't think this is --  
7 can be really analogized to a mortgage situation, a loan  
8 mortgage situation. I think here the question is there's  
9 this underlying debt, this basic, fundamental debt, and it  
10 really is just one debt, one claim, and I don't think it  
11 can be broken up into a series of little claims, of small  
12 claims, so --

13 QUESTION: But you could say the same thing  
14 about a mortgage securing a loan, that it's -- you know,  
15 you borrow \$50,000, and the lender puts up \$50,000, but  
16 your duty to repay is not to repay \$50,000 in any lump  
17 sum, but to pay so much each month, representing principal  
18 and interest.

19 MR. TERHEYDEN: That's correct, but here when  
20 you have the one fundamental, underlying debt, and it's  
21 supposed to be paid on a certain period of time, whether  
22 it be a lump sum or the commencement of these -- in the  
23 alternative the commencement of these monthly payments,  
24 when nothing is done, when nothing is paid within that  
25 time established under the law, under 1399(c)(2), I think

1 there is no more opportunity to say, well, we really have  
2 a series of debts after that that we can collect on.

3 QUESTION: Are you saying that the statute  
4 begins to run at the time of withdrawal?

5 MR. TERHEYDEN: That's what we're saying.  
6 That's our fundamental point. That is our fundamental  
7 position, that's true.

8 QUESTION: On the whole thing, so it has the  
9 result in effect of accelerating the entire debt, even  
10 though there are provisions in the statute that expressly  
11 say it won't be accelerated unless this plan's sponsor  
12 takes certain action.

13 MR. TERHEYDEN: Well, which they did in this  
14 case. They accelerated in this case. They gave the  
15 notice, and then in the lawsuit is when the acceleration  
16 took place.

17 QUESTION: So the consequence, I take it, of  
18 what you're saying is, going back to Justice Breyer's  
19 question, that if they pay all their installments for 6  
20 years and the seventh year comes, and they start paying,  
21 there's no possible collection action.

22 MR. TERHEYDEN: That was a point that  
23 petitioners brought up, and it's a very good point. In  
24 that situation they have effectively agreed to the whole  
25 payment process. It's just like a contract. There's a

1 contract obligation. This is what the Seventh Circuit has  
2 said, and the Ninth Circuit has said. They've given their  
3 assent to this whole process, and in that situation --

4 QUESTION: Oh, so we have a whole new agreement.

5 MR. TERHEYDEN: You have a whole new agreement  
6 in that particular situation. Without question, I don't  
7 think it would make sense --

8 QUESTION: In what particular situation? I  
9 don't know what particular situation you're --

10 MR. TERHEYDEN: In the situation where they've  
11 made some payments. They've made payments. In that  
12 situation, they have given their assent to this payment  
13 process. A new contract -- a new contract has  
14 effectively been created, and then they can sue in that  
15 situation.

16 QUESTION: Then it becomes like a regular  
17 mortgage.

18 MR. TERHEYDEN: A regular contract.

19 QUESTION: You can sue payment by payment.

20 MR. TERHEYDEN: Correct.

21 QUESTION: So in this case, then, all you're  
22 saying is there's a special rule when you miss your first  
23 payment. Anybody who misses the first payment's out of  
24 luck, and it's -- for everybody --

25 MR. TERHEYDEN: If --



1 QUESTION: Everybody who makes a first payment,  
2 it -- you agree with that. All right.

3 MR. TERHEYDEN: If you haven't made any payments  
4 whatsoever, then they have 6 years to do something.

5 QUESTION: All right. Out of curiosity, in  
6 respect to that first payment, I take it that you and the  
7 Solicitor General are reading (c)(2), there has to be a  
8 cause of action. I take it everybody agrees you get 6  
9 years from when the cause of action arises.

10 Then the question is, when does it arise, and  
11 (c)(2) begins by saying, withdrawal liability shall be  
12 payable in accordance with the schedule set forth by the  
13 sponsor, but the schedule can't extend it beyond 60 days,  
14 all right.

15 So then I looked at the schedule, and the  
16 schedule seems to say, on page 24, that they have a  
17 choice. They can either have a schedule of payments, in  
18 which case the first one is due on February 1, or they  
19 could pay the whole thing in a lump sum 60 days  
20 thereafter, which I take it would be February 10. Is that  
21 right?

22 MR. TERHEYDEN: I would take it it would be  
23 February 1, with all due respect.

24 QUESTION: It says you may pay the withdrawal  
25 liability set forth in the preceding paragraph, that's

1 \$45,000-some-odd, by a single lump sum payment within 60  
2 days after your receipt of this letter.

3 MR. TERHEYDEN: But they gave us the schedule  
4 here.

5 QUESTION: Oh, that's right. They said you may  
6 either do it -- you don't know what my question is, so --  
7 I just want to be sure the factual premise is right. The  
8 factual premise is that they told you that you could  
9 either do it in a lump sum 60 days after, which would be  
10 February -- it doesn't say you may pay the withdrawal --

11 MR. TERHEYDEN: In their letter to us, they say  
12 you have until February 1, because they track -- I think  
13 they track (c)(2).

14 QUESTION: Well, maybe I'm not reading the right  
15 letter. My letter has a paragraph on page 24, you may pay  
16 in a lump sum within 60 days. Then the next paragraph,  
17 the act also permits a schedule, in which case the first  
18 payment is due by February 1.

19 Am I reading the right thing?

20 MR. TERHEYDEN: If that's the December 12, 19 --

21 QUESTION: It's page 24. If I'm reading the  
22 right thing, then I imagine it's now February 8. I  
23 wondered how there could be a cause of action on  
24 February 8, since the trustee would not yet know which had  
25 been chosen.

1           If the trustee did not know which had been  
2 chosen, how would there be a cause of action yet, since  
3 they have till February 10 to make the election, and if  
4 there is no cause of action on February 8, then how can it  
5 be that the statute starts to run? That was my question.

6           MR. TERHEYDEN: Okay, and we're assuming that it  
7 doesn't run from the time of withdrawal in this situation.

8           QUESTION: No, no, I will not make any  
9 assumption.

10           I'm saying, I read you the two paragraphs, and I  
11 said, that -- I am assuming that they say you have till  
12 February 10 to make the election. If that's so, it sounds  
13 as if on February 8 there was no cause of action yet,  
14 because they had till February 10.

15           Now, I'm putting it as a question. I'm not  
16 making a statement. I want to know what your response to  
17 that problem is. You can it isn't a problem and explain  
18 why, whatever you'd like.

19           MR. TERHEYDEN: I guess we did view the letter  
20 as requiring either-or by February 1 and not February 10,  
21 in which case it would be -- would have been late.

22           QUESTION: The court of appeals also, has my  
23 reading of it on page 2a, it says it could either make a  
24 lump sum payment in 60 days, or it could begin installment  
25 payments on February 1.

1           But if that's a correct reading, then is that  
2 the end of this matter? Then --

3           MR. TERHEYDEN: I don't know if that's -- if  
4 it's -- I don't know if it's the end of this matter,  
5 because we still have the ancillary question of whether it  
6 started at the time of withdrawal, which would set it all  
7 back at a time earlier.

8           QUESTION: Unless we say withdrawal, and if  
9 that's right then they can get the first payment and  
10 everything in your view, if we reject your argument as to  
11 the withdrawal.

12           MR. TERHEYDEN: Well, I guess I do view it as  
13 running, Your Honor, with one and the same time, February  
14 1, and that the time of the first -- the option was the  
15 time of the -- February 1 a time when the payment  
16 schedules could be begin, or as an option, because it's an  
17 option here.

18           Congress has given them an option to do one or  
19 the other, and so I view those options as coming into  
20 place at one and the same time, and so if the schedule of  
21 monthly payments was to begin on February 1, then, since  
22 those options run at one and the same time, we view the  
23 time for the lump sum payment also to have begun on  
24 February 1.

25           QUESTION: Well, what is your theory,

1 Mr. Terheyden, as to why the statute of limitations should  
2 begin running from the date of withdrawal?

3 MR. TERHEYDEN: Our theory there, Your Honor, is  
4 that Congress has spoken in section 1451(a). We hunted  
5 around, could there be anything which says it only  
6 starts -- any statutory provision that only starts at the  
7 time of the first missed payment.

8 We couldn't find anything, but section 1451 says  
9 that a fiduciary, in this case a trust fund, could bring a  
10 lawsuit, may maintain an action if it has been adversely  
11 affected by an act or omission of another party. It  
12 may -- Congress has said that. It may bring an action.

13 Now, at the time the company, an employer  
14 withdraws, the trust fund at that time is adversely  
15 affected. The contributions are no longer flowing in,  
16 in --

17 QUESTION: But there is a substitute that the  
18 statute provides, this payment -- the series of payments,  
19 isn't there?

20 MR. TERHEYDEN: Well, that's --

21 QUESTION: Isn't that a compensation?

22 MR. TERHEYDEN: No. That's an option. Again,  
23 that's an option. It's not -- it's -- I know petitioner  
24 has fixated, fixed in on the payment, but I think that's  
25 an option. It's one or the other.

1 QUESTION: Well, what would the suit say if the  
2 suit were filed the day after their withdrawal?

3 MR. TERHEYDEN: In the unlikely event that it  
4 was filed the day after the withdrawal they would be  
5 asking under 1451(a) for the amount to come from the  
6 employer, and I think it would be 1) in an amount of  
7 damages to be proved at trial, that's what it would say,  
8 and 2) --

9 QUESTION: Well, what is the wrong?

10 MR. TERHEYDEN: I think at that point in time  
11 it's not so much the -- a wrong, but what has happened  
12 then is, Congress has said at the time -- in 1381(a) at  
13 the time, employer, you withdraw, you are liable to the  
14 trust fund. It's an instantaneous thing, and I think --

15 QUESTION: Are you saying, then, you can have a  
16 claim for relief that's unripe? I mean, do you agree that  
17 at the point when withdrawal liability kicks in the  
18 employer has done nothing wrong? There's no wrong until  
19 there's a payment due that has not been paid.

20 MR. TERHEYDEN: I don't think it's -- of course  
21 not. There's not a wrong. It's not illegal to withdraw,  
22 but there's --

23 QUESTION: So what's the claim for relief for,  
24 when all that's been done is something that the statute  
25 doesn't say is unlawful?

1 MR. TERHEYDEN: The court has said there's a  
2 cause and effect -- the court and the Congress has said  
3 there's a cause-effect relationship. They're always  
4 speaking in the present tense. When you withdraw, you are  
5 liable to the trust fund, and the court in the Gray case  
6 and the Concrete Pipe case --

7 QUESTION: But liable for what? If you --

8 MR. TERHEYDEN: You have this obligation to pay  
9 your fair share --

10 QUESTION: But you don't know what it is.

11 MR. TERHEYDEN: -- of the unfunded pension  
12 benefits.

13 QUESTION: But you don't know what the  
14 obligation is until the plan sends out the notice.

15 MR. TERHEYDEN: But Congress did something in  
16 this case very wise. It said, you may sue. You've been  
17 adversely affected, but it also at the same time said --

18 QUESTION: But that's a who --

19 MR. TERHEYDEN: -- you have 6 years.

20 QUESTION: I was struck by what you said, and I  
21 looked at this section 1451(a) on page 17a, and it says,  
22 persons entitled to maintain actions, and I said, yeah, I  
23 recognize that. That answers who, and then I looked, I  
24 find out a plan fiduciary, et cetera.

25 That's typical of statutory -- there's a who

1 question and a when question, and you are referring us to  
2 the who question to answer the when question.

3 MR. TERHEYDEN: But I think 1451(f) says it  
4 accrues -- it talks about when the cause of action arises.  
5 This is the one section which says when it arises. When  
6 you read that in conjunction with 1381(a), and listening  
7 to what --

8 QUESTION: Where does it say anything about  
9 where it arises? It says persons entitled to maintain an  
10 action, and this --

11 MR. TERHEYDEN: It says if you've been adversely  
12 affected. I think that is crucial here. A fund has been  
13 harmed. It's been hurt at this time.

14 QUESTION: It says, when you are adversely  
15 affected, you are the people who can sue. These are the  
16 people who can sue.

17 Why isn't this just such a familiar, who may  
18 sue, like standing, who has standing to sue, not when you  
19 begin your action?

20 MR. TERHEYDEN: I think it's the one possible  
21 definitional section in the statute which explains when  
22 the cause of action arises, and that this cause of action  
23 arises at the time -- almost a traditional way that a  
24 cause of action can arise, when someone is harmed. In  
25 this case the trust fund is harmed, or adversely affected



1 at this point in time.

2 QUESTION: But that's not necessarily true.  
3 Supposing you paid the full amount of the withdrawal  
4 liability. You would have paid for all the unfunded  
5 liability, your share of the unfunded liability.  
6 Withdrawal doesn't necessarily harm the plan.

7 MR. TERHEYDEN: I think as no more contributions  
8 are coming in, that --

9 QUESTION: No, but if you promptly paid the  
10 assessment, there would have been no harmful consequences  
11 to the plan from the withdrawal.

12 MR. TERHEYDEN: Well, I think the minute there's  
13 a -- I think the minute there's a stopping of this flow of  
14 contributions these unfunded vested benefits are just  
15 going to get worse.

16 Part of the contributions go to reduce the  
17 unfunded vested benefits.

18 QUESTION: Well, is that true 100 percent of the  
19 time? Does every employer who withdraws always have to  
20 pay an additional amount?

21 MR. TERHEYDEN: No, not every time. Congress --

22 QUESTION: No, because sometimes the fund is  
23 adequate.

24 MR. TERHEYDEN: No -- is adequate --

25 QUESTION: Sometimes it's -- sometimes the fund

1 is adequate for the -- to pay the benefits.

2 MR. TERHEYDEN: That's true. That's true, but  
3 even -- I think even if a fund is fully funded it is still  
4 harmed because these contributions are no longer coming in  
5 to fund these funded benefits, so --

6 QUESTION: If there's any analogy to contract  
7 law it seems to me the most you can say about the -- it's  
8 like an anticipatory breach, saying that in the future I'm  
9 not going to do something that I'm obligated, and for an  
10 anticipatory breach, that's at the election of the payee.  
11 They can exercise it or not. Isn't that true?

12 MR. TERHEYDEN: In contract situations, but  
13 again here I don't believe that there is a contract  
14 situation, as the Seventh and Ninth --

15 QUESTION: What is it, then, because when I read  
16 the petitioner's brief I said, well, the closest analogy  
17 is a contract, and so that's -- there's a lot of merit to  
18 her argument. Then I looked at your brief to see what is  
19 the analogous cause of action, the analogous type of wrong  
20 that you assert, and I couldn't find it.

21 MR. TERHEYDEN: Well --

22 QUESTION: I mean, is it some kind of breach of  
23 fiduciary duty, or something like that? I -- no, that  
24 doesn't work.

25 MR. TERHEYDEN: I think it's -- it's Congress

1 saying, this is your right, trustees of trust funds. This  
2 is -- and you may sue to perfect that right, and you have  
3 6 years to do it. That's a very long time, and during the  
4 6 years you have to make the calculation and the demand,  
5 something that is very easy to do, very simple to do.

6 QUESTION: Except that a contract somehow  
7 springs into existence if the withdrawing employer makes  
8 the first payment.

9 MR. TERHEYDEN: Makes -- that's what the --  
10 that's precisely what the Seventh Circuit said, and the  
11 Ninth Circuit here in the case below. They have given  
12 their assent to this process. They have agreed that they  
13 can be -- that this sum can be paid over a period of time.  
14 They have agreed that suit may be brought at a later  
15 stage -- points in time, but until that happens there is  
16 no mutual agreement as you would have in an ordinary  
17 contract situation.

18 QUESTION: Is this implied in fact, or implied  
19 in law? I mean, do you really -- is this supposed to be  
20 an estimation of what was genuinely in the mind of whoever  
21 made the first payment?

22 MR. TERHEYDEN: Implied in -- I --

23 QUESTION: Well --

24 MR. TERHEYDEN: I -- the Ninth Circuit --

25 QUESTION: I mean, you could say -- you could

1 say that. You could say, you know, by doing this you have  
2 agreed to, but is it true?

3 MR. TERHEYDEN: That's true --

4 QUESTION: I mean, have they agreed to it  
5 because you say so, or have they agreed to it because  
6 somehow the making of the payment --

7 MR. TERHEYDEN: The making of the payment --

8 QUESTION: -- genuinely represents some  
9 contractual undertaking?

10 MR. TERHEYDEN: It -- that is an implied  
11 agreement with this process. It's -- I think the Ninth  
12 Circuit looked at Korman and they said the act of paying  
13 can be an implied agreement with the -- in this case with  
14 the process.

15 QUESTION: All right, so I --

16 MR. TERHEYDEN: That's how the contract  
17 impliedly arises.

18 QUESTION: All right, so either they do -- on  
19 your theory -- I'm just interested in your theory. On  
20 your theory, they agree to the schedule of payments or  
21 they don't.

22 MR. TERHEYDEN: Correct.

23 QUESTION: Okay. Now you're saying, if they do,  
24 then fine. Then we have the bank collecting the mortgage.  
25 But if they don't, now, then what? That's what I want to

1 know.

2 Imagine they don't. They're never going to  
3 agree to this condition of all the payments. They're  
4 always never going to agree to it.

5 Very well, then on that theory why isn't it the  
6 case that they withdraw, then they get a notice, then they  
7 have 60 days from that time, since they're never going to  
8 agree to the schedule, and then they can bring their  
9 lawsuit, and on that theory it would still be timely. It  
10 would have been until February 10 they would have had.

11 MR. TERHEYDEN: I --

12 QUESTION: So how does your theory work on that  
13 branch of your --

14 MR. TERHEYDEN: On that, I -- you know, I could  
15 well understand somebody -- someone saying the employer  
16 hasn't absolutely refused yet, I suppose. Unfortunately  
17 the alternative to that, Mr. Justice Breyer, is that it  
18 leaves it entirely up into the hands of the petitioner to  
19 start this process going.

20 QUESTION: Oh, yes, just as for example, if I  
21 make a --

22 MR. TERHEYDEN: You could never have a statute  
23 of limitations.

24 QUESTION: Well, it's rather like the bank.  
25 Let's say we get into an odd agreement -- I grant you this

1 would be a little odd, but I don't have to make my first  
2 mortgage payment until the bank requests it. Well, I  
3 guess that would be up to them.

4 You're right, the thing would never come to rest  
5 as long as they didn't ask me to make my first payment.  
6 But however, they might see a problem with that. I mean,  
7 they might ask, and I guess the trustee's in the same  
8 boat.

9 MR. TERHEYDEN: Yes, I mean --

10 QUESTION: Or a demand promissory note. There's  
11 no due date, and so whenever the holder of the note says,  
12 okay, I want payment now, in 60 days, that triggers the  
13 running of the statute. It's not a concept unknown in our  
14 legal system.

15 MR. TERHEYDEN: Again -- I don't want to beat  
16 this point into the ground. Again, that would be a  
17 contract situation, which we don't have here.

18 QUESTION: Well, I actually think a demand note  
19 runs from the time it's made, but there are a number of --  
20 not a number, but there are some instances where there is  
21 a continuing wrong, and the statute of limitations is in  
22 effect in the hands of the plaintiff, because the  
23 plaintiff demands that you cease the wrong and can sue  
24 from that point.

25 MR. TERHEYDEN: I don't think this is a

1 continuing obligation situation, as petitioner has  
2 submitted, and --

3 QUESTION: Well, I was trying to think of an  
4 instance in which the statute of limitations is really in  
5 the hands of the plaintiff, and that's what I came up  
6 with.

7 MR. TERHEYDEN: I think here -- this whole law  
8 was enacted at a time of crisis for trust funds.  
9 Employers were bailing left and right, and so Congress I  
10 think really wanted to see that these funds move as  
11 swiftly as possible.

12 Under our view, under our theory of the case,  
13 we're putting some teeth into Congress' exhortation to say  
14 act as soon as practical to go ahead and collect this.  
15 We're putting some teeth into --

16 QUESTION: Well, but the very idea of a 6-year  
17 statute of limitations suggests that they did not regard  
18 it as terribly urgent. I mean, we have 6-month statutes  
19 of limitations. 6 years suggested that they were willing  
20 to have people take their time.

21 MR. TERHEYDEN: 6 years in which they have to  
22 file suit. Here we have almost 8 years before the suit  
23 was filed.

24 QUESTION: But on their view they had nothing to  
25 sue for because there was nothing -- no wrong was done, no

1 obligation was incurred until there was a payment  
2 schedule.

3 MR. TERHEYDEN: That's true there was -- in our  
4 view there is no obligation that -- there's an underlying  
5 obligation, but not an obligation to pay pursuant to a  
6 payment schedule. There is a --

7 QUESTION: Are there other examples where a  
8 statute of limitations starts to run before the claim  
9 ripens, at a point where we don't know whether there's  
10 going to be any claim?

11 MR. TERHEYDEN: I think -- you know, I can't  
12 think of one precisely, but in this situation, as you  
13 know, we say the claim has ripened, but I think --

14 QUESTION: But it hasn't, because you would -- I  
15 thought you conceded that if the complaint were to be  
16 filed the day after the withdrawal, the permanent  
17 withdrawal occurred there would be no relief possible  
18 because the employer hasn't done anything to be obligated  
19 to pay anything.

20 MR. TERHEYDEN: But I think, Your Honor, if this  
21 was a -- if it were the last of the 6 years, the last day  
22 of the sixth year and the trust fund hadn't done anything,  
23 I think certainly it could --

24 QUESTION: But we're talking about when the  
25 claim accrued, not the last day of the 6 years. We're



1 talking about the starting gun.

2 MR. TERHEYDEN: Yes.

3 QUESTION: And I don't know of a situation where  
4 the starting gun goes off before you have a claim, before  
5 you have a ripe claim.

6 MR. TERHEYDEN: In the -- this is --

7 QUESTION: Before the runners know in which  
8 direction to run, so to speak.

9 (Laughter.)

10 QUESTION: Or how far.

11 MR. TERHEYDEN: I understand. This is what  
12 happened in the Joyce case, which -- one of the main cases  
13 petitioner relies on.

14 The trust fund sent out the demand on the very  
15 same day they filed the lawsuit, and the issue was brought  
16 up there, was this premature or not, and the reason -- the  
17 trust fund said the reason we did it is because we weren't  
18 sure when the statute of limitations ran, but we'd better  
19 make sure we protect our rights, and I think that's what  
20 the fund would have to do here. It could file the suit to  
21 protect it --

22 QUESTION: And they -- and then Joyce gave them  
23 an answer, right, and the answer was the claim doesn't  
24 accrue until the first payment is due, until there's a --  
25 payment is due.

1 MR. TERHEYDEN: But by then it was no -- yes,  
2 and then it was no longer premature. I think here they  
3 could file the suit and the court could --

4 QUESTION: I mean, when you -- I'm not following  
5 your example of Joyce, because Joyce was presented, as you  
6 say, in a climate where the law was uncertain, so -- but  
7 there was a determination of the payments that were due.  
8 The schedule was out, right?

9 MR. TERHEYDEN: Yes, but the employer hadn't  
10 refused at that point, at time they filed suit, and they  
11 were able to stay into court, because by the time it came  
12 up through the court, the district court system, they --  
13 there was no payment by the employer, so they were  
14 legitimately able to file their lawsuit the same day they  
15 sent the payment.

16 QUESTION: So -- but there was a claim by the  
17 employer's -- on the employer's part that that claim was  
18 untimely, right, in Joyce, because it wasn't within  
19 6 years from when the withdrawal liability -- from when  
20 the withdrawal occurred.

21 MR. TERHEYDEN: That's true. They were saying,  
22 I think -- there the employer said, as we do here, it  
23 adhered back to the time of the actual withdrawal.

24 But I think my point there is there's nothing to  
25 really -- to stop them to meet this long 6-year statute of

1 limitation where nothing has been done, where no -- to  
2 meet this statute of limitation, where they haven't done  
3 anything to protect their rights and the court could very  
4 easily stay the action.

5 They could very easily -- otherwise, I'm afraid  
6 it's just going to go further and further into the future.  
7 They could -- they'd come back and if nothing's done in 8  
8 years or in 10 years --

9 QUESTION: If -- you say there's nothing that  
10 impels the trustee, the plan trustees to do this faster?  
11 I mean, they are losing at least interest, aren't they?

12 MR. TERHEYDEN: They said, you know -- that's  
13 true. They're losing some interest. They say perhaps a  
14 suit for breach of fiduciary obligation can be brought  
15 against the trustees, but our view, Your Honor, gives it  
16 some teeth. It says there's a penalty here. If you don't  
17 do anything here in 6 years you will incur a penalty.

18 And look what happens when it goes on beyond the  
19 6 years. When nothing is done is what happened in this  
20 case. We now --

21 QUESTION: Well, not as to penalty. You say  
22 there's no liability at all because it's time-barred.

23 MR. TERHEYDEN: That's right. They would lose  
24 it all, Your Honor. They would lose it all, and here if  
25 this keeps going beyond the 6 years, what you have in this

1 case, by this time you have an insolvent trust fund and a  
2 defunct employer because it's gone on so long.

3 QUESTION: Yes, but the delay during this period  
4 is all to the advantage of the person who is obligated to  
5 pay.

6 I mean, there's an incentive on the part of the  
7 trust, that if trustees are doing their job they'll get  
8 moving. The longer they take, the better off you are.  
9 You get an interest-free loan for this whole period of  
10 time.

11 MR. TERHEYDEN: But I think policy wise the  
12 longer it goes on the employers could move, the employers  
13 could go out of business --

14 QUESTION: Sure.

15 MR. TERHEYDEN: -- the employers could become  
16 defunct --

17 QUESTION: The employers may be able to escape  
18 the liability, but that's certainly not anything they  
19 should be complaining about.

20 MR. TERHEYDEN: No, but that certainly doesn't  
21 serve the purposes of the act, serve the purposes of the  
22 beneficiaries, I don't believe, if that happens. If  
23 there's nothing that actually compels them to do it --

24 QUESTION: Well, they have a duty to act as soon  
25 as practical, or whatever the statute says.

1 MR. TERHEYDEN: Yes, that's true, as soon as  
2 practical, and I give absolute pause with that exhortation  
3 by Congress to act as soon as practical.

4 QUESTION: But it's sort of a strange way to  
5 penalize them to say that if you don't act promptly we'll  
6 let the employer -- let the contributor off the hook.  
7 That doesn't make any sense to me.

8 MR. TERHEYDEN: Well, I think it really compels  
9 them to move forward and do something. I think it really  
10 gives them some real, definitive, objective hammer, if you  
11 will, that they'd better act now, especially in a  
12 situation where there's been nothing, nothing done.

13 I understand it's different in a schedule  
14 payment situation where there has been something done.  
15 There's been an effort, and that's why in those situations  
16 certainly you can -- it can go on for a longer period.

17 If there's no further questions, I'll yield back the  
18 balance of my time.

19 QUESTION: Thank you, Mr. Terheyden.

20 MR. TERHEYDEN: Thank you very much.

21 QUESTION: Ms. Berzon, you have 3 minutes  
22 remaining.

23 REBUTTAL ARGUMENT OF MARSHA S. BERZON

24 ON BEHALF OF THE PETITIONER

25 MS. BERZON: I'd like to address two things.

1 First, it's important to be clear that -- and I think it  
2 is clear that this is a statutory obligation. That is,  
3 the schedule is a statutory obligation, and the employer,  
4 while it has the option to prepay under 1399(c)(4), it  
5 doesn't have the option to not pay and say that it has  
6 chosen a total payment option but it isn't doing it.

7 The statute isn't set up that way. The statute  
8 is set up with a baseline obligation to pay on a schedule,  
9 a periodic payment basis, and the only way that the  
10 employer doesn't have to meet that payment-by-payment  
11 obligation is if it prepays the entire amount.

12 This employer has not prepaid the entire amount,  
13 and therefore it had a prepay -- a payment-by-payment  
14 obligation which was not contractual, which should not  
15 depend upon it making the first payment at all, but which  
16 went into effect with the demand letter and stayed there  
17 for the entire period that the payments were due. That's  
18 the first point.

19 And the second point is, which is related, is to  
20 respond to Justice Breyer's dealing with this case in  
21 particular, and I would agree with perhaps the slight  
22 twist in the explanation.

23 On page 24 of the joint appendix the demand  
24 letter does, indeed, say that \$45,570 can be paid within  
25 60 days after the receipt of this letter, which was

1 actually probably sometime after February 10 would have  
2 been due, and then says that there is an option to make a  
3 payment-by-payment instalment instead.

4 If, in fact, for all the reasons we stated, it  
5 is the payment-by-payment obligation which is the  
6 statutory obligation, and absent a permissive acceleration  
7 by the fund at a time when it can make the acceleration,  
8 which it couldn't here, that's the only obligation.

9 But if somehow one thought that there was  
10 another obligation, i.e., a lump sum payment, we know when  
11 that was one due, and it was due within the limitations  
12 period, so there's no way to take the failure --

13 QUESTION: No, but according to the letter it  
14 would have been due before -- they gave them -- you gave  
15 them up to February 10, 60 days from December 12.

16 MS. BERZON: It was actually 60 days from when  
17 they received the letter, so it would have been a little  
18 after that.

19 QUESTION: Well, but in any event you gave them  
20 beyond February 1.

21 MS. BERZON: Exactly.

22 QUESTION: So that the -- under his reading and  
23 my reading of that paragraph you lose the first payment.

24 MS. BERZON: I --

25 QUESTION: Because they had no obligation to do

1 anything --

2 MS. BERZON: That may be if you do it on a  
3 payment-by-payment --

4 QUESTION: -- because they had an option to pay  
5 in full on February 8, because that's what you asked for.

6 MS. BERZON: On February 8 they didn't have an  
7 obligation to pay in full. They only had an obligation --

8 QUESTION: They didn't have an obligation, they  
9 had an option. They had an option, because you demanded  
10 payment in full within 60 days, or if you don't do it you  
11 can pay monthly.

12 MS. BERZON: That's correct, but on February --

13 QUESTION: So on February 8 --

14 MS. BERZON: -- 8 we don't know whether they're  
15 going to pay in full on February --

16 QUESTION: That's right, so you could not have  
17 sued.

18 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Berzon.

19 MS. BERZON: Thank you.

20 CHIEF JUSTICE REHNQUIST: The case is submitted.

21 (Whereupon, at 1:59 p.m., the case in the above-  
22 entitled matter was submitted.)

23

24

25



# 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:

BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND, Petitioner v. FERBAR CORPORATION OF CALIFORNIA, INC. AND STEPHAN BARNES  
CASE NO: 96-370

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

BY Don Mari Fedico

(REPORTER)