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ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: CURTIS GUIDRY, Petitioner V. SHEET METAL
WORKERS NATIONAL PENSION FUND, ET AL.

CASE NO: 88-1105

PLACE: Washington, D.C.

DATE: November 29, 1989

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1 inherent equitable common law powers to create exceptions
2 to a congressional enactment.

3 The Tenth Circuit also recognized on the
4 alternative argument of Mr. Guidry that a constructive
5 trust was a garnishment within the Consumer Credit
6 Protection Act, which meant that he would be entitled to
7 75 percent as an exemption. However, the Tenth Circuit
8 held Mr. Guidry failed to preserve that right.

9 Today I will make three major arguments. The
10 first is that Congress created the anti-alienation clause
11 in ERISA with its own three narrow exceptions, none of
12 which are applicable here. Under separation of powers, it
13 is Congress, not the courts, that should make any changes
14 to ERISA.

15 Second, the creation of a special exemption for
16 the union based on federal labor law would effectively gut
17 the anti-alienation clause because any other judgment
18 creditor of a federal cause of action would also say that
19 its judgment was claimed to be impaired by the
20 anti-alienation clause.

21 Lastly, in the event that you find that the
22 constructive trust was properly imposed, Mr. Guidry is
23 entitled to at least 75 percent of his pension under the
24 Consumer Credit Protection Act because a constructive
25 trust clearly fits within the definition of garnishment.

1 QUESTION: Why do you say at least?

2 MR. SILVERMAN: Why do I say at least?

3 QUESTION: Yes.

4 MR. SILVERMAN: I should say 75 percent. There
5 is no quantification. It's exactly that figure.

6 QUESTION: I thought I'd missed something.

7 MR. SILVERMAN: No.

8 As to the --

9 QUESTION: You didn't mean entitled to at least.
10 You meant at least entitled to.

11 MR. SILVERMAN: I imagine. What I'm actually
12 arguing is that he's entitled under the ERISA to 100
13 percent, so I'm arguing in the alternative that if you
14 don't accept the first argument of 100, then he deserves
15 75 percent.

16 As to the first argument, after almost a decade
17 of study, Congress passed ERISA. This Court has
18 repeatedly called ERISA a comprehensive and reticulated
19 statute. In fact, it has six subtitles. It has over 150
20 subsections, not -- not counting other intricate sections.

21 Among one of the interrelated provisions is the
22 anti-alienation clause in Section 1056(d), which is clear-
23 cut and straightforward.

24 The concept of anti-alienation is not new to
25 federal law in ERISA. Strong anti-alienation causes have

1 predated ERISA, such as in the Civil Service Retirement
2 Act, the Social Security Act, the Railroad Retirement Act
3 and others. Congress has shown that it can create its own
4 exceptions to ERISA by initially in the first act
5 legislating two narrow exceptions and then in 1984
6 legislating a third, none of which are claimed to be
7 applicable here.

8 In enacting an anti-alienation clause, Congress
9 chose between competing social principles. In enacting
10 the clause, Congress decided that no matter how deserving
11 a judgment creditor, how egregious an action of the
12 judgment debtor was, that pension funds could not be
13 touched. This is not unusual either, because both state
14 and federal legislatures historically have provided
15 exemption laws. Take the Homestead exemption which has
16 been historical. Take the Tools of the Trade exemption.

17 A pension is a tool of the trade of a retired
18 person.

19 QUESTION: Mr. Silverman, can federal taxes be
20 taken out of his share of the pension fund?

21 MR. SILVERMAN: Under a special federal statute
22 in the IRS, yes.

23 QUESTION: The Tenth Circuit assumed that the
24 embezzlement of funds was from the pension fund itself.

25 MR. SILVERMAN: Correct.

1 QUESTION: The Solicitor General says that isn't
2 so, that the embezzlement was only of the union's funds.

3 MR. SILVERMAN: That has been a misinterpreted
4 fact, and we say the same thing. In fact, the
5 action -- there were competing claims in the district
6 court, and, in fact, Mr. Guidry was only fiduciary of one
7 of the three plans, the Local 9 plan. He wasn't a
8 fiduciary of the two national pension plans.

9 As to that one plan, there was a state court
10 action. He settled it before this instant case, and there
11 was a release given to him, and the pension resumed. So
12 he basically upheld his anti-alienation rights in that
13 state court action. The union then started a separate
14 action, brought in the pension funds. They came in in
15 different ways below.

16 QUESTION: Did -- did the Respondent raise this
17 argument based on the LMRDA provision in the lower courts?

18 MR. SILVERMAN: Not exactly. It was raised by
19 the district judge. He -- when he went and said in pari
20 materia to create a narrow exception, he did cite the
21 LMRDA and said I think it's in pari materia. And as we've
22 argued, in pari materia means statutes of the same subject
23 matter.

24 If you have to get to judicial construction, we
25 would argue that the same subject matter of

1 anti-alienation is anti-alienation, and those are found in
2 the Civil Service and in other federal acts which have
3 mandated exemptions.

4 So we think LMRDA talks about a substantive
5 right perhaps, whereas there's another substantive right
6 in ERISA; namely, an exemption. But you can still get
7 your judgment; you just can't collect it against the
8 pensions.

9 QUESTION: Are the narrow exceptions to the
10 anti-alienation provision to which you refer, are they
11 contained in the -- in ERISA?

12 MR. SILVERMAN: Correct.

13 QUESTION: So we don't have to look outside of
14 ERISA to decide what -- what is a provision that prohibits
15 assignment or alienation?

16 MR. SILVERMAN: Correct. The first two were
17 that you could voluntarily and revocably assign 10 percent
18 of your benefits. The second and the initial legislation
19 was if you borrowed from the plan you could secure it with
20 your benefits, and then in '84 Congress allowed the QDRO,
21 Qualified Domestic Relations Order, to further the purpose
22 of the Act so that divorced people, divorced spouses and
23 children, were also included within the rights of ERISA.

24 So they have -- Congress has clearly thought
25 about it, and this Court has cautioned in other cases of

1 ERISA against assuming that Congress unintentionally
2 omitted something. That was in Massachusetts Mutual v.
3 Russell. There was a caution of this Court to assume that
4 there is an additional remedy within this very complex
5 interrelated statute.

6 I today represent -- as I had mentioned earlier,
7 we view the pension as an exemption similar to the tool of
8 the trade because, in essence, this is how the pensioner
9 supports his family, and his family is often innocent of
10 any wrongdoing in any event. And, of course, the whole
11 point of a pension fund is not only to provide for the
12 pensioner but for the dependents.

13 Now I do represent Mr. Guidry who did seek to
14 enforce his rights. In asserting his rights, I do not
15 seek nor do I need to rehabilitate Mr. Guidry. He was
16 convicted. He served a maximumly imposed not only fine
17 but criminal sentence, and today at 67 he is simply
18 seeking a legal right that anyone else who is a judgment
19 debtor has under the laws, whether under the Homestead
20 exemption, the Tools of the Trade or the Medical.

21 QUESTION: May I just ask at that point, do you
22 agree that he violated the LMRDA statute? I'm interested
23 in the argument that Respondent makes that the Tenth
24 Circuit didn't really rely on the relief under that
25 statute.

1 MR. SILVERMAN: Well, not under 501(b) because
2 they never brought a 501(b) argument. So it's for the
3 first time that they say wouldn't we fit within 501(b).

4 501(b) says the court should give other
5 appropriate relief. It is a broad general statement, and
6 it cannot in a view of construction overcome a specific
7 enactment. They got their relief. They got their
8 judgment. They're frustrated like every other judgment
9 creditor that they can't --

10 QUESTION: I understand your statutory.

11 Supposing before ERISA was enacted you had a
12 trust of this kind administered by in this way, and a
13 fiduciary of the trust violated the LMRDA statute and
14 there were spendthrift provisions in the trust which would
15 normally be enforceable as a matter of state law.

16 Would you not agree that in enforcing the
17 federal statute that the federal judge could order relief
18 that overcome the state law obstacle?

19 MR. SILVERMAN: Respectfully, I do not. That's
20 the very issue in United Mine Workers v. Tony Boyle where
21 there -- it was pre-ERISA, and the argument was made that
22 Mr. Boyle's conduct was reprehensible, and the court said
23 it's reprehensible. The next argument was made, well,
24 there's this federal labor policy in the LMRDA. There,
25 the court ruled that LMRDA cannot overcome a lawyer-drawn

1 spendthrift clause.

2 My argument is if it can't overcome a
3 lawyer-drawn spendthrift clause, how can it overcome a
4 congressionally drawn spendthrift clause. I'm calling it
5 a spendthrift clause --

6 QUESTION: Right. No, that's right. It would
7 seem to follow that if it could not overcome -- I'm -- I
8 just wasn't aware of that case. Is that a -- a circuit
9 court case?

10 MR. SILVERMAN: Yes, it's a circuit court case.

11 QUESTION: That's it. I mean, if that case is
12 right, your argument would follow.

13 MR. SILVERMAN: Well, it's a D.C. Circuit Court
14 case. I can't appeal to --

15 QUESTION: What circuit is it from?

16 MR. SILVERMAN: Well, it's -- we think it is a
17 proper ruling, and even if it isn't, the end result
18 of -- let's say you gave --

19 QUESTION: You said it's D.C. Circuit, isn't it?

20 MR. SILVERMAN: Yes.

21 QUESTION: There. There. There you are.

22 (Laughter.)

23 MR. SILVERMAN: Let's assume --

24 QUESTION: It may be right anyway.

25 MR. SILVERMAN: -- and again, it's our argument

1 you can't come to this Court for the first time and say I
2 wish I would have brought a 501(b) case, but let's give
3 them that and say they bring it.

4 If they got a judgment, it would still be
5 for -- it's a derivative suit that comes through a union
6 member, and again we claim they can't bring it because the
7 union always -- already brought a suit. But let's say
8 they bring it. They get a judgment. It's the same
9 judgment they have here for defalcation against an
10 employer, not against a union, and so you have the same
11 bar. It all comes out the same. It's a judgment though
12 derivative in that instance.

13 And I -- I do want to emphasize that the facts
14 of this case seem to -- to -- to do get a bit twisted;
15 that here we have a man who did steal from his employer
16 union but not the pension funds. His criminal conviction
17 was for theft from the union. This civil judgment is for
18 theft from the union.

19 QUESTION: (Inaudible.)

20 MR. SILVERMAN: They did say otherwise. I
21 raised it in my Petition for Rehearing, but it was -- it
22 was not granted. But it wouldn't change the case at all
23 if they decided differently because they followed St. Paul
24 Fire & Marine v. Cox, which is an employer embezzlement
25 case which says federal courts have broad equitable powers

1 and we want to use it here.

2 In fact, the majority of these cases that are in
3 dispute are all employer embezzlement cases. So that
4 seems to be the context in which it arises. So it is an
5 error, and we feel we have to point it out, but it
6 wouldn't change the result from the rationale of the Tenth
7 Circuit.

8 The district court in imposing the constructive
9 trust and creating what it called a narrow exception had
10 to rule in an inconsistent manner. We have two clauses
11 that came into play in the district court: the
12 nonforfeiture clause and the anti-alienation clause.

13 The district court followed those restrictive
14 cases, saying let Congress decide on the nonforfeiture
15 issue. The pensions were seeking to deprive him of a
16 pension. Mr. Guidry was seeking to get his pension, and
17 the unions were saying give him his pension but give it to
18 me.

19 So we had three competing interests in the
20 district court, and the district court said I'm going to
21 follow those restrictive cases; I'm not going to create an
22 exception on the non-anti-alienation clause. But then the
23 court inconsistently to perhaps fill a social purpose that
24 it saw or to do what it saw as good, it created the so-
25 called narrow exception; and as we all know, good lawyers

1 will use this narrow exception to create a greater crack
2 in the door than we have now.

3 QUESTION: (Inaudible.)

4 MR. SILVERMAN: There is. There's a Treasury
5 regulation that we believe is legislative in nature, that
6 versus interpretive --

7 QUESTION: Is it -- is it right on this?

8 MR. SILVERMAN: Right on.

9 QUESTION: So -- and did you call that to the
10 attention of --

11 MR. SILVERMAN: Yes, we did. And the reg is
12 Section 1.401(a)-13(b)(1), and it clearly says that a
13 trust is not --

14 QUESTION: Where are you reading from in your
15 brief?

16 MR. SILVERMAN: On page 3 of my brief, I put it
17 as statutes and regulations involved.

18 Of course, that comes up under the Treasury
19 context because one of the points in the anti-alienation
20 clause is it appears not only in the Treasury law and
21 amendment to the IRS, but it also appears under the labor
22 portion.

23 QUESTION: Regulations really just say what the
24 statute does in about twice as many words, don't they?

25 MR. SILVERMAN: You might say it, but at least

1 for our purposes it -- it goes ahead and says there that
2 in the parens "either at law or in equity cannot be
3 alienated or subject to attachment, garnishment, levy and
4 execution."

5 And I know we could all make distinctions
6 between those remedies, but it's like some cases say we're
7 doing a constructive garnishment. Others say we're doing
8 a constructive trust. Others say we're doing equity. It
9 comes out that he doesn't have his pension, and -- and he
10 deserves his pension.

11 QUESTION: Yes, but that -- that provision
12 merely is something that has to be included in order to
13 meet the tax -- requirements, and it merely requires that
14 that clause be in the instrument. It doesn't really say
15 anything about the enforceability of the clause in a
16 situation like this, does it?

17 MR. SILVERMAN: Well, it's -- it appears that
18 the Treasury regulation was given power by the -- Congress
19 to interpret it not only for the Labor Department but for
20 the Treasury Department. There's a separate provision in
21 ERISA.

22 What you're reading, as you'll see in page 3,
23 there is almost an identical provision in the IRS Code and
24 in the ERISA, and what we have here is that it was just
25 decided that labor would not give duplicitous regulations.

1 As to --

2 QUESTION: Yes, but I still think it's -- maybe
3 I misread it. But all it says is that -- that the trust
4 instrument must contain such a provision.

5 MR. SILVERMAN: Well, and everyone wants their
6 trust to be protected under federal law from taxes or from
7 initial --

8 QUESTION: Right, but I'm not sure that adds
9 anything to the fact that -- I mean, it doesn't really
10 answer the question. When a trust instrument has that
11 kind of a provision, is it -- is it subject to having --
12 to an exception such as was imposed in this case?

13 MR. SILVERMAN: Absolutely not. Congress -- the
14 Treasury reg says we won't qualify a plan taxwise --

15 QUESTION: Right.

16 MR. SILVERMAN: -- unless you have the
17 provision. So if they didn't have it, they'd lose their
18 tax, and you can say so what.

19 QUESTION: Right.

20 MR. SILVERMAN: But ERISA itself says something
21 in addition. It says plan benefits shall not be
22 alienated, which is about the same thing, I agree, but
23 it --

24 QUESTION: Well, I agree with you. I understand
25 your statutory argument. But all I'm saying is I'm not

1 sure the regulation really adds any force to your
2 statutory argument. That's really all I'm saying.

3 MR. SILVERMAN: All right.

4 I wanted to point out as an argument under --

5 QUESTION: You might say that it does indicate
6 at least the Treasury's interpretation of what alienation
7 would consist of.

8 MR. SILVERMAN: Garnishment.

9 QUESTION: That it would consist of garnishment
10 and either at law -- and assignment either at law or in
11 equity and so forth.

12 MR. SILVERMAN: Well, the reason I didn't argue
13 it strongly is because my principal argument is plain
14 meaning, and I didn't need to go and say, but look at the
15 Treasury regulation. That supports my argument. Perhaps
16 I should have, but since I felt it was plain and we didn't
17 really get that argument back at us -- the argument we got
18 back at us is we should have brought another lawsuit
19 against you under the LMRDA. We're not going to support
20 the Tenth Circuit and you should lose.

21 I would point out the argument that under the
22 saving clause, if you take it that the saving clause
23 somehow impairs an LMRDA judgment under Section 501(b)
24 that they never got, if you argue that, then you'd argue
25 that a judgment under the Securities Exchange Act of '34,

1 the Fair Labor Standards Act would also be impaired by the
2 anti-alienation clause. You'd end up with any federal
3 cause of action judgment creditor going right through the
4 anti-alienation clause, which could not have been the
5 intention.

6 As to the last argument, in the event the Court
7 does uphold the constructive trust we have made the
8 alternative argument that under the Consumer Credit
9 Protection Act he is entitled to a 75 percent exemption.
10 The union employer in its brief concedes as it does on the
11 constructive trust theory that it's not seeking to uphold
12 the rationale of the Tenth Circuit. That rationale was
13 that Mr. Guidry failed to claim the exemption by filing an
14 objection form.

15 As the case was set up, they garnished before
16 they got the constructive trust. The pensions denied they
17 owed any sums because, as I had told you earlier, they
18 wanted it forfeited, so they wrote zero. Under Colorado
19 law, you have to calculate 75 percent, the garnishee.
20 Well, the garnishee, because it's mathematically
21 impossible, did not calculate 75 percent of zero;
22 therefore, Mr. Guidry did not have -- it wasn't right for
23 him to object.

24 The union's basic argument is, well, we need to
25 go back to when -- when it all happened in the beginning,

1 and whatever they argue they can't get around the fact
2 that their cause of action in the district court invoked
3 the equity arm of the court. It said it was an equitable
4 remedy. In their brief, they admit a constructive trust
5 is an equitable remedy.

6 And earnings under CCPA include pensions, and
7 you have to give a 75 percent exemption at the very least
8 in terms of use of the CCPA.

9 A decision against Mr. Guidry, though satisfying
10 for the particular moment and this particular union, would
11 not be a step forward for the vast number of American
12 workers who participate in pension funds whether they're
13 union members or not. ERISA's anti-alienation clause
14 protects not only workers but its often innocent spouses
15 and dependents.

16 Anti-alienation is a clear federal policy
17 expressed not only in ERISA but in other acts. Congress
18 created the anti-alienation clause. If it is to be
19 changed, Congress, not the Court, should weigh, deliberate
20 and decide.

21 Thank you. I would like to reserve my balance.

22 QUESTION: Thank you, Mr. Silverman.

23 Mr. Goldhammer, we'll hear from you.

24 ORAL ARGUMENT OF JOSEPH M. GOLDHAMMER

25 ON BEHALF OF THE RESPONDENT

1 MR. GOLDHAMMER: Mr. Chief Justice, and may it
2 please the Court:

3 What we have before us here is a case that the
4 LMRDA was exactly designed to cover. And the LMRDA has
5 been in this case from the very beginning. The LMRDA was
6 the basis of the district court's opinion in this case.
7 Opposing counsel quarrels with the district court's use of
8 the term in pari materia, but what we have here is a case
9 where you have to --

10 QUESTION: And -- and you sought recovery under
11 LMRDA?

12 MR. GOLDHAMMER: That's correct, Your Honor. We
13 brought complaint in the District Court for the District
14 of Colorado in which we alleged jurisdiction under Section
15 501(b) of the LMRDA. The first claim for relief -- by the
16 way, that's on page 29 of the Joint Appendix. Paragraph
17 number 1 of the complaint alleges jurisdiction under
18 Section 501(b). So I don't know where opposing counsel
19 gets the idea that this is not a 501(b) case or that we
20 never alleged 501(b).

21 Then, the first claim for relief in the
22 complaint alleges breach of fiduciary duties under Section
23 501 of ERISA -- of the LMRDA, the Labor Management
24 Reporting and Disclosure Act, which is 29 United States
25 Code, Section 501.

1 The LMRDA has been in this case from day one.
2 It was the basis of the district court's opinion. It's
3 been here all along. It is the essence of this case, and
4 the fact that the Tenth Circuit did not -- I take chief
5 responsibility for not being persuasiveness -- persuasive
6 enough in my arguments to -- to the Tenth Circuit for them
7 to rely upon it.

8 QUESTION: (Inaudible) your judgment, you defend
9 their opinion?

10 MR. GOLDHAMMER: Well, I defend the -- the
11 result of their opinion.

12 There are two major aspects of it that I have
13 problems with. One of the problems --

14 QUESTION: Well, I don't -- you're not here
15 defending that rationale?

16 MR. GOLDHAMMER: I'm not really defending that
17 rationale --

18 QUESTION: You're -- you're presenting another
19 ground for affirmance?

20 MR. GOLDHAMMER: I am -- I am presenting
21 another, more persuasive ground for affirmance in -- in
22 some respects at least, in many respects at least.

23 This -- this is the type of case that was
24 exactly designed to be covered under the LMRDA.

25 QUESTION: May I just ask you a question --

1 MR. GOLDHAMMER: Yes.

2 QUESTION: -- about the LMRDA?

3 There were three trusts involved, and is it
4 correct that he was a fiduciary of only one of the three?

5 MR. GOLDHAMMER: There were actually -- yes,
6 that's true. Three pension trusts and a welfare trust
7 that he stole some money from. He was pensioned -- he was
8 a trustee out of -- of two out of the four.

9 QUESTION: And as to the two of which he was not
10 a trustee, did you assert an LMRDA claim as to those?

11 MR. GOLDHAMMER: Well, the LMRDA claim doesn't
12 assert stealing in particular from pension funds. It
13 asserts --

14 QUESTION: It asserts a violation of his --

15 MR. GOLDHAMMER: -- stealing from unions.

16 QUESTION: -- a violation of his duties as a
17 union officer, not as a fiduciary of the trust?

18 MR. GOLDHAMMER: Exactly. Exactly. Section 501
19 specifically creates fiduciary duties for union officers.

20 QUESTION: I see.

21 MR. GOLDHAMMER: And they --

22 QUESTION: But you are not claiming, you are not
23 in this argument at least, you are not relying on a claim
24 that a breach of his fiduciary obligations as a trustee of
25 two of the four funds is what justifies this relief?

1 MR. GOLDHAMMER: Well, we're in a sense relying
2 on both; but primarily, primarily, we are relying on the
3 fact that he breached his fiduciary duties to the union.

4 QUESTION: And is it correct that insofar as you
5 sought relief from the fund of which he was a trustee,
6 whether it's one or two, that that claim has been
7 satisfied?

8 MR. GOLDHAMMER: No, that claim has -- oh -- ah,
9 what happened here was that --

10 QUESTION: It would be a lot easier for me if I
11 got a yes or no.

12 MR. GOLDHAMMER: Yeah, and --

13 QUESTION: They seem -- I got the impression
14 from your --

15 MR. GOLDHAMMER: Insofar as -- let me make
16 sure --

17 QUESTION: I got the impression from your
18 opponent that it had been satisfied, and I want to be sure
19 I'm not misled.

20 MR. GOLDHAMMER: Okay. Insofar as that trust
21 fund claims against him, he has been released by that
22 trust fund for any liability to that trust fund.

23 QUESTION: All right, thank you.

24 MR. GOLDHAMMER: And the facts of this case are
25 very complicated, and the reason why they're complicated

1 is because Mr. Guidry made them complicated. The way in
2 which he stole money was very complicated.

3 QUESTION: No, I understand, but the two things
4 that are -- do characterize the claims that, at least the
5 main portion of what remain, is, one, he was an officer of
6 the union, and the union was his employer. I mean, it's
7 both that he breached duties that he owed under the
8 statute, and, secondly, his status as an employee of the
9 union makes it fit within some of these other cases.

10 MR. GOLDHAMMER: The fact that he was an
11 employee of the union makes no difference in this case.
12 The LMRDA --

13 QUESTION: You don't rely on that?

14 MR. GOLDHAMMER: -- imposes --

15 QUESTION: Well, I understand it doesn't for the
16 LMRDA, but I'm talking about some of the other circuit
17 court decisions have relied -- have said in effect that
18 embezzlement from an employer, when that happens, when you
19 embezzle from an employer, you can get relief against the
20 ERISA program --

21 MR. GOLDHAMMER: Right, and we don't rely on
22 those cases either.

23 QUESTION: You don't rely on those. Okay.

24 MR. GOLDHAMMER: We don't rely on the Cox case.

25 QUESTION: Okay.

1 MR. GOLDHAMMER: Okay. But we rely --

2 QUESTION: Which I think is a conflict
3 (inaudible) to resolve.

4 MR. GOLDHAMMER: -- on the fact that he was a
5 union officer. Mr. Guidry -- and in fact in many unions
6 the rank and filers are the officers of the union. They
7 aren't employed by the union in any sense, and that has
8 nothing to do with this case. The fact that Mr. Guidry
9 was employed by the union really has no major part in this
10 case. The fact that he was a union officer is the key --
11 key thing.

12 QUESTION: Well, the funds we're talking about
13 now were funds taken from the union, not the pension
14 funds?

15 MR. GOLDHAMMER: Well --

16 QUESTION: For purposes of our discussion.

17 MR. GOLDHAMMER: For purposes of our discussion,
18 yes. And I'm giving you a yes answer to that question
19 just so you don't misunderstand me.

20 But it's also important for you to understand
21 that Mr. Guidry's schemes of embezzlement involved these
22 pension funds very directly and it -- to a very great
23 degree, and this is the way he did it. Money passed
24 between the pension funds and the union. The reason for
25 that is that the union performed clerical services for the

1 pension funds. And Mr. Guidry would steal them while they
2 were in transit, and then nobody could figure out who he
3 stole the money from.

4 And I'm terribly sorry that I have to give you
5 evasive or ambiguous answers about where the money was
6 stolen from.

7 What?

8 QUESTION: You said yes?

9 (Laughter.)

10 MR. GOLDHAMMER: Yeah. But -- but -- but what's
11 going on here is that Mr. Guidry has created these
12 complexities, and now he relies on these complexities in
13 order to thwart the union's attempt to get his money back.

14 QUESTION: Has the union gotten any of its money
15 back?

16 MR. GOLDHAMMER: No, not one penny. Even though
17 Mr. Guidry has indicated that he's very sorry.

18 QUESTION: How much is -- is missing?

19 MR. GOLDHAMMER: Well, we -- our judgment is for
20 \$275,000. The -- the audit that was done in 1981 by
21 Arthur Young and Company showed that practically a million
22 dollars, \$998,000 and change, was missing from the union
23 at that time. And what was happening is that during the
24 period at least we know from early 1970 up through
25 September of 1981, Mr. Guidry was stealing from the union

1 on a month-by-month-by-month basis, every single month.

2 In the criminal case it was documented in the
3 prosecutor's statement that between April of '77 and the
4 end of September of '81, Mr. Guidry stole on 75 separate
5 occasions. This is the kind of --

6 So, what we have here is a -- an LMRDA case, and
7 it's also a state law case. You'll notice in the
8 complaint that we also went ahead and claimed four claims
9 for relief under state law. So you might ask the
10 question, what was the Congress doing in enacting the
11 LMRDA if the types of -- of conduct which they were trying
12 to proscribe in the LMRDA was also covered under state
13 law. In Colorado we have laws against embezzlement and
14 theft and conversion, and all of those are pled in the
15 complaint.

16 So what was going on here is that union
17 officers, union officers in the 1950s and before that, the
18 Jimmy Hoffas, the Dave Becks, the people who are the most
19 ignominious names in labor history, were stealing from
20 unions and not paying the money back. And they found a
21 way under state law to avoid paying money back. And what
22 the LMRDA is all about is you got to pay it back. It's a
23 restitutionary statute.

24 What it adds to state law is you got to pay it
25 back. It's a federal law, first of all. It gives the

1 federal powers and the federal authorities --

2 QUESTION: It adds federal enforcement to state
3 law. That's a -- that's a -- that's a big thing right
4 there.

5 MR. GOLDHAMMER: Yes. It adds federal --

6 QUESTION: Even without anything else, it would
7 be worth it.

8 MR. GOLDHAMMER: That's right, but it went
9 further. It incorporated state fiduciary laws in Section
10 501(a), which means fiduciary means equitable remedies.

11 What you're talking about here is broadening the
12 scope of remedies. Senator Goldwater --

13 QUESTION: Excuse me. So does -- so does
14 employer-employee relationship involve fiduciary, but you
15 don't want to rely on those cases, and I think why you
16 don't is because it's clear that there's no less reason
17 for applying those cases and that relationship than there
18 is to apply the union -- the union officer relationship.

19 MR. GOLDHAMMER: Well, there -- there are some
20 employer-employee relations are fiduciary relations, and
21 some may not be. But -- but I --

22 QUESTION: What I'm worried about, I mean my
23 point is I'm worried about making a big hole --

24 MR. GOLDHAMMER: Absolutely.

25 QUESTION: -- in the provision that

1 these -- these trust funds are or these retirement funds
2 are not obtainable by judgment creditors.

3 MR. GOLDHAMMER: Absolutely. And we're worried
4 about the same thing --

5 QUESTION: No, you're not.

6 MR. GOLDHAMMER: -- and that's why we're not
7 relying on those cases.

8 (Laughter.)

9 QUESTION: You're worried that I'm worried.
10 That's what you're worried about.

11 (Laughter.)

12 MR. GOLDHAMMER: Exactly. I somehow had a
13 feeling you'd be worried. And -- and so what we did here
14 was we say, you know, this is an LMRDA case, first of all;
15 and second of all, you then -- you've got Section 514(d)
16 of ERISA which says that although ERISA
17 preempts -- actually in 514(a) it says ERISA preempts
18 state law. It says that ERISA shall not impair,
19 supersede, modify, amend, do anything to -- it doesn't say
20 that.

21 But the overall picture here is not to affect
22 other federal laws, and that's the important point about
23 federalizing the fiduciary relationship in the LMRDA. So
24 what does the other side do with 514(d)? They don't
25 mention it.

1 And -- but there is also the argument that if
2 you apply 514(d) in this case, then you open up the, you
3 know, the floodgates again because then every other
4 federal judgment will be taken in by this, and anybody who
5 has a federal judgment can overcome the anti-alienation
6 provision.

7 Wrong. Not every federal judgment is based upon
8 a statute like the LMRDA. The LMRDA is remedies,
9 remedies, remedies. That's what it's all about.

10 QUESTION: Well, but certainly you can say the
11 same thing about the Securities Act, about some other
12 acts. They have elaborate provisions for remedy.

13 MR. GOLDHAMMER: Well, to the extent that they
14 were exclusively created for the purpose, I must confess,
15 Your Honor, that my malpractice insurance doesn't cover
16 securities law and, therefore, I know -- what I know about
17 it you can put in a thimble. But to the extent that those
18 --

19 QUESTION: Well, but -- just a minute. Wait
20 until I finish my question.

21 MR. GOLDHAMMER: Absolutely.

22 QUESTION: You're defending against an argument
23 that if we accept your position here, judgments under
24 other federal laws would be equally subject over a
25 garnishment. So surely you're obligated to make some sort

1 of a response.

2 MR. GOLDHAMMER: And my response is that -- that
3 the Court should approach those subjects on a case-by-case
4 basis.

5 I accept your characterization of the securities
6 laws because I know nothing about it, but I accept your
7 characterization. And to the extent that the securities
8 laws were created as a remedial supplement to already
9 existing state laws to cover ground that was already
10 covered by state law, then I would argue that there would
11 be an exception for the securities laws as well.

12 Have I answered your question?

13 QUESTION: It seems to me you've agreed there
14 should be an exception for any federal statute that
15 authorizes the judge to grant X, Y and Z relief and any
16 other appropriate relief.

17 MR. GOLDHAMMER: Well, I --

18 QUESTION: Maybe RICO, the Sherman Act, all
19 sorts of statutes.

20 MR. GOLDHAMMER: I'm not going that far. I'm
21 saying that what we have here is a case where there would
22 be no reason for the statute's existence at all.

23 There -- what -- what the other side seems to be
24 saying is that this case is not --

25 QUESTION: Well, no, that isn't true here

1 because the statute, LMRDA would at the very least
2 authorize a judgment against your adversary. Maybe you
3 couldn't collect it from this particular pool of assets,
4 but you're not totally frustrating the purposes of
5 Landrum-Griffin.

6 MR. GOLDHAMMER: Well, in this case there's no
7 reason for the existence of Title 5 except for the fact
8 that it broadens the remedial scope of the statute. You
9 know, we could have gotten the same judgment under four
10 counts in the complaint stating state law.

11 QUESTION: Well, to say that it doesn't apply to
12 your case is not to say it has no purpose. I mean that's
13 a rather high standard to impose upon any law. To say
14 that it's a law that does nothing unless it helps your
15 case --

16 MR. GOLDHAMMER: Yeah.

17 QUESTION: It helps a lot of other cases.

18 MR. GOLDHAMMER: No. My case is the typical
19 Landrum-Griffin case. If -- if Landrum-Griffin was
20 designed to cover anything, it was designed to cover
21 stealing from labor unions, Title 5.

22 QUESTION: But the typical case is the one in
23 which the only assets remaining are the assets that are --
24 that are under -- under this kind of an -- of an ERISA --
25 entitlement.

1 MR. GOLDHAMMER: The typical case is where --

2 QUESTION: That's the typical case?

3 MR. GOLDHAMMER: -- where the defalcating union
4 officer finds convenient ways to make his assets.

5 QUESTION: Well, but this is -- this is only one
6 convenient way.

7 MR. GOLDHAMMER: Yes, and it's the one we're
8 dealing with here.

9 QUESTION: That's right.

10 MR. GOLDHAMMER: It's probably the most
11 convenient way.

12 QUESTION: Well, I don't know.

13 QUESTION: What about a embezzlement statute
14 that says anytime you embezzle money from the federal
15 government you're in deep trouble and you can -- and
16 there's provision for recovering the money? Do you think
17 the United States could attach these funds?

18 MR. GOLDHAMMER: Judging by the United States'
19 position with regard to taxes and the FDIC --

20 QUESTION: I know, but their position with
21 respect to this getting to the pension fund is a little
22 different.

23 MR. GOLDHAMMER: So you're saying that if the
24 federal government --

25 QUESTION: I'm asking you.

1 MR. GOLDHAMMER: I know, but I want to make sure
2 I understand your question.

3 QUESTION: All right.

4 MR. GOLDHAMMER: And you're saying that if the
5 federal government had an embezzlement statute,
6 federal embezzlement --

7 QUESTION: Which it does. Suppose it -- suppose
8 it brings -- it wants to recover the money, and so it
9 brings a suit to recover the money.

10 MR. GOLDHAMMER: Uh-hum>

11 QUESTION: Can it -- can they attach his
12 benefits from a pension fund?

13 MR. GOLDHAMMER: I -- I --

14 QUESTION: After all, the only reason for the
15 embezzlement statute is to -- is to prevent embezzling
16 from the government.

17 MR. GOLDHAMMER: Yeah, and -- and --

18 QUESTION: I don't know why -- if they can't
19 recover, I don't know why the union should be able to.

20 MR. GOLDHAMMER: Right, and -- and what -- what
21 I would say to that is if you apply Section 514(b)
22 strictly, then you -- the answer to that question would be
23 yes, they could recover out of a -- out of a spendthrift
24 clause.

25 These spendthrift clauses have a -- a -- a --

1 not a totally clear history. The Boyle case, which is the
2 D.C. Circuit case that we were talking about earlier, was
3 a case in which -- it was a pre-ERISA case but it was
4 about a 1977 case covering events in the early '70s, and
5 it was a case basically in which there was a voluntary
6 spendthrift trust provision in one of these pension plans
7 that was voluntarily agreed to by the union that was now
8 trying to get around it, and the court basically said --
9 the district court in that case basically said we're not
10 going to let you get around it because you could have
11 had -- you could have changed it. At any time you could
12 have changed it.

13 At that time, the major debate was whether
14 spendthrift clauses covered any torts whatsoever. And so
15 when Congress enacted ERISA, they brought the spendthrift
16 trust provision into the federal arena, and at that time
17 they also enacted Section 514(d), and they said that we're
18 not going to impair any other federal law with this whole
19 statute; and, therefore, if the example that you give
20 is -- is consistent with the -- the literal language of
21 ERISA and with the statements made and with the entire
22 purpose of ERISA.

23 I -- I would like to cover a couple of other
24 points. One is that -- well, I -- I probably ought to go
25 on and talk about the CCPA argument. Here again, we are

1 faced with harmonizing the CCPA and the LMRDA. The remedy
2 that the Court chose in this case was the constructive
3 trust, which is an equitable remedy. There's no doubt
4 it's an equitable remedy.

5 And what we were arguing under the CCPA is that
6 the equitable remedy they chose authorizes the Court to go
7 back and look at what -- what the source of the earnings
8 was and to determine whether those earnings were obtained
9 by fraud.

10 In this case, Mr. Guidry's earnings were
11 obtained by fraud. He engaged in a long series of
12 fraudulent activities against the union which were not
13 disclosed. The contributions were made into the pension
14 plans by him when they shouldn't have been made by him
15 into the pension plans because he was committing fraud at
16 the same time. He was in effect getting double
17 compensation for -- for his work at the union, and they
18 were fraudulently obtained.

19 What the opponent's position is on the CCPA is
20 that the rather typical language in that -- in that
21 statute which prohibits any legal or equitable procedure
22 to get at the earnings of a person precludes the Court
23 from engaging in that kind of analysis.

24 In other words, I guess what they're saying is
25 that if you commit an outright theft of money and put it

1 into a pension plan that there's no way to get at that
2 money anymore. And that is a radical position for the
3 Court to take. It is not

4 QUESTION: (Inaudible) maybe Congress was
5 radical.

6 MR. GOLDHAMMER: Congress wasn't radical. The
7 language of this statute is similar to the language
8 of -- of most anti-alienation provisions in various
9 statutes, and the common law is that with respect to
10 homesteads, with respect to anti-alienations provisions in
11 life insurance policies, that we're just not going to
12 allow these little refuges for fraud that -- that the --
13 that the common law -- that these equitable remedies were
14 designed for the very purpose of voiding exemptions where
15 that's necessary to avoid unjust enrichment.

16 QUESTION: What is the rule if -- if -- if
17 a -- there's a beneficiary of a -- of a spendthrift trust
18 works for a bank but he likes to steal so he steals from
19 the bank, too, and the bank wants to get the money back.
20 Can they get at -- break the spendthrift provision?

21 MR. GOLDHAMMER: Well, the -- the rule in the
22 Cox case is that they can. That's -- that's the case in
23 which there is a split --

24 QUESTION: They can or they cannot?

25 MR. GOLDHAMMER: There's a split in the circuits

1 on that.

2 QUESTION: Well, so you mean some people say the
3 bank could break the spendthrift trust?

4 MR. GOLDHAMMER: That's correct.

5 QUESTION: And others say not? What's the
6 majority rule?

7 MR. GOLDHAMMER: The Tenth in this case and the
8 Eleventh say yes, you can. I believe the Second and the
9 Sixth say no, you can't.

10 QUESTION: Apart from -- just going back to
11 Justice White's question, at common law, before we had all
12 these statutes, what would the answer have been in his
13 hypothetical?

14 MR. GOLDHAMMER: At common law I think the
15 majority view was that tort creditors were not covered by
16 spendthrift trust provision and therefore you could get at
17 the money. That was the argument in the Boyle case. That
18 was the argument that was being made in the Boyle case,
19 and the Court said, well, we're not going to get to that
20 question as to whether tort causes of action are covered
21 under spendthrift trust provisions because you were the
22 ones who made the spendthrift trust provision yourself,
23 and you didn't provide any exception yourself.

24 So that the law clearly was that if the
25 spendthrift provision was defined by the agreement of the

1 parties to -- to the pension agreement --

2 QUESTION: Of course, the Boyle case is not a
3 typical common law case. That's also got -- had the
4 Landrum-Griffin involved and so forth.

5 I was really asking, let's say, in the
6 Nineteenth Century the old cases on just breaking
7 spendthrift trusts. You say the general rule was that if
8 it would -- that a tort judgment creditor could invade the
9 trust notwithstanding the spendthrift?

10 MR. GOLDHAMMER: Right. And Scott, On Trusts,
11 describes the reason for that. He says that a person who
12 makes a contract with another person has the opportunity
13 to investigate that person's credit rating and determine
14 whether he's going to have to get at pensions in order to
15 satisfy his judgment, whereas a person who's standing in
16 front of a vehicle who happens to get knocked down by a
17 careless driver doesn't have that choice and that,
18 therefore, he makes the strong argument that tort
19 creditors at common law should never have been precluded
20 from getting at pension --

21 QUESTION: Well, in making the -- Professor
22 Scott making the argument that they should never have been
23 subjected, is that the same as saying that was the law at
24 common law?

25 MR. GOLDHAMMER: It's my understanding --

1 QUESTION: That's what I see.

2 MR. GOLDHAMMER: -- that that is the common law.

3 QUESTION: Okay, thank you.

4 MR. GOLDHAMMER: There is -- there is no
5 question that if Mr. Guidry is able to do what he has set
6 out to do in this case that it would cause great impairment
7 to Landrum-Griffin, and it would cause great impairment
8 also to ERISA itself.

9 There is a case which the government was a party
10 in called Crawford v. La Boucherie Bernard which
11 establishes yet another exception to the anti-alienation
12 provision, one where the money is actually stolen from the
13 trust fund itself.

14 There are several other exceptions that have
15 been recognized by the Court for the anti-alienation
16 provision. We cite them in the brief. One is -- is
17 bankruptcy and the question of whether the pension fund
18 becomes a part of the bankrupt's estate.

19 There is a case called FDIC v. Calhoun and
20 another one in the Tenth Circuit called FDIC v. Farha in
21 which the FDIC has contended that when they come in and
22 take over a bank that they can invade the pension funds of
23 a -- let's say the president of the bank who may owe money
24 to the bank in order to satisfy that debt.

25 And there have been a number of exceptions at

1 common law. So the only place to look for these
2 exceptions is not ERISA itself. In fact, before ERISA was
3 amended to expressly authorize exceptions for domestic
4 relations orders, the courts had already implied an
5 exception.

6 And what -- what Mr. Guidry did here in large
7 measure was to steal money from a union, to steal some
8 money from the pension fund and from a welfare fund -- and
9 by the way, the fact that he stole money from those two
10 entities is in the record by virtue of the fact that Mr.
11 Guidry himself entered into the record a settlement
12 agreement that he made, and in that settlement agreement
13 he confessed to a judgment of \$205,000 against the two
14 local funds, the -- the welfare fund and the pension fund,
15 but he was left off the hook for only \$50,000.

16 But we are concerned about the fact that this
17 kind of activity is documented in labor history, the very
18 kind of activity that Mr. Guidry engaged in. In the
19 legislative history of Landrum-Griffin, Dave Beck is
20 reputed to have stolen \$400,000, and now they are unable
21 to get the money back because he is engaged in some kind
22 of subterfuge to hide the money away or do whatever.

23 And it will also damage ERISA itself, because
24 ERISA is really designed to protect pensioners, and if Mr.
25 Guidry can get away from stealing money in transit or from

1 stealing money directly from these trust funds and making
2 it so complicated that we can't tell who he stole it from,
3 then that will occur again, and we are concerned about
4 that in particular.

5 We are also concerned about the -- the
6 individuals who are the victims of these thefts --

7 QUESTION: (Inaudible) your opposition's
8 position is that it wouldn't make any difference whether
9 he stole it from the pension fund or anyplace else.

10 MR. GOLDHAMMER: Well, I'm not -- I'm not
11 completely clear about that. The Crawford case -- at
12 least the amicus in this case, the Solicitor General, has
13 taken the position, has admitted in taking the position
14 that he supports the rule in the Crawford case, and -- and
15 so I'm not completely clear that what my opponent's
16 position would be on it.

17 I think it is important to point out that unions
18 are vulnerable to these kinds of thefts because while the
19 members of Local 9 of the Sheet Metal Workers Union are --
20 are tremendous sheet metal workers, they are of necessity
21 people who work with their hands and are unsophisticated
22 about financial affairs and that they will lose if ERISA
23 is not upheld, the purposes of ERISA is not upheld to --
24 to promote fiduciary and honest conduct.

25 And also if the LMRDA is -- if this loophole is

1 created in the LMRDA to allow union officers to put money
2 away in pension funds while they know that that money
3 isn't really owed to them because they've been taking what
4 --

5 QUESTION: Mr. Goldhammer, I take it as a
6 creditor you can get money as it's paid out up to 75
7 percent of it; is that right?

8 MR. GOLDHAMMER: That we can get?

9 QUESTION: When the benefits are actually paid
10 out on a monthly basis and in the hands of Mr. Guidry?

11 MR. GOLDHAMMER: Mr. Guidry's position is that
12 we can get nothing, Your Honor.

13 QUESTION: Even when they're paid out?

14 MR. GOLDHAMMER: Ah, when they are in his hands?

15 QUESTION: Yes, uh-huh.

16 MR. GOLDHAMMER: Ah. If they are in a bank
17 account, then I think the law is that we can get them. If
18 they are in a brown bag or if they are in Switzerland
19 where we can't get access to them or if they are under Mr.
20 Guidry's mattress and we don't know about it, then we
21 can't get anything, and Mr. Guidry has shown himself quite
22 competent --

23 QUESTION: (Inaudible) with -- with wherever the
24 \$900,000 he took is.

25 MR. GOLDHAMMER: Well, the 900,000 --

1 QUESTION: You don't know where that is, I
2 guess?

3 MR. GOLDHAMMER: Well, the \$900,000 it's pretty
4 well documented was spent at gambling casinos.

5 QUESTION: Oh, really?

6 MR. GOLDHAMMER: Establishments.

7 QUESTION: Just frittered it away.

8 QUESTION: He didn't win.

9 MR. GOLDHAMMER: Yes. He lost big. Actually,
10 the union lost big. It was the union that was gambling,
11 not Mr. Guidry. It's only the problem is that the union
12 didn't know it.

13 QUESTION: I take it procedures to execute your
14 judgment, I suppose you can haul him in, haul him into
15 court and ask him -- find out what his assets are and
16 things like that?

17 MR. GOLDHAMMER: Sure.

18 QUESTION: And can you get an order to pay over
19 to -- as soon as he gets the money, can you get an order
20 to have him to pay it over?

21 MR. GOLDHAMMER: There's a case in this Court
22 called Hisquerdo v. Hisquerdo which said you can't do
23 that. In that case there was an anti-alienation provision
24 --

25 QUESTION: That's just a runaround in the

1 anti-alienation --

2 MR. GOLDHAMMER: Yes. That makes the
3 anti-alienation provision meaningless. If you want to
4 rule that we can do that, we'd be more than happy to
5 accept that ruling, but you'd have to overrule Hisquierdo
6 v. Hisquierdo.

7 QUESTION: Thank you, Mr. Silverman.

8 Mr. Goldhammer.

9 MR. GOLDHAMMER: I'm Mr. Goldhammer.

10 QUESTION: I'm sorry. Thank you, Mr.
11 Goldhammer.

12 Mr. Silverman.

13 REBUTTAL ARGUMENT OF ELDON E. SILVERMAN

14 ON BEHALF OF THE PETITIONER

15 MR. SILVERMAN: Thank you, Mr. Chief Justice.

16 QUESTION: Do you have rebuttal?

17 MR. SILVERMAN: I do. I would like to say,
18 however, that I don't have any formal rebuttal but would
19 be glad to answer any questions.

20 QUESTION: What if the money had been stolen
21 from the pension fund itself?

22 MR. SILVERMAN: That would have been a different
23 case. That's the Crawford case.

24 QUESTION: Yes.

25 MR. SILVERMAN: And it would be -- I think there

1 I can make an argument on either side. You're asking, and
2 I am happy to make it, to, of course, discuss a case that
3 isn't here because their judgment, as he admitted.

4 But the argument that I would make as strict
5 construction as to the policy is that the only way the
6 Crawford court allowed an offset -- it called it an offset
7 between the plan and the individual as opposed to a third
8 party, the employer. Even though the employer has related
9 interests under Section 1103, plan benefits can't inure to
10 the benefit of the employer.

11 But as to the Crawford instance, the Congress
12 allowed the courts to create a common law remedial or
13 equitable remedy for breach of fiduciary duty. There, you
14 would have to confront the question of how far you take
15 your case of Massachusetts Mutual v. Russell, where that
16 same language about common law creation within ERISA, you
17 did refuse to say that Congress left out a remedy. There,
18 there was a claim for extra-contractual damages, for
19 punitive damages, and the Court said don't assume Congress
20 left out something.

21 What you have to --

22 CHIEF JUSTICE REHNQUIST: I think you have
23 answered the question, Mr. Silverman. Thank you.

24 The case is submitted.

25 (Whereupon, at 2:55 o'clock p.m., the case in

1 the above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 88-1105 - CURTISSGUIDRY, Petitioner V. SHEET METAL WORKERS NATIONAL PENSION

FUND, ET AL.

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

BY Judy Freilicher
(REPORTER)

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