

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: HARRIS TRUST AND SAVINGS BANK, ETC., ET AL.

Petitioners v.

SALOMON SMITH BARNEY INC., ET AL.

CASE NO: No. 99-579 *℄*-2

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 HARRIS TRUST AND SAVINGS BANK, :

4 ETC., ET AL., :

5 Petitioners :

6 v. : No. 99-579

7 SALOMON SMITH BARNEY INC., :

8 ET AL. :

9 - - - - -X

10 Washington, D.C.

11 Monday, April 17, 2000

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 11:07 a.m.

15 APPEARANCES:

16 ROBERT A. LONG, JR., ESQ., Washington, D.C.; on behalf of
17 the Petitioners.

18 BETH S. BRINKMANN, ESQ., Assistant to the Solicitor
19 General, Department of Justice, Washington, D.C.; on
20 behalf of the United States, as amicus curiae,
21 supporting the petitioners.

22 PETER C. HEIN, ESQ., New York, New York; on behalf of the
23 Respondents.

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

2 (11:07 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 99-579, the Harris Trust and Savings Bank
5 v. Salomon Smith Barney, Inc.

6 Mr. Long.

7 ORAL ARGUMENT OF ROBERT A. LONG, JR.

8 ON BEHALF OF THE PETITIONERS

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

11 The issue in this case is whether ERISA provides
12 a cause of action for appropriate equitable relief against
13 a party in interest who engages in a prohibited
14 transaction with an ERISA plan. The text of ERISA
15 provides that such actions are available for two reasons,
16 and they correspond to our two arguments today.

17 First, based on all the relevant statutory
18 language, ERISA's prohibited transaction provisions apply
19 to parties in interest as well as to fiduciaries and,
20 second, ERISA's carefully crafted civil enforcement
21 provisions in section 502 authorize actions for
22 restitution of plan assets transferred in a prohibited
23 transaction without regard to whether the party in
24 interest is itself deemed a violator of ERISA.

25 QUESTION: If the provision allows suit against

1 parties in interest, why wouldn't it also allow suits
2 against persons who are not parties in interest?

3 MR. LONG: Well, again, we make two arguments,
4 Justice --

5 QUESTION: Because I mean, the provision you're
6 relying on doesn't say, parties in interest. It neither
7 says fiduciaries nor parties in interest, and if you're
8 going to say that it doesn't matter who it says is the
9 defendant, then I guess we have to say the defendants
10 could be anybody.

11 MR. LONG: Well, our first argument is that
12 outside of section 502(a)(3) ERISA does say in section 406
13 and section 502(i) and section 4975 that parties in
14 interest are not to engage in prohibited transactions. If
15 they do, they're subject to punitive penalties and taxes,
16 so that distinguishes the party-in-interest transactions
17 from other sorts of nonfiduciary activity.

18 QUESTION: True, but those are not the sections
19 that create the cause of action. The section that creates
20 the cause of action doesn't say whom it's against.

21 MR. LONG: Well, and that --

22 QUESTION: You say that it doesn't matter
23 whether it says whom it's against. I don't know why it
24 couldn't be against anybody --

25 MR. LONG: That is our --

1 QUESTION: -- whenever it's equitable to get the
2 money out of somebody's hide.

3 MR. LONG: And that is our second argument, and
4 under our second argument, looking to the language of
5 502(a)(3), the plain language, it -- you're correct, it
6 does not matter when there is a violation of -- any
7 violation of any provision of title I, the plain language
8 of 502(a)(3) is that there shall be a civil cause of
9 action for appropriate, equitable relief to redress the
10 violation, and the --

11 QUESTION: Any other instance where, you know,
12 the United States Code, or even a State code, creates a
13 cause of action without saying whom it's against?

14 MR. LONG: Well, I think, I mean, Congress --
15 the Court has said several times that this is a very
16 carefully crafted provision and the Court will not tamper
17 with its language, and it's -- what Congress did here was
18 deliberate. It's -- if you look at other provisions, the
19 preceding subsection 502(a)(2), that's limited to
20 fiduciaries. If you look at the preceding section --

21 QUESTION: Where is that set forth in the
22 briefs, 502(a)(2)?

23 MR. LONG: 50 -- the statutory provisions, Mr.
24 Chief Justice, in the joint appendix, and 502(a)(2) is on
25 page 254 of the joint appendix.

1 QUESTION: Thank you.

2 MR. LONG: And that provision provides for an
3 action by the Secretary or by a participant beneficiary or
4 fiduciary for appropriate relief under section 409, and
5 section 409, in turn, is limited to fiduciary breaches,
6 and two other examples, if you look to section --

7 QUESTION: Excuse me. Make the point again.
8 You're saying --

9 MR. LONG: The point --

10 QUESTION: -- 502(a)(2) --

11 MR. LONG: The point very simply, Justice
12 Scalia, is that if Congress had meant to limit 502(a)(3)
13 to any fiduciary who violates any provision of ERISA or
14 any person who violates any provision of ERISA, it would
15 have said so. 502(a)(2) is an example of a limitation to
16 fiduciaries. Another good example is the Federal Employee
17 Retirement System statute that's cited in our reply brief,
18 in footnote 1 of our reply brief. That is a provision
19 that is modeled directly on 502(a)(3). Congress picked up
20 precisely the language of 502(a)(3) with an important
21 change.

22 QUESTION: Where is that cited in your reply
23 brief?

24 MR. LONG: It's -- Mr. Chief Justice, it's on
25 page 1, and it carries over onto page 2 in the first

1 footnote.

2 QUESTION: Thank you.

3 MR. LONG: And that provision says that a civil
4 action may be brought by the Secretary of Labor or any
5 participant beneficiary or fiduciary against any fiduciary
6 to enjoin any act or practice which violates any
7 provision, or to obtain any other appropriate equitable
8 relief, so when Congress wanted to limit the cause of
9 action to any fiduciary or any person, it knew how to do
10 it.

11 Another provision which is not cited in our
12 brief, and I apologize for this, section 501 of ERISA that
13 precedes 502, that section provides that any person who
14 wilfully violates any provision of the reporting and
15 disclosure requirements is liable, so Congress was very
16 deliberate about the language it used. When it wanted to
17 limit liability to any person or any fiduciary, it said
18 so.

19 QUESTION: Or any person who's violated, so you
20 really think that the best --

21 MR. LONG: Well --

22 QUESTION: -- reading of this provision is that
23 you can bring the action against anyone, even someone who
24 has not been in violation of the law.

25 MR. LONG: Yes, Your Honor. It says any act or

1 practice which violates a provision of ERISA, and then it
2 says, for appropriate equitable relief to redress the
3 violation, and that dovetails with the reference to any
4 act or practice, because appropriate equitable relief
5 certainly includes a constructive trust, and the nature of
6 a constructive trust is that it follows the assets. It
7 doesn't look to whether the person in possession of the
8 assets was a violator.

9 QUESTION: Well, but it doesn't say just
10 constructive -- I mean, it's an extraordinary,
11 extraordinary intent to attribute to Congress, that it
12 essentially left it up to the courts to decide who is
13 liable.

14 MR. LONG: Well, it is based --

15 QUESTION: Because I mean, a court could say,
16 somebody who knew of this violative transaction, who has
17 no other connection with the thing at all, just knew about
18 it and did not blow the whistle, presumably a court could
19 say that person should cough up some money.

20 MR. LONG: Well, first, this is in the language
21 of the statute. We're attributing this to Congress
22 because Congress expressly referred to appropriate
23 equitable relief.

24 QUESTION: That's right.

25 MR. LONG: And second, it is a self-limiting

1 type of relief. The constructive trust only applies in
2 limited situations where --

3 QUESTION: Well, a constructive trust is pretty
4 much of a gimmick, isn't it, that courts have made up to
5 do something that they wanted to do and couldn't find any
6 other reason for it?

7 (Laughter.)

8 MR. LONG: Well, I wouldn't call it a gimmick,
9 Mr. Chief Justice. It's expressly referred to by the
10 Senate in the report that created this appropriate
11 equitable relief provision. It's a well-established --

12 QUESTION: I thought you were seeking -- your
13 client was seeking restitution.

14 MR. LONG: Well, restitution pursuant to a
15 constructive trust is a classic form of equitable relief,
16 so that is -- that's how a constructive trust gets into
17 it.

18 QUESTION: Where you allege unjust enrichment --

19 MR. LONG: Yes.

20 QUESTION: -- on the basis that the respondent
21 was employed as the investment advisor for this plan --

22 MR. LONG: Yes.

23 QUESTION: -- and you allege knowingly sold
24 worthless property.

25 MR. LONG: Yes, precisely, and again, to switch

1 back to -- we have the narrower argument and the broader
2 argument. Certainly in the context of a prohibited
3 transaction what Congress expressly said, parties in
4 interest are not to engage in these transactions. If they
5 do, they are subject to punitive taxes and civil --

6 QUESTION: Well, it doesn't say that exactly,
7 does it? It says a fiduciary shall not cause the plan to
8 engage in a transaction if he knows --

9 MR. LONG: Yes.

10 QUESTION: -- and so forth.

11 MR. LONG: That is correct, Your Honor, but the
12 Court has always refused, in construing ERISA and other
13 statutes as well, to look simply to any single phrase, and
14 when you look not only to 406 but to other provisions such
15 as 3003, that's a provision of ERISA that says -- it
16 refers expressly to a part -- a violation of section 406
17 by a party in interest, so there's an express statement in
18 the text of the statute that a party in interest can
19 violate section 406.

20 QUESTION: Mr. --

21 QUESTION: It provides penalties by the
22 Secretary of Labor, doesn't it?

23 MR. LONG: Well, section 3003 simply is a
24 reporting provision coordinating between the Labor and
25 Treasury Departments. It says whenever the Secretary of

1 Labor has information that a party in interest is
2 violating section 406, it shall report the information to
3 the Secretary of the Treasury.

4 But Mr. Chief Justice, there are also section
5 502(i) and section 4975, which just as you say, impose on
6 parties in interest these heavy taxes or civil penalties,
7 which are really designed not only to keep the party in
8 interest from entering into the transaction but, if it
9 does, it's supposed to give the money back to the plan.

10 There's an incentive to correct the transaction.
11 That's a defined term that means, give the money back, so
12 certainly in the narrow context of a prohibited
13 transaction allowing a participant or a beneficiary or a
14 fiduciary to sue for precisely that, that is, to get back
15 the plan's --

16 QUESTION: But Mr. Long, why does that follow,
17 because in other schemes -- take title VII, for example,
18 of the Fair Labor Standards Act. When Congress means to
19 create both a private right of action and an executive
20 enforcement scheme it provides specifically for a private
21 right of action, not in the air, but against the employer
22 in the case of title VII and in the case of the Fair Labor
23 Standards Act.

24 So the normal pattern, when Congress wants to
25 create a private right of action against the person who

1 could be subject to executive action, Congress makes that
2 clear.

3 MR. LONG: Well, and our submission is that
4 Congress did make it clear here in these carefully crafted
5 provisions of section 502.

6 QUESTION: Well, the conspicuous absence is,
7 here it says, executive, you can go after the party in
8 interest.

9 MR. LONG: That's correct.

10 QUESTION: It doesn't say, private plaintiff,
11 you can go against the party in interest, and that is what
12 these other statutes that have dual enforcement schemes do
13 say.

14 MR. LONG: Well, but in this statute, I mean, in
15 each case the court's obligation, of course, is to follow
16 the plain language as Congress wrote it, unless there's
17 some strong reason to depart from it, and here the
18 language of 502(a)(3) and 502(a)(5), which is a parallel
19 provision that gives the Secretary of Labor authority to
20 bring an action for appropriate equitable relief for any
21 violation of ERISA, both of those provisions are broadly
22 written.

23 What Congress did here was, it provided some
24 specific -- they're not really remedies, but taxes and
25 civil penalties, and it also provided a general catch-all

1 provision. The Court addressed this in Varsity and said
2 the fact that Congress has addressed it narrowly does not
3 mean that we shouldn't give the full effect to its broad
4 language as well.

5 QUESTION: Mr. Long, with respect to the catch-
6 all I've been assuming, and tell me whether my
7 assumption's right, that but for ERISA and its preemptive
8 effect, you would be entitled to seek this kind of
9 equitable remedy in a State court under its equity
10 jurisdiction.

11 MR. LONG: That's correct.

12 QUESTION: And so the real reason -- I guess one
13 of your reasons for saying you've got to find it in the
14 catch-all here is that it would have been very odd for
15 Congress in effect to take away a remedy for the benefit
16 of the ERISA beneficiaries by preemption without allowing
17 it under the Federal jurisdiction created by the statute.

18 MR. LONG: Yes, that's absolutely correct, but
19 our argument is not simply that we don't think Congress in
20 any respect could have cut back on any rights that
21 participants or beneficiaries had pre-ERISA, and our
22 argument is again based on the language of the statute,
23 this carefully crafted language in section 502, and when
24 you see how the pieces dovetail together it's just clear
25 that Congress did not limit this to any person who

1 violates ERISA, or any fiduciary who violates ERISA.

2 QUESTION: But if you're right -- what -- the
3 thing -- I'm having trouble with the case, and maybe it's
4 only tangentially relevant, but if you're right, I thought
5 stockbrokers are always selling investments to people, and
6 companies hire stockbrokers and so do plans, and why
7 wouldn't you do this.

8 If you ran a plan, you'd buy a lot of
9 investments and then the ones that went up you'd keep, and
10 then as soon as some went down you'd ask the stockbroker
11 or the investment manager to give you your money back. I
12 mean, that would be a very good way of running a fund.
13 You couldn't lose.

14 MR. LONG: Well --

15 QUESTION: So there's something I'm missing in
16 how this statute works.

17 MR. LONG: Well, I think -- a few points. One
18 is, I mean, certainly there are the excise taxes and the
19 civil penalties which apply to all these prohibited
20 transactions, so to the --

21 QUESTION: My difficulty is probably something
22 very basic. I don't understand how the -- you read the
23 statute, and it seems to say you can't buy services from
24 somebody who sells you services.

25 MR. LONG: Well --

1 QUESTION: It seems to say you can't buy
2 computers from a computer servicing company.

3 MR. LONG: Right. Well --

4 QUESTION: It seems to say you can't buy
5 investments from a stockbroker, and yet I thought that's
6 their job.

7 MR. LONG: And --

8 QUESTION: And so there's something basic I'm
9 not understanding. What did --

10 MR. LONG: Well --

11 QUESTION: Maybe it's not relevant, in which
12 case just tell me that and don't answer.

13 MR. LONG: No, I mean, I think in part you're
14 quite right, and it shows how serious Congress was about
15 these prohibited transaction provisions. It really
16 wanted -- it really was a shift. It wanted to bar these
17 transactions categorically, but then subject to
18 exemptions, and I think a big part of the answer to the
19 difficulty you're having is section 408 does create
20 certain exemptions.

21 QUESTION: You're saying the real issue in this
22 case is whether Salomon Brothers is or is not a party in
23 interest.

24 MR. LONG: Well, I think if we get by the issue
25 that's before the Court today, that will be an issue.

1 Whether this is, in fact, entitled to an exemption is an
2 issue.

3 QUESTION: Well, isn't it -- didn't Salomon say
4 that if it loses here it does want to contest whether it's
5 a party in interest and whether this is a prohibited
6 transaction?

7 MR. LONG: Oh, yes. That's -- there are many --
8 and Ameritech can attest that it's delegated its fiduciary
9 responsibility here, so Ameritech's --

10 QUESTION: So we are supposed to assume for
11 purposes --

12 MR. LONG: Yes.

13 QUESTION: -- of the decision two things that
14 may be the case to be decided no matter what we said here.
15 That is, we're supposed to assume that we are dealing with
16 a party in interest, that Salomon is a party in interest,
17 and that this is a prohibited transaction.

18 MR. LONG: Yes, Your Honor.

19 QUESTION: Although neither may turn out to be
20 the case.

21 MR. LONG: That's correct. That's what the --

22 QUESTION: Although you say it doesn't matter
23 whether Salomon Brothers is a party in interest. You
24 say --

25 MR. LONG: Well --

1 QUESTION: -- you say that you --

2 MR. LONG: Well, it --

3 QUESTION: You would have a cause of action
4 under this provision whether or not.

5 MR. LONG: It -- no. It does matter and that's
6 because, as the Court said in Mertens, there's not
7 equitable relief at large. There has to be equitable
8 relief to address a violation of ERISA. If there's not a
9 prohibited transaction, there's no violation of ERISA, so
10 no equitable relief would be appropriate, so it would
11 matter.

12 Mr. Chief Justice, I'd like to reserve the
13 balance of my time.

14 QUESTION: Very well, Mr. Long.

15 Ms. Brinkmann, we'll hear from you.

16 ORAL ARGUMENT OF BETH S. BRINKMANN

17 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

18 SUPPORTING THE PETITIONERS

19 MS. BRINKMANN: Mr. Chief Justice, and may it
20 please the Court:

21 Congress enacted the prohibited transaction
22 provisions of ERISA to protect plan assets from
23 overreaching by parties and persons who deal with the
24 plan. Under section 502(a)(3) recovery of plan assets
25 from parties in interest who obtained assets through a

1 prohibited transaction is appropriate equitable relief.

2 The penalty and tax provisions of ERISA make
3 clear that the preference is for disgorgement of such
4 assets from a party in interest who receives such assets.
5 To enforce those provisions, the Secretary of Labor goes
6 to court under a virtually identical provision, 502(a)(5)
7 to enforce the restitution, and under (a)(6) to enforce
8 the penalties.

9 Justice Breyer, you had been inquiring about the
10 reach of the prohibited transactions. I think it might be
11 useful, to understand it, to take a look at some of the
12 exemptions. For example, at joint appendix page 246
13 there's a general exemption for contracting or making
14 reasonable arrangements with a party in interest for
15 things like office space, legal, accounting or other
16 services, so long as it's no more than a reasonable
17 compensation is paid.

18 QUESTION: Well, the part that was worrying me
19 about that is that it says, other services necessary for
20 the operation of the plan, and so I could imagine an
21 enormous litigation growing up where the plans are saying
22 in respect to a losing investment, well, the service
23 wasn't actually necessary, it was sort of a frill, and
24 therefore we get back the loss that we incurred.

25 And where you talk about the other enforcement

1 provisions, it's the Secretary doing it, so we have a
2 screen that would screen out the legal claims that are not
3 quite well-founded and just represent an effort to get
4 your money back.

5 MS. BRINKMANN: Well, Your Honor, as it stands,
6 however, the parties in interest and fiduciaries are all
7 bound by these rules and regulations because they can be
8 subject up to 100 percent penalty and tax on these
9 transactions, but the structure of the law makes clear
10 that the --

11 QUESTION: But that's up to an administrator to
12 bring that suit, and I'm willing to, and I think Justice
13 Breyer is willing to assume some good faith on the part of
14 the Secretary or on the part of the Department of the
15 Treasury in bringing a lawsuit. I'm not willing to assume
16 good faith on the part of a private litigant.

17 MS. BRINKMANN: Well, Your Honor, the Secretary
18 of Labor in good faith needs to be able to come to court
19 to also, to get restitution under the parallel provision
20 of (a) (5). That's crucial to the enforcement of the
21 Secretary of Labor, and the language is identical in
22 relevant respects, and the statute makes quite clear that
23 that is the priority of recouping the assets to the plan.

24 The purpose was not to generate additional money
25 for the public fisc. One provision that makes that very

1 clear is requiring the remarkable, quite frankly,
2 provision that the Secretary of Treasury, before assessing
3 the tax, must refer it to the Secretary of Labor to obtain
4 a correction, and that is when the Secretary tries
5 voluntary means to do that through negotiations and
6 letters of notice and all, and then can go into court to
7 sue for appropriate equitable relief to recoup those
8 assets for the plan. That's crucial to the Secretary's
9 enforcements, and that's under the parallel provision of
10 (a) (5).

11 QUESTION: Is it the Government's position, as
12 it is petitioner's, that it is not only an interested
13 person who can be sued under this provision but also
14 anybody else, so long as there's a violative -- a
15 violation?

16 MS. BRINKMANN: So long as they are a person
17 from whom appropriate equitable relief can be obtained to
18 redress a violation, and that is quite a limiting
19 principle, Your Honor. As Justice O'Connor pointed out,
20 it's based on unjust enrichment.

21 QUESTION: Well, who says it is? All it says is
22 appropriate, appropriate equitable relief. I guess a
23 court of equity can decide -- I mean, I'm inclined to
24 agree with you that the easiest reading of the whole
25 statute is to assume that suit would be allowed here, but

1 I'm -- I am -- I think maybe we should require something
2 more than, you know, well probably the easier reading is
3 this, in order to make me believe that Congress enacted a
4 provision that just left it up to the courts who can be
5 used. I think that's extraordinary.

6 MS. BRINKMANN: Your Honor, I think 25 years of
7 experience or more would actually show that it's not a
8 problem and not extraordinary. Before this court of
9 appeals entered the judgment in this case, at least six
10 other circuits had held that there was this type of cause
11 of action, and the Secretary has been bringing suits under
12 (a) (5) since the seventies, so --

13 QUESTION: Well, Ms. Brinkmann, isn't the -- I'm
14 searching for the same thing that Justices Breyer and
15 Scalia are searching for, and is the answer maybe simpler
16 than we tend to assume? Is the answer to this seemingly
17 ballooning liability the concept of the prohibited
18 transaction, so that if, you know, they -- the trustee
19 buys lousy stock, that's not a prohibited transaction?

20 MS. BRINKMANN: That's correct.

21 QUESTION: The stock goes down, nobody's going
22 to be able to sue. I mean, is that in effect the
23 limitation that should satisfy us for what we're worrying
24 about here?

25 MS. BRINKMANN: I do think the concerns Your

1 Honor -- were very well put by Your Honor that it may be
2 the scope of the prohibited transaction --

3 QUESTION: All right, but in respect to that
4 particularly, I guess that you can buy an investment from
5 a broker-dealer provided that a certain number of
6 conditions listed in the regulation are met.

7 MS. BRINKMANN: In addition --

8 QUESTION: And those are fairly technical, and
9 therefore we're asking the brokers and the dealers to
10 become ERISA experts, understand that regulation, and if
11 they get it wrong, it's not just that the Secretary might
12 sue them. It's that any fund would be negligent not to --
13 I mean, I'm not saying literally negligent, but I mean, a
14 fund would say, sure, let's sue and get our money back.

15 Now, it's that kind of highly technical thing in
16 the scope of the substantive duty that I guess produces
17 some concern about who can enforce it.

18 MS. BRINKMANN: Your Honor, I can understand
19 that. I think a couple of things. First of all, there
20 are the statutory exemptions. Second of all, there are
21 some exemptions enacted, promulgated by regulation for
22 certain classes of transactions, for instance, having to
23 do with security dealers. Third, there is a process for
24 applying for exemptions to the Secretary.

25 Another point would be, Your Honor, is I come

1 back to that these entities are still going to be liable
2 for 100 percent of that transaction and a penalty if it is
3 not recouped, and here the purpose is to have those assets
4 go back to the plan, and then that diminishes the penalty
5 or the taxes imposed. Each of those provisions, 4975,
6 502(i), 502(l), have specific provisions for the Secretary
7 to waive such penalties if the transaction is corrected,
8 and that is the thrust of this, and the --

9 QUESTION: Ms. Brinkmann, do you know what
10 exemption is urged by Salomon Brothers to cover them? Is
11 it this contracting for legal, accounting, or other
12 services necessary for the operation of the plan?

13 MS. BRINKMANN: I don't believe so, Your Honor,
14 because the reason that the -- the transaction in question
15 is the selling of these interests in the hotel industry,
16 the hotel --

17 QUESTION: Do you know what exemption is urged?

18 MS. BRINKMANN: No, Your Honor. That has not
19 been litigated, I'm sorry. That's being reserved for the
20 case on -- for the proceedings after this. This issue was
21 decided on summary judgment, Your Honor.

22 We think it's important, Your Honors, to
23 recognize that to not permit the Secretary to bring this
24 kind of suit under 502(a)(5) and other parties to bring it
25 under (a)(3) would significantly undermine the purposes of

1 the prohibited transactions.

2 QUESTION: Do the two go together? Maybe the
3 Secretary can but the private individual can't.

4 MS. BRINKMANN: That would be a difficult
5 matter, I think, as far as statutory construction would
6 go, Your Honor, but we would certainly urge that the Court
7 find some --

8 QUESTION: Because the very same language is
9 used in the provision allowing the Secretary to sue. It
10 also doesn't say whom, whom it may sue.

11 MS. BRINKMANN: That's correct, Your Honor.
12 That's in fact the structure of virtually all of the cause
13 of actions under 502(a), but we think that's because the
14 appropriate equitable relief goes to the main purpose of
15 ERISA and that is, again, maintaining the financial
16 soundness of the plans, recouping those assets to the
17 plan, not generating money for the Federal Treasury.

18 QUESTION: Yes, but you can't want to open it up
19 to recovery of every bad investment that the plan makes.

20 MS. BRINKMANN: But it's not, Your Honor. I
21 think that the long history --

22 QUESTION: That's what everybody is concerned
23 about.

24 MS. BRINKMANN: I think the long history of this
25 makes clear that it is not, Your Honor. Party at interest

1 is defined by the plan, and in order to have this type of
2 cause of action there has to be a prohibited transaction
3 violation, and that means it has to be one of the
4 specifically identified statutory transactions between a
5 fiduciary and a party in interest.

6 QUESTION: What, in your view, would make this a
7 prohibited transaction?

8 MS. BRINKMANN: Under subsections (a) and (d)
9 there was an exchange of plan assets. If you look at --
10 the prohibited transactions are set forth in the joint
11 appendix beginning on page 242. This would come under
12 407(a) (1) (A), where there was a sale or exchange or
13 leasing of property between a plan and a party in
14 interest, or (D), a transfer to or use or of the benefit
15 of a party in interest of any assets of the plan.

16 QUESTION: Thank you, Ms. Brinkmann.

17 MS. BRINKMANN: Thank you, Your Honor.

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

19 ORAL ARGUMENT OF PETER C. HEIN

20 ON BEHALF OF THE RESPONDENTS

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

23 I'd like to address the two statutory provisions
24 that are at issue. The first, 406, prohibits conduct. By
25 its terms, the prohibition is directed at the fiduciary.

1 Salomon was ruled here not to be a fiduciary. 406 says a
2 fiduciary shall not cause the plan to enter into
3 particular transactions.

4 The second statute at issue, 502(a)(3), does not
5 prohibit conduct. It does not, by its terms, impose --

6 QUESTION: May I just ask you about 406?

7 MR. HEIN: Sure.

8 QUESTION: I've got to kind of go a little slow.
9 It speaks in terms of what the fiduciary can do, but is
10 your adversary correct in saying that if the fiduciary did
11 this it was a prohibited transaction?

12 MR. HEIN: If it was --

13 QUESTION: If it is -- was the transaction at
14 issue in this suit prohibited by 406(1)(a) or 406(1)(b),
15 in your view?

16 MR. HEIN: That is an issue, Justice Stevens,
17 that has yet to be determined. I think Justice Ginsburg
18 is correct that in the current procedural posture of this
19 case, where we have the question of whether there's a
20 right of action at all, one assumes, arguendo, as the
21 court of appeals did --

22 QUESTION: That's what I mean. For purposes of
23 our decision -- you may win later on, obviously, but for
24 purposes of our decision there was a sale by a fiduciary
25 which violated 406(a)(1)(A) and 406(a)(1)(D)?

1 MR. HEIN: Again, Justice Stevens, with the
2 caveat that we will be disputing that in the future --

3 QUESTION: Correct. No, no, I understand.

4 MR. HEIN: Yes, for present purpose --

5 QUESTION: But we're assuming that they may be
6 able to prove whatever they have to prove on remand that
7 would establish those facts, and your argument is, that
8 doesn't matter, you still win?

9 MR. HEIN: That's correct.

10 QUESTION: But you're not -- you don't win
11 because it was not a prohibited transaction.

12 MR. HEIN: At this level we win because there is
13 no prohibition directed at the counterparty, whether it's
14 a party in interest or not.

15 QUESTION: I understand.

16 MR. HEIN: The statute is clear. It says a
17 fiduciary shall not. By its terms, it does not impose a
18 prohibition or create a duty on the part of the
19 counterparty, which could be a party in interest, or a
20 number of those subdivisions in section 406 do not even
21 refer to party in interest at all. If one looks at --

22 QUESTION: No, but the ones we're talking about
23 do refer to a party in interest. At least the
24 406(a)(1)(A), and (a)(1)(D), do depend on your being a
25 party in interest.

1 MR. HEIN: Yes, Justice Stevens, those
2 provisions do refer to the party in interest, but the
3 entire section, 406, prohibited transactions, is
4 structured to prohibit conduct by the fiduciary, so in
5 section 406(a) there's a list of prohibitions that says
6 the fiduciary shall not, and one of those does not even
7 refer to party in interest.

8 QUESTION: Yes, but what you're only saying,
9 it's a prohibited transaction because of misconduct by the
10 fiduciary. That's what your point is.

11 MR. HEIN: That's exactly correct, Justice
12 Stevens.

13 QUESTION: It nevertheless is a prohibited
14 transaction, and the argument by them is that a party in
15 interest who engages in such a transaction knowingly may
16 not keep the benefit of the transaction without being
17 unjustly enriched. That's what --

18 MR. HEIN: Well, at the district court level
19 petitioner's argument was strict liability. They've now
20 revised it to be a knew-or-should-have-known standard, and
21 our alternative argument, which we don't believe this
22 Court need reach, is that if one is going to recognize the
23 cause of action here, the standard at least has to be
24 equal to that in 405(a), because Congress -- in section
25 405(a) Congress expressed addressly the question of

1 whether or not participants in fiduciary breaches should
2 have liability.

3 QUESTION: Why isn't what you've just said the
4 answer to the problem that I earlier raised, or that we
5 were talking about?

6 That is to say, if we decide with you now on
7 this threshold issue, let's take a different case and get
8 out of the case the problem as to whether you're a party
9 in interest, imagine that a fiduciary or somebody else
10 gives about a billion dollars of the trust's assets to a
11 crooked employer, and the employer runs off with the
12 billion, and what the trustee would like to do is to get
13 the billion dollars back from the employer, who's in
14 Mexico, or wherever.

15 Now, you're saying that Congress didn't want
16 that to happen. Well, I mean, that's -- why not? I mean,
17 it's sort of like basic laws of any trust, et cetera, so
18 you take the assets of the trust, you run off with them.
19 What you've done is unlawful. You gave it to your cousin.
20 He was knowing. You get it back from the cousin. So why
21 would we interpret this to be any different?

22 MR. HEIN: What we're saying, Justice Breyer, is
23 that Congress made a deliberate choice, and this was a
24 legislative compromise, a legislative compromise where
25 there would be this administrative mechanism, civil

1 penalties or excise taxes as an administrative mechanism
2 that could be pursued to obtain a correction or
3 restitution from the --

4 QUESTION: Why would Congress not have wanted to
5 follow the more elementary sort of law of getting assets
6 back for trusts in this kind of situation, where we get
7 out of the case --

8 MR. HEIN: Well --

9 QUESTION: -- the party at interest issue --

10 MR. HEIN: I think --

11 QUESTION: -- so we focus on a clear case where
12 there really is a party in interest and they shouldn't
13 have done it and so forth?

14 MR. HEIN: Justice Breyer, let me address you in
15 two ways, because I think that the first question that
16 you're asking is, in effect, why would Congress have set
17 it up this way? It was a legislative compromise. The
18 House was saying no party-in-interest liability in civil
19 suit. Also, the House was not proposing to have excise
20 taxes or other administrative sanctions against a party in
21 interest. The Senate wanted both. The Senate bill
22 provided for civil liability of parties in interest both
23 for damages and for disgorgement. The Senate bill also
24 provided for an excise tax regime for administrative
25 enforcement, so the Senate wanted both.

1 There was a compromise, and it's very clear that
2 what happened is that the conference committee staff, and
3 it's in the appendix, recommended that the House position
4 be accepted on the issue of liability, that there should
5 not be civil liability of parties in interest. However,
6 Congress did continue with the excise tax provisions that
7 the Senate had proposed, providing an administrative
8 sanction.

9 And the Government argues here that, well, they
10 need the right to sue under (a) (5) as well, and that
11 private parties have to have the right to sue under (a) (3)
12 as well, but when one thinks about it, the logical
13 consequence here of the Government's position -- because
14 the Government says that the excise tax and civil penalty
15 mechanism is all set up to procure the restitution of the
16 assets to the plan. That's the whole purpose of it.

17 But if that is the case, then on the
18 Government's theory and on petitioner's theory, if you
19 allow an action under (a) (3) for a private party, or under
20 (a) (5) for the Secretary to compel the restitution
21 directly, as opposed to going through the administrative
22 penalty and excise tax regime that Congress provided for,
23 if you allow for the action directly, you basically render
24 superfluous this complex penalty and excise tax regime
25 that Congress arrived at as a part of a process of --

1 QUESTION: Mr. Hein, why, any more than many
2 schemes where Congress has said, like the Fair Labor
3 Standards Act, if the Secretary went out suing all the
4 employers who violated the wage and hours law there would
5 be no need for private suits, so I don't think that what
6 you just said really holds up, because there are many
7 times when Congress provides for executive action and
8 penalties and still allows a private action.

9 MR. HEIN: Yes, but --

10 QUESTION: They're not inconsistent.

11 MR. HEIN: Justice Ginsburg, you're correct that
12 they're not inconsistent. However, here, if one accepts
13 the Government's theory of what the purpose of excise tax
14 and the penalty scheme is, i.e. to force restitution to
15 the plan from the party in interest, in effect, if they
16 can sue directly to compel that restitution, then this
17 complex administrative scheme becomes essentially
18 superfluous.

19 QUESTION: The difference here is that it is not
20 just the allowance of suits by private individuals, but it
21 is also an allowance of a suit by the Secretary herself
22 for the restitution, which would make the other
23 administrative remedies that the Secretary has available
24 in order to coerce restitution superfluous.

25 MR. HEIN: That's correct, Justice Scalia.

1 QUESTION: So it's -- 502(a)(5), you say these
2 two travel together, and the Secretary no more than the
3 private individual can bring a suit against anyone other
4 than the fiduciary. Is that --

5 MR. HEIN: That's correct, with the caveat that
6 you do have the excise tax and the civil penalty scheme,
7 and --

8 QUESTION: But the Secretary's right is
9 identical to the private person's right, and that is, it's
10 only against the fiduciary under (a)(3) and (a)(5), is
11 that --

12 MR. HEIN: That's I think substantially correct.
13 There are minor differences in the language of the two
14 provisions and, of course, (a)(5) is not at issue here.

15 The second part of --

16 QUESTION: But I wanted to know what is your
17 position. I thought you would answer that with a firm,
18 that's right, the Secretary can't sue the party in
19 interest either, the only one against whom a suit would
20 lie under 501(a)(3) or (a)(5) is the fiduciary.

21 MR. HEIN: That is correct in this situation.
22 There are a number of situations where suits could be
23 brought against a nonfiduciary under (a)(3). For example,
24 if an employer, acting as a nonfiduciary, fired someone to
25 deprive them of benefits, 510 of ERISA says that that is

1 enforceable under 502. Potentially one could be suing
2 that employer under 502(a)(3).

3 Or one may have a situation where someone has
4 violated the terms of a plan by refusing to make a
5 reimbursement to the plan for medical expenses that they
6 were paid and then got reimbursed for in a lawsuit, and
7 that suit may be brought under (a)(3), so --

8 QUESTION: But I want -- my question really was,
9 you see the same limits on (a)(5) as (a)(3)? That is,
10 whatever a private individual could sue for under (a)(3),
11 the Secretary can, but the Secretary can't sue anyone who
12 would not be amenable to suit by a private party under
13 (a)(5), as distinguished from (a)(6)?

14 MR. HEIN: Yes. That is correct, and as I said,
15 Justice Ginsburg, I don't mean to quibble, but there are
16 minor differences in the language of the two and, for
17 example, a suit to enforce the terms of a plan is under
18 (a)(3) but not (a)(5), but for purposes of this case I
19 think Your Honor's analysis is correct, but the two are
20 substantially comparable.

21 QUESTION: Well, I asked if that was your
22 position that the Secretary has no broader authority than
23 the private suitor --

24 MR. HEIN: Under --

25 QUESTION: -- to bring this kind of suit against

1 a party in interest --

2 MR. HEIN: Under --

3 QUESTION: -- or anyone who was allegedly
4 unjustly enriched.

5 MR. HEIN: Under (a) (5), that is correct, but of
6 course under (a) (6) they can bring an action to collect a
7 civil penalty. They do have a right to pursue an
8 administrative penalty in appropriate cases involving
9 welfare plans, and you have the excise tax regime
10 established to cover pension plans, so there is a separate
11 administrative mechanism. The excise tax and the civil
12 penalty mechanism is separate and apart from suits under
13 (a) (5).

14 QUESTION: But you couldn't get back the billion
15 dollars that the employers made off with?

16 MR. HEIN: Well, you could --

17 QUESTION: How?

18 MR. HEIN: -- if you were successful through the
19 administrative mechanism of forcing the correction,
20 assuming that the person who has made off with the money
21 is a party in interest. That is the whole purpose of this
22 administrative mechanism, is to force the correction.
23 That's -- and this is -- whether or not it's eloquent,
24 this is what Congress agreed to. This was the deal. This
25 is what the House and Senate compromised on, and I'm not

1 here to defend the eloquence of the arrangement. I'm here
2 to defend that this was the arrangement they agreed upon.

3 QUESTION: If you prevail on your principal
4 argument here, are State causes of action preempted?

5 MR. HEIN: Our position is that if Salomon, for
6 example -- our position is, Salomon is not a party in
7 interest. Our position is there's no cause of action
8 against us under ERISA, and we would acknowledge, as we
9 did in the Seventh Circuit, that if one accepts that we
10 are not a party in interest, and that there's no ERISA
11 cause of action, there would be no preemption of State law
12 claims.

13 QUESTION: But if you are a party in interest,
14 but prevail on your argument here, then what?

15 MR. HEIN: Then I think, Your Honor, there may
16 be a closer question, because under Pilot Life there's a
17 recognition that Congress -- if Congress set up a remedial
18 scheme to deal with parties in interest and the remedial
19 scheme was to rely on administrative enforcement, the
20 civil penalty and the excise tax, there would be an
21 argument, I think, under Pilot Life that that is
22 exclusive. There may be an argument to the contrary as
23 well.

24 This Court in Mertens I think quite correctly
25 said that our job at hand is to deal with whether there's

1 a right of action or whether there's a particular stated
2 remedy, whatever the preemption consequences of that
3 decision may be is for the future, and that is how the
4 Court approached this problem in Mertens, saying
5 preemption issues are for the future. I think that was
6 the proper analysis.

7 Just going back to Justice Breyer's question in
8 terms of what would be the logic in saying that you can't
9 sue the party in interest in a civil action, I think this
10 case illustrates many of the pitfalls -- apart from
11 vindicating the congressional intent, many of the pitfalls
12 about private suits. For example, if one can sue under
13 (a) (3) you have the specter of the fiduciaries who
14 themselves violated the statute, who themselves caused the
15 plan to enter into the prohibited transaction, or who
16 knowingly participated in that conduct, being the ones who
17 themselves are plaintiffs.

18 Here, Ameritech Corp., for 3 years running
19 Ameritech Corp. represented to the United States
20 Government no prohibited transactions, no nonexempt
21 prohibited transactions. Here, NISA, the investment
22 manager -- and Salomon was not the investment manager.
23 NISA, the investment manager, had an agreement with
24 Ameritech that it would not knowingly participate in a
25 prohibited transaction.

1 QUESTION: But you have other doctrines that can
2 take care of it, like the clean hands doctrine, if this
3 was to be an equitable remedy, that would bar some people
4 in the situation you're describing.

5 MR. HEIN: That may be, but Mr. Chief Justice, I
6 would go back to the fact -- and this is central here,
7 that under 502(a)(3) there has to be -- and this Court
8 indicated this in Mertens, embraced it the next year in
9 Central Bank. There has to be a substantive right and
10 duty.

11 Equitable relief. Relief is a remedy, and as a
12 remedy does not itself invoke a substantive right and
13 duty, and I think this Court --

14 QUESTION: But Mr. Hein, why isn't it -- if this
15 is -- the Secretary of the Treasury can get these stiff
16 penalties against the party in interest specifically, why
17 isn't it clear from that that this transaction is
18 prohibited as to the party in interest, otherwise how
19 could the -- how could Congress say, Secretary, you can
20 hit them with 100 percent?

21 So there is -- there is a provision in this
22 complex law that says the party in interest is subject to
23 penalty for engaging in a prohibited transaction. That's
24 what -- what is it? -- 4975 is all about.

25 MR. HEIN: Yes. Justice Ginsburg, I think that

1 proves my point. In 4975 Congress was explicit that there
2 would be an excise tax imposed on a disqualified person
3 who participates in a prohibited transaction. Congress
4 knew how to use the words, participate in a prohibited
5 transaction.

6 QUESTION: But I'm just trying to clarify the
7 argument that you were making before, which seemed to say
8 that the person, the party in interest is out of it, and
9 that is certainly not the case, because 4975 puts the
10 party in interest right into the position of being a
11 violator of the 406 prohibited transaction.

12 MR. HEIN: No, Justice Ginsburg, because
13 502(a)(3) refers to violations of title I. 4975 is part
14 of title II. It's a separate tax section of ERISA, so it
15 is not --

16 QUESTION: But where does it pick up the word,
17 prohibited transaction from? Isn't that in title I?

18 MR. HEIN: 4975 is a self-contained excise tax
19 provision, and was established as an excise tax provision
20 quite deliberately. That was the --

21 QUESTION: Does it or does it not hit a party in
22 interest who engages in a prohibited transaction? Does
23 4975 enable the Secretary of Treasury to go after a party
24 in interest who has been on one side of a prohibited
25 transaction?

1 MR. HEIN: With regard to certain parties in
2 interest the answer is yes, but it does not create a duty
3 or a liability under ERISA enforceable in suit under
4 (a) (3) and (a) (5), both of which are confined to title I
5 provisions, and 4975 in creating the excise tax mechanism,
6 and yes, the Secretary of Treasury can go after a
7 disqualified person, which is most parties in interest, if
8 the other conditions of 4975 are met to collect the excise
9 tax.

10 QUESTION: And -- but in effect and in purpose,
11 to get that party in interest to disgorge and return to
12 make restitution, because if the party does, then they're
13 not subject to the 100 percent tax.

14 MR. HEIN: Yes, Justice Ginsburg. That is the
15 purpose of the 4975 excise tax administrative mechanism of
16 enforcement --

17 QUESTION: Mr. Hein --

18 MR. HEIN: -- relative to most parties in
19 interest who qualify as disqualified persons and to me
20 this proves our point, because, as is evident from the
21 legislative history, the Senate was proposing both the
22 administrative mechanism with excise taxes and expressly
23 imposing a civil duty on the party in interest.

24 The Senate bill --

25 QUESTION: The only simple point I wanted to

1 make is that you can't say the party in interest is not
2 liable for entering a prohibited transaction. They are
3 under that section. That was all.

4 MR. HEIN: Yes. That --

5 QUESTION: I think Justice Stevens had a
6 question.

7 QUESTION: May I ask you one question about --
8 it's a little bit of a variation of Justice Breyer's
9 question, but the other appropriate relief language in
10 502(3), or -- what about rescission?

11 The typical transaction that I recall being sort
12 of the thing that Congress clearly wanted to prohibit was
13 a fund, a pension fund using its assets to dissipate those
14 assets by buying properties from someone who might be
15 close to one of the trustees, or something like that, and
16 a new set of trustees come in, they find out about the
17 self-dealing, they get new trustees elected, they want to
18 set aside the transaction, get their money back. As I
19 understand your position, they could not do that. Even a
20 new fiduciary couldn't bring an action.

21 MR. HEIN: That's correct, because 502(a)(3)
22 does not create duties or liabilities.

23 QUESTION: Well, I understand, but I -- but you
24 would apply the same reasoning to the rescission suit as
25 you would to the unjust enrichment claim.

1 MR. HEIN: Yes. Our position would be there
2 must be a substantive basis for liability for
3 participation in the --

4 QUESTION: All right. Now, understanding -- I
5 just want to be -- what seems to me the bottom line of
6 this, of what you're saying is, if you're right and we --
7 it doesn't matter in terms of getting money back from the
8 party in interest, because the Secretary can get the money
9 back by suing under the provision that you and Justice
10 Ginsburg were talking about. It's called a penalty, but
11 it's 100 percent if he doesn't pay back in a year, so he
12 can get the money back. So that helps you. That doesn't
13 hurt you.

14 But where it matters is, number 1, if you want
15 to trace the assets further, you couldn't do it, and
16 number 2 is if you want rescission. So what this case
17 really turns on is, does the Secretary and does the
18 trustee have the power, under this statute, to get
19 rescission and to trace the assets beyond the party in
20 interest himself? Am I right?

21 MR. HEIN: I think that is certainly --

22 QUESTION: The heart of it.

23 MR. HEIN: Yes.

24 QUESTION: I'm not saying the little -- because
25 you're an expert. I know you know --

1 MR. HEIN: Yes.

2 QUESTION: -- all these extra things --

3 MR. HEIN: I think, Justice Breyer --

4 QUESTION: -- that I don't know, but I mean, is
5 that the heart of it?

6 MR. HEIN: -- that may well be getting to the
7 heart of it.

8 QUESTION: All right. If that's the heart of
9 it, then you have a statute which really doesn't talk
10 about defendants. It doesn't talk about them at all.
11 That's, you know, where they list it in 502(a)(3), it just
12 says it may be broad.

13 So it must be assuming you could bring this
14 action against somebody, and it just doesn't list
15 defendants, so when we have a -- traditional kind of
16 remedies like rescission and asset-tracing, and we have a
17 statute that doesn't mention defendants at all, why
18 wouldn't we assume that traditional principles will apply?

19 MR. HEIN: I think the answer --

20 QUESTION: And you're back to your --

21 MR. HEIN: The answer is, there has to be a
22 threshold duty and liability under ERISA to point to.
23 That's what this Court said in Mertens, reprised the next
24 year in Central Bank. There has to be this threshold duty
25 and liability. Where is the duty and liability under

1 title I, because it's only violations of title I that can
2 be enforced under (a)(3), so where is the threshold duty
3 and liability under title I?

4 QUESTION: Mr. Hein, about the tax. Is it
5 correct that the -- as Justice Breyer assumes, that the
6 100 percent tax goes to the fund? I thought it went to
7 the Government.

8 MR. HEIN: The tax --

9 QUESTION: How does it get back to the fund?

10 MR. HEIN: Justice Scalia, the tax is the
11 prospective sanction --

12 QUESTION: No, no, penalty. He means the
13 penalty. That's good --

14 QUESTION: Yes. A tax equal to 100 percent of
15 the amount involved.

16 MR. HEIN: Yes.

17 QUESTION: That's a tax. It goes to the
18 Government, right?

19 MR. HEIN: Justice Scalia --

20 QUESTION: Does the Government turn around and
21 give it to the defrauded --

22 MR. HEIN: Justice Scalia, the scheme that
23 Congress came up with was one where this tax or penalty
24 would be used as a lever by the Government to force
25 correction.

1 QUESTION: I know, but you have an intransigent
2 object, and he says, you know, I don't like this fund.
3 I'd rather give the money to the Government.

4 MR. HEIN: Then --

5 QUESTION: And so he coughs up the 100 percent.
6 What happens to it?

7 MR. HEIN: Then the Government --

8 QUESTION: The Government keeps it.

9 MR. HEIN: The Government would keep it, and
10 again --

11 QUESTION: Has that ever happened in all the
12 application of this penalty, that somebody has opted to
13 give -- in effect, to make restitution to the Government
14 rather than to the trustee?

15 MR. HEIN: I would have two answers, Justice
16 Ginsburg. The first is, I personally don't know. The
17 second is, I believe the Government -- the petitioners in
18 their brief and the Government in their brief take the
19 position that very, very little tax revenue is collected
20 under this provision, so I would infer that if little tax
21 revenue is collected, that it is very, very --

22 QUESTION: It's serving its purpose to get the
23 money back to the plan, rather than in the coffers of the
24 Treasury.

25 MR. HEIN: That would be my --

1 QUESTION: Yes, but still it's an important
2 point, isn't it? Because, in fact, I was wrong. In fact,
3 if this civil penalty is going to the Government, then if
4 you're right there's no legal way to get the money back to
5 the workers.

6 I mean, that's basically the upshot, isn't it,
7 that I was wrong in saying it's just tracing. It's
8 tracing, plus it's restitution, plus it's the fact that
9 you can't get the money they took and gave to their
10 cousins or whatever. You can't get it back to the
11 workers. You get it back to the Government.

12 So that's three problems, not two.

13 MR. HEIN: Justice Breyer, if it does not have
14 its desired force as the sanction to force the
15 correction -- the whole theory of the excise tax and civil
16 penalty was, it would force people to correct, and so the
17 plan would get the money back, and I might add that the
18 plan in a situation -- take this situation. The plan is
19 not without its remedies. If the fiduciary breaches,
20 there is full recourse against that fiduciary. If there's
21 a fiduciary that knowingly participates in the breach,
22 there is recourse against that knowing participant.

23 QUESTION: Yes, but --

24 QUESTION: If the fiduciary is solvent.

25 QUESTION: Yes.

1 MR. HEIN: There's provision in ERISA that a
2 plan can insist that it's fiduciaries have insurance. The
3 plan can itself buy insurance against fiduciary breach,
4 and again, there may be other -- under Federal statutory
5 law there may be remedies.

6 Conduct such as sending the money to some
7 cousin, that would be criminal. 18 U.S.C. 664, it would
8 be criminal, so the fiduciary would be engaged in a
9 criminal act and the fiduciary would be liable, and if the
10 plan had insisted that its fiduciaries have appropriate
11 insurance, there could be compensation out of that --

12 QUESTION: But in this very case, the whole
13 object of going after Salomon, I take it, is that they are
14 the party that ended up with the money and nobody else and
15 then the investment, when it was in the hands of the plan,
16 went down the tube. So the argument is, yeah, we could
17 sue the fiduciary, who made nothing out of this deal. The
18 only one who made anything out of it is Salomon.

19 MR. HEIN: Well, here there are two fiduciaries,
20 Ameritech Corp., which is the plan sponsor, and NISA,
21 which was its appointed investment advisor, and Ameritech
22 Corp. was actively involved in the transaction with NISA.
23 If there was a prohibited transaction that violated 406 --

24 QUESTION: Yes, but just the simple point is,
25 who ended up with the money and who had nothing as a

1 result of this? The allegation is that the -- Salomon was
2 paid before the market went bust on this kind of --

3 MR. HEIN: Yes, that is correct, Justice
4 Ginsburg, but when you look at the potential for
5 pernicious consequences with litigation, private
6 litigation with the benefit of hindsight, I think this
7 case illustrates such a situation. Ameritech Corp.,
8 representing the --

9 QUESTION: This is not getting into the -- I
10 don't mean to get into the merits of it. All I'm saying
11 is, as you looked -- if you were looking around for whom
12 to sue, you would pick the person who got the gain.

13 MR. HEIN: But you can --

14 QUESTION: And then of course you would have to
15 show that it was indeed a prohibited transaction, that you
16 are dealing with a party in interest.

17 MR. HEIN: But you could also sue the fiduciary.

18 And one other point I would like to stress in
19 this regard is, under the common law a trustee could
20 transact with the service provider, with the trust, and
21 there would not be any liability by the trustee. There
22 would not be liability by the service provider.

23 This whole regime in 406 is a pure statutory
24 creation.

25 QUESTION: It's not displacing any common law

1 liability if we don't find liability here.

2 MR. HEIN: That's correct. That --

3 QUESTION: Well, is that so, because if you
4 posit a common law situation in which there -- let's leave
5 ERISA out of it. Let's just assume you had a State law
6 case to keep it simple.

7 If you assume that there was, in fact, a State
8 law that prohibited a transaction, a State equity court
9 presumably would have authority to award the kind of
10 relief that in fact is being claimed here, and it would do
11 so, number 1, because there was a State law violation and
12 number 2, the relief that it was awarding would in fact be
13 for the benefit of those intended to be benefited by the
14 State law.

15 So what you're saying is, well, there's --
16 nothing is being displaced here simply because ERISA
17 preempts any State law -- I think you're assuming that
18 ERISA preempts any State law jurisdiction to protect the
19 benefited parties.

20 MR. HEIN: Well, Justice Souter, what I was
21 referring to is here the act of a trustee for a trust
22 dealing with -- transacting with the service provider to
23 that trust was not a breach by the trustee and was not a
24 breach by the service provider under the common law, and I
25 think this --

1 QUESTION: Well, nobody's claiming it is. I
2 mean, the whole point here is that there was -- the
3 allegation is that there is a breach of the statutory
4 duty, and equity ought to be in a position in effect to
5 limit the harm by ordering restitution or rescission.

6 MR. HEIN: And Justice Souter, again I would
7 point to this Court's opinion in Mertens, echoed the next
8 year in Central Bank, where this Court indicated that
9 there has to be a substantive duty and liability under
10 ERISA, that there was no provision of ERISA that
11 prohibited participation in the fiduciary breach --

12 QUESTION: Well, that gets us perhaps back to
13 Justice Ginsburg's question, but it -- I guess the bottom
14 line of your argument is the one that came out in your
15 earlier answer to Justice Breyer. There are certain
16 circumstances in which people on your theory in effect can
17 walk off with the money and no one can make a direct claim
18 in equity to keep the money from being dissipated. That's
19 what it boils down to.

20 You can't do it -- you can't do it under -- in
21 State law, because there's preemption. You can't do it
22 under ERISA because, in fact, the section does not
23 expressly mention parties in interest versus trustees, and
24 that's the bottom line, right?

25 MR. HEIN: Justice Souter, that's the

1 legislative compromise that Congress worked out both as to
2 the enforcement scheme as well as its decision on
3 preemption.

4 QUESTION: Thank you, Mr. Hein.

5 Mr. Long, you have 4 minutes remaining.

6 REBUTTAL ARGUMENT OF ROBERT A. LONG, JR.

7 ON BEHALF OF THE PETITIONERS

8 MR. LONG: Thank you, Mr. Chief Justice.

9 There was a question earlier about what
10 exemption Salomon is relying on here. It's prohibited
11 transaction exemption 75-1, and that actually I think
12 answers the question.

13 It is cited in respondent's brief -- let's
14 see -- yes, it's in the Federal Register, but basically it
15 shows how many of these transactions are clearly subject
16 to an exemption, and it's not going to cause great
17 difficulties.

18 Basically, under this exemption, if a security
19 is sold at the market price you're basically in a safe
20 harbor. You can show that the plan didn't get a bad deal,
21 and if the security goes down to a low level, as some have
22 been doing recently, that's -- the plan is out of luck.

23 This case is different. These purchase fee
24 agreements are sort of special things. It's very
25 difficult to value them, and that's exactly the situation

1 where Congress wanted the parties in interest to be very
2 careful.

3 And there are problems the other way. That
4 is -- well, the other thing I'll say is, we've been living
5 with this system now for years, and it has not caused
6 great problems. That is, the parties in interest are not
7 only subject to the taxes and the civil penalties, but
8 everywhere in the country, except now recently in the
9 Seventh Circuit they have been subject to these suits by
10 the Secretary and by fiduciaries, and by parties,
11 participants and beneficiaries, and it has not caused
12 great problems, so we've been essentially running an
13 experiment with this, and it's been -- it's not been a
14 problem.

15 There are problems the other way. That is, if
16 you were to hold 502(a)(3) and 502(a)(5) don't apply
17 according to their terms -- you were exploring the issue
18 about the billion dollars of assets that walks off.
19 Another situation that comes up is if assets are paid by
20 mistake to a participant or a beneficiary, and this can --
21 is supposed to be a one-time lump sum, and suppose the
22 computer gets misprogrammed, and instead of paying out
23 \$100,000 once it starts paying out \$100,000 every month.
24 That is, an annuity.

25 Well, if 502(a)(3) isn't available, there's no

1 way that the plan can get that money back if the
2 participant says, well, sorry, your mistake. I've cashed
3 the checks. Of course, the fiduciary, if it's solvent,
4 would have to make up the difference, but if it's not, the
5 other plan participants and beneficiaries --

6 QUESTION: Would it be reasonable to say, this
7 is equitable relief, so in an instance where the only
8 violation of this reg you cited that makes it a prohibited
9 transaction is a technical matter like failing to keep
10 adequate records --

11 MR. LONG: Oh, yes.

12 QUESTION: -- then it is not equitable to get
13 back the money?

14 MR. LONG: That's very important, and I mean,
15 equity itself is self-limiting. It has to be something
16 that the party in interest knew or should have known, and
17 if it's -- might very well be unreasonable for parties in
18 interest to inquire whether the fiduciary is keeping all
19 the records, I would think it would be, and in that case
20 this sort of equitable relief would not be available. It
21 would not be appropriate.

22 QUESTION: How would (a)(3) cover the situation
23 if we find for you, of payments that were made excessive?
24 Is that an act or practice which violates any provision of
25 the subchapter?

1 MR. LONG: That is a prohibited transaction,
2 Justice Scalia. When a service provider provides services
3 to the plan and is paid excessive compensation, which
4 means truly excessive, not just something over the market
5 rate, that is a prohibited transaction, and it could be
6 subject to equitable restitution.

7 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Long.

8 The case is submitted.

9 (Whereupon, at 12:07 p.m., the case in the
10 above-entitled matter was submitted.)