IN THE SUPREME COURT OF THE UNITED STATES

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JEFFREY H. BECK :

LIQUIDATING TRUSTEE OF :

THE ESTATES OF CROWN :

VANTAGE, INC. AND CROWN :

PAPER COMPANY, :

Petitioner :

v. : No. 05-1448

PACE INTERNATIONAL UNION, :

ET AL. :

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Washington, D.C.

Tuesday, April 24, 2007

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES:

M. MILLER BAKER, ESQ., Washington, D.C.; on behalf of Petitioner.

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

JULIA P. CLARK, ESQ., Washington, D.C.; on behalf of Respondents.

C O N T E N T S

P R O C E E D I N G S

[11:02 a.m.]

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 05-1448, Beck versus PACE International Union.

Mr. Baker.

ORAL ARGUMENT OF M. MILLER BAKER

ON BEHALF OF THE PETITIONER

MR. BAKER: Thank you, Mr. Chief Justice, and may it please the Court:

After filing for bankruptcy, Crown Vantage decided to terminate 12 over-funded pension plans. By terminating these pension plans, Crown was able to provide its plan participants with 100 percent of their accrued benefits and at the same time recover almost $5 million in surplus plan assets for the benefits of both Crown's creditors as well as plan members who made individual contributions to those pension plans.

After Crown made the decision to terminate these pension plans, it received a merger proposal from the PACE union to merge the pension plan into the PACE multi-employer pension plan. Crown rejected that proposal. The Ninth Circuit held that Crown breached its fiduciary duty by not sufficiently considering that merger proposal.

This Court should reverse the Ninth Circuit for two separate and independent reasons. First, merger is a nonfiduciary plan sponsor function and Crown could not have had a fiduciary duty to consider the merger proposal by PACE. A series of this Court's decisions beginning with Curtiss-Wright and continuing with Lockheed, Hughes aircraft and Pegram hold that decisions to create, to modify, to terminate, or to amend pension plans are sponsor functions, settlor functions under trust law, that are not subject to ERISA fiduciary duties.

JUSTICE GINSBURG: I could understand that if the plan is being set up or if there's going to be a change to the multiemployer plan while the business is ongoing. But in this situation, you, you say if the employer elects to have an annuity, then choosing which insurance company is going to supply the annuity, that would be a fiduciary function. Well, this is, the termination, the merger that's proposed here, is instead of having an annuity we'll put the assets into this other plan. It's quite different from choosing a form for an ongoing operation and saying, we're out of it and we're now going to try to distribute the assets in the way that will best protect the beneficiaries.

MR. BAKER: Justice -- Justice Ginsburg,

that's not correct. The answer to that question is that a decision to terminate a plan or a decision to merge a plan requires that a plan sponsor consider as a threshold matter several factors. First, what will the plan form be of the acquiring plan? And PACE's proposal would have required the merger into a multiemployer plan as opposed to a single employer plan. That goes to the form of the plan. PACE's proposal would have resulted in a new plan sponsor and a new plan administrator. It would have resulted in a new dispute resolution mechanism. That goes to the content of the plan. And finally, most importantly, the PACE proposal would have gone to the level of benefits provided by the plan and the level of benefits, as this Court has repeatedly recognized is a decision that is a plan sponsor decision.

JUSTICE KENNEDY: Well if you're correct and this was a sponsor decision, not a fiduciary decision, let me ask you when you're wearing, when the company is wearing its sponsor hat and says we're going to terminate this plan, does it have a duty to consider the best interests and the security of the employees, number one, when it picks an insurance company? It can't pick some flaky insurance company if there is a much more solid insurance company, can it?

MR. BAKER: Justice Kennedy, it depends upon the function at issue. If the function is the selection of an insurance company to provide the annuity, that is a plan administrator function and it is subject to ERISA fiduciary duties. But you is to analyze it from --

JUSTICE KENNEDY: But if have this duty to consider the interest of the employees in selecting the, the insurance company, in selecting the amount of the annuity, etcetera, if you have that duty it seems to me that that's a fiduciary duty.

MR. BAKER: It absolutely is, Justice Kennedy, Kennedy. But it is only in the context of the selection of the annuity that the plan sponsor, the plan administrator, must purchase after the plan sponsor has made that threshold decision to terminate the plan. There is that threshold decision. And likewise, merger is a threshold decision that goes to the --

JUSTICE SOUTER: No, but that's I think our sticking point. If the, if the plan sponsor decides to purchase an annuity, it's accepted I think by you and by everybody that there are two decisions being made. Decision one is terminate the plan. Decision two, distribute the assets by purchasing an annuity that gives the beneficiaries what they should get. And so on.

But when we come to the question of merger, you're saying there's only one decision, and I think that's where I'm having trouble with your argument. When we come to the question of merger, it seems to me there are two decisions again. The first decision is we're going to terminate the plan that we've got. What do we do with our assets. We have decided to merge -- one possible decision as an alternative to annuities is to merge the plan with, with another one. Why aren't there two decisions in the merger case just as there are two decisions in the annuity case?

MR. BAKER: There are two decisions in a merger case and the threshold question, Justice Souter, is whether to merge. Whether to merge is a --

JUSTICE SOUTER: Why do you say that's the threshold question? I thought the threshold question is whether to terminate what we've got now.

MR. BAKER: That's a different question, Justice Souter. The question is whether to merge, and a question whether to merge goes to plan form, it goes to the content of the plan and it also --

JUSTICE SOUTER: If they say, look, we're not ending our plan. Let's assume you have an ongoing business and they say, we're just sick of the form that it's in now and we can get a good deal by letting

somebody else administer this, so we're going to merge. I can see that as a single decision. But that's not what you've got here. As I understand it, the decision to terminate was made, it was over and done with. The question was what are they going to do with these assets? It's at that point that PACE arrived and said: Give them to us through a merger.

I don't see how you eliminate the, the termination decision before the merger decision.

MR. BAKER: Justice Souter, there are two different questions. One question is termination, one question is merger, and they're not the same. And the question whether to merge is a sponsor decision because you have to make those threshold questions as to what will the form of the plan be, what will the benefits provided be.

JUSTICE SOUTER: The form of the plan is going to be zero. Our plan is over. We are terminating our plan. What do we do now? We have two choices roughly, maybe three. We can either buy annuities, we can give the assets to the beneficiaries or we can give the assets to PACE in the form of a merger.

MR. BAKER: It's not a disposition of assets, Justice Souter.

JUSTICE SOUTER: Are you saying you can't

have a merger of a plan that has already been terminated, so that the merger decision is necessarily a decision that has to be made before the termination -- before a termination decision.

MR. BAKER: It is -- once a plan decision, once a termination decision has been made, and once that decision has been executed, it's impossible to merge the plan.

JUSTICE SCALIA: Mr. Baker, I thought your position in your briefs, and I don't know why you do not make this reply to this exchange, is that the merger with another plan is not a termination, isn't that your basic position?

JUSTICE SOUTER: That's what I keep suggesting.

MR. BAKER: Absolutely, it's not a termination.

JUSTICE SCALIA: Because if it were a termination, in a termination, you must distribute the assets to the participants. And here when you merge with somebody else, the assets are not distributed to the participants, but they are thrown into a pot with other people.

MR. BAKER: That's absolutely correct, Justice Scalia.

JUSTICE KENNEDY: I agree with Justice Scalia, that that's one answer. On the other hand, you have -- there are two arguments here. And what we are exploring now is whether this is a fiduciary obligation or a sponsor obligation.

MR. BAKER: That's correct.

JUSTICE KENNEDY: So we will have to assume for that -- if you can't do it by merger, then the whole case goes away anyway. If merger is not permitted under the statute, then we don't need to worry whether it's a fiduciary response, correct?

MR. BAKER: That's correct.

JUSTICE KENNEDY: So what we're asking in the first part of this argument is whether or not it's a fiduciary response. And that's what Justice Souter and I are questioning. And it does seem to me, assume that there is a meeting of the board of directors, we think we are going to terminate this plan. At that point, choices are made as to how to terminate it. And it's difficult for me to see why the interests of the employees are not uppermost in -- in your duties, i.e. a fiduciary duty, when you decide how you're going to terminate it.

MR. BAKER: The answer, Justice Kennedy, is that it is a business decision to decide in what form

the benefits are going to be provided. And the very choice between a termination and a merger goes to that issue. For example, in a merger, there is no automatic vesting --

JUSTICE KENNEDY: Why can't you say it's a business decision as to which insurance company you're going to select. Maybe you do say that.

MR. BAKER: Because at that point, it's a mere execution of the prior policy decision.

JUSTICE KENNEDY: Well, but that's the way you characterize it. I don't know why it's mere execution, when it's an annuity and it's not mere execution when it's a merger, once the determination decision has been made.

MR. BAKER: Because the merger decision -- you have to ask those threshold questions, Justice Kennedy, what are the level of benefits that are going to be provided in the acquiring plan. In a merger, there is no automatic vesting of accrued benefits as there is in a termination.

JUSTICE BREYER: I'm just listening to this. It sounds to me as if you're saying, one, the employer decides to terminate, okay? Now that's done. Then we go to the next question. How would we terminate? And in respect to that, I think Justice Kennedy was asking,

as I heard him, don't you have a fiduciary duty when you decide how. And your answer, as I heard it, was yes, you do.

And now there is a third question. Does what happened in terminating mean that although you have a fiduciary duty, you couldn't consider a merger, because that's just not consistent with the basic plan of terminating. Is that right? If it's wrong, don't even bother to answer it.

JUSTICE SCALIA: He doesn't like to hear that he is wrong.

MR. BAKER: None of us do, Justice Scalia. The answer to the third part of that question, Justice Breyer, is yes. But where I disagree with you is in the second predicate, which is that the -- the execution of the termination is necessarily --

JUSTICE BREYER: Why did you answer yes to his question, Justice Kennedy's, about the insurance company?

MR. BAKER: Perhaps I was imprecise. If I was imprecise, I apologize. The answer is, it depends upon the function at issue. A broad generalization that any decision taken after termination is necessarily a plan sponsor function is just wrong. One has to look at the function at issue, and the function in connection

with a merger is a plan sponsor decision, because you can't get away from those threshold questions as to the form, the content, and the benefits that are to be provided in that plan.

JUSTICE SOUTER: Why isn't exactly the same point true with respect to purchasing annuities?

MR. BAKER: Because the decision has already been made, usually it's in the plan document, to provide for annuities. And the only question is providing the annuity that is best suited to the interest of the principals.

JUSTICE SOUTER: What if the plan document doesn't say anything about what will follow termination. There is nothing in there about annuities. Is the annuity -- the decision to purchase annuities a decision subject to fiduciary obligation.

MR. BAKER: You mean the decision to offer annuities? Yes, Justice Souter. The decision to offer annuities, that is the provision, the actual selection of the annuities -- and I note that the Internal Revenue Service will require --

JUSTICE SOUTER: The decision to -- to take the option of purchasing annuities or offering annuities to the beneficiaries, that is a fiduciary decision.

MR. BAKER: No, Justice -- the -- if the

plan is silent --

JUSTICE SOUTER: If the plan is silent.

MR. BAKER: If the plan is silent, and the plan sponsor -- and the question is, how do we distribute, the mechanism of distribution. That is a plan sponsor function in the absence of any provision --

JUSTICE SOUTER: What if they say, we will distribute by going to the top of the building and throwing the money out on the street. Fiduciary problem?

MR. BAKER: Well, that would not be permitted by the, by the --

CHIEF JUSTICE ROBERTS: Right --

MR. BAKER: By operation of law, Justice Souter.

CHIEF JUSTICE ROBERTS: I thought your argument was, once you make a decision to terminate, there are various rules that are triggered, you just can't take the money and run with it. You've got to make provision. And that merger was not one of the permitted ways of terminating a plan. Is that wrong?

MR. BAKER: Well, that is a second argument, an alternative argument, Chief Justice Roberts, that merger is not a means of termination. But the threshold question is --

JUSTICE SCALIA: Maybe it's a simpler argument than this first one we've been wrestling with.

MR. BAKER: Justice Scalia, they may have different issues associated with them. But the threshold question here is whether or not this is a plan sponsor decision. And a plan sponsor decision is always a decision that goes to the content and the form of the plan, as well as to level of benefits to be provided.

JUSTICE ALITO: Is what's really involved in this, who is going to get the $5 million reversion that you would get if you purchased an annuity? Is that what's really in dispute?

MR. BAKER: That's what's really in dispute, Justice Alito.

JUSTICE ALITO: I mean, PACE would like it, you would like it. I mean, how would a fiduciary decide between those two, if it were a fiduciary duty.

MR. BAKER: Well, it's not a fiduciary duty. This Court's cases are -- the PBGC and the agencies recognize that the decision to terminate in order to recapture a reversion is perfectly permissible, so long as the plan sponsor complies with all the relevant requirements of a termination.

JUSTICE KENNEDY: But Justice Alito's question, and I have the same question. Let's assume,

A -- I know this is not your position -- but the merger is a permissible option. And B -- and I know this is not your position -- that this is a fiduciary obligation. I assume then you would lose, because the extra assets must go, the reversion interest, must go to the employees if it's in their benefit.

MR. BAKER: If we lose on both the issues that we have argued, Justice --

CHIEF JUSTICE ROBERTS: But the point is the $5 million is not going to these employees, it's being thrown into this vast sea of all these other employees, whose employers have not done as good a job of funding their plans. This is to the benefit not to the beneficiaries of this plan, but to other union members who don't have the luxury of having an employer who has overfunded their plan, and are trying to get that five million to help them, not your beneficiaries.

MR. BAKER: Well, that's absolutely correct. The money here would have gone not to the plan members, but to another union.

JUSTICE KENNEDY: But then you say that if it's a fiduciary obligation, and the merger is a permitted option, that the administrator, A, can, or B, must still give the money back to you.

MR. BAKER: If it's a fiduciary obligation,

no. If it's a fiduciary obligation, the plan sponsor, plan administrator -- because now we're talking about an administrative function -- the plan administrator has a duty to carefully consider that option. It doesn't necessarily result in the money automatically flowing over --

JUSTICE KENNEDY: The administrator, as a fiduciary, can consider the interest of the employer as well as the employees?

MR. BAKER: No. The plan administrator, acting as a fiduciary, can only consider the interest of the employees.

JUSTICE SOUTER: No. Reserve your time.

MR. BAKER: I'd like to reserve my time.

CHIEF JUSTICE ROBERTS: Thank you, Counsel. Mr. Roberts.

ORAL ARGUMENT OF MATTHEW D. ROBERTS

ON BEHALF OF THE UNITED STATES

AS AMICUS CURIAE, SUPPORTING THE PETITIONER

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

An employer does not have a fiduciary duty to consider merger as a means of terminating a defined benefit pension plan. First of all, just like the decision to terminate the plan, the decision to merge

the plan is a sponsor function, because it's a choice to alter the design, composition and structure of the plan. And because both the decision to terminate and the decision to merge are sponsor functions, the choice between the two is a sponsor function.

The plan administrator has a duty to carry out the sponsor's decision to terminate the plan, not to revisit that decision by considering whether to merge the plan instead.

JUSTICE GINSBURG: Suppose the argument is made very forcefully that the insurance companies with these annuities haven't been doing so well, but there is this multi-employer plan that has been just performing so well, and so the -- an appeal is made to the company, you're going out of business, you're not going to be running a plan anymore. Put those assets, distribute those assets to the place where they will serve the employees best.

MR. ROBERTS: Well, that would be not be a distribution of the assets as a means of terminating the plan, but the employer as a sponsor could, of course, decide to merge the plan instead of to terminate the plan, if the employer made that choice.

JUSTICE GINSBURG: You're making the same rigid argument that Mr. Baker made, that whatever the

termination, even though the company is going out of business, it's bankrupt, it's always -- a merger is always characterized as a sponsor business, not fiduciary.

MR. ROBERTS: Yes. There are two reasons that I say that. First, even in the case of a sponsor of a plan that's going out of business, and that isn't going to be participating in any merged plan, the merger still is a decision to alter the design and composition and structure of the plan, as this case illustrates for the reasons that Mr. Baker said. That it's going to change fundamentally the plan from a single employer plan to a multi-employer plan, that it's going to change the -- who is the administrator, that it's going to increase the pool of participants, that it's going to affect the benefits, because the assets that were available to pay the benefits are now going to be available to pay benefits of other participants in the, in the successor plan, that the PBGC's guarantee of the benefits is going to be lower in a multi-employer plan.

So for all those reasons, it's going to change, still change the structure of the plan. But in addition to that, the employer of -- the sponsor of this plan that would either terminate, or possibly merge, has a legitimate interest in choosing termination rather

than merger, because in a termination, the sponsor can obtain a reversion of the surplus assets, and still fully provide all the benefits of the employees.

JUSTICE KENNEDY: Could an administrator make that decision in its fiduciary capacity?

MR. ROBERTS: No, Your Honor, and that goes back to a confusion that I think was -- was present before, that the decision about the distribution options at termination is a sponsor decision that the employer makes in the plan documents, because those distribution options are benefits under the plan.

And while Section 1341(b)(3)(A), in isolation, might appear to permit the plan administrator to choose which of those distribution options that are in the plan to make available, other provisions of ERISA and the tax code prohibit the plan from vesting that discretion in the plan administrator.

So in other words, the way it works is when the employer sets up the plan, the employer provides for the forms of distribution that are going to be available at termination. And those forms are just forms of benefits, optional ways of providing the accrued benefits to the participants. And then the participants get to pick among those options at termination.

JUSTICE SOUTER: Then why are we having this

argument? Why isn't it simply a question of construing the provision for options in the original plan.

MR. ROBERTS: Well, we think that one requirement is that it's consistent with the plan, and the plan didn't provide that here.

JUSTICE SOUTER: Then why isn't --

MR. ROBERTS: Held it was waived.

JUSTICE SOUTER: Then why isn't the simple argument, you can't merge because the plan didn't provide that as an option.

MR. ROBERTS: That would certainly be a basis on which the Court of Appeals could have correctly decided this case, other than the way it did.

JUSTICE SOUTER: Was that position presented, I should have asked you --

MR. ROBERTS: It was presented. The Court of Appeals held that Petitioner had waived the argument, based on the terms of the plan, because Petitioner hadn't made that argument in the bankruptcy court, even though the district court had actually addressed the terms of the plan, but mistakenly construed the plan to permit merger, Your Honor.

JUSTICE SOUTER: So we've got to assume that the plan is silent in the sense that, insofar as the plan documents are concerned, merger is at least a

possibility.

MR. ROBERTS: I don't think that you have to assume that, Your Honor. I think that because the Court of Appeals vacated the district court's decision, you know, there is no decision on it. And if it's necessary to -- to resolving the questions presented, I think the Court could address that question. We don't think it's necessary to resolve the questions presented because we think that merger is a, is a sponsor decision as a choice to alter the design, composition and the structure of the plan even if it arises in the context of termination.

And in addition, we also think that merger is not a permissible method of plan termination under the statute or PBGC regulations which treat merger and termination as distinct procedures. The statute requires that the assets of a terminating plan be distributed by allocating them among the participants of that plan. That just doesn't occur in a merger. Instead the assets are transferred to the successor plan and in the successor plan they are commingled to fund the benefits of all the participants in that plan.

JUSTICE KENNEDY: Could a plan document provide that upon termination the employer is entitled to a refund of any excess funding? And would that then

be binding on an administrator in a fiduciary capacity?

MR. ROBERTS: The plan document could provide for a reversion for the employer and in fact this -- it does. But the --

JUSTICE KENNEDY: And I take it the administrator would then have the duty to obey that?

MR. ROBERTS: That. Yes, because that would be consistent with ERISA and the administrator has to follow the plan in accordance with ERISA.

JUSTICE SOUTER: Then why doesn't the administrator here take the position that it's going to reserve the five million for itself and merge what's left? If PACE wants a merger with what's left, fine; if PACE doesn't, end of problem?

MR. ROBERTS: Well, an employer, not an administrator could, could as a sponsor of the plan decide to do a transfer of assets and liabilities of some portion of the, of the plan assets and retain some assets in the plan.

JUSTICE SOUTER: My question is why -- why isn't it an option here to say all right, number one, we got a $5 million surplus. We are going to terminate this plan and we are going to take the five million. Question number two, should we, should we use what's left to merge into the PACE plan? Is that an option?

MR. ROBERTS: What the employer would have to do would be make a sponsor decision to make a transfer of assets and liabilities to the PACE plan before terminating the plan. The employer could make that decision but that, that decision and the decision afterwards to terminate the remains of the plan would both be sponsor decisions that the employer wouldn't make in a fiduciary capacity.

JUSTICE SOUTER: By doing it in that sequence could it reserve the five million for itself?

MR. ROBERTS: It -- it could conceivably do that, Your Honor, subject to the fact that there are guidelines that the agencies have put out, the 1984 joint guidelines that require in some cases, in order to prevent circumvention of the termination requirements, that require the purchase of annuities or the other distribution of the assets, that those guidelines require that if there is a spinoff or a transfer of assets that's followed by the, by the termination of the remains of the transferee plan, that in some circumstances annuities have to be purchased for the accrued benefits of the participants that are transferred into the other ongoing plan and that are going to be participants of that plan.

JUSTICE SOUTER: If we assume that, can they

keep the five million?

MR. ROBERTS: Yes, Your Honor but that would be a decision that they make as sponsor of the plan.

JUSTICE SOUTER: I don't care how they make it; I just want to know under the terms of the plan and consistently with ERISA, could they keep the five million and in some sequence provide for a merger with PACE? And I think you're telling me yes.

MR. ROBERTS: Yes, Your Honor, subject to the fact that here it's quite possible that the PBGC would consider a transfer of assets and liabilities just to leave assets in a plan as a reversion, that they would be subject to that requirement. And so they would have to annuitize the benefits of, of the participants in the plan. Because the PBGC would -- would look at that and they would say that looks like an effort just to extract assets out of what's really an ongoing plan because the employer is not going to be participating in that other plan. The -- they are just stripping it.

JUSTICE KENNEDY: Then why couldn't the PBGC say, you know, we are not quite sure how these insurance companies work. So we'll buy the annuity and then the five million is an extra guarantee to make sure the annuities are paid and that also goes to the insurance company?

MR. ROBERTS: If I could answer the question. The -- the -- they could not -- the plan administrator could decide to give the reversion to the employees and not -- not take a reversion. It could amend the plan to allow that but the point is it has a legitimate interest in taking the reversion and that that interest encourages plan sponsors to fully fund their plan, and depriving it of that would prevent them from that discourage full funding of plans.

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

Ms. Clark.

ORAL ARGUMENT OF JULIA P. CLARK,

ON BEHALF OF RESPONDENTS

MS. CLARK: Mr. Chief Justice and may it please the Court. It's notable that neither the Petitioner nor the Government in their arguments here has referred at all to the definition of fiduciary in ERISA. But that is the beginning point of every one of this Court's decisions as to what is a fiduciary function and what is not. The statute and I'm quoting from 29 U.S.C., Section 1002(21)(A), it's in the first page of the appendix to our brief, is that a person is a fiduciary with respect to a plan to the extent that -- and then it goes on and there are three subparts, two of which are relevant in this case.

One of them and I'm taking them out of order because I think subpart 3 is the simplest way to resolve this case, "to the extent that he has any discretionary authority or discretionary responsibility in the administration of the plan." The other one that's relevant is subpart 1, which is "to the extent he has" -- "he exercises any authority or control respecting disposition of its assets."

The reason that the plan administration subpart is the simplest way to resolve this case is that Congress in Section 1341 of 29 U.S. Code, and that's quoted just immediately below what I was just citing to the Court, specifically assigned to the plan administrator all of the decisions that must be made with respect to implementing the termination of a pension plan. Throughout that section, everything that must be done is stated specifically to be done by the plan administrator.

JUSTICE SCALIA: Of course this argument would not have any force whatever if indeed, transferring the assets to another plan does not constitute a termination of the plan.

MS. CLARK: Justice Scalia, that of course is the second major issue in the case, and the Government's attorney admitted that in a two-stage

transaction, the assets and liabilities of a plan can be transferred to another plan, and the plan can be terminated and assuming the plan provisions are correctly in place the employer can take the reversion of any excess assets. And then --

JUSTICE SCALIA: But the first step would be the transfer. And at that, at that stage it would not be a termination and therefore it would not be within the authority of the administrator under this provision.

MS. CLARK: Justice Scalia, the implementation guidelines which the Government attorney also referred to have as their entire focus to make certain that two-part transactions of just the sort that you have referred to are treated as a single whole in determining whether a plan has been legitimately terminated or not. The entire focus of those guidelines is, we are not going to permit an employer by separating things out into two parts, first the transfer of assets and liabilities, then a termination, to do in form what in substance is simply the continuation of the same plan.

JUSTICE SCALIA: That's fine, but that still does not convert the termination decision into, into a, an administrator's decision, rather than a sponsor's decision.

MS. CLARK: I agree completely --

JUSTICE SCALIA: Sure, you can oversee it and make sure that there is no hanky-panky going on in the two-step process but the -- but the determination whether to terminate or not is a sponsor's determination.

MS. CLARK: I agree completely, Justice Scalia. There is no question here but that the decision to terminate a plan is the plan's sponsor decision. But when the plan sponsor has made that decision and the question on the table is how shall we implement that decision to terminate, it does not matter whether that's done through a two-step transaction in which assets are first transferred to another plan and then the formal termination of what's left remains. The implementation guidelines make very clear that you can't tease those apart and say no, we are only going to look at the final step and that's a termination and nothing else is.

JUSTICE SCALIA: But they, but they don't say that in, in looking at the two of them, you suddenly transform the decision whether to, to transfer as -- as a termination. You transfer that decision from the plan sponsor to the administrator.

MS. CLARK: No, Justice Scalia. The implementation guidelines did not address the question

of in what capacity these decisions would be made. My point in referring to it is simply to say that it is, it is a form over substance argument to say that there is a difference between decision to terminate in which the plan administrator then has a choice of implementing it by either transferring the assets and liabilities to another plan or purchasing an annuity, versus as the Government and as the, I mean as the Petitioner would have it, that that's a completely different transaction from merger as a means of implementing --

JUSTICE STEVENS: I'm puzzled. Can I just get myself straightened out a little bit?

If there is a decision to terminate you're suggesting, you're suggesting that it's after that decision made, is made, there can be a decision to merge which would not be a termination?

MS. CLARK: That is correct, Justice Stevens.

JUSTICE STEVENS: Your, your adversary --

MS. CLARK: -- that the termination decision has been made.

JUSTICE STEVENS: I disagree with you on that.

MS. CLARK: I'm sorry; I didn't --

JUSTICE STEVENS: Your adversary takes a

position that the merger would be not a termination.

MS. CLARK: That is what my adversary says. And if I might focus on the termination section itself, 29 U.S.C. Section 1341, their position has been that a merger with another plan is completely different from the purchase of annuities to provide those benefits.

JUSTICE STEVENS: It would seem to me that a merger is a continuation rather than a termination. And explain to me why I'm wrong on that.

MS. CLARK: The Government's regulations on single employer plan mergers take the very clear position, and we cited them in our brief, it's the regulations under Section 414(1), the clear position that any time there is a transfer of assets and liabilities from one plan to another, whether a complete transfer or not, that is treated as a spinoff of a plan from the original plan and a merger of the spun off assets and liabilities into the other plan.

So that merger is a more flexible concept. It is not just the all-in kind of merger where two plans merge and continue down the road as a single entity. Merger also in the Government's own usage describes a transaction in which all or some portion of liabilities and all or some portion of assets are separated from the original plan and transferred to the second plan.

Now, that being the case, the question really as to whether this is the proposed, the proposal of any merger -- and the question presented to the Court is in the abstract, is any plan merger an acceptable means of terminating a plan under Section 1341?

JUSTICE SCALIA: Right. And -- and the argument your adversaries make is that termination requires that the plan assets be distributed to the beneficiaries.

MS. CLARK: Yes, Justice Scalia. That's what it says.

JUSTICE SCALIA: And that in the case of a merger the assets are not distributed to the beneficiaries, they are distributed to this new plan, which benefits not only the beneficiaries of this plan but the beneficiaries of other plans.

MS. CLARK: Justice Scalia, we disagree for the following reason. Section 1341 specifically provides that the plan administrator implementing a plan termination may -- and here I'm referring to the language that's again in the appendix to our brief; this is the last page of that appendix, right at the top -- plan administrator may purchase irrevocable commitments from an insurer, that's an insured annuity, to provide all benefit liabilities under the plan, or, in

accordance with provisions of the plan and any applicable regulations, otherwise fully provide all benefit liabilities under the plan.

Now, this Court just last week in James vs. United States construed a similar statute that had a list of crimes followed by the phrase or otherwise involves a serious risk of potential harm to persons -- I'm paraphrasing. I didn't get it exactly right. Both the majority and the dissenting opinion in that case agreed that an "otherwise" structure of this sort means that what precedes the "otherwise" phrase is taken as a baseline against which to judge what follows it, and that it tells you what Congress had in mind as something that satisfies in this case the distribution requirements of the statute.

JUSTICE SCALIA: Right. But now, does indeed the transfer here meet the requirement of little (i)? Does the transferee plan undertake an irrevocable commitment to provide to these beneficiaries all that they're entitled to, even at the expense of some of the other beneficiaries of that plan? In other words, if the plan's investments go south does that plan have the authority to say, oh, you know, our first payments have to go to the beneficiaries under this plan that was transferred and the rest of you will get, will get the

leavings? I don't think that the plan has the authority to do that.

MS. CLARK: Well, Justice Scalia, it does it in exactly the same way the purchase of an insurance policy to provide annuities from an insurer does. In each case the assets are commingled with the entire assets of the financial institution to which these liabilities are transferred.

CHIEF JUSTICE ROBERTS: But I thought we just heard that the PBGC might look at it a little differently, that they are more comfortable with the annuity insuring that these beneficiaries get their benefits as opposed to just throwing the beneficiaries into a pool with your other union members.

MS. CLARK: Mr. Chief Justice, it's very clear that if as we are correct -- I mean, as we argue here, if we're correct that it is a fiduciary responsibility for the plan administrator to select the option on the table that is most secure for providing the benefits in the future to the participants, that if the multiemployer plan in question were poorly funded or shaky for any other reason and there is a solid insurance company offering an annuity, that the plan administrator would --

CHIEF JUSTICE ROBERTS: Doesn't this put you

in an awfully difficult position? I mean, you're representing the union, which has other members besides these beneficiaries, and you're saying even though under their plan the beneficiaries are fully protected with irrevocable annuities, we think they're going to be better off if they're thrown in with our other members and we get the $5 million to spread out, not to these beneficiaries but among all these other members. Isn't that an awkward position to be in?

MS. CLARK: The plan administrator is the one that ultimately makes the determination. The union may advocate for what it believes to be in the best interest of its members, but the party that makes the decision is the plan administrator wearing a fiduciary hat under which it can make no decisions --

JUSTICE ALITO: Well, why would the beneficiaries be better off if there were a merger? What would their benefit be, as opposed to an annuity?

MS. CLARK: Probably the single advantage to participants in a multiemployer plan is portability, which is to say some of these participants were working for employers that purchased facilities from Crown and if their employer participated in the multiemployer plan in the future they would be able to add to the benefits that they had accrued and perhaps to reach something

like an enhanced benefit at 25 years of service or the like. In terms of advantage to the participant in comparison to an annuity, that would be the major one.

But I want to come back to why it is that the multiemployer plan distributes the assets in precisely the same way that the purchase of an annuity from an insurance company does.

JUSTICE SCALIA: Does it make a commitment, a commitment to fully provide all benefit liabilities under the now deceased plan?

MS. CLARK: Yes, it does, Justice Scalia. The law requires that. In any plan merger or transfer of assets and liabilities from one plan to the other, the fundamental requirement is that all benefits earned to the date of the transfer must be protected on both sides of the transaction for all participants.

JUSTICE BREYER: What's the -- I'm trying to work this out now. Suppose I buy the annuity for these employees from the X insurance company, all right, and so the insurance company promises when they retire we'll pay them a thousand dollars a month. Suppose the company goes bankrupt. Does the, what is it, the PGPB, what do you call it, the Pension Guarantee --

MS. CLARK: PBGC.

JUSTICE BREYER: Yes. Do they pick up any

of that?

MS. CLARK: They do not.

JUSTICE BREYER: They do not, okay. So I'm trying to understand this, then, the reg under this, and it says: Administrator, you buy the, the annuity from an insurance company, for example, or do the same thing, get an irrevocable commitment in another permitted form. So one question is when they do that the administrator doesn't have to have any fiduciary thought in his mind.

The second position is -- that's their position. The second position is, even if that's so, this is not another permitted form because a merger isn't a determination. And the third position is, that's what we were just getting to, is that we don't see any way in which this could help the employee. Now you say, oh yes, there is a way.

Now suppose we're choosing between two insurance companies. Insurance company A says: We will pay precisely what is owed, precisely; we're as solid as a rock. Insurance company B is hungry for business, so it says: We'll give those employees exactly what's owed and we'll write each of them a check for $500. Now, is that something that means then -- remember, this statute says you have to get what they promised them and not a penny more. Is that something that the insurance, the

administrator then has to do? He has to take B because the insurance company is promising him a bonus?

MS. CLARK: No.

JUSTICE BREYER: Well then, if not that why this?

MS. CLARK: No. The Department of Labor has made clear that when making a fiduciary choice among annuities that are offered by an insurer, it is the plan administrator's fiduciary duty to look to the security of the benefit. That is its sole guiding concern.

CHIEF JUSTICE ROBERTS: And beyond as well? I mean, let's say we have 5 million extra dollars here. See, that's what I don't understand. If you're saying it's a fiduciary, I mean, how can they make a decision ever to do anything other than just give the five million to the beneficiaries?

MS. CLARK: That would depend on the plan, Mr. Chief Justice. If the plan --

CHIEF JUSTICE ROBERTS: Well, the terms, the plans terms here, did not provide for merger in the event of termination, right?

MS. CLARK: No, we disagree. The district court determined that they did authorize the merger for this purpose.

JUSTICE SCALIA: The other side said that

the district court found that the argument was waived, or the court of appeals did.

MS. CLARK: Justice Scalia, it was the court of appeals that held that the argument was waived. The court of appeals said that because this was not presented in the bankruptcy court that the argument would not be considered by the court of appeals in Petitioner's urging the court of appeals to overturn what the district court had done.

CHIEF JUSTICE ROBERTS: Even though the district court decided it? Usually in a waiver situation it's whether you argued it or whether it was addressed by the court.

MS. CLARK: In this case, I could see a reason why that would make sense, because in the bankruptcy proceeding both parties presented evidence, and the interpretation of a plan document is like interpreting any other contract. You may have the opportunity to present evidence on what it means.

CHIEF JUSTICE ROBERTS: If you're -- if you prevail here -- I mean, the reason we have a case is because the employer overfunded the plan to the tune of $5 million. If you prevail and they cannot get that back even after fully insuring the benefits for the beneficiaries, employers in the future will be very

careful not to put in one penny more than what's required to fund the plan; isn't that right.

MS. CLARK: Mr. Chief Justice, I don't believe that that's the case, because the funding rules of ERISA do encourage employers to fund well at times when times are good. But --

JUSTICE KENNEDY: Well, if you prevail won't plan documents or shouldn't plan documents be amended to say that merger is not an option and any reversion goes to the employer?

MS. CLARK: That may well be the case, Justice Kennedy. Or they may say whatever the method of implementing the termination that the plan administrator chooses, it must provide for a reversion to the employer.

CHIEF JUSTICE ROBERTS: What possible equitable basis does the union have to claim this extra $5 million?

MS. CLARK: The actual --

CHIEF JUSTICE ROBERTS: It's not for these beneficiaries. It's for all the others. It's spread out among this pool in the multiemployer plan. These are the employer excess contributions. What -- looking at it as an equitable matter, what claim do they have to the extra money?

MS. CLARK: Mr. Chief Justice, I could answer that on two levels. One is that the record of this case does not preclude the possibility that this would have been negotiated to leave the reversion for the employer. But that's speculation because, since the fiduciary didn't go down that path, we don't know where it could have taken it.

CHIEF JUSTICE ROBERTS: Are there a lot of plans that look like that, that if there's extra money, we've overfunded that it goes back to the union, not back to the company?

MS. CLARK: It never goes to the union. That would be violation of a different section of Federal law.

CHIEF JUSTICE ROBERTS: The union plan.

MS. CLARK: But to a plan. The reason -- and plans simply don't address this, except for authorize merger --

JUSTICE KENNEDY: Well, how could the administrator, how could the administrator negotiate with the employer to give the $5 million back if it's with a fiduciary?

MS. CLARK: If the employer had said, had amended the plan to say, whatever you do by way of terminating this plan, you must protect our right to the

reversion, then the plan administrator would have been --

JUSTICE KENNEDY: Well, I suppose if it would have been amended. But what happens, what happens if the employer wants to continue in business, but simply turn the plan over to a multiemployer plan? Is that a fiduciary -- and you have an employer that wears two hats. The employer is also the administrator. Is that a fiduciary decision?

MS. CLARK: No, Justice Kennedy, it is not, because there there really is an impact on the form and the amount of benefits that will be accrued in the future under an ongoing plan, as well as --

JUSTICE KENNEDY: So then it's the ongoing significance of the decision to the employer that determines whether there's a fiduciary obligation?

MS. CLARK: No, Justice Kennedy. It's the ongoing significance to the participants, because then what you have is truly a plan design decision, which does not come within plan administration, while in the case of a merger as a means of implementing termination the law fixes those benefits. They are what they are.

JUSTICE KENNEDY: I can't see why it's a fiduciary obligation in case A -- a sponsor obligation in case A and a fiduciary obligation in case B. That

just depends on the sequence of timing.

MS. CLARK: Again, it's not, it's not the timing. It's the context. In a case like this one, where the employer is clearly going out of business, it's talking termination, it's got annuity quotes on the table, it's, everything is the implementation of the termination of the plan. If instead this employer remains in business and is continuing to employ people who are going to be accruing benefits in the future, then that is the question of what are the benefits they are going to be accruing in the future.

JUSTICE SOUTER: Okay. But what about the employees who are on board at the time the merger decision is made? Are you saying that an, an employer who continues to operate can say, I'm going to merge my sound plan, I'm sick of having to worry about it, I'm going to merge this financially sound plan into plan A out here, which is very, very shaky, and I know perfectly well that plan A, you know, may very well collapse, but I don't care. I just want to get rid of what I have. Is that an option for the plan sponsor?

MS. CLARK: That would be a plan sponsor decision, but the plan sponsor would be subjecting itself to obligations for future enhanced funding of the plan that it joins.

JUSTICE BREYER: Could you go back for just one second to Justice Alito's question, because that's what I'm having trouble with, because I think the question is what, assuming you're right on all the other points for argument's sake, but what is the advantage to the worker here? And the answer I heard you give was the advantage is, well, maybe the worker if he goes and works in the right place will get some more money.

Well, and I wonder is that relevant. And you told me in respect to the two insurance companies it wasn't relevant. So if it isn't relevant in respect to the two insurance companies, how can that be relevant here, and if that isn't relevant here what is the possible advantage to the worker?

MS. CLARK: Justice Breyer, I believe I was cut off and didn't finish my answer to your question when you asked it before. In determining which of two annuities on the table are to be chosen, the Department of Labor's instructions to employers have clearly said if they're equal on the basis of safety and security of the benefits, then it's appropriate for the fiduciary to take other considerations into account. So our position here would be that, by parallel to that, if the fiduciary were to conclude that the multiemployer plan is of equal safety and security to the participants

benefits that they have earned to date, it would then be able to take into consideration in the interest of participants any other difference.

JUSTICE BREYER: So then you're saying that the answer -- we have annuity company A and B, they're identical, the worker has a pension that promises them $1,000 a month, not a penny more, and company A says, we'll give you $500 extra. Then in your opinion under the current regs and so forth, the administrator must choose that company; is that right?

MS. CLARK: Only if the two companies are equivalent in terms of their security.

JUSTICE BREYER: I said they are equivalent in terms of -- of the security and so forth; they are each good companies and one will write out a check for $500, which is what I thought my example was. And now you're saying under the law the fiduciary must choose the first but you're hesitating on that which means I think I don't understand it fully.

MS. CLARK: I'm trying to make sure that I understand your question fully, Justice Breyer.

The, the choice must be made and the Department of Labor's instructions to employers are very clear on this, in the interest of the security of those benefits which have been accrued, that's the guiding

principle, (i) single to the rights and interests of the beneficiaries. If they are equal, then the Department of Labor guidelines permit the fiduciary to take other factors into consideration. So that the first decision has to be made in terms of the security of those benefits that the individual has already earned.

JUSTICE SCALIA: Well, I don't think, I just don't read 1341 the way you do. It seems to me that little (i) at the top of your page 2a is a safe harbor. I don't think that the, even if it is a fiduciary decision that he has to, once he has found an insurer that is rock solid, that is willing to provide all the benefit liabilities, I don't think he has to look throughout the rest of the world to see if there is anything that might be better for his plan participants. I think that's a safe harbor and if he purchases an irrevocable commitment from an insurer and then that insurer is as solvent as any other insurer he is home free. You're saying he is not home free. He has to consider little (ii) and see what other ways of fully providing all benefit liabilities might be better for the plan participants. I -- I think that's, that's placing on him an obligation that I don't see there.

MS. CLARK: Well, Justice Scalia, a safe harbor doesn't necessarily mean that it isn't

appropriate for the fiduciary to consider other alternatives. It would mean I believe if he chooses an annuity that is a safe and secure way to provide the benefit and is equally good with anything else, he would be solidly protected from any challenge that a participant might make.

JUSTICE KENNEDY: Well -- excuse me. Excuse me. I'm just not sure I understand your answer.

If the employer finds the rock solid insurance company under -- pardon me, the administrator finds the rock solid insurance company under Justice Scalia's hypothetical under (i) he must consider all other options under (ii)?

MS. CLARK: If -- if options have been proposed and they are of equal or better security for the participants, yes, Justice Kennedy.

JUSTICE SOUTER: And you're saying in this case, this is sort of the square one question that I want to be clear on. You're saying in this case simply that the employer had to give consideration to PACE's proposal rather than cutting off consideration, we presume in part, because of the issue of the $5 million. It had to think about it some more. Is that correct?

MS. CLARK: Yes, Justice Souter.

JUSTICE SOUTER: Okay.

CHIEF JUSTICE ROBERTS: Counsel, your little (ii) that you're relying on begins by saying in accordance with the provisions of the plan, the other solution otherwise provides. Where in the provisions of the plan does it say that they will consider merger?

MS. CLARK: That was what the district court found, that the provisions of the plan authorized the merger, as an option.

CHIEF JUSTICE ROBERTS: Do you know, is there a particular provision in the plan that says that? Or --

MS. CLARK: The district court cited what it was relying on; I don't have those at my fingertips.

JUSTICE GINSBURG: Was it specific in the plan or it just didn't exclude, the plan didn't exclude the possibility of merger?

MS. CLARK: Well -- the usual reading of a term in accordance with means that it must not violate. It must be consistent with the terms of that plan.

JUSTICE GINSBURG: So that could be if they just didn't say anything so it would be a choice. Just like it doesn't say, may not say anything about a lump sum, which would be an alternative. But your point --

CHIEF JUSTICE ROBERTS: I don't read in accordance with the way you do. I read in accordance

with to mean provided by the plan.

MS. CLARK: Certainly if the plan has a provision then it must be followed. If the plan is silent, Mr. Chief Justice, your -- your question suggests that there must be an affirmative authorization in the plan. The district court found there was sufficient authorization here in whatever form that the district court found satisfactory. And because that issue was not raised in a bankruptcy court there was no opportunity to present evidence on that matter.

JUSTICE GINSBURG: Do I understand that your position is twofold? One is you say you -- you put this on the table, the board was bound to consider it with their fiduciary hat. So it's not just that they were to consider it. But they had to consider it as a fiduciary and not as a sponsor?

MS. CLARK: Precisely, Justice Ginsburg. Now, I have -- my time is up. Thank you.

CHIEF JUSTICE ROBERTS: Thank you Ms. Clark.

Mr. Baker, you have three minutes remaining.

REBUTTAL ARGUMENT OF M. MILLER BAKER,

ON BEHALF OF PETITIONER

MR. BAKER: Thank you, Mr. Chief Justice. I'm going to turn -- cover a couple points on function and then turn to the statutory question.

First, I would like to return the Court to the factual context of this case. In this case, PACE made not a two-step proposal, PACE proposed an outright merger in which all assets and liabilities would be transferred to the PACE union. That's in the record. It's Plaintiff's trial Exhibit 25. And what's significant about the merger proposal that PACE sent to Crown is that this is PACE's merger proposal. It had Crown signing the merger in Crown's planned sponsor capacity not as a, not as an administrator but as a plan sponsor. That's what PACE proposed, recognizing that the decision whether to merge the plan was a plan sponsor function.

I'd like to turn now to the question of the, also the second stage issue here. Even, even if this was a two-stage transaction, which was not proposed, each stage of that transaction is a plan sponsor decision. A plan sponsor has to make the decision whether to transfer assets and then a plan sponsor has to make the decision whether or not to then terminate the plan. Each separate stage is a plan sponsor function.

In terms of the plan sponsor function changing because the company is going out of business, that simply cannot be. A plan sponsor function depends

upon what the function is, and it doesn't matter whether the business is going out of business or whether the business is an ongoing concern. If anything, because it's going out of business, it's important to protect the, the discretion of a plan sponsor.

In terms of the contextual argument it's very important to note that nowhere -- that Section 1341 which governs standard termination does not cross-reference mergers and the Section 1412 governing mergers does not apply to terminations. In fact the only place in the statute where the two words appear together is in Section 1058, in which the two procedures are actually compared to each other.

There are some significant differences between termination and merger. In a termination, there is a reversion to the company. There is also reversion to employees based upon their individual contributions. There is no similar reversion in a merger. That is why a merger simply cannot be a method of termination. The two are different. You might have a two-stage transaction but they are two separate transactions each of which is a plan sponsor function.

JUSTICE SCALIA: I'm not sure I understand what you mean by a reversion to the employees who have made contributions. They get their cash back?

MR. BAKER: Yes. If employees, under 1334, if employees have made individual contributions to the plan, it's not merely paid for by the employer --

JUSTICE SCALIA: Right.

MR. BAKER: -- the employee has a right to a pro rata percentage of the surplus plan assets in the event of termination. There is no similar right of reversion to the employee in the event of a merger.

JUSTICE SOUTER: What if the plan, the plan provides that in the event of a merger there will in fact be a reversion to the employees, if they've paid in too much or to, or to the sponsor if the sponsor has overfunded, and there will be no merger except on those terms? Is that enforceable?

MR. BAKER: I'm not sure I -- I understand your question.

JUSTICE SOUTER: If the plan document says look, if we decide to merge, anybody who has paid in more than he has to, employee or employer, gets the money back or there's no merger. In other words it's going to be the terms of the merger that there is a reversion. Can a plan provide for that?

MR. BAKER: A plan cannot provide for that because it would be contrary to ERISA, Justice Souter.

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

The case is submitted.

(Whereupon, at 12:03 p.m., the case in the above-titled matter was submitted.)