



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

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

2 [11:02 a.m.]

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

6 Mr. Baker.

7 ORAL ARGUMENT OF M. MILLER BAKER

8 ON BEHALF OF THE PETITIONER

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

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

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

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

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

25           MR. BAKER: Justice -- Justice Ginsburg,

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

25 JUSTICE SOUTER: Are you saying you can't

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

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

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

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

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

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

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

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

6 MR. BAKER: That's correct.

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

12 MR. BAKER: That's correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 plan is silent --

2 JUSTICE SOUTER: If the plan is silent.

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

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

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

13 CHIEF JUSTICE ROBERTS: Right --

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

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

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

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

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

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

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

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

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

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



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

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

9 CHIEF JUSTICE ROBERTS: But the point is the  
10 \$5 million is not going to these employees, it's being  
11 thrown into this vast sea of all these other employees,  
12 whose employers have not done as good a job of funding  
13 their plans. This is to the benefit not to the  
14 beneficiaries of this plan, but to other union members  
15 who don't have the luxury of having an employer who has  
16 overfunded their plan, and are trying to get that five  
17 million to help them, not your beneficiaries.

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

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

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

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

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

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

13 JUSTICE SOUTER: No. Reserve your time.

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

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

17 ORAL ARGUMENT OF MATTHEW D. ROBERTS

18 ON BEHALF OF THE UNITED STATES

19 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25                   JUSTICE SOUTER:  Then why are we having this

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

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

6 JUSTICE SOUTER: Then why isn't --

7 MR. ROBERTS: Held it was waived.

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

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

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

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

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

1 possibility.

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

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

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

1 be binding on an administrator in a fiduciary capacity?

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

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

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

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

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

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



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

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

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

25                  JUSTICE SOUTER: If we assume that, can they

1 keep the five million?

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

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

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

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

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

10 CHIEF JUSTICE ROBERTS: Thank you, Counsel.  
11 Ms. Clark.

12 ORAL ARGUMENT OF JULIA P. CLARK,  
13 ON BEHALF OF RESPONDENTS

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

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

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

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

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

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

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

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

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

1 MS. CLARK: I agree completely --

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

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

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

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

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

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

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

17 MS. CLARK: That is correct, Justice  
18 Stevens.

19 JUSTICE STEVENS: Your, your adversary --

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

22 JUSTICE STEVENS: I disagree with you on  
23 that.

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

25 JUSTICE STEVENS: Your adversary takes a

1 position that the merger would be not a termination.

2 MS. CLARK: That is what my adversary says.

3 And if I might focus on the termination section itself,

4 29 U.S.C. Section 1341, their position has been that a

5 merger with another plan is completely different from

6 the purchase of annuities to provide those benefits.

7 JUSTICE STEVENS: It would seem to me that a

8 merger is a continuation rather than a termination. And

9 explain to me why I'm wrong on that.

10 MS. CLARK: The Government's regulations on

11 single employer plan mergers take the very clear

12 position, and we cited them in our brief, it's the

13 regulations under Section 414(1), the clear position

14 that any time there is a transfer of assets and

15 liabilities from one plan to another, whether a complete

16 transfer or not, that is treated as a spinoff of a plan

17 from the original plan and a merger of the spun off

18 assets and liabilities into the other plan.

19 So that merger is a more flexible concept.

20 It is not just the all-in kind of merger where two plans

21 merge and continue down the road as a single entity.

22 Merger also in the Government's own usage describes a

23 transaction in which all or some portion of liabilities

24 and all or some portion of assets are separated from the

25 original plan and transferred to the second plan.



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

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

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

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

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

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

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

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

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

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

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

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

25                  CHIEF JUSTICE ROBERTS:  Doesn't this put you

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

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

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

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

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

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

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

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

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

24            MS. CLARK: PBGC.

25            JUSTICE BREYER: Yes. Do they pick up any

1 of that?

2 MS. CLARK: They do not.

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

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

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

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

3 MS. CLARK: No.

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

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

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

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

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

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

25 JUSTICE SCALIA: The other side said that

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

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

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

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

20 CHIEF JUSTICE ROBERTS: If you're -- if you  
21 prevail here -- I mean, the reason we have a case is  
22 because the employer overfunded the plan to the tune of  
23 \$5 million. If you prevail and they cannot get that  
24 back even after fully insuring the benefits for the  
25 beneficiaries, employers in the future will be very



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

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

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

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

16 CHIEF JUSTICE ROBERTS: What possible  
17 equitable basis does the union have to claim this extra  
18 \$5 million?

19 MS. CLARK: The actual --

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

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

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

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

15 CHIEF JUSTICE ROBERTS: The union plan.

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

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

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

1    reversion, then the plan administrator would have been  
2    --

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

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

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

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

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

1 just depends on the sequence of timing.

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

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

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

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

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

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

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

4 JUSTICE BREYER: So then you're saying that  
5 the answer -- we have annuity company A and B, they're  
6 identical, the worker has a pension that promises them  
7 \$1,000 a month, not a penny more, and company A says,  
8 we'll give you \$500 extra. Then in your opinion under  
9 the current regs and so forth, the administrator must  
10 choose that company; is that right?

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

13 JUSTICE BREYER: I said they are equivalent  
14 in terms of -- of the security and so forth; they are  
15 each good companies and one will write out a check for  
16 \$500, which is what I thought my example was. And now  
17 you're saying under the law the fiduciary must choose  
18 the first but you're hesitating on that which means I  
19 think I don't understand it fully.

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

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

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

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

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

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

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

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

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

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

24 MS. CLARK: Yes, Justice Souter.

25 JUSTICE SOUTER: Okay.



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

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

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

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

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

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

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

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

1 with to mean provided by the plan.

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

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

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

19 CHIEF JUSTICE ROBERTS: Thank you Ms. Clark.

20 Mr. Baker, you have three minutes remaining.

21 REBUTTAL ARGUMENT OF M. MILLER BAKER,

22 ON BEHALF OF PETITIONER

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

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

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

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

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

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

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

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

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

4           JUSTICE SCALIA: Right.

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

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

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

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

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

25          CHIEF JUSTICE ROBERTS: Thank you, Counsel.

1                   The case is submitted.

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

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