

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JEFFREY H. BECK :

4 LIQUIDATING TRUSTEE OF :

5 THE ESTATES OF CROWN :

6 VANTAGE, INC. AND CROWN :

7 PAPER COMPANY, :

8 Petitioner :

9 v. : No. 05-1448

10 PACE INTERNATIONAL UNION, :

11 ET AL. :

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13 Washington, D.C.

14 Tuesday, April 24, 2007

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

19 APPEARANCES:

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

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

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

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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 multiemployer pension plan. Crown rejected that proposal. The Ninth Circuit held that Crown breached its fiduciary duty by not sufficiently considering that merger proposal.

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

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

25 MR. BAKER: Justice -- Justice Ginsburg,

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

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

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

6 JUSTICE KENNEDY: But if have this duty to
7 consider the interest of the employees in selecting the
8 -- the insurance company, in selecting the amount of the
9 annuity, et cetera, if you have that duty it seems to me
10 that that's a fiduciary duty.

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

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

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

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

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

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

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

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

8 I don't see how you eliminate the -- the
9 termination decision before the merger decision.

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

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

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

25 JUSTICE SOUTER: Are you saying you can't

1 have a merger of a plan that has already been
2 terminated, so that the merger decision is necessarily a
3 decision that has to be made before the termination --
4 before a termination decision?

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

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

14 JUSTICE SOUTER: That's what I keep
15 suggesting.

16 MR. BAKER: Absolutely, it's not a
17 termination. There are --

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

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

1 JUSTICE SOUTER: Okay, but -- then why --

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

7 MR. BAKER: That's absolutely correct.

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

13 MR. BAKER: That's correct.

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

25 MR. BAKER: The answer, Justice Kennedy, is

1 that it is a business decision to decide in what form
2 the benefits are going to be provided. And the very
3 choice between a termination and a merger goes to that
4 issue. For example, in a merger, there is no automatic
5 vesting --

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

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

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

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

22 JUSTICE BREYER: I'm just listening to this.
23 It sounds to me as if you're saying, one, the employer
24 decides to terminate, okay? Now that's done. Then we
25 go to the next question. How would we terminate? And

1 in respect to that, I think Justice Kennedy was asking,
2 as I heard him, don't you have a fiduciary duty when you
3 decide how? And your answer, as I heard it, was yes,
4 you do.

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

11 (Laughter.)

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

14 (Laughter.)

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

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

23 MR. BAKER: Perhaps I was imprecise. If I
24 was imprecise, I apologize. The answer is, it depends
25 upon the function at issue. A broad generalization that

1 any decision taken after termination is necessarily a
2 plan sponsor function is just wrong. One has to look at
3 the function at issue, and the function in connection
4 with a merger is a plan sponsor decision, because you
5 can't get away from those threshold questions as to the
6 form, the content, and the benefits that are to be
7 provided in that plan.

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

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

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

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

25 JUSTICE SOUTER: The decision to -- to take

1 the option of purchasing annuities or offering annuities
2 to the beneficiaries. That is a fiduciary decision?

3 MR. BAKER: No, Justice -- the -- if the
4 plan is silent --

5 JUSTICE SOUTER: If the plan is silent.

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

10 JUSTICE SOUTER: What if they say, we will
11 distribute it by going to the top of the building and
12 throwing the money out onto the street. Fiduciary
13 problem?

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

16 CHIEF JUSTICE ROBERTS: Right --

17 MR. BAKER: By operation of law, Justice --
18 so it -- you don't even --

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

25 MR. BAKER: Well, that is a second argument,

1 it's an alternative argument, Chief Justice Roberts,
2 that merger is not a means of termination. But the
3 threshold question is --

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

6 MR. BAKER: Justice Scalia, I think both
7 arguments have merit and they have different issues
8 associated with them. But the threshold question here
9 is whether or not this is a plan sponsor decision. And
10 a plan sponsor decision is always a decision that goes
11 to the content and the form of the plan, as well as to
12 level of benefits to be provided.

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

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

19 JUSTICE ALITO: And PACE would like that,
20 you would like it. I mean, how would a fiduciary decide
21 between those two, if it were a fiduciary duty?

22 MR. BAKER: Well, it's not a fiduciary duty.
23 This Court's cases are -- the PBGC and the agencies
24 recognize that the decision to terminate in order to
25 recapture a reversion is perfectly permissible, so long

1 as the plan sponsor complies with all the relevant
2 requirements of a termination.

3 JUSTICE KENNEDY: But Justice Alito's
4 question -- and I have the same question. Let's assume,
5 A -- I know this is not your position -- but the merger
6 is a permissible option. And B, let's assume -- and I
7 know this is not your position -- that this is a
8 fiduciary obligation. I assume then you would lose,
9 because the extra assets must go -- the reversion
10 interest -- must go to the employees if it's in their
11 benefit.

12 MR. BAKER: If we lose on both the issues
13 that we have argued, yes, Justice Kennedy.

14 CHIEF JUSTICE ROBERTS: No, I thought you --
15 but the point is the \$5 million is not going to these
16 employees, it's being thrown into this vast sea of all
17 these other employees, whose employers have not done as
18 good a job of funding their plans. This is to the
19 benefit not to the beneficiaries of this plan, but to
20 other union members who don't have the luxury of having
21 an employer who has over-funded their plan, and are
22 trying to get that five million to help them, not your
23 beneficiaries.

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

1 but to another union.

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

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

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

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

19 JUSTICE SOUTER: Would it be consistent with
20 the -- no. Reserve your time.

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

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.
23 Mr. Roberts.

24 ORAL ARGUMENT OF MATTHEW D. ROBERTS

25 ON BEHALF OF THE UNITED STATES

1 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

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

4 An employer does not have a fiduciary duty
5 to consider merger as a means of terminating a defined
6 benefit pension plan. First of all, just like the
7 decision to terminate the plan, the decision to merge
8 the plan is a sponsor function, because it's a choice to
9 alter the design, composition and structure of the plan.
10 And because both the decision to terminate and the
11 decision to merge are sponsor functions, the choice
12 between the two is a sponsor function.

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

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

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

6 JUSTICE GINSBURG: You're making the same
7 rigid argument that Mr. Baker made, that whatever the
8 termination, even though the company is going out of
9 business, it's bankrupt, it's always -- a merger is
10 always characterized as a sponsor business, not
11 fiduciary.

12 MR. ROBERTS: Yes. There are two reasons
13 that I say that. First, even in the case of a sponsor
14 of a plan that's going out of business, and that isn't
15 going to be participating in any merged plan, the merger
16 still is a decision to alter the design and composition
17 and structure of the plan, as this case illustrates for
18 the reasons that Mr. Baker said. That it's going to
19 change fundamentally the plan from a single employer
20 plan to a multiemployer plan, that it's going to change
21 the -- who is the administrator, that it's going to
22 increase the pool of participants, that it's going to
23 affect the benefits, because the assets that were
24 available to pay the benefits are now going to be
25 available to pay benefits of other participants in the

1 -- in the successor plan, that the PBGC's guarantee of
2 the benefits is going to be lower in a multiemployer
3 plan.

4 So for all those reasons, it's going to
5 change, still change the structure of the plan. But in
6 addition to that, the employer of -- the sponsor of this
7 plan that would either terminate, or possibly merge, has
8 a legitimate interest in choosing termination rather
9 than merger, because in a termination, the sponsor can
10 obtain a reversion of the surplus assets, and still
11 fully provide all the benefits of the employees.

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

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

20 And while section 1341(b)(3)(A), in
21 isolation, might appear to permit the plan administrator
22 to choose which of those distribution options that are
23 in the plan to make available, other provisions of ERISA
24 and the Tax Code prohibit the plan from vesting that
25 discretion in the plan administrator.

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

8 JUSTICE SOUTER: Then why are we having this
9 argument? Why isn't it simply a question of construing
10 the provision for options in the original plan?

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

14 JUSTICE SOUTER: Then why isn't --

15 MR. ROBERTS: The court of appeals held that
16 that was waived.

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

20 MR. ROBERTS: That would certainly be a
21 basis on which the court of appeals could have correctly
22 decided this case, other than the way it did.

23 JUSTICE SOUTER: Was that position
24 presented? I should have asked your brother.

25 MR. ROBERTS: It was presented. The court

1 of appeals held that Petitioner had waived the argument,
2 based on the terms of the plan, because Petitioner
3 hadn't made that argument in the bankruptcy court, even
4 though the district court had actually addressed the
5 terms of the plan, but mistakenly construed the plan to
6 permit merger, Your Honor.

7 JUSTICE SOUTER: So we've got to assume that
8 the plan is silent in the sense that, so far as the
9 plan documents are concerned, merger is at least a
10 possibility.

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

22 And in addition, we also think that
23 merger is not a permissible method of plan termination
24 under the statute or PBGC regulations which treat merger
25 and termination as distinct procedures. The statute

1 requires that the assets of a terminating plan be
2 distributed by allocating them among the participants of
3 that plan. That just doesn't occur in a merger.
4 Instead the assets are transferred to the successor plan
5 and in the successor plan they are commingled to fund
6 the benefits of all the participants in that plan.

7 JUSTICE KENNEDY: Could a plan document
8 provide that upon termination the employer is entitled
9 to a refund of any excess funding? And would that then
10 be binding on an administrator in a fiduciary capacity?

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

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

16 MR. ROBERTS: That -- yes, because that
17 would be consistent with ERISA and the administrator has
18 to follow the provisions of the plan in accordance with
19 ERISA.

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

25 MR. ROBERTS: Well, an employer, not an

1 administrator could, could as a sponsor of the plan
2 decide to do a transfer of assets and liabilities of
3 some portion of the, of the plan assets and retain some
4 assets in the plan.

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

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

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

21 MR. ROBERTS: It -- it could conceivably do
22 that, Your Honor, subject to the fact that there are
23 guidelines that the agencies have put out, the 1984
24 joint guidelines that require in some cases, in order to
25 prevent circumvention of the termination requirements,

1 that require the purchase of annuities or the other
2 distribution of the assets, that those guidelines
3 require that if there is a spinoff or a transfer of
4 assets that's followed by the -- by the termination of
5 the remains of the transferee plan, that in some
6 circumstances annuities have to be purchased for the
7 accrued benefits of the participants that are
8 transferred into the other ongoing plan and that are
9 going to be participants of that plan.

10 JUSTICE SOUTER: If we assume that, can they
11 keep the five million?

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

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

19 MR. ROBERTS: Yes, Your Honor, subject to
20 the fact that here it's quite possible that the PBGC
21 would consider a transfer of assets and liabilities just
22 to leave assets in a plan as a reversion, that they
23 would be subject to that requirement. And so they would
24 have to annuitize the benefits of -- of the participants
25 in the plan. Because the PBGC would -- would look at

1 that and they would say that looks like an effort just
2 to extract assets out of what's really an ongoing plan
3 because the employer is not going to be participating in
4 that other plan. The -- they are just stripping it.

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

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

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Ms. Clark.

22 ORAL ARGUMENT OF JULIA P. CLARK,

23 ON BEHALF OF RESPONDENTS

24 MS. CLARK: Mr. Chief Justice, and may it
25 please the Court:

1 It's notable that neither the Petitioner nor the
2 Government in their argument here has referred at all to
3 the definition of "fiduciary" in ERISA. But that is the
4 beginning point of every one of this Court's decisions
5 as to what is a fiduciary function and what is not. The
6 statute -- and I'm quoting from 29 U.S.C. section
7 1002(21)(A) it's in the first page of the appendix to
8 our brief -- is that "a person is a fiduciary with
9 respect to a plan to the extent that" -- and then it
10 goes on and there are three subparts, two of which are
11 relevant in this case.

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

20 The reason that the plan administration
21 subpart is the simplest way to resolve this case is that
22 Congress in section 1341 of 29 U.S. Code -- and that's
23 quoted just immediately below what I was just citing to
24 the Court -- specifically assigned to the plan
25 administrator all of the decisions that must be made

1 with respect to implementing the termination of a
2 pension plan. Throughout that section, everything that
3 must be done is stated specifically to be done by the
4 plan administrator.

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

9 MS. CLARK: Justice Scalia, that of course
10 is the second major issue in the case, and the
11 Government's attorney admitted that in a two-stage
12 transaction, the assets and liabilities of a plan can be
13 transferred to another plan, and the plan can be
14 terminated and assuming the plan provisions are
15 correctly in place, the employer can take the reversion
16 of any excess assets. And then --

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

21 MS. CLARK: Justice Scalia, the
22 implementation guidelines which the Government attorney
23 also referred to have as their entire focus to make
24 certain that two-part transactions of just the sort that
25 you have referred to are treated as a single whole in

1 determining whether a plan has been legitimately
2 terminated or not. The entire focus of those guidelines
3 is, we are not going to permit an employer by separating
4 things out into two parts, first a transfer of assets
5 and liabilities, then a termination, to do in form what
6 in substance is simply the continuation of the same
7 plan.

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

12 MS. CLARK: I agree completely --

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

18 MS. CLARK: I agree completely, Justice
19 Scalia. There is no question here but that the decision
20 to terminate a plan is the plan sponsor's decision. But
21 when the plan sponsor has made that decision and the
22 question on the table is how shall we implement that
23 decision to terminate, it does not matter whether that's
24 done through a two-step transaction in which assets are
25 first transferred to another plan and then the formal

1 termination of what's left remains. The implementation
2 guidelines make very clear that you can't tease those
3 apart and say no, we are only going to look at the final
4 step and that's a termination and nothing else is.

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

10 MS. CLARK: No, Justice Scalia. The
11 implementation guidelines did not address the question
12 of in what capacity these decisions would be made. My
13 point in referring to it is simply to say that it is --
14 it is a form-over-substance argument to say that there
15 is a difference between decision to terminate in which
16 the plan administrator then has a choice of implementing
17 it by either transferring the assets and liabilities to
18 another plan or purchasing an annuity, versus as the
19 Government and as the -- I mean as the Petitioner would
20 have it -- that that's a completely different
21 transaction from merger as a means of implementing --

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

24 If there is a decision to terminate you're
25 -- you're suggesting that it's after that decision made

1 -- is made, there can be a decision to merge which would
2 not be a termination?

3 MS. CLARK: That is correct, Justice
4 Stevens.

5 JUSTICE STEVENS: Your, your adversary --

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

8 JUSTICE STEVENS: -- disagree with you on
9 that.

10 MS. CLARK: I'm sorry; I didn't hear the
11 first part of the question.

12 JUSTICE STEVENS: Your adversary takes a
13 position that the merger would be not a termination.

14 MS. CLARK: That is what my adversary says.
15 And if I might focus on the termination section itself,
16 29 U.S.C. section 1341, their position has been that a
17 merger with another plan is completely different from
18 the purchase of annuities to provide those benefits.

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

22 MS. CLARK: The Government's regulations on
23 single employer plan mergers take the very clear
24 position -- and we've cited them in our brief, it's the
25 regulations under section 414(l) -- the clear position

1 that any time there is a transfer of assets and
2 liabilities from one plan to another, whether a complete
3 transfer or not, that is treated as a spinoff of a plan
4 from the original plan and a merger of the spun off
5 assets and liabilities into the other plan.

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

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

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

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

24 JUSTICE SCALIA: And that in the case of a
25 merger the assets are not distributed to the

1 beneficiaries, they are distributed to this new plan,
2 which benefits not only the beneficiaries of this plan
3 but the beneficiaries of other plans.

4 MS. CLARK: Justice Scalia, we disagree for
5 the following reason. section 1341 specifically
6 provides that the plan administrator implementing a plan
7 termination may -- and here I'm referring to the
8 language that's again in the appendix to our brief; this
9 is the last page of that appendix, right at the top --
10 "plan administrator may purchase irrevocable commitments
11 from an insurer" -- that's an insured annuity -- "to
12 provide all benefit liabilities under the plan, or, in
13 accordance with provisions of the plan and any
14 applicable regulations, otherwise fully provide all
15 benefit liabilities under the plan."

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

1 had in mind as something that satisfies in this case the
2 distribution requirements of the statute.

3 JUSTICE SCALIA: Right. Now, does
4 indeed the transfer here meet the requirement of little
5 (i)? Does the transferee plan undertake an irrevocable
6 commitment to provide to these beneficiaries all that
7 they're entitled to, even at the expense of some of the
8 other beneficiaries of that plan? In other words, if
9 the plan's investments go south does that plan have the
10 authority to say, oh, you know, our first payments have
11 to go to the beneficiaries under this plan that was
12 transferred and the rest of you will get -- will get the
13 leavings? I don't think that the plan has the authority
14 to do that.

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

21 CHIEF JUSTICE ROBERTS: But I thought we
22 just heard that the PBGC might look at it a little
23 differently, that they are more comfortable with the
24 annuity insuring that these beneficiaries get their
25 benefits as opposed to just throwing the beneficiaries

1 into a pool with your other union members.

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

12 CHIEF JUSTICE ROBERTS: Doesn't that put you
13 in an awfully difficult position? I mean, you're
14 representing the union, which has other members besides
15 these beneficiaries, and you're saying even though under
16 their plan the beneficiaries are fully protected with
17 irrevocable annuities, we think they're going to be
18 better off if they're thrown in with our other members
19 and we get the \$5 million to spread out, not to these
20 beneficiaries but among all these other members. Isn't
21 that an awkward position to be in?

22 MS. CLARK: The plan administrator is the
23 one that ultimately makes the determination. The union
24 may advocate for what it believes to be in the best
25 interest of its members, but the party that makes the

1 decision is the plan administrator wearing a fiduciary
2 hat under which it can make no decisions --

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

6 MS. CLARK: Probably the single advantage to
7 participants in a multiemployer plan is portability,
8 which is to say some of these participants were working
9 for employers that purchased facilities from Crown and
10 if their employer participated in the multiemployer plan
11 in the future, they would be able to add to the benefits
12 that they had accrued and perhaps to reach something
13 like an enhanced benefit at 25 years of service or the
14 like. In terms of advantage to the participant in
15 comparison to an annuity, that would be the major one.

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

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

23 MS. CLARK: Yes, it does, Justice Scalia.
24 The law requires that. In any plan merger or transfer
25 of assets and liabilities from one plan to the other,

1 the fundamental requirement is that all benefits earned
2 to the date of the transfer must be protected on both
3 sides of the transaction for all participants.

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

11 MS. CLARK: PBGC.

12 JUSTICE BREYER: Yes. Do they pick up any
13 of that?

14 MS. CLARK: They do not.

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

23 The second position is -- that's their
24 position. The second position is, even if that's so,
25 this is not another permitted form because a merger

1 isn't a termination. And the third position is,
2 that's what we were just getting to, is that we don't
3 see any way in which this could help the employee. Now
4 you say, oh yes, there is a way.

5 Now suppose we're choosing between two
6 insurance companies. Insurance company A says: We will
7 pay precisely what is owed, precisely; we're as solid as
8 a rock. Insurance company B is hungry for business, so
9 it says: We'll give those employees exactly what's owed
10 and we'll write each of them a check for \$500. Now, is
11 that something that means then -- remember, this statute
12 says you have to get what they promised them, not a
13 penny more. Is that something that the insurance, the
14 administrator then has to do? He has to take B because
15 the insurance company is promising him a bonus?

16 MS. CLARK: No.

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

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

24 CHIEF JUSTICE ROBERTS: And beyond as well?
25 I mean, let's say we have 5 million extra dollars here.

1 See, that's what I don't understand. If you're saying
2 it's a fiduciary, I mean, how can they make a decision
3 ever to do anything other than just give the five
4 million to the beneficiaries?

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

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

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

13 JUSTICE SCALIA: The other side said that
14 the district court found that the argument was waived,
15 or the court of appeals did.

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

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

1 addressed by the court.

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

8 CHIEF JUSTICE ROBERTS: If you're -- if you
9 prevail here -- I mean, the reason we have a case is
10 because the employer overfunded the plan to the tune of
11 \$5 million. If you prevail and they cannot get that
12 back even after fully insuring the benefits for the
13 beneficiaries, employers in the future will be very
14 careful not to put in one penny more than what's
15 required to fund the plan; isn't that right?

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

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

24 MS. CLARK: That may well be the case,
25 Justice Kennedy. Or they may say whatever the method of

1 implementing the termination that the plan administrator
2 chooses, it must provide for a reversion to the
3 employer.

4 CHIEF JUSTICE ROBERTS: What possible
5 equitable basis does the union have to claim this extra
6 \$5 million?

7 MS. CLARK: The actual --

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

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

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

25 MS. CLARK: It never goes to the union.

1 That would be a violation of a different section of
2 Federal law.

3 CHIEF JUSTICE ROBERTS: The union plan.

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

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

11 MS. CLARK: If the employer had said, had
12 amended the plan to say, whatever you do by way of
13 terminating this plan, you must protect our right to the
14 reversion, then the plan administrator would have been
15 --

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

23 MS. CLARK: No, Justice Kennedy, it is not,
24 because there there really is an impact on the form and
25 the amount of benefits that will be accrued in the

1 future under an ongoing plan, as well as --

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

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

11 JUSTICE KENNEDY: I can't see why it's a
12 fiduciary obligation in case A -- a sponsor obligation
13 in case A and a fiduciary obligation in case B. That
14 just depends on the sequence of timing.

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

25 JUSTICE SOUTER: Okay. But what about the

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

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

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

23 Well, and I wonder is that relevant. And
24 you told me in respect to the two insurance companies it
25 wasn't relevant. So if it isn't relevant in respect to

1 the two insurance companies, how can that be relevant
2 here, and if that isn't relevant here what is the
3 possible advantage to the worker?

4 MS. CLARK: Justice Breyer, I believe I was
5 cut off and didn't finish my answer to your question
6 when you asked it before. In determining which of two
7 annuities on the table are to be chosen, the Department
8 of Labor's instructions to employers have clearly said
9 if they're equal on the basis of safety and security of
10 the benefits, then it's appropriate for the fiduciary to
11 take other considerations into account. So our position
12 here would be that, by parallel to that, if the
13 fiduciary were to conclude that the multiemployer plan
14 is of equal safety and security to the participants
15 benefits that they have earned to date, it would then be
16 able to take into consideration in the interest of
17 participants any other difference.

18 JUSTICE BREYER: So then you're saying that
19 the answer -- we have annuity company A and B, they're
20 identical, the worker has a pension that promises them
21 \$1,000 a month, not a penny more, and company A says,
22 we'll give you \$500 extra. Then in your opinion under
23 the current regs and so forth, the administrator must
24 choose that company; is that right?

25 MS. CLARK: Only if the two companies are

1 equivalent in terms of their security.

2 JUSTICE BREYER: I said they are equivalent
3 in terms of -- of the security and so forth; they are
4 each good companies and one will write out a check for
5 \$500, which is what I thought my example was. And now
6 you're saying under the law the fiduciary must choose
7 the first but you're hesitating on that which means I
8 think I don't understand it fully.

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

11 The -- the choice must be made and the
12 Department of Labor's instructions to employers are very
13 clear on this, in the interest of the security of those
14 benefits which have been accrued, that's the guiding
15 principle, (i) single to the rights and interests of the
16 beneficiaries. If they are equal, then the Department
17 of Labor guidelines permit the fiduciary to take other
18 factors into consideration. So that the first decision
19 has to be made in terms of the security of those
20 benefits that the individual has already earned.

21 JUSTICE SCALIA: Well, I don't think that in
22 the -- I just don't read 1341 the way you do. It seems
23 to me that little (i) at the top of your page 2a is a
24 safe harbor. I don't think that the, even if it is a
25 fiduciary decision that he has to, once he has found an

1 insurer that is rock solid, that is willing to provide
2 all the benefit liabilities, I don't think he has to
3 look throughout the rest of the world to see if there is
4 anything that might be better for his plan participants.
5 I think that's a safe harbor and if he purchases an
6 irrevocable commitment from an insurer and then that
7 insurer is as solvent as any other insurer he is home
8 free. You're saying he is not home free. He has to
9 consider little (ii) and see what other ways of fully
10 providing all benefit liabilities might be better for
11 the plan participants. I -- I think that's a -- that's
12 placing on him an obligation that I don't see there.

13 MS. CLARK: Well, Justice Scalia, a safe
14 harbor doesn't necessarily mean that it isn't
15 appropriate for the fiduciary to consider other
16 alternatives. It would mean I believe if he chooses an
17 annuity that is a safe and secure way to provide the
18 benefit and is equally good with anything else, he would
19 be solidly protected from any challenge that a
20 participant might make.

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

23 If the employer finds the rock solid
24 insurance company under -- pardon me, the administrator
25 finds the rock solid insurance company under Justice

1 Scalia's hypothetical under (i), he also must consider
2 all other options under (ii)?

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

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

13 MS. CLARK: Yes, Justice Souter.

14 JUSTICE SOUTER: Okay.

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

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

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

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

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

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

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

14 CHIEF JUSTICE ROBERTS: I don't read in
15 accordance with the way you do. I read in accordance
16 with to mean provided by the plan.

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

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

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

9 CHIEF JUSTICE ROBERTS: Thank you
10 Ms. Clark.

11 Mr. Baker, you have three minutes remaining.

12 REBUTTAL ARGUMENT OF M. MILLER BAKER,
13 ON BEHALF OF PETITIONER

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

17 First, I would like to return the Court to
18 the factual context of this case. In this case, PACE
19 made not a two-step proposal, PACE proposed an outright
20 merger in which all assets and liabilities would be
21 transferred to the PACE union. That's in the record.
22 It's plaintiff's trial exhibit 25. And what's
23 significant about the merger proposal that PACE sent to
24 Crown is that this is PACE's merger proposal. It had
25 Crown signing the merger in Crown's planned sponsor

1 capacity not as a -- not as an administrator but as a
2 plan sponsor. That's what PACE proposed, recognizing
3 that the decision whether to merge the plan was a plan
4 sponsor function.

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

14 In terms of the plan sponsor function
15 changing because the company is going out of business,
16 that simply cannot be. A plan sponsor function depends
17 upon what the function is, and it doesn't matter whether
18 the business is going out of business or whether the
19 business is an ongoing concern. If anything, because
20 it's going out of business, it's important to protect
21 the -- the discretion of a plan sponsor.

22 In terms of the textual argument, it's
23 very important to note that nowhere -- that section 1341
24 which governs standard termination does not
25 cross-reference mergers and the section 1412 governing

1 mergers does not apply to terminations. In fact the
2 only place in the statute where the two words appear
3 together is in section 1058, in which the two procedures
4 are actually compared to each other.

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

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

17 MR. BAKER: Yes. If employees, under 1344
18 -- if employees have made individual contributions to
19 the plan, it's not merely paid by the employer --

20 JUSTICE SCALIA: Right.

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

25 JUSTICE SOUTER: What if the plan -- the

1 plan provides that in the event of a merger there will
2 in fact be a reversion to the employees, if they've paid
3 in too much or to -- or to the sponsor if the sponsor
4 has overfunded, and there will be no merger except on
5 those terms? Is that enforceable?

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

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

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

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.
17 The case is submitted.

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

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