

RICHARD SHOFR
VS.
THE STUART HACK CO., ET AL.
CASE NO: 88102069/CL-79993
VOLUME 4 of 4
EXHIBITS --- NO
TRANSCRIPTS --- YES

one CROSSAPPEAL / one Record

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IN THE CIRCUIT COURT FOR BALTIMORE CITY

FILED

RICHARD SHOFER,

Plaintiff

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APR 1990
CIRCUIT COURT FOR
BALTIMORE CITY

V.

CASE NO. 88102069/CL-79993

THE STUART HACK COMPANY
and
STUART HACK,

Defendants

PART 19

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REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS

(Motion)

MONDAY, JULY 2ND, 1990

BALTIMORE, MARYLAND

BEFORE:

THE HONORABLE DAVID ROSS, ASSOCIATE JUDGE

APPEARANCES:

For the Plaintiff:

THOMAS A. BOWDEN, ESQUIRE

For the Defendant:

JANET TRUHE, ESQUIRE

ROBERT GAVIN ODDO
Official Court Reporter
Room 535 Courthouse East
Baltimore, Maryland 21202

1158

1
2 MONDAY, JULY 2ND, 1990

3 (P-R-O-C-E-E-D-I-N-G-S)

4 THE COURT: Good afternoon. Please be seated.

5 COUNSEL: Good afternoon, Your Honor.

6 THE COURT: Stuart Hack Company and Stuart Hack,
7 defendants by their attorneys move for an order dismissing,
8 the court lacks subject matter jurisdiction, over Count
9 Four. All right. Who cares to be heard in support of that
10 motion?

11 MS. TRUHE: I do, Your Honor. Janet Truhe on
12 behalf of the Defendant, Stuart Hack and the Stuart Hack
13 Company.

14 These defendants provided pension consulting
15 services to the Catalina Enterprises pension plan. This
16 pension plan was established by the defendants in 1971 for
17 the employees of Catalina Enterprises, a car dealership,
18 owned and operated by the plaintiff.

19 Now, the plaintiff has filed a four-count
20 amended complaint here in state court against the
21 defendants for negligence, breach of contract, common law
22 breach of fiduciary duty and count four, breach of fiduciary
23 duty under ERISA. And it is specifically styled as an
24 ERISA count.

25 The thrust of each of these claims, however, is
that the defendants failed to advise the plaintiff about

1 tax consequences, which would occur when the plaintiff
2 borrowed money from the pension plan above a certain amount.
3 It is this last count, count four, to which the defendants have
4 filed their motion to dismiss for lack of subject matter
5 jurisdiction.

6 It is our argument that this court lacks subject
7 matter jurisdiction over count four because it is specifically
8 a claim for breach of fiduciary duty under ERISA over which
9 this court lacks jurisdiction and over which the Federal
10 Courts have explicit jurisdiction.

11 Now, the ERISA statute is a federal statute,
12 which governs all employee benefit plans by employers
13 engaged in interstate commerce. The plan, which is the
14 subject of this case is governed by ERISA, and there is a
15 specific provision of ERISA dealing with jurisdiction
16 cited in the defendants' memorandum at page 3. This is
17 §1132.

18 THE COURT: Hold on --

19 MS. TRUHE: At page --

20 THE COURT: Your memorandum?

21 MS. TRUHE: Our memorandum in support of the
22 motion to dismiss at page 3.

23 THE COURT: Bear with me.

24 Except for actions under A1B?

25 MS. TRUHE: Yes, Your Honor.

1 THE COURT: Exclusive. AlB concurrent. AlB
2 to recover benefits due under the plan to enforce his rights
3 under the terms of the plan or to clarify his rights to
4 future benefits. Okay.

5 MS. TRUHE: Exactly. All other types of claims,
6 including breach of fiduciary duty claims are subject to the
7 exclusive jurisdiction of the federal courts.

8 Now, the plaintiff is not seeking to do any one
9 of those things in AlB. Rather, he is seeking to impose
10 liability on the defendants for breach of fiduciary duty,
11 and §1109, which is cited on page 4, gives a participant the
12 right to sue a fiduciary for breach of fiduciary duty.

13 So, §1132 clearly distinguishes between AlB
14 actions on the one hand, which are to recover benefits,
15 recover the right to future, or to enforce rights to future
16 benefits and to enforce rights under the plans and all other
17 types of claims.

18 Now, in his opposition, the plaintiff tries
19 to argue that he is really trying to bring one of these
20 AlB claims because he personally had the right to good
21 advice from this fiduciary. But the allegations of count four,
22 the ERISA count, are controlling and they are unambiguous
23 about the kind of claim being asserted by the plaintiff.

24 In count four plaintiff has alleged that these
25 defendants were "fiduciaries" to the Catalina plan and as

1 such "were required to discharge their duties with respect
2 to the plan with care, skill, prudence and diligence."
3 The plaintiff goes on to state in count four that these
4 defendants "were at all relevant times retained by Catalina
5 under the terms of the plan and therefore charged with the
6 fiduciary duties imposed under the plan."

7 The plaintiff then states as a participant in the
8 plan he was entitled to the benefit "of the fiduciary
9 obligations imposed by the plan on Hack and the Stuart Hack
10 Company," and he concludes count four by stating that "the
11 advice at issue in this case rendered by Stuart Hack and the
12 Stuart Hack Company was rendered in violation of the
13 fiduciary duties imposed on Hack and the Stuart Hack Company
14 by the plan."

15 It is very clear, Your Honor, from these
16 allegations that the plaintiff is not suing the plan to
17 recover any benefit from the plan or to enforce his rights
18 under the terms of the plan. Everyone agrees that he had
19 the right to make these loans, and he is not seeking to
20 clarify his rights to future benefits under the terms of the
21 plan.

22 These are the only claims over which this court
23 would have jurisdiction. Again, he's not suing the plan
24 at all; he's suing these defendants for breach of their
25 fiduciary duty.

1 And in deciding a similar motion to dismiss, a
2 New York Superior Court in *Young v. Sheetmetal Workers*
3 *International Association*, 447 N.Y. Sup. 2d, 798 at 803,
4 frames the issue as follows: "A resolution of this motion
5 to dismiss for lack of subject matter jurisdiction rests
6 then upon whether plaintiff's action may properly be
7 characterized as one to 'clarify rights to benefits under
8 the terms of the plan'. This court finds that this is not
9 such an action. Rather, plaintiff's action places directly
10 into question the propriety of fiduciary conduct and calls
11 for the construction and implementation of standards of
12 conduct established by ERISA."

13 Federal courts addressing this issue of breach
14 of fiduciary duty claims and jurisdiction over them have
15 uniformly held that jurisdiction over such claims is
16 exclusively federal, and I would cite to the court the
17 cases in our memorandum. *Levy v. Lewis*, 635 F.2d at 960;
18 *Central States*, 600 F.2d, 671; *Green v. Indoll*, 565 F.Sup.
19 805; *Long v. Began*, 445 F. Sup. 1177 and the *Marshall v.*
20 *Chase Manhattan Bank*, 558 F.2d. 680, and those are set forth
21 in the defendants' memorandum.

22 State courts which have addressed this issue
23 have also uniformly held that ERISA breach of fiduciary
24 duty claims are beyond their subject matter jurisdiction, and
25 I would also cite to the court the cases in the memorandum

1 Dubey v. Brannon, a Vermont case, Lembo v. Texaco, a
2 California case, Pierce v. P. J. --

3 THE COURT: I read your memorandum.

4 MS. TRUHE: Pardon?

5 THE COURT: I read your memorandum.

6 MS. TRUHE: All right. Then I'll skip the
7 citation of the cases.

8 Your Honor, the plaintiff even concedes in his
9 opposition that breach of fiduciary duty claims can be
10 prosecuted only in federal court. It is clear from the
11 allegations of count four pertaining to liability and
12 damages that plaintiff is asserting exactly that type of
13 claim. This court does not have subject matter jurisdiction
14 to hear that kind of claim, and for these reasons the
15 defendants would request that count four of the plaintiff's
16 amended complaint be dismissed. Thank you.

17 THE COURT: Who speaks for the plaintiff?

18 MR. BOWDEN: Your Honor, I'm Thomas Bowden on
19 behalf of the plaintiff, Richard Shofer. I would refer
20 Your Honor to §1109 of the ERISA statute, and I would again
21 concede that if this is a case of breach of fiduciary duty
22 imposed upon fiduciaries under the subject, and that's the
23 language of §1109, then that claim is fiducively cognizable
24 in federal court.

25 However, under the language of §1132, if there are

1 rights under the plan, those rights may be prosecuted in
2 state court. The middle phrase of §1132-A1B is the one
3 that keeps getting skipped over. It talks about enforcing
4 his rights under the terms of the plan.

5 The plan in this case is this multi-page
6 very complicated document --

7 THE COURT: Well, what terms of the plan are you
8 seeking then to enforce?

9 MR. BOWDEN: Your Honor, it's found at page
10 11-5 of the plan, in paragraph 11.6.

11 THE COURT: What does it say?

12 MR. BOWDEN: It says that the administrator,
13 trustees, and all other persons in any fiduciary capacity
14 with respect to the plan shall discharge their duties
15 with respect to the plan. And I'll skip over some of the
16 language that is not relevant. Shall discharge their
17 duties with the care, skill, prudence and diligence under
18 the circumstances then prevailing, that a prudent man
19 acting in a like capacity, and familiar with such matters,
20 would use in the conduct of an enterprise of a like
21 character and with like aims.

22 I believe, Your Honor, that a fiduciary duty
23 is established under the terms of the plan that is separate
24 and apart from any fiduciary duty established under the
25 sub-chapter of ERISA.

1 THE COURT: Where, in whose memorandum, do we
2 have -- you say §1109?

3 MR. BOWDEN: Your Honor, the plan is attached
4 to my memorandum.

5 THE COURT: No.

6 MR. BOWDEN: It's the thick one.

7 THE COURT: I'm talking about the statute.

8 MR. BOWDEN: Oh, the statute, Your Honor. I,
9 I don't believe it's attached to either.

10 MS. TRUHE: Your Honor, it's at page 4 of
11 defendants' memorandum.

12 THE COURT: Oh, there it is. Okay. Let me
13 read it.

14 (Pause while court read statute).

15 THE COURT: So what you're saying is count
16 four seeks to enforce fiduciary rights created by that
17 portion of the plan, and therefore is enforcement of
18 rights under the terms of the plan as distinguished from
19 enforcement of fiduciary duties imposed by the statute.

20 MR. BOWDEN: That's precisely right, Your Honor.

21 THE COURT: I mean, that's your point; I'm
22 precisely right that that's your point? Is that --

23 MR. BOWDEN: That's right. And that's the
24 significance of paragraph 38.

25 THE COURT: Pardon?

1 MR. BOWDEN: That's the signifance of paragraph
2 38 and count four of the complaint, where it states a
3 civil cause of action by a participant in a plan to enforce
4 his rights under the plan provided by 29 USCA, §1132. That
5 was the original intention of the count.

6 THE COURT: You allege no violation of the statute?

7 MR. BOWDEN: That's correct, Your Honor.

8 THE COURT: And you're not seeking --

9 MR. BOWDEN: We're not seeking --

10 THE COURT: -- on behalf of the plan to recover
11 from this fiduciary for breach of his fiduciary duty to the
12 plan.

13 MR. BOWDEN: That's right.

14 THE COURT: You say that this term in the plan
15 gives rise to a fiduciary duty not to the plan, but to the
16 beneficiary.

17 MR. BOWDEN: That's, that's exactly my point,
18 Your Honor.

19 THE COURT: All right. And the, the statute
20 imposes expressly no fiduciary duties on the fiduciaries
21 vis-a-vis beneficiaries as distinguished from the plan?

22 MR. BOWDEN: On the contrary, Your Honor,
23 the staute does imposed fiduciary duties, I believe, on the,
24 certainly on the trustees. I couldn't, couldn't catalogue
25 for --

1 THE COURT: With respect as to the beneficiaries
2 as distinguished from the plan?

3 MR. BOWDEN: I believe that's correct, Your
4 Honor. I'd have to find the -- here it is, §1104 states
5 that the fiduciary shall discharge his duties with the care,
6 skill, prudence and diligence under the circumstances, et
7 cetera, et cetera, very similar language.

8 THE COURT: So, in other words, the language in
9 the plan is no more than a tracking of the statute.

10 MR. BOWDEN: I think that's a fair statement.

11 THE COURT: And you then argue that since we
12 took this statutory language and put it in the plan, we
13 can, we can sue in a state court under ALB even though
14 if we wanted to sue for the same fiduciary violation under
15 the statute, we'd be limited to the federal court?

16 MR. BOWDEN: It gets a little tricky, Your
17 Honor, in that --

18 THE COURT: That's the reason I've asked the
19 question.

20 MR. BOWDEN: -- in that I believe that the
21 defendant would say that, M's Truhe's client is not a
22 fiduciary under ERISA. I believe that's what she would
23 say if asked to speak to that issue.

24 So that §1104 would not apply, might not apply
25 in this case if we sought to bring an action for breach of

1 fiduciary duty under the statute. However, I think it's
2 arguable that the plan itself is a bit broader in imposing
3 fiduciary duties, because under the terms of the plan,
4 --

5 THE COURT: You say that Hack and Hack and
6 Company are not fiduciaries under the statute?

7 MR. BOWDEN: I don't concede that, Your Honor,
8 but I believe that's the argument that --

9 THE COURT: But you're afraid if you were
10 in federal court, that's what you would be faced with?

11 MR. BOWDEN: That's correct, Your Honor. And
12 I believe that, that the plan here imposes, clearly imposes
13 a duty on Mr. Hack, whereas it's arguable in federal court,
14 whether it does or not.

15 There are cases that say that a person in Hack's
16 position is not a fiduciary, but I think under this plan,
17 under this plan the administrator of the plan, and again
18 this plan, this plan is drafted by Mr. Hack. It's a very
19 complicated document. It's a little hard to articulate all
20 the ins and outs of it, but it basically assigns to the
21 administrator of the plan the duty to resolve questions
22 that arise under the plan.

23 It also imposes on the administrator a duty --
24 upon the trustee of the plan, a duty to make loans out of
25 voluntary accounts, or out of accounts.

1 What happened here is that plaintiff went to
2 Mr. Hack and said, can I borrow something like several
3 hundred thousand dollars out of my voluntary account, and
4 Mr. Hack came back and basically said, sure, go ahead,
5 without mentioning the tax consequences of that. Namely,
6 that Uncle Sam treats it as income as of the date of the
7 loan. So that on Mr. Hack's advice, the loans are made
8 and a great tax penalty incurred by Mr. Shofer.

9 Under the terms of the plan, I believe that Mr.
10 Hack, as delegated administrator, is subject to the same
11 fiduciary duties as the named administrator in the plan.
12 The named administrator delegated all of the duties under
13 this plan to Mr. Hack. The trustee, who is also Mr.
14 Shofer, he wears three hats in the matter, trustee,
15 administrator and participant. He's a car dealer, and he
16 doesn't understand this plan.

17 THE COURT: Pardon?

18 MR. BOWDEN: I say, he's a car dealer, who
19 doesn't understand --

20 THE COURT: He's a what?

21 MR. BOWDEN: Car dealer.

22 THE COURT: Car dealer?

23 MR. BOWDEN: A car dealer.

24 THE COURT: Oh, okay. I just didn't understand
25 the words that you were using.

1 MR. BOWDEN: An automobile dealer, not a
2 card--

3 THE COURT: He sells automobiles.

4 MR. BOWDEN: Yes. Not a card dealer.

5 In essence, Mr. Shofer looked to Mr. Hack to answer all
6 questions as to the technicalities of the tax law and the
7 pension law with respect to the administration of this
8 plan. So when it came time to make loans, rather than sit
9 down and try to make sense out of this document, Mr.
10 Shofer went to Mr. Hack and said, can I make the loan.

11 M's Truhe says there is no debate as to whether
12 Mr. Shofer had the right --

13 THE COURT: I understand.

14 MR. BOWDEN: -- to make these loans.

15 THE COURT: I understand all of that.

16 MR. BOWDEN: But that is the key issue, and
17 there's a specific clause in the plan that imposes on the
18 administrator the duty to resolve all ambiguities, questions
19 and so forth arising --

20 THE COURT: To give tax advice?

21 MR. BOWDEN: -- under the plan.

22 THE COURT: To give tax advice to all
23 beneficiaries whether requested or not?

24 MR. BOWDEN: Well, it permits the administrator
25 to delegate to a professional pension consultant, and again,

1 Mr. Hack drafted the plan, so he was clearly setting it up
2 so it would be proper to delegate back to him the duty to
3 advise of such things. And there's language --

4 THE COURT: Then is there an express duty
5 imposed in the plan to give unsolicited tax advice to
6 beneficiaries?

7 MR. BOWDEN: Well, no, but this was not un-
8 solicited tax advice. I'm not sure what Your Honor means
9 by unsolicited.

10 THE COURT: Nobody asked for it.

11 MR. BOWDEN: But Mr. Shofer asked Mr. Hack.

12 THE COURT: For tax advice?

13 MR. BOWDEN: Yes, Your Honor, and there was a
14 history over 10 or 15 years of, of Shofer going to Hack --

15 THE COURT: He said, he said, can I make
16 a loan, and he said yes, and then he said, what will the tax
17 consequences be or will there be any tax consequences?

18 MR. BOWDEN: The facts are a little bit
19 different, Your Honor. He said, can I make a loan, and
20 the facts would show at trial that the course of dealing
21 between the parties was such that Mr. Hack should have made
22 known the adverse tax consequences.

23 THE COURT: Well, that's what I meant by un-
24 solicited.

25 MR. BOWDEN: If any of them were --

1 THE COURT: He did not solicit expressly tax
2 advice. He impliedly --

3 MR. BOWDEN: That's correct.

4 THE COURT: -- solicited tax advice--

5 MR. BOWDEN: That's --

6 THE COURT: -- based on the course of conduct
7 and what you hope the plan says.

8 MR. BOWDEN: Well, Your Honor, there's specifically
9 a duty in the plan for the trustee to make loans. It says
10 the trustee shall make loans. And in --

11 THE COURT: And advise each beneficiary with
12 respect thereto as to what the tax consequences will be.

13 MR. BOWDEN: Well, it's not exactly that.
14 It's that the trustee, in order to know whether he can make
15 loans is also empowered under the plan to look to
16 professional pension consultants to figure it out, because
17 you just can't look at this thing and understand it.

18 So, that the trustee in the discharge of his
19 duties as trustee went to Mr. Hack in a --

20 THE COURT: Well, you say Hack's not a trustee?

21 MR. BOWDEN: Hack is not the trustee. My client
22 really wore three hats, trustee, --

23 THE COURT: Your client is the trustee.

24 MR. BOWDEN: Yes, sole trustee.

25 THE COURT: Under the plan?

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MR. BOWDEN: Under the plan.

THE COURT: So, he's the fiduciary.

MR. BOWDEN: Well, he's definitely a fiduciary.

THE COURT: Pardon?

MR. BOWDEN: He is definitely a fiduciary. I don't think he's the only fiduciary.

THE COURT: Well, does the statute define him as a fiduciary?

MR. BOWDEN: Yes, Your Honor, it does.

THE COURT: And what does it say?

MR. BOWDEN: Again, my argument is not under the, strictly under the ERISA statute, because if it were, I would have to concede that M's Truhe's right that this claim is not cognizable in this court.

THE COURT: Any rebuttal?

MS. TRUHE: Your Honor, just briefly. Count four is specifically an ERISA claim. It is styled as an ERISA claim. The plaintiff invokes or references that statute specifically, and indeed §1132 does give him a cause of action as a participant against the fiduciary, and it is contended throughout count four that Mr. Hack was functioning in that capacity at the time he was rendering this advice.

Section 11.6, which deals with fiduciary standards cited to the court by Mr. Bowden tracks that of the federal statute and, in fact, it references the federal

1 statute, and when there is a breach --

2 THE COURT: Is Hack a fiduciary?

3 MS. TRUHE: I would concede for purposes of this
4 motion that he is, yes.

5 THE COURT: Would you concede for the purposes
6 of this case that he is?

7 MS. TRUHE: Not for purposes of this case. He
8 was a plan administrator. You were asking earlier who was
9 a fiduciary. The statute itself names certain persons
10 automatically fiduciaries, trustees are one. Those, however,
11 like Mr. Hack, who do not have any discretionary control over
12 the funds of a pension plan or who do not render investment
13 advice, that, that, it's a functional type definition. One
14 who has discretionary control over funds and renders invest-
15 ment advice, those persons will also be considered
16 fiduciaries to the plan.

17 Contract plan administrators, who fill out
18 forms, who provide annual reports to employees, that sort of
19 thing, that's what Mr. Hack was doing in this case. But
20 there is a factual dispute as to whether the kinds of
21 services Mr. Hack was performing would land him in that
22 category of fiduciary. That's going to be a factual
23 dispute.

24 THE COURT: The defendants' motion to dismiss
25 count four of complaint is granted and count four is dis-

1 missed with leave to amend.

2 It is clear that the claim in count four
3 is an ERISA claim, and as an ERISA claim is beyond the
4 jurisdiction of this court.

5 The argument made that this claim could be made
6 under the plan, while not particularly persuasive, is one
7 that I would reserve and will if the issue comes back to me
8 on a motion to dismiss an amended complaint, would defer
9 to trial. I think it's a question that if there is a claim,
10 that the terms of the plan give a right and this is a suit
11 under the plan for that right can best be determined by the
12 trial judge, who will have the entire plan before him and
13 all of the evidence, and can there determine whether or not
14 this court has jurisdiction.

15 But certainly, as far as the complaint is now
16 drafted, saying that there is a claim for breach of fiduciary
17 duty under the ERISA statute, this court has no jurisdiction
18 over that claim.

19 Here are copies for counsel if they wish to
20 have them, of the court's ruling. We shall adjourn.

21 COUNSEL: Thank you, Your Honor.

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(CONCLUSION OF PROCEEDINGS)

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REPORTER'S CERTIFICATE

I, Robert Gavin Oddo, an Official Court Reporter of the Circuit Court for Baltimore City, do hereby certify that I stenographically recorded the proceedings in the matter of Richard Shofer v. The Stuart Hack Company, et al, Case No. 88102069/CL-79993, on July 2nd, 1990.

I further certify that the foregoing pages constitute the official transcript as transcribed under my direction from my stenographic notes in a complete and accurate manner.

In witness whereof, I have hereunto set my hand this 29th day of January, 1991.

R Gavin Oddo

OFFICIAL COURT REPORTER

#23502

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

RICHARD SHOFER,

Plaintiff,

vs.

Case No. 88102069
CL799993

THE STUART HACK COMPANY, ET AL,

Defendants.

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS

Baltimore, Maryland

Wednesday, June 1st, 1994

BEFORE:

HONORABLE ELLEN L. HOLLANDER, JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

THOMAS H. BORNHORST, ESQ.

FOR THE DEFENDANTS:

JANET M. TRUHE, ESQ.

JAYSON L. SPIEGEL, ESQ.

MARK ANTHONY KOZLOWSKI, ESQ.

JOHN T. TROWBRIDGE
Official Court Reporter
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P R O C E E D I N G S

THE CLERK: All rise. The Circuit Court for Baltimore City, Part 20, is now in session, the Honorable Ellen L. Hollander presiding.

THE COURT: Be seated, counsel. Let me begin by thanking you for your cooperation in rescheduling several times the starting time of this hearing. The jury just went out to begin deliberations in what turned out to be a lengthy malpractice case, medical malpractice. I was concerned about interrupting the flow of the case because I couldn't sit on the case on Friday because I had a criminal day. Then Monday was a holiday. Then you all had been set for some time on Tuesday. I kept hoping the case would finish but it didn't. Then when it didn't, obviously it was going to create some problems for the case if we couldn't reschedule all of you. So I really do appreciate that you were so accommodating.

This, of course, is a case that has been scheduled for some time. It's the case of Richard Shofer versus The Stuart Hack Company, et al, Case Number 88102069/CL799993. In addition, there is the companion case, and I say companion only in that it was set to be heard today on a motion to consolidate. I don't seem to have that case number, counsel, if one of you can be kind enough to supply it.

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MR. KOZLOWSKI: Your Honor, that would be 93285087/CL171133.

THE COURT: And that is a motion I believe filed by Defendants Hack and Grabush, Newman, and that is in connection with the suit that has been filed against the law firm of Blum, Yumkas.

Counsel, at this time I would ask that you identify yourselves.

MR. BORNHORST: Thomas H. Bornhorst, representing the Plaintiff Richard Shofer.

MR. KOZLOWSKI: Mark Anthony Kozlowski, representing Blum, Yumkas.

MS. TRUHE: Janet Truhe, representing the Defendants Stuart Hack and The Stuart Hack Company.

MR. SPIEGEL: And Jay Spiegel, representing Third Party Defendant Grabush, Newman and Company.

THE COURT: Okay. There are two motions, as I have mentioned. Only the latter, being the motion to consolidate, that's the only one really that involves Blum, Yumkas. In connection with the motion for summary judgment or alternatively partial summary judgment, that motion has been filed by Defendant Hack individually and The Stuart Hack Company. That motion has not, I don't believe, been joined by Grabush, Newman, at least as I have understood it.

So really this is your motion, Ms. Truhe, is the

1 long and the short of it.

2 I do have a verdict in my case, which they have
3 only been deliberating since two o'clock or, excuse me, ten
4 of two. In any event, as soon as everybody is gathered on
5 that case, I'll ask to interrupt our proceedings in this
6 matter to take that verdict, but I think it still would be
7 worth everyone's while if you got started.

8 So, with that, if you don't mind.

9 MS. TRUHE: Thank you, Your Honor. The Defendant
10 Stuart Hack and The Stuart Hack Company, as Your Honor just
11 mentioned, have really filed two motions, the first being a
12 motion for summary judgment which raises the issue of the
13 viability of Plaintiff's two remaining state law claims for
14 negligence and breach of contract. Those claims were
15 remanded by the Court of Appeals for the purpose of trial on
16 September 17th, 1991, after that court found that these
17 claims were not preempted by ARISA.

18 The court did so, however, primarily for two
19 reasons which Defendants believe have largely been
20 discredited by the recent Supreme Court decision in Mertens
21 versus Hewitt Associates. Now, the first basis on which the
22 court relied was dicta, appearing in Footnote 7 of the Third
23 Circuit case of Painters of Philadelphia versus Price,
24 Waterhouse and a line of lower federal court cases relying
25 on that dicta which permitted Plaintiffs to go forward on

1 claims against non-fiduciaries for misconduct in state
2 court, and these cases are distinguishable from the present
3 one for another reason which I will get to in a moment.

4 The second basis on which the Court of Appeals
5 found that Mr. Shofer's claims were not preempted was the
6 fact that it was clearly troubled by the fact that, and I'm
7 quoting now from page 105 of the Court of Appeals' opinion,
8 "If Shofer's malpractice claim is sufficiently closely
9 related to the Catalina plan to be preempted, there may not
10 be any remedy at all, not even if asserted under ARISA,
11 because there can be a gap between the scope of ARISA
12 remedies and the sweep of ARISA preemption."

13 So the court was clearly bothered by the fact that
14 if it did not keep the Plaintiff alive in state court, he
15 would not be alive anywhere.

16 Now, with respect to the Painter's case, the Court
17 of Appeals cited the following dicta appearing in Footnote 7
18 of that case. "We feel that professional malpractice
19 actions brought by a plan are directly analogous to the
20 situation in Mackey and that in the absence of an explicit
21 corresponding provision in ARISA allowing a professional
22 malpractice cause of action, Congress did not intend to
23 preempt a whole panoply of state law in this area. Thus, we
24 conclude that ARISA does not generally preempt state
25 professional malpractice action." But, again, that was

1 strictly dicta appearing in a footnote in the court's
2 opinion in Painter's.

3 As a factual matter in the Painter's case, that
4 involved a malpractice claim brought by a plan itself that
5 was under contract with or had a contract with an accounting
6 firm. So there were two legal relationships existing in
7 that case which permitted some form of lawsuit. First of
8 all, that of accountant/client, and there was a relationship
9 between the parties by virtue of their contract.

10 That isn't the case here where the Defendants
11 Stuart Hack and Stuart Hack Company were hired strictly by
12 the pension plan, Catalina Enterprises, Inc., and were under
13 contract solely to the plan, not to Mr. Shofer individually.
14 And Mr. Shofer has conceded that on numerous occasions. For
15 example, in his response to our motion, to Defendants'
16 motion to dismiss the second amended complaint, it states on
17 page one "Stuart Hack and The Stuart Hack Company were
18 professional pension consultants hired by Catalina
19 Enterprises, Inc. to administer Catalina's pension plan."

20 And in one of the pleadings filed in opposition to
21 Stuart Hack's petition for cert to the Supreme Court, it
22 states on page fourteen of the opposition, Footnote 5,
23 "Petitioners were under contract to Catalina to perform
24 consulting services involving the plan. It was purely
25 fortuitous that Respondent, Mr. Shofer, chose to consult

1 Petitioners." Thus, it is undisputed in this case that Mr.
2 Hack was retained by the plan, not by Mr. Shofer
3 individually, and that all services rendered by Hack to
4 Shofer were in the capacity of Hack as plan administrator on
5 the one hand, and Mr. Shofer as trustee participant on the
6 other, and it was Mr. Hack's business to provide advice to
7 the trustee and participants as to the proper use of pension
8 plan assets. There is simply no common law duty which the
9 Plaintiff can identify to support a claim that Hack owed him
10 personally any duty in the tax area.

11 And if you look at the five cases cited in the
12 Maryland Court of Appeals' decision on page 104 in support
13 of the court's decision that Mr. Shofer's state law claim
14 should be allowed to go forward, in each one of those cases
15 there was always a legal relationship between the Plaintiff
16 and the Defendant. For example --

17 THE COURT: I don't want to cut you off but let me
18 ask you this question, Ms. Truhe.

19 MS. TRUHE: Uh-huh.

20 THE COURT: I understand, I think, the argument
21 you advance about why the Court of Appeals may have done
22 what they did and whatever, but the bottom line is they are
23 the Court of Appeals and I am just the Circuit Court and
24 what they say goes. So the only way for me to revisit this
25 is if Mertens makes a change in the law that, in other

1 words, since the time the Court of Appeals had this issue,
2 if something has occurred, then I would, in my position, be
3 able to revisit since something new has happened.

4 So don't we really have to look at Mertens? This
5 is a case upon which you rely, if I understand your
6 argument, to suggest to me that if the Court of Appeals
7 could do it over again now that Mertens has been decided,
8 then their decision would have been different. The state of
9 the law essentially having changed is, I think, really at
10 the heart of what you are telling me.

11 MS. TRUHE: Exactly.

12 THE COURT: And the only reason I mention that, I
13 really am trying to understand, of course, everything that
14 you contend, and having read all of these briefs it would
15 seem to me that, understanding if you will why the Court of
16 Appeals decided as they did in their review of Judge Ross'
17 decision, it is really not for me now to go back and figure
18 out.

19 The only issue is whether, in light of Mertens,
20 there has been some change.

21 Incidentally, while you are thinking of how to
22 respond to that -- I'm sure it won't take you all that
23 long -- I have all the attorneys present in my malpractice
24 case, so I believe we are ready to bring in the jury. If
25 you don't mind, you can sit on that bench that says reserved

1 for prisoners.

2 (Brief recess.)

3 THE COURT: Okay. Counsel, we can resume. Ms.
4 Truhe, I think you were cut off midstream.

5 MS. TRUHE: All right. Your Honor, responding to
6 your point, that is true. At this point we are down to a
7 battle of dicta, so to speak. When the Court of Appeals
8 rendered its decision in September of '91, it was
9 considering a number of different approaches by other courts
10 to the issue of where do claims for non-fiduciary misconduct
11 belong, and it chose to pick up on that line of cases which
12 had adopted the thinking of the Painter's court and, of
13 course, did not have the benefit of any Supreme Court
14 thinking on this issue.

15 Now, however, we do, and I think it is some rather
16 strong expression of where the Supreme Court would come down
17 if deciding the issue head-on, and that is the case of
18 Mertens versus Hewitt Associates where the Supreme Court
19 held that such claims against non-fiduciaries may not go
20 forward under ARISA, and in so deciding stated that "Any
21 such claims are likely preempted as well under ARISA's broad
22 preemption provision." That's the strongest statement we
23 have obviously, given that it comes from the Supreme Court,
24 on this issue.

25 THE COURT: I'm sorry, where were you reading

1 from?

2 MS. TRUHE: Okay. This would be --

3 THE COURT: I'm looking -- I have the Supreme
4 Court version.

5 MS. TRUHE: Right. This would be the Supreme
6 Court version at pages thirteen and fourteen. The quote
7 begins, "Even -

8 THE COURT: Oh, I'm sorry. No, what I meant is I
9 have 113 Supreme Court, starting at 2063.

10 MS. TRUHE: Oh, I've just got the slip opinion.

11 THE COURT: Okay.

12 MS. TRUHE: It's the part that states, "Even
13 assuming without deciding --

14 THE COURT: I have it. That's at page 2071.

15 MS. TRUHE: Okay. Again, the fact that such
16 claims are likely preempted was an argument used by the
17 Petitioners in that case in favor of allowing such claims to
18 go forward in federal court. And this gap problem was the
19 second basis on which the Court of Appeals in this case
20 relied in finding no preemption of Mr. Shofer's state law
21 claims.

22 Now, the Supreme Court has reflected in its
23 decision in Mertens it believes that this is not a sound
24 basis on which to resolve that type of issue. And when you
25 consider the gap argument which the Court of Appeals is

1 obviously very impressed by and influenced by in September
2 of '91, and that argument not being so impressive to the
3 Supreme Court, and, secondly, the dicta in Painter's which
4 picked up on dicta from the Supreme Court's decision in
5 Mackey authored by Justice White who is, by the way, a
6 dissenter in the Mertens case, I think it is clearly more
7 persuasive now on the issue of whether Mr. Shofer's state
8 law claims should go forward in this court to have the
9 benefit of the Supreme Court's expression in both the
10 majority and in the dissenters' opinion because, as Justice
11 White said in his dissent, it is difficult to imagine how
12 any common law remedy could have survived enactment of
13 ARISA's deliberately expanded preemption provision.

14 This tells us that the Third Circuit Painter's, I
15 think, got off track when it gave so much weight to his
16 dicta in the earlier Mackey case, and that the other lower
17 court, to have picked up on that dicta in Painter's, are off
18 track as well. Instead, the decisions from the Fifth,
19 Eleventh and other lower federal courts which have followed
20 the reasoning and arguments which we made to the Court of
21 Appeals are much more in line with the Supreme Court's
22 thinking on this issue of non-fiduciary misconduct.

23 It is for these reasons that Defendants believe
24 the two grounds on which the Court of Appeals rested its
25 decision that Mr. Shofer's state law claims were not

1 preempted have been largely undercut by the Supreme Court's
2 decision in Mertens, albeit those expressions appearing in
3 dicta only. So we do come down to a battle of dicta between
4 Painter's and the Supreme Court, and I think had the Court
5 of Appeals had the benefit of Mertens they would have
6 decided more in line or I think would have opted in favor of
7 the Supreme Court's dicta than the Third Circuit. And we
8 believe, naturally, that the dicta in Mertens is a better
9 indicator of the law in this area although the Supreme Court
10 has, indeed, not squarely decided this issue.

11 I think, too, it is fair to say that the Court of
12 Appeals' decision in this case was result-oriented. Mr.
13 Shofer's claims were barred in federal court by limitations.
14 They wanted to keep, I think, Mr. Shofer alive somewhere.
15 They came right out and said, "If we find preemption here,
16 he has nowhere to go." This was clearly a consideration by
17 the court. And the Supreme Court, in Mertens, I think has
18 said rather dramatically that this is not the sort of thing
19 that a court should be considering in deciding the
20 preemption issue. Congress enacted a very complex statute
21 in ARISA and struck many balances, not all in favor of the
22 Plaintiffs.

23 Therefore, Defendants are requesting that The
24 Court revisit, in light of the dicta in Mertens, the issue
25 of whether Mr. Shofer's claims are, in fact, preempted under

1 ARISA. Having said that --

2 THE COURT: When I read Mertens again in
3 preparation for the hearing today and studied that quote or
4 that comment on which some of your argument is based, I
5 looked at it and I thought -- of course, we always run into
6 these things and I don't mean anything sinister by this --
7 but really, when you just focus on that, it's really not in
8 context because, as I went back and read it more carefully,
9 perhaps, than I had when you all were in on your scheduling
10 conference, I read it and I thought, well, really what the
11 court is saying, even assuming without deciding, is they
12 have laid out in the paragraph preceding all of the
13 arguments that Petitioners and the United States were making
14 in connection with various ARISA provisions, and this was
15 their response.

16 In other words, I didn't read it particularly to
17 say they are giving credence one way or the other to this
18 issue about preemption of previously available state court
19 actions but, rather, just to respond saying, well, even
20 assuming -- we are not deciding it -- but even assuming that
21 Petitioner's arguments were correct, they go on to then
22 dispose of various matters. So, I mean, I didn't think this
23 was, when I looked at it more carefully, really enough for
24 this court to decide that if the Court of Appeals had had
25 this decision, they would have made some other decision

1 different from the one they actually made.

2 I mean, this, I think, would be asking a lot of
3 the mere trial judge to take this quote and then say, well,
4 sorry, Judge Radowski and your fellow brethren, you didn't
5 mean what you said and if you had had this case you would
6 have done something differently.

7 MS. TRUHE: Well, Your Honor, I --

8 THE COURT: And they may get there --

9 MS. TRUHE: Right.

10 THE COURT: -- but I think they will have to get
11 there.

12 MS. TRUHE: Yes.

13 THE COURT: Right now, I am troubled by whether I
14 could use this quote in Mertens. And you, of course,
15 candidly acknowledge that this is no more than dicta. Then
16 even if it is just dicta, what does it really say, and that
17 is another subject of debate. But, at best, it's dicta. It
18 certainly wasn't the issue before the court.

19 So I think it would be a lot for me to just go and
20 throw out that Court of Appeals' decision and say, well, now
21 that we have Mertens, it couldn't possibly stand. The Court
22 of Appeals may do that and that may be where this ends up
23 yet again.

24 MS. TRUHE: It would be a bold step. I think
25 Justice White's dissatisfaction in the dissent and his

1 picking up on that dicta and saying, well, you know, if
2 these claims can't go forward in federal court, they are
3 probably also, in light of the court's rumblings on this
4 issue, preempted in state court as well and now we have got
5 a gap.

6 I think he did pick up on it and gave it a spin or
7 the interpretation that we are trying to give it and, given
8 that he was the one who got the whole ball rolling in Mackey
9 when he said certain state law claims against plans could go
10 forward, and then Painter's picked up on that, I think it
11 does give some meaning and some substance to the argument we
12 are making here.

13 THE COURT: Right. In other words, I'm not saying
14 that it's a frivolous argument. I'm just saying that, look,
15 knowing basically that this is no more than dicta, and then
16 even when recognizing that it's dicta, there is
17 interpretation about exactly whether they are saying what
18 you think they are saying or whether they are just
19 responding to arguments that had been advanced in the
20 previous paragraph.

21 Coupled with the fact that the Court of Appeals
22 made a ruling, I think it would be pretty hard for me
23 basically sitting here to sort of reverse, which would be
24 the net result of what you are asking, the Court of Appeals.
25 If they want to change their minds, they will be free to do

1 that down the road but I don't think that it would really be
2 based on this, something I could do. It's not clear
3 certainly what the Supreme Court is really saying, and if
4 they are saying what you would like me to say that they are
5 saying, and on that basis for me to just sort of say, well,
6 you know, Judge Radowski, as I say, and the other members of
7 the court didn't mean what was written in that opinion --
8 well, you got the drift, you are a quick study.

9 MS. TRUHE: Exactly.

10 THE COURT: So I think you see the problems.

11 MS. TRUHE: Yes. And I think one of our main
12 criticisms of the Court of Appeals' decision in this case is
13 it largely rests on dicta itself from a Third Circuit
14 decision. So we felt entitled to come in again and say, oh,
15 but we have got dicta now from the Supreme Court and we
16 think the Supreme Court really is more persuasive than the
17 Third Circuit. But, again, it is asking a lot of a trial
18 court. This probably would be a better argument to the
19 Court of Appeals itself.

20 THE COURT: Right. And you have raised it and it
21 is preserved, et cetera.

22 MS. TRUHE: Preserved.

23 THE COURT: But I think that it would probably be
24 a little presumptuous of me, on the basis of this kind of
25 analysis, to just say, well, the Court of Appeals is wrong

1 now and, so be it, it is sort of the law of the case.

2 Okay. Your other argument on damages.

3 MS. TRUHE: On damages. Now, should this court
4 find that, in fact, Mr. Shofer's state law claims do survive
5 ARISA preemption, Defendants have moved in the alternative
6 for partial summary judgment as to some of the Plaintiff's
7 damages. All of the Plaintiff's damages that he is seeking
8 at trial in this case are set forth in a letter dated
9 October 20th, 1993, and it is Exhibit F attached to
10 Defendants' motion.

11 THE COURT: Exhibit F, you said?

12 MS. TRUHE: Exhibit F. And Defendants believe
13 that some of these damages are not recoverable as a matter
14 of law, and I would just like to basically go down that
15 list.

16 THE COURT: Before you do, would you like to be
17 the one here today to explain in the context of this case
18 what is meant by excise taxes?

19 MS. TRUHE: Excise taxes, I believe, are some sort
20 of extra or penalty type tax meant to punish Mr. Shofer for
21 having --

22 THE COURT: But that is different than penalties
23 because we see the term penalties used a lot and that is
24 what it is. But excise in a concept -- I thought that was
25 sort of more of a commerce kind of assessment.

1 MS. TRUHE: Well, the penalties, in terms of tax
2 interest in penalties, the penalties that The Court is
3 referring to are late payment and late filing penalties
4 having to do with filing the tax return so late and then
5 reflecting additional income, taxable income, on which Mr.
6 Shofer should have paid taxes. One of those penalties for
7 late filing has been abated.

8 Now, the excise taxes are an extra type of
9 penalty. They are similar in that they are a type of
10 penalty. They were imposed upon Mr. Shofer as a result of
11 his borrowing from the pension in violation of the terms of
12 the plan. They were assessed solely by virtue of the fact
13 that the Plaintiff violated certain pension laws when he
14 took money out in '84, '85 and '86.

15 He also engaged in prohibited transactions
16 because, again, under the terms of the plan, the manner in
17 which this Plaintiff took loans out was in violation of
18 certain provisions of that plan. Again, he is assessed
19 excise taxes and prohibited transaction penalties because
20 his behavior, in addition to not paying his full taxes, also
21 violated the terms of his pension plan, and under ARISA he
22 gets hit with additional types of penalties. They are all
23 really penalties in the generic sense but they are imposed
24 for different reasons.

25 The excise taxes in the amount of \$53,240 and the

1 prohibited transaction penalties in the amount of \$310,807
2 are all pension related. They were assessed solely by
3 virtue of the fact that this was pension money involved and
4 that this money was withdrawn in violation of the pension
5 plan.

6 THE COURT: You see, that's where I'm still
7 confused. What's the difference between the prohibited
8 transaction penalties and the excise tax in the context of
9 what you just said? The excise is for borrowing from the
10 plan in violation of the pension laws is what you said.

11 MS. TRUHE: Right.

12 THE COURT: Isn't that the same as a prohibited
13 transaction?

14 MS. TRUHE: No, they are different. Perhaps this
15 is one area where I can defer to Mr. Bornhorst because he is
16 more knowledgeable about exactly why the Plaintiff was hit
17 with these penalties. They have been recently assessed and
18 I think he could identify better for The Court the exact
19 provisions.

20 THE COURT: It would just be helpful to be sure I
21 understand all the terms that you are sort of pinning
22 arguments to, to be sure that we have a common, if possible,
23 understanding of what these terms even mean. Would you like
24 to volunteer, Mr. Bornhorst?

25 MR. BORNHORST: Certainly, Your Honor. Frankly, I

1 would like to back up a little bit because, even though The
2 Court was fairly explicit about its feelings concerning the
3 first issue that was raised --

4 THE COURT: Well, I don't want to hear your
5 argument yet.

6 MR. BORNHORST: Okay.

7 THE COURT: I just want to get it down. I mean,
8 because she is not done.

9 MR. BORNHORST: Okay.

10 THE COURT: I just was looking for some kind of
11 agreement, if possible, among us as to what these terms for
12 damages purposes mean.

13 MR. BORNHORST: All right. I disagree. I don't
14 have the cases in front of me but I'm sure I've seen cases
15 stating that those excise taxes are not considered
16 penalties. They are simply -- they might be called
17 incentives. What happens is that when Mr. Shofer takes
18 money out of his pension in excess of \$50,000, it's treated
19 in two ways by the Internal --

20 THE COURT: At one time or just ever?

21 MR. BORNHORST: Well, at any time actually because
22 of his circumstances with the pension. He is the trustee.
23 He is the majority shareholder in the pension. This
24 qualifies him under the code as an interested party in the
25 pension, and there are special rules concerning interested

1 parties.

2 The first thing that happens when Mr. Shofer takes
3 money in excess of \$50,000 is that it's treated in one
4 section of the Internal Revenue Code as a distribution of
5 income. It's as simple as that. It's taxed as a
6 distribution. Mr. Shofer still owes the loans, he still has
7 to pay back the interest and so forth, but the Internal
8 Revenue Service says this is a distribution because you took
9 out money in excess of \$50,000.

10 In another part of the Internal Revenue Code it
11 also qualifies these events as prohibited transactions
12 because Mr. Shofer is also an interested party. Now, you
13 have got to go over to ARISA to find out all of the
14 definitions involved but the tax liabilities arise under the
15 Internal Revenue Code under two separate sections. Very
16 clearly, the excise taxes are an incentive to interested
17 parties not to self-deal with the pensions, and the kinds of
18 loans taken by Mr. Shofer were clearly determined by the law
19 in advance to be self-dealing, the kind of transactions that
20 were, you know, one of the objects of the law in this case.

21 So on the one hand, in one sense, the Department
22 of Labor says, yes, they are loans but they are prohibited,
23 and in the other sense the Internal Revenue Department says
24 they are distributions and they are not loans at all. So
25 it's treated in two different ways by the government. There

1 is apparently no conflict. We are not making an issue that
2 there is any particular conflict with that treatment under
3 the law, but the same events create two separate tax
4 liabilities.

5 THE COURT: And so --

6 MR. BORNHORST: Now, there is one other --

7 THE COURT: Well, does that mean --

8 MR. BORNHORST: There is one other qualification.

9 THE COURT: Wait, hang on. Does that mean then
10 that is where the terms arise that as far as the prohibited
11 transactions are concerned for IRS purposes there is the
12 penalty, and as far as the Department of Labor is concerned
13 there is the excise tax?

14 MR. BORNHORST: All of the taxation comes under
15 the Internal Revenue Code.

16 THE COURT: Okay. I was trying to get --

17 MR. BORNHORST: But the prohibited transaction,
18 excise taxes for prohibited transactions, in order to
19 determine what is a prohibited transaction or what the
20 definition of an interested party is, you have to go over to
21 ARISA. But the term "prohibited transaction" and the
22 "excise tax liability" arises under the Internal Revenue
23 Code, the same as --

24 THE COURT: What is an excise tax then in the
25 context of this case? That's where we started this

1 discussion.

2 MR. BORNHORST: Okay.

3 THE COURT: What is meant by that? What kind of
4 tax is that?

5 MR. BORNHORST: Well, it's a tax of five percent
6 of the value of the loans with a very unusual incentive
7 built in. Because Mr. Shofer's five percent tax liability
8 has now accumulated in the vicinity of \$100,000 for excise
9 tax damages, his potential excise tax exposure is over
10 \$400,000. The difference is this: When an interested party
11 engages in a prohibited transaction, there is by definition
12 under the code the beginning of a taxable event. That is,
13 the prohibited transaction, the date of the prohibited
14 transaction, the date of the loan is the date when the
15 excise tax of five percent begins to run. The end of that
16 taxable period, it says that if the prohibited transaction
17 is not corrected before the end of the taxable period, there
18 is a 100 percent penalty that is going to be assessed. The
19 end of the taxable period, as it is defined in the code, is
20 the date on which the excise taxes are actually levied or
21 assessed against Mr. Shofer.

22 In other words, the incentive built in is this:
23 We are going to say that when you enter into a prohibited
24 transaction, your five percent tax starts as of that moment.
25 As soon as it is determined that it is prohibited, your tax

1 starts back on day one of the loan. Okay. If you don't
2 clear it up before we actually send you our final bill for
3 those taxes, we will also assess you a 100 percent penalty
4 against it. The incentive is for these people to clear up
5 these prohibited transactions at absolute peril to
6 everything they hold economically dear.

7 In this case, there are a number of reasons --
8 they are probably not relevant to the hearing -- why the
9 Department of Labor took until January of 1993 to send a
10 detailed notice of intention to levy those taxes, but that's
11 all that we have. We do not have the final assessment of
12 the taxes, and that's fortunate for both the Plaintiff and
13 the Defendants in this case because when that day occurs, if
14 it does, okay, then the results will be catastrophic. But
15 that's the extent of Mr. Shofer's exposure under these
16 circumstances. He has never been in a position economically
17 to recall the loans and to fix it.

18 THE COURT: Just out of curiosity, separate and
19 apart from any of the issues that are before the court
20 today, I'm just curious, as far as the IRS is concerned, I
21 gather there is --

22 MR. BORNHORST: They work hand-in-hand with the
23 Department of Labor in this area, Your Honor. As a matter
24 of fact, there seems to be a pretty clear mandate in the law
25 that they do so. In other words, all of Shofer's tax

1 liabilities that have accrued from these events have more or
2 less been held in abeyance by the Internal Revenue Service
3 too pending final determinations by the Department of Labor,
4 and that's procedurally correct. We have letters to that
5 effect.

6 The Internal Revenue Service at one time in 1993
7 started to charge ahead and we raised an alarm and they sent
8 notices back saying, okay, we are going to hold our final
9 actions against you --

10 THE COURT: But what I was going to ask, though I
11 don't think it's pertinent to the issues that are here
12 today, just out of curiosity, is does the Department of
13 Labor and/or the IRS treat it as a defense if somebody acted
14 on advice of counsel or advice of an accountant that what
15 they did was proper?

16 MR. BORNHORST: Oh, no. All of those arguments
17 have been presented. I mean, I have all of the
18 documentation and the solicitation to both the Internal
19 Revenue Service and the Department of Labor trying to
20 mitigate any and all of these damages. It's not a question
21 of interpretation.

22 THE COURT: In other words though, if somebody who
23 is an interested party or otherwise borrows from his or her
24 pension plan on the advice of -- and I'm not saying that's
25 this case because I understand there is an issue about to

1 whom advice was given and what the advice even really said.
2 But all those issues notwithstanding, I'm talking about a
3 case where you really do it properly and you ask your tax
4 advisor or your attorney or whoever, you know, can I do "X",
5 "Y" and "Z", and you get an opinion letter and everybody
6 tells you that you can do it, and then it turns out you
7 can't do it, is it a defense, as far as the IRS is
8 concerned, with regard to some of these penalties and excise
9 taxes?

10 I'm just asking out of my own curiosity.

11 MR. BORNHORST: Clearly not, Your Honor, and we
12 have responses in regard to the issues.

13 THE COURT: In other words, it's like strict
14 liability.

15 MR. BORNHORST: Strict liability.

16 THE COURT: They don't care why you did it if you
17 did do it.

18 MR. BORNHORST: No, Your Honor. If they see more
19 than \$50,000 worth of loans, they are distributions. If
20 they see that an interested party did this and it's also a
21 prohibited transaction because of that, then the five
22 percent penalty, the excise tax penalty, also attaches, with
23 the 100 percent penalty at the end of that trail if and when
24 those prohibited transactions are not cleared up.

25 THE COURT: Okay. Thank you, I appreciate that.

1 Ms. Truhe, go ahead.

2 MS. TRUHE: Okay. I think Mr. Bornhorst has
3 demonstrated, in response to The Court's questions, again
4 the relationship between the specialty type taxes that have
5 been imposed upon Mr. Shofer over and above the income tax
6 which he owes as a result of taking these loans, the
7 relationship between ARISA pension law and these damages,
8 and the Court of Appeals, in holding that Mr. Shofer's state
9 law claims survived ARISA preemption, carved out these
10 clearly pension related type damages and held that they may
11 not be recovered in this state case.

12 Now, this fact was also recognized by Judge Ward
13 of this court in --

14 THE COURT: You wouldn't want me to adopt the
15 opinion for one purpose and throw it out for another, would
16 you?

17 MS. TRUHE: No, that's true. Now the rationale
18 works for me. Judge Ward read the Court of Appeals'
19 decision the same way the Defendants do as excluding these
20 types or these categories of taxes and dismissed them from
21 the Plaintiff's third amended complaint. I think, at this
22 point, the Plaintiff has announced his intention to pursue
23 them and --

24 THE COURT: By pension related damages, you are
25 referring to the excise taxes.

1 MS. TRUHE: Excise taxes and the prohibited
2 transaction penalties. Both categories were before the
3 Court of Appeals when it rendered its decision. The Court
4 of Appeals read them out of this case and --

5 MR. BORNHORST: Well, it's the same issue.

6 MS. TRUHE: Yes.

7 MR. BORNHORST: Excise tax and prohibited
8 transactions, that's the same exact issue.

9 MS. TRUHE: Right.

10 MR. BORNHORST: Yes.

11 MS. TRUHE: And for this reason, we believe they
12 should be excluded from the upcoming trial of this case and
13 judgment entered in favor of the Defendants on those two
14 categories.

15 There is another category of additional taxes,
16 again a specialty type tax, of \$51,831, which was not before
17 the Court of Appeals in '91 because it was only recently
18 assessed. I can be a little more clear for The Court as to
19 exactly why Mr. Shofer was hit with this tax. This was
20 because he did not pay interest on the monies he took from
21 the pension on a timely basis in accordance with ARISA law,
22 again a very special reason why --

23 THE COURT: He didn't pay interest on the loans?

24 MS. TRUHE: Interest on the loans he took on a
25 timely basis.

1 THE COURT: And the interest would have been to
2 the plan?

3 MS. TRUHE: Yes, it would have been back to the
4 plan. Mr. Shofer had on his own, completely on his own,
5 decided all the various terms in making these loans. He
6 decided they were going to be payable on demand, which was
7 in violation of the law. He decided his own rate of
8 interest. He decided all of his own terms. He did not put
9 up adequate security. All of this was in violation of ARISA
10 law.

11 I think the same rationale on which the excise
12 taxes and prohibited transaction penalties were excluded by
13 the Court of Appeals applies to this category of damage as
14 well. It is pension related and it is strictly because of
15 pension law that this damage was ever assessed in the first
16 place.

17 THE COURT: You see, I couldn't tell from reading
18 the briefs -- maybe I missed it -- but the way it read, it
19 sounded like they were some kind of income tax, in which
20 case I didn't understand why they wouldn't, at least from
21 your point of view, why they wouldn't be recoverable,
22 assuming the Plaintiff prevails. But now as you are
23 explaining them, do they have a name?

24 MS. TRUHE: No. And the reason I used the word
25 "income tax" was I just used the Plaintiff's label from his

1 letter, additional income taxes of, but I don't --

2 THE COURT: Right. So when I saw income tax, that
3 made me think -- and I'm not making any rulings and I
4 haven't heard from Mr. Bornhorst -- but I'm just saying when
5 you called it an income tax, that led me to think that is
6 precisely what the Court of Appeals said could be recovered.

7 MR. BORNHORST: This is another point for
8 clarification. The Internal Revenue Service -- all of these
9 events, the need for Shofer to amend his tax returns, when
10 these events came to light, triggered an audit. They came
11 in. When they looked at how the loans were handled, they
12 determined that there was an additional category of
13 distribution that was taxable. The additional category was
14 interest not paid timely.

15 THE COURT: Thank you.

16 MR. BORNHORST: Excuse me.

17 MS. TRUHE: And it was not paid timely by virtue
18 of, again, pension law.

19 THE COURT: Do you have to look to ARISA to know
20 that it's not paid timely?

21 MS. TRUHE: Yes, or ARISA adopting certain -- the
22 problem is ARISA works hand-in-hand with the IRS code and
23 the two have a great interrelationship. It was by virtue of
24 pension law, as it has adopted portions of the IRS code,
25 that Mr. Shofer got hit with these extra taxes over and

1 above that amount which was deemed additional taxable income
2 to him which the Court of Appeals held could be recovered.

3 There is also a factual problem with the Plaintiff
4 seeking recovery of this particular category of damage, and
5 that is it was as a result of his failure to follow proper
6 procedure in making these loans that he was hit with this
7 tax. It is undisputed by the parties in this case that Mr.
8 Hack didn't even know that Mr. Shofer was taking the money
9 when he took it in 1984, 1985 and 1986. So simply as a
10 factual matter, I think it would be impossible for Mr. Hack
11 to be found responsible and liable for failing to advise
12 about a transaction he didn't even know was taking place.

13 The next item of damage relates to Mr. Shofer's
14 Virgin Islands home which he bought in 1985, a year after
15 the Defendants --

16 THE COURT: Well, just so we are clear, as I
17 analyzed it reading all your briefs, you could break out, if
18 you will, this what I thought had been called an income tax
19 but now whatever it is, this late paid interest, and put
20 that in a kind of category, if I buy your argument, of a
21 pension related damage. But I just want to clarify, before
22 the Court of Appeals, am I correct, on round one, that there
23 wasn't a claim at that point for damages related to being
24 unable to refinance the Virgin Islands property because his
25 financial posture was so poor, and it wasn't the kind of

1 claim for damages you are now about to discuss? I mean, the
2 court didn't have this yet, did they?

3 MS. TRUHE: That is correct.

4 MR. BORNHORST: Can I -- I can clear this up very
5 quickly.

6 THE COURT: Okay.

7 MR. BORNHORST: And this is not argument, this is
8 concession.

9 THE COURT: Okay.

10 MR. BORNHORST: Your Honor, you know, in light of
11 Stone and all these other cases which we will be coming to
12 by way of argument, I advised my client that I was not able
13 to support in law the claim for the Virgin Island property
14 circumstance, and that certainly was nothing that Mr. Hack
15 had any reason to be able to foresee, and it was a very
16 remote event to everything else. We are withdrawing --

17 THE COURT: Because he didn't even own the house
18 in the Virgin Islands when he started borrowing the money,
19 according to --

20 MR. BORNHORST: I understand. You know, the
21 ripples get too big there and we are withdrawing that claim.

22 THE COURT: Thank you, counsel. But I gather you
23 are still pursuing the claim for lost business profits. Was
24 I correct, something about wages --

25 MR. BORNHORST: The loss of --

1 THE COURT: -- time he had to devote to the
2 litigation and he couldn't work?

3 MR. BORNHORST: Your Honor, I understand where
4 some of these things fall and, you know, Mr. Shofer's time
5 invested with counsel and everything else in this case. We
6 can't get attorney's fees and that's part of the price you
7 pay for being a litigant. There are no claims for that.
8 What the principal flow of argument from the Plaintiff in
9 this case is, is loans, taxes, liens, and the devastating
10 effect on personal credit. Now, those things flow directly
11 from each other and that is what we will argue. But that is
12 preempting Ms. Truhe and she ought to go forward.

13 THE COURT: Well, she is glad to go forward, I
14 know, but it's helpful to know what she doesn't have to
15 fight about.

16 MS. TRUHE: Well, if I understand Mr. Bornhorst
17 correctly, the item pertaining to Plaintiff's inability to
18 refinance his Virgin Islands property, which he calculates
19 to be a loss of \$46,532.10, is now out of this case and
20 withdrawn as damage.

21 MR. BORNHORST: Yes, it is.

22 MS. TRUHE: Thank you. Now, with respect to the
23 final categories of damage which Mr. Shofer has labeled
24 other economic damage, his inability to draw his regular
25 salary of \$200,000 in 1991 and 1992, and some lost business

1 profits from declining sales in his used car dealership in
2 the amount of \$1,929,471, I would like to make a few
3 comments about both of those categories.

4 First, with respect to lost salary, the Plaintiff
5 has testified that part of why he is seeking his lost salary
6 is because he estimates approximately twenty percent of his
7 time over the last five years has been devoted to the Hack
8 litigation. As Mr. Bornhorst has just acknowledged,
9 Maryland law does not permit a party to recover damages for
10 time spent in litigation. And over and above that, I think
11 there are a myriad of other possible reasons why Mr. Shofer
12 did not allegedly take his regular \$200,000 salary in '91
13 and '92. And I think under the Court of Appeals' analysis
14 in Stone, Mr. Hack certainly could not have foreseen in 1984
15 an inability to take salary from the used car business in
16 1991 and 1992. It's simply too remote, it's highly
17 extraordinary and the kind of thing that could be due to a
18 number of other reasons.

19 I think the same rationale applies to the
20 approximately 1.9 million which Mr. Shofer is seeking in
21 damages as a result of declining profits in his used car
22 business since 1988. Even Mr. Shofer has admitted in
23 deposition that there was an economic downturn during this
24 period and there could be a number of reasons why the used
25 car business allegedly fell off since '88. I don't believe

1 the Defendants, again under the court's analysis in Stone,
2 should have to litigate these either and prove that their
3 alleged negligence in 1984 was not the proximate cause.

4 For that reason, the Defendants are seeking
5 dismissal of all the other economic damages in the form of
6 lost salary and lost business profits because they were
7 simply too remote and unforeseeable to the Defendants in
8 1984 when in a ten minute conversation about whether
9 Plaintiff could borrow from his pension, Mr. Hack indicated
10 that Mr. Shofer could borrow that money. It's simply too
11 remote in time and not the kind of acceptable nexus that the
12 court was talking about in Stone. Mr. Hack was unaware of
13 Mr. Shofer's other debts, evidently Mr. Shofer's financial
14 house of cards, just as the lawyers in the Stone case were
15 unaware of the Plaintiff's dealing in the stock market and
16 the fact that he was going to be in a financial bind as a
17 result of any possible mishandling of that property
18 settlement in that case.

19 So again, Defendants request dismissal of all
20 other economic damages. Thank you.

21 THE COURT: Okay. Thank you. The other
22 attorneys, besides you, Mr. Bornhorst, really don't have, I
23 don't think, anything to add on this, do you, because you
24 are not a party to it?

25 MR. SPIEGEL: Your Honor, if I may, just for the

1 record, as Third Party Defendant, we would join in the
2 motion to the extent damages are recoverable from us in this
3 case only to the extent they are recoverable from Stuart
4 Hack.

5 And if I might make just one brief point that Ms.
6 Truhe and I discussed with respect to the final category of
7 damages, the lost inventory, we submit that in actuality Mr.
8 Shofer individually has no standing to seek recovery for
9 that lost inventory as properly a claim of Catalina
10 Enterprises which is a corporation organized under Maryland
11 law. If any inventory is lost, Catalina is the proper party
12 with standing.

13 THE COURT: Do you mean car inventory?

14 MR. SPIEGEL: That's my understanding, the claim
15 focuses upon, that because of Mr. Shofer's personal
16 financial problems, he was unable to maintain an adequate
17 inventory of used cars in his business. But the party with
18 standing is really Catalina Enterprises, not --

19 THE COURT: But let me just make sure I understand
20 this. You didn't file any motion. Are you just trying to
21 say that if the Defendants Hack, et al, prevail, that
22 obviously they can't recover from you more than can be
23 recovered against them.

24 MR. SPIEGEL: That's correct.

25 THE COURT: I don't think they would quarrel with

1 that.

2 MR. SPIEGEL: No.

3 THE COURT: Okay.

4 MR. SPIEGEL: I'm just raising this point only --

5 THE COURT: All right. Do you have any cases you
6 want me to consider in regard to this argument?

7 MR. SPIEGEL: With respect to standing, I think
8 that just goes -- it's something we just discussed just
9 prior to argument, quite candidly, but I submit that an
10 individual can't maintain a lawsuit on behalf of losses of a
11 separate party. It's just a matter of basic procedural
12 standing.

13 THE COURT: All right. Thank you. Mr. Bornhorst.

14 MR. BORNHORST: Your Honor, on the issue of who
15 the Plaintiff is in this case and what he can and can't do,
16 that's an issue that wasn't raised in the motion for summary
17 judgment. Obviously at some point the Plaintiff can't hide
18 behind the fact that he might be the wrong person, if that's
19 the case.

20 I would refer The Court, because of the arguments
21 made, to Goerlich versus Courtney Industries, Incorporated,
22 84 Md. App. 660, a 1990 case, which is a legal malpractice
23 case. It represented this principle which seems to be the
24 law elsewhere. Where a third party an allege and prove that
25 the client intended him to be the third party beneficiary of

1 the attorney services, and where his interests are identical
2 to those of the client, the suit for legal malpractice may
3 be maintained by the third party. What we are claiming this
4 case represents for us is support for the fact that Mr.
5 Shofer's interests in soliciting advice from Mr. Hack on
6 behalf of Catalina Enterprises, if that's in fact what
7 happened, is not relevant because the interests which Mr.
8 Hack's advice concerned were identical to Mr. Shofer's
9 interests. Mr. Hack was giving Mr. Shofer specific advice
10 on the handling of Mr. Shofer's pension assets as it
11 concerned loans. So I don't think that's a serious issue.

12 I would like to also go back to the beginning.
13 Even though I understand The Court's disposition, I think
14 that rather than just to continue to bolster that position
15 concerning the jurisdictional issue again raised by the
16 Defendant in this case, I think within that issue is a
17 perspective that's absolutely necessary if there is going to
18 be any fairness between these parties in this case. It goes
19 back to the whole purpose of ARISA and what does and does
20 not flow from the intentions of Congress in putting ARISA
21 together because the defense is arguing with an awfully
22 broad brush when it comes to preemption. I think that
23 speaks for itself. I mean, between 1974 and when Mertens --
24 Mertens came up also because in 1989 there were amendments
25 to ARISA that also allowed other persons to be sued. That

1 is, in addition to fiduciaries, now apparently some non-
2 fiduciaries could also be sued under ARISA. The common law
3 they are concerned with is trust law and the trust law
4 having to do with fiduciary duties and, in particular, in
5 Mertens, when a fiduciary and a non-fiduciary get together
6 what happens.

7 Now, that's different than saying that Mertens
8 obviously is going to stand for the principle that it wipes
9 out all common law causes of action. And Mertens itself, as
10 I pointed out, is a case in which the state common law
11 causes of action were sent back to the trial court for trial
12 by the Circuit Court before it got to the Supreme Court. So
13 Mertens can't by itself represent the fact that common law
14 causes of action are not proceeding in almost every
15 jurisdiction. Shofer versus Hack is not a strange blip on
16 the radar screen. There are a lot of cases throughout this
17 country in which the common law state causes of action are
18 being maintained even though the circumstances relate to the
19 pension.

20 There isn't any event, Your Honor, in this case
21 that does not relate to ARISA or a pension. There is no
22 event. Mr. Shofer's pension was an ARISA governed pension.
23 When Mr. Shofer took money out of his pension, he took it
24 out of an ARISA pension. The tax liabilities that flow,
25 whether they are excise tax or income tax, flow because he

1 took out these monies from an ARISA pension.

2 Now, I'll get back to the distinction between the
3 excise taxes and the income taxes because, clearly, the
4 Court of Appeals has made that distinction, and obviously it
5 is of great concern to this court.

6 THE COURT: Well, let me ask you this, just to be
7 fair between the parties, to quote you. Having told Ms.
8 Truhe that it wasn't likely, it wasn't maybe even
9 reasonable, frankly, to expect a mere trial judge to decide
10 the Court of Appeals erred in this decision in this very
11 case, I would think it would be equally unlikely to expect
12 that same trial judge to say that the Court of Appeals
13 didn't mean what it said when it carved out, whether it was
14 right, wrong or indifferent.

15 I mean, I read your brief. I know that it was a
16 different lawyer at the argument at that time and a
17 concession they thought was obtained, but the bottom line is
18 the same mere trial judge now looking at it on your end
19 isn't likely, is she, to decide the Court of Appeals didn't
20 mean what it said in regard to throwing out, if you will,
21 pension related, what they saw as pension related damages,
22 even though they ruled that the state cause of action for
23 malpractice wasn't preempted?

24 MR. BORNHORST: Your Honor, the language you are
25 using is counsel's language, not the Court of Appeals'

1 language. The Court of Appeals was concerned with this
2 category that they called contingent damages.

3 THE COURT: Well, when you look at what they say -
4 -

5 MR. BORNHORST: Obviously, unless the ARISA --
6 first of all, the Court of Appeals threw out the ARISA
7 claims because the principal reason ARISA was used in the
8 state court was to try to get access to attorney's fees. So
9 they said, no, we are not going to allow ARISA claims to be
10 litigated in Maryland state courts, that's clearly against
11 the preemption statute. That's a different matter than
12 saying that all of the issues in this case are ARISA issues.

13 Now, the contingent liabilities which were of
14 concern to the court were just that. They were contingent
15 liabilities. They hadn't even matured yet. They didn't
16 have anything to show the Court of Appeals with regard to
17 excise tax damages.

18 THE COURT: Whatever they say, whether it was a
19 holding or a ruling or dicta, they don't say this is
20 premature, it's contingent, and therefore it's not in this
21 case. They could have said that if that's what they wanted
22 to say.

23 MR. BORNHORST: But if you look at that Court of
24 Appeals opinion as any guidance at all for a rule of law,
25 the only thing it represents, Your Honor, is a principle

1 that incorporation by reference is no longer procedurally
2 correct in Maryland. In one section it admits that these
3 contingent damages and the excise tax thing was incorporated
4 by reference into Counts 1 and 2, which were the common law
5 counts. Then counsel gets up and says, well, they weren't
6 specifically mentioned there, Your Honor. So, he says, oh,
7 I take that as concession that they are not involved. The
8 court itself admits that they were incorporated by
9 reference.

10 All I'm saying is that those claims weren't mature
11 at that time and that --

12 THE COURT: Well, show me where you are reading.

13 MR. BORNHORST: Not only that, Your Honor, but,
14 look, one of the contingent damages was the prospect that
15 this pension plan by the Department of Labor would be
16 completely thrown out, that the plan itself would be wiped
17 out. Okay. That doesn't seem likely at this point. All
18 right. But at that point there would have been a claim
19 directly for pension benefits. The pension itself is the
20 whole heart of the matter. I mean, not for some, not just
21 because a taxable event took place, not just because the
22 pension was misused in a particular way, that the funds were
23 drawn in and out in a particular way, but the whole pension
24 itself.

25 Now, that raises issues that certainly seem to

1 carry an ARISA umbrella. I am not faulting the Court of
2 Appeals for what it did. It dodged a bullet. There wasn't
3 anything there. There were no facts. There were no
4 findings concerning damages in this case that the Court of
5 Appeals was considering. It was considering a
6 jurisdictional issue. There was not any judicial review in
7 this case of those issues. They just seemed to fall within
8 the category of the Plaintiff's other claims. And all those
9 other claims were wiped out, but Counts 1 and 2 were left
10 intact, and those were the ones that entitled us to bring a
11 claim for breach of contract and also the --

12 THE COURT: Could you show me where in the opinion
13 from the Court of Appeals you want me to look to support
14 what you are telling me, that they didn't throw these
15 damages out?

16 MR. BORNHORST: No, I'm not saying that, Your
17 Honor. It's correct, I'm not saying that they did not
18 because this category of contingent damages is the one, is
19 the umbrella under which excise taxes was part at that time.
20 It had to be. There was no tax statement. There was
21 nothing that the Plaintiff could go on.

22 There are other cases that say as long as you have
23 got what we have got, you can go ahead and litigate. You
24 don't have to get all these things solved before you can
25 litigate, as long as you have got some reasonable notice of

1 the fact that you are going to be assessed these taxes,
2 which we now have. They didn't have it at that time.

3 THE COURT: I will say, for whatever it's worth,
4 and I need you to incorporate in your comments where I
5 should find in this opinion whatever it is you want me to
6 find, but I will say I'm not sure I understand logically why
7 the court would say that in the surviving state law claims
8 the Plaintiff, if he proves his claim, can recover income
9 taxes which were basically assessed on the basis that the
10 loans were tantamount to a distribution of income, which
11 grows out of the pension, and borrowing from the pension,
12 but at the same time saying any excise or penalties from the
13 very same conduct wouldn't be recoverable.

14 I mean, I don't get it. But I'm not here to
15 rewrite the Court of Appeals decision. So I am struggling.
16 I don't see, and I appreciate Ms. Truhe nodding her head in
17 the affirmative, and I think she is saying to me in body
18 language as an officer of the court that she doesn't think
19 I'm off base in being confused about that. I mean, not that
20 she wants me to change anything, but I read that message, if
21 you will, that way. I don't get why one would survive and
22 one wouldn't.

23 MR. BORNHORST: The court didn't --

24 THE COURT: So I sort of agree with you but I'm
25 not here to rewrite the opinion.

1 MR. BORNHORST: Well, I understand.

2 THE COURT: Which is why I started out asking what
3 is this excise tax.

4 MR. BORNHORST: I understand, Your Honor.
5 However, there is nothing in this case -- there is not only
6 anything in this case that can't guide this court, there is
7 nothing in this case concerning those excise tax damages
8 that can guide anybody else either, any other litigant.
9 These issues weren't discussed by the Court of Appeals.
10 They just weren't discussed. The damage itself had not
11 ripened. There was no cause of action for them to consider
12 for excise tax damages. That cause of action, in terms of
13 tort law, didn't arise until there was actual damage on the
14 horizon, and that notice was received in January of 1983.

15 And the Court of Appeals did not have the -- now
16 the fact that counsel didn't -- I don't know what else --
17 well, I'm certainly not condoning --

18 THE COURT: Did you make sure everybody --

19 MR. BORNHORST: Counsel didn't make a concession.
20 The court just took it as a concession. How could counsel
21 make a concession of something that is already procedurally
22 established? That is, Counts 1 and 2 incorporate all of the
23 facts common to all counts. How could it not be included in
24 Counts 1 and 2 if that's the case? This flies completely in
25 the face of civil procedure in this state.

1 THE COURT: Just out of curiosity, I know you
2 weren't the attorney at that stage, but I'm sure you have
3 read everything there is to read, and I had this question of
4 what the excise taxes were, and one of the things I thought
5 was maybe that was something -- I mean, I understood it was
6 assessed against Mr. Shofer -- but I guess I thought perhaps
7 this was something that was going to be assessed against the
8 plan. I wasn't sure what it was in the context of this
9 case. But I am just wondering, did the Court of Appeals
10 know? I mean, we can't presume that they knew.

11 MR. BORNHORST: At this time, Your Honor, the
12 Court of Appeals seized this case on its own initiative from
13 the Court of Special Appeals. It's obvious that it wanted
14 to hear an ARISA case and make a decision that common law
15 counts from one standpoint or another could be brought, even
16 though there was this umbrella called ARISA preemption in
17 the State of Maryland.

18 There has been a lot happen since then. This was
19 this court's first impression of what these issues meant. I
20 was going to start out before and I would like to interject
21 at this point because I think this is the substance of the
22 issue. Okay. This is an article I'm reading from -- all
23 I'm doing is reading from a statement that was made before
24 Congress by Senator Williams, Chairman of the Senate
25 Committee on Labor and Public Welfare, in connection with

1 ARISA. And it cited to an article in the Washington
2 University Law Quarterly which discusses ad nauseum Mertens
3 and the issues related --

4 THE COURT: What is the cite of the article?

5 MR. BORNHORST: Sir? I'm sorry, Your Honor.

6 THE COURT: What is the cite of the article?

7 MR. BORNHORST: It's Washington University Law
8 Quarterly, Volume 71, Page 773, and the short caption on the
9 other page is "Liability of Non-Fiduciary". The whole
10 caption is, "Should non-fiduciaries who knowingly
11 participate in a fiduciary breach be liable for damages
12 under ARISA?"

13 THE COURT: It sounds like Mertens.

14 MR. BORNHORST: But it's an extremely intelligent
15 discussion of the principal concerns that led, that flowed
16 through to the Mertens decision, and I might add is one of
17 the few articles that has appeared so far concerning Mertens
18 and it is certainly critical in various ways of it.

19 But the fundamental statement that I wanted to
20 read is this: Senator Williams stated, "The legislation
21 imposes strict fiduciary obligations on those who have
22 discretion or responsibility respecting the management,
23 handling, or disposition of pension or welfare plan assets.
24 The objectives of these provisions are to make applicable
25 the law of trusts to establish uniform fiduciary standards

1 to prevent transactions which dissipate or endanger plan
2 assets and to provide effective remedies for breaches of
3 trust."

4 Your Honor, Mr. Shofer was using his own plan
5 assets. Mr. Shofer wasn't endangering anyone else's plan
6 assets. None of the issues concerning which ARISA was
7 designed and managed have to do with the circumstances of
8 this case. Mr. Shofer could have written himself a check
9 for the loans any time he wanted to. Mr. Shofer could, in
10 that pejorative way I'm using that particular word, have
11 taken these loans at any time. He didn't do that. He
12 called his pension plan consultant, Mr. Hack, and he said,
13 hey, what's the story?

14 Now, there is lots of testimony and factual
15 determinations to be made before this court can decide what
16 the nature and the extent of the Defendants' duties were to
17 Mr. Shofer under these circumstances. But in the meantime,
18 the point that I'm trying to make is that whatever concerns
19 that -- the Court of Appeals was extremely concerned in
20 Shofer versus Hack whether Hack was a fiduciary under the
21 circumstances. I think they concluded correctly that he was
22 not. He didn't have control over the plan and he didn't
23 manage the funds of the plan. He didn't consult with the
24 plan concerning plan investments. These are the types of
25 things that fiduciaries do, go and invest it in this

1 particular block of stock or in that mutual fund or in that
2 housing development. He wasn't doing that. He didn't have
3 that relationship with this plan. So Hack is not a
4 fiduciary in these instances. He is not someone who would
5 be governed by the concerns of ARISA, nor would he be
6 approachable through there.

7 In the beginning, there was lots of confusion
8 because the preemption said, or the preemption appeared to
9 be stated so literally that anything that had the slightest
10 association with a pension -- in 1974 or 1975 or 1976, Mr.
11 Shofer couldn't have brought this case and he would have
12 been just thrown out completely -- but by 1991, it was
13 obvious that there were a lot of litigants and lots of
14 causes of action which didn't have anything to do with the
15 law of trusts and the law of fiduciaries, and they were
16 rightful causes of action, and one of those causes of action
17 which clearly has survived is the professional malpractice
18 claim.

19 It's the Plaintiff in this instance who brought up
20 and made specific ARISA claims in the state court. Now,
21 that seems ill advised to me. You can't read anything about
22 ARISA and believe that you can claim that you are claiming a
23 right under ARISA and present it to a state court. Why they
24 chose that cause of action and why they just didn't file in
25 federal court to begin with, like everybody else does, is

1 beside the point. But back then --

2 THE COURT: You want to ask Mr. Kozlowski that
3 question, I gather.

4 MR. BORNHORST: But that's one of the things that
5 created the need for the Court of Appeals to make
6 distinctions. We are not going to have ARISA claims decided
7 in Maryland state court. End of message. That's what
8 Shofer versus Hack stands for, and it well should stand for
9 that.

10 THE COURT: I did try an ARISA case, as I
11 mentioned, in which there was concurrent jurisdiction, and
12 it was under the provision that allows in a state court the
13 court to hear a claim for benefits under the plan, which is
14 what I ruled my case was, but they had filed in federal
15 court to preserve the situation and then got a stay in the
16 federal court while it was litigated here. If I had thrown
17 it out, then they would have been able to go over to federal
18 court and litigate it.

19 MR. BORNHORST: Well, in this instance, Your
20 Honor, the problem with the circumstances of this case is
21 that it's very, very clear that this trial and this case
22 will not conclude this issue. I don't think the Court of
23 Appeals would have any problem at all revisiting this and
24 reconsidering this matter because of its relevance to the
25 Plaintiff in this case and because it wasn't even a mature

1 issue back then.

2 I don't blame the Court of Appeals. I don't think
3 they did a bad thing at that point. They got out on the
4 basis -- but I'm looking at this case wanting to know what
5 the principles of law are. Could this case -- could you
6 find a statement in this case that excise tax damages are
7 not recoverable and income tax damages are? You would have
8 to do it only by inference and the only way you could get
9 there is to completely destroy civil procedure in the state
10 by saying, well, they didn't include that in Counts 1 or 2.
11 Of course they did because they are included in the facts
12 common to all counts.

13 So I don't know what the rule is. I don't know
14 what the rule of law is. I know what the effect is. I will
15 even agree with defense counsel that it has been the effect
16 in the past in this case that the contingent damages and
17 excise tax damages were under that umbrella and were
18 excluded from this case by the very language of the Court of
19 Appeals' opinion.

20 THE COURT: I'm sorry, say that again, your last
21 statement.

22 MR. BORNHORST: Excise tax damages were one of the
23 "contingent damages" which were -- the following language --

24 THE COURT: Are you reading from the slip opinion?

25 MR. BORNHORST: I'm reading from my own brief the

1 statement again that the Plaintiff's counsel had just made a
2 concession limiting the scope of damages claimed in Counts 1
3 and 2 so as to exclude the three above-described contingent
4 liabilities. I'm now Plaintiff's counsel. I'm stating that
5 that's not the case. And I'm stating that there was nothing
6 to concede at that point if there was no viable cause of
7 action, if there were no damages, if there was no assessment
8 of excise tax damages, if there was nothing to sue the
9 Plaintiff for, no evidence to give the jury, nothing for the
10 Court of Appeals to consider.

11 Since those events have happened since then, I
12 think that this issue deserves reconsideration, and I think
13 especially in view of ARISA's intention of the viability of
14 professional malpractice claims. There is no pension, there
15 is no pension, very few -- I don't know of any. I don't
16 know that much about pension law myself, Your Honor, except
17 that pensions now seem to be regulated by ARISA. It's very
18 clear that just because certain standards of professional
19 conduct might be gleaned from the requirements -- how can
20 you practice in this field and not -- how can you determine
21 that Mr. Shofer owes income taxes without referring to
22 ARISA? You can't decide that there are any duties or
23 obligations or liabilities without coming under the ARISA
24 umbrella.

25 So I think that if excise tax damages are

1 excluded, then that logically should exclude the income tax
2 damages as well.

3 THE COURT: Well, they will be happy to make that
4 agreement with you.

5 MR. BORNHORST: And I am talking about some
6 ultimate position but the other, the last concern in this
7 area, Your Honor, is that there is virtually no way this
8 Plaintiff can take \$400,000 worth of exposure and say, well,
9 I had a bad day in court, not on the basis of an opinion
10 that reads like the Court of Appeals' opinion, and not
11 without asking the court at every opportunity to reconsider
12 this issue.

13 I didn't raise this issue, Your Honor. The reason
14 that the Defendant raised this issue in her motion was
15 because she knows this case won't go away until this issue
16 is resolved, and it may or may not get resolved at this
17 point, depending upon your ruling, by the hearing which we
18 are going to have and the trial because it can't. It can't.
19 If it only determines the nature and extent of certain
20 liabilities and not others, this case will have to continue.
21 It will have to proceed whether or not it is an appeal by
22 the Defendant because The Court finds that there is really
23 no, there is no legal principle under which the -- the
24 effect is one thing. As a litigant, I want to know -- I can
25 go to a Court of Appeals' opinion and find some kind of

1 reason, even if it's reason I don't agree with. My argument
2 is that there is none that can help this court or any other
3 litigants and, on that basis, that issue certainly deserves
4 to be well considered by The Court when it is reaching its
5 decision.

6 THE COURT: How about on the business damage
7 issues?

8 MR. BORNHORST: The damage issues. Your Honor,
9 this --

10 THE COURT: Well, I'm rereading it now
11 incidentally for about the third time and your argument is
12 interesting, counsel. I don't know really how this will end
13 up but looking at the slip opinion starting on page twenty-
14 one, the court says "The respondents urge preemption of the
15 malpractice claims because they intend to include or
16 preserve contingent damages by way of additional taxes that
17 might be imposed." Then this continues at page twenty-two
18 of the slip opinion, "...discussed in a category in the
19 complaint called 'contingent liabilities'." And as you
20 point out, apparently at that point in time all of these
21 things were potential but not yet realized damages from the
22 Plaintiff's point of view.

23 MR. BORNHORST: I think from a jurisdictional
24 point of view as well, Your Honor.

25 THE COURT: Well, I'm not sure what that means but

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MR. BORNHORST: It means that you need four squares to get there --

THE COURT: They could say --

MR. BORNHORST: -- and unless you have got damages, you can't come to court.

THE COURT: Well, somebody put them in the lawsuit, so that --

MR. BORNHORST: Well, the issue, I think it was probably premature because, again, the appeal was -- the Court of Appeals stated that the trial judge correctly decided that it was the existing law in Maryland that anything related to pensions were preempted. It congratulated the trial court on its decision in Shofer versus Hack, and it was a correct decision at the time in Maryland. It said, no, we are going to change that now. It didn't -- this was not an appeal on any facts or findings concerning damages. The court was trying to sort out what claims fell under, or which were ARISA claims and which were not ARISA claims.

THE COURT: Well, when you read the language, it sounds like one could argue, and we will see where this ends up, a so limited potential plan disqualification is not in the case. But that could mean, and I guess this is what you are saying, if by the time it went to trial the plan had

1 been disqualified, well, I think that would clearly be a
2 pension related matter --

3 MR. BORNHORST: Because he would be suing for his
4 pension.

5 THE COURT: -- under ARISA.

6 MR. BORNHORST: Yes.

7 THE COURT: But as far as the other issues are
8 concerned --

9 MR. BORNHORST: Mr. Shofer is not suing for
10 pension benefits, Your Honor, and never was.

11 THE COURT: It says, "So as to exclude the three
12 above 'contingent liabilities'." So if they are no longer
13 contingent, maybe this doesn't stand for anything but we
14 will have to see.

15 MR. BORNHORST: Your Honor, again, I want to call
16 The Court's attention to the motion for summary judgment
17 which was filed in this case, and my responses to the motion
18 for summary judgment. I didn't take that opportunity in my
19 responses to go over every item of the Plaintiff's damages.
20 They weren't argued. They have been argued summarily. That
21 is, that any events which flow from the loss of credit or
22 from the loss of the value of Mr. Shofer's asset, which is
23 Crown Motors, were not foreseeable at the time.

24 The Stone case is really just Hadley versus
25 Baxendale, as far as I can tell. I can't tell any

1 difference. It uses the exact same language. But there is
2 one -- and I don't have any problem with the language in
3 this case. I don't argue that there should be different
4 principles in Maryland than these. But like Hadley versus
5 Baxendale, in Hadley versus Baxendale it wasn't the
6 Defendant who supplied the Plaintiff with a defective shaft.
7 It was a carrier. And obviously in Stone, stock market
8 damages were an extraordinary result of the attorney's
9 failure to record the release of lien. There is no question
10 about that. I don't argue with the results in Stone.

11 The issue in this case is, again, it's going to
12 have to be based upon -- the conclusion of which is going to
13 have to be based on an awful lot of testimony, expert and
14 otherwise. But the issue is what's the subject matter here?
15 What's the subject matter? The subject matter is the loans.
16 Did Mr. Hack have any reason to know that Mr. Shofer might
17 take substantial loans from his pension? Mr. Hack was the
18 one that published advice stating that he could take up to
19 100 percent. Mr. Shofer didn't need Mr. Hack's permission
20 to take those loans if he wanted to rape his assets. He was
21 looking for professional advice on how to do it. And the
22 only reason that Mr. Hack exists is as a tax shelter
23 consulting firm with lawyers and with a staff that provide
24 this kind of information and service, well beyond anything
25 that you can find in a CPA firm under the same

1 circumstances.

2 Mr. Hack was the one that designed that particular
3 plan and published it in the first instance. Mr. Hack
4 cannot claim that it is unforeseeable in this case that Mr.
5 Shofer would not, in fact, borrow up to 100 percent of the
6 assets he had available if that's the advice he published.
7 The broken shaft in this case, the warranty in this case, is
8 provided by the Plaintiff. It's the very factual basis of
9 the Plaintiff's claim against the Defendant, far from being
10 unforeseeable.

11 Mr. Shofer's right to more professional advice
12 under the circumstances, even to go seek additional counsel
13 from others who might be more informed in one way or
14 another, is the factual basis of the Plaintiff's case. And
15 when in fact those same events, i.e. borrowing from the
16 substance of his pension funds, had devastating effects,
17 became distributions of income, became prohibited
18 transactions, it triggered massive tax liability and tax
19 liens which were assessed. The tax liens didn't flow
20 because Mr. Shofer had made a bad business deal. They
21 flowed because of Mr. Shofer's tax liability, and not even
22 the excise tax liability but just simply because of the
23 income tax liability. It's going to be a factual
24 determination that Mr. Shofer at that point was not able to
25 correct things. He didn't have the funds to correct things.

1 Mr. Shofer was certainly known to the Plaintiff to
2 be a merchant. The merchant class lives on their credit.
3 You can't be a car dealer and not live on your credit. I
4 think the evidence will show that the class of people that
5 Mr. Hack does business with certainly includes a generous
6 amount of people who are 100 percent owners of their
7 business who are in this same position. These events are
8 not unforeseen. They are certainly unhappy events. But
9 they flow directly -- whether or not the damages sought must
10 arise naturally from the breach of contract itself -- well,
11 if it's a breach of warranty, if it was a breach of warranty
12 claim, then Hadley versus Baxendale wouldn't have had any
13 problem finding --

14 THE COURT: Well, who are the liens against? Are
15 they against Mr. Shofer or against Catalina?

16 MR. BORNHORST: Well, like most small businessmen,
17 Your Honor, it's Mr. Shofer's--

18 THE COURT: Well, he is not exactly what I think
19 of as a small businessman when he earns \$200,000 a year. So
20 maybe we have a definitional issue. But separate and apart
21 from that, tell me what you were going to say.

22 MR. BORNHORST: Is there a question pending from
23 The Court?

24 THE COURT: Yes. I said, who were the liens
25 against? Were they against him personally or against the

1 company?

2 MR. BORNHORST: They were against Mr. Shofer.
3 They were against Mr. Shofer.

4 THE COURT: Not Catalina.

5 MR. BORNHORST: Not Catalina, but literally
6 everything Catalina does is supported by Mr. Shofer's
7 personal credit, and all I'm saying is that those are
8 circumstances which even help to account for the whole
9 formation of the pension plan and everything else. These
10 aren't extraneous facts and circumstances. It wasn't
11 because Mr. Shofer had some other interest. Obviously, one
12 of those other interests was buying property in St. Thomas
13 and he did so. But I can't fit these arguments underneath
14 of that particular damage. Whether this court allowed them
15 or not, I think at some point or another they were going to
16 get thrown out.

17 THE COURT: Well, you just saved me a little bit
18 of writing.

19 MR. BORNHORST: Okay.

20 THE COURT: But basically I didn't see them in
21 this case.

22 MR. BORNHORST: I understand, Your Honor. It must
23 have been reasonably within the contemplation of the parties
24 at the time the contract was entered. I mean, that gets
25 measured by actually what happened. Mr. Shofer is taken as

1 he is found. I mean, he is a person in a certain set of
2 circumstances. It is an ordinary and a natural consequence
3 of massive tax liability to have tax liens assessed against
4 you, especially when the Internal Revenue determines that
5 these tax bills are several years old, as they were in this
6 case. And unless you have a way of simply paying the taxes
7 and going away, those tax liens are going to remain
8 outstanding and they are going to be a direct impediment to
9 the value of whatever assets that you have. And Mr. Shofer
10 is a 100 percent owner of the company.

11 THE COURT: Just out of curiosity, also not
12 germane to the issues before the court today, but I am
13 curious why it is that, given the nature of the case and the
14 fact that you brought the suit against Hack, and Hack
15 impleads Grabush, Newman, but how come your client didn't
16 sue Grabush, Newman directly?

17 MR. BORNHORST: Your Honor, there is a separate
18 agreement that exists in this case that makes it very
19 convoluted, but factually at the time that Mr. Shofer's
20 business had progressed to the point where there was a new
21 round of negotiations going on with Maryland National Bank
22 concerning an expanded credit line, they needed information
23 from Grabush, Newman. When this happened and Grabush was
24 sued, they stopped all work. They said we are not going to
25 do anything else for you.

1 THE COURT: Who said that? Who is the they you
2 are talking about?

3 MR. BORNHORST: Grabush, Newman. Under those
4 circumstances, there was virtually no way to change horses
5 in midstream. Mr. Shofer entered into an agreement with
6 Grabush, Newman that he would not sue them in this case in
7 exchange for their continued cooperation but that if they
8 were found liable, the Statute of Limitations is waived
9 concerning any claims that Shofer has against Grabush,
10 Newman. So I suppose that there is some contingency under
11 which Grabush can be found liable but I find that
12 questionable as well.

13 Mr. Shofer, by virtue of a separate agreement,
14 ostensibly still has rights against Grabush, Newman if any
15 liability is found on Grabush, Newman in this case.

16 THE COURT: I had been wondering for a very long
17 time and I just had to ask that question.

18 MR. BORNHORST: In any event, Your Honor, there
19 are other issues that haven't been raised by counsel because
20 they require particular attention by this court. It
21 involves Mr. Shofer and -- my point is, there is a list of
22 damages we have presented to the Plaintiff. The Plaintiff
23 has done -- what the Plaintiff has done is the same sort of
24 thing that was done with contingent liabilities. They are
25 saying, well, all these other economic damages, Your Honor,

1 obviously they don't belong in because they are not
2 foreseeable and they are not this and they are not that.
3 Well, I think that they are and I think that we certainly at
4 least overcome the burden that we need to sustain on summary
5 judgment on these matters. And beyond that, they are
6 particularized, but that is not what the defense has done.
7 The defense doesn't say, well, there are these four other
8 claims. What the defense has done is said, well, we don't
9 like the St. Thomas property thing, and I ultimately had to
10 agree with them on that. Okay. They don't like that one.

11 We think, for example, the other specific one that
12 was argued here today about the matter about interest paid
13 timely -- Your Honor, the whole factual issue in this case
14 is whether Mr. Hack violated his duty to advise Mr. Shofer
15 about how to conduct this process. Otherwise, why shouldn't
16 Mr. Shofer assume that he can take these liberties. The
17 fact that he didn't intend to do that, that he wanted to do
18 it the right way, is obvious because he went to the right
19 party. As a matter of fact, he has a history of using some
20 of the best people who are available, among which is
21 Grabush, Newman.

22 THE COURT: Lawyers included, I'm sure.

23 MR. BORNHORST: Well, I don't want to prejudice
24 myself in that regard, Your Honor. But that's part of the
25 issue of this case. It isn't so obviously out of this case

1 that it can't survive summary judgment. And if this court
2 makes a ruling that there is no way that Mr. Shofer can
3 present evidence to the court concerning what happened to
4 him personally and his personal assets by virtue of these
5 tax liens and his loss of credit, and even his corresponding
6 loss of business, the only way -- I'm not saying that Crown
7 Motors has a claim in this case for loss of business -- but
8 the only way Mr. Shofer can prove how his asset has
9 diminished is by presenting statistics and information to
10 the defense concerning Crown Motors' loss of business, Crown
11 Motors' production, Crown Motors' credit line, Crown Motors'
12 account with Maryland National Bank. Every single one of
13 these things were supported by Mr. Shofer's personal credit.

14 THE COURT: Excuse me one minute.

15 (Brief pause.)

16 THE COURT: Go ahead, Mr. Bornhorst.

17 MR. BORNHORST: The point I'm making to this court
18 is that there is a danger in this court stating that, well,
19 we are not going to allow any evidence of economic damages.
20 One of the dangers is that the Defendant has not with
21 particularity, with the exception of a couple of instances,
22 even proffered to The Court what each and every damage item
23 that this Plaintiff is asking for is. This court is not
24 hearing any full discussion of those issues at all.

25 For example, among them is a technical feature but

1 it involved Mr. Shofer's money in the pension. He put in
2 out of his pocket \$76,600 which became a tax shelter. Okay.
3 In an effort to try to undo some of these loans, he
4 reclassified that money, which it requires expert testimony,
5 frankly, to understand the nature and extent of that
6 particular financial transaction. But the fact of the
7 matter is that it was done specifically to try to overcome
8 the loans which were taken from the pension which were
9 prohibited transactions which would trigger the additional
10 tax liability if they were not undone. His efforts to undo
11 those things are also included as damages in this case.

12 Yet, if this court just says, well, what I see now
13 is -- if this court just excludes economic damages, per se,
14 from this case, and without any opportunity for the
15 Plaintiff to even present evidence, the Defendant obviously
16 will take advantage of that come trial time and say, well,
17 this has already been ruled on, you can't present evidence
18 on any of these things. I would say, wait a minute, the
19 court didn't decide any of those. Yes, it did, it had this
20 umbrella ruling. Well, that's exactly what the Court of
21 Appeals did, Your Honor, and I think that that is unfair
22 treatment.

23 If the Defendant wants to assault the Plaintiff's
24 case prior to trial on summary judgment, it should do so in
25 terms of its motion for summary judgment, so I have a fair

1 opportunity to answer those questions specifically. And as
2 far as I know, that's all I can do today on the Plaintiff's
3 behalf. I can say, I don't think jurisdiction has been
4 overcome by Mertens for very good reasons, and the Mertens
5 case itself is evidence of that. I can say, please, please,
6 please read, as carefully as The Court can stand, the Court
7 of Appeals' opinion and consider that excise tax damages
8 were not a material item of damage and got lost in the
9 crowd, and that there are no principles of law that Shofer
10 versus Hack represent that can intelligently exclude those
11 damages, even though we are sure The Court would be on --
12 The Court necessarily understands that in its umbrella
13 treatment those damages certainly got washed away with
14 others by the Court of Appeals.

15 And, lastly, I'm saying that either the principles
16 of contract or tort apply to this case, apply very clearly
17 and apply in a very compelling way, and certainly require
18 evidence which will be forthcoming, without which the
19 Plaintiff wouldn't have a case. The loss of whatever you
20 want to call it, whatever you want to call it, the loss of
21 profits, there are, you know, there are cases, Your Honor,
22 that suggest -- we are making a claim for capital loss and
23 we are making a claim for salary -- it's possible that the
24 Defendant may very well find some law to support the fact
25 that we can't get both, but it's very unlikely that there is

1 law that exists that says that under these circumstances,
2 with the direct impact upon this man's ability to make money
3 and have his -- the way he made money was not unknown and he
4 wasn't doing it in a way that other people like him were
5 not.

6 I'm looking for -- I'm looking for -- the closest
7 thing I can come to, Your Honor, so far are breach of
8 warranty type cases. I mean, if you are using contract and
9 if you are using tort principles and if you are using Hadley
10 versus Baxendale and all of its progeny, then it's very
11 clear that lost profits and economic damages can, in fact,
12 be awarded. There aren't any states that say that that's
13 not possible. I'll cite two cases. One is Westric Battery
14 Company versus Standard Electric Company, 482 Fed 2nd 1307,
15 Tenth Circuit, 1973. It's a breach of warranty case.
16 Plaintiff claimed at trial that the defective goods supplied
17 so impaired Plaintiff's business that it was required to
18 mortgage its assets to creditors who subsequently
19 foreclosed. Plaintiff sought and recovered damages equal to
20 the amount of the mortgage. On appeal, the Plaintiff
21 claimed that it was entitled to recover damages for
22 impairment of assets, in addition to damages for lost
23 profits up to the time of trial and loss of future profits.
24 The court held, however, that the award of damages for
25 impairment of assets duplicated the award of damages for

1 loss of profits and reversed for retrial on the question of
2 damages. The court stated that the Plaintiff could omit its
3 claim for lost profit damages and alternatively seek to
4 recover the reduction in net worth suffered in consequence
5 of the Defendant's failure to supply goods of merchantable
6 quality.

7 There is another analogous case which is Bader
8 versus Cerri, 96 Nevada 352, 609 Pacific 2nd 314, 1980. It
9 is closely analogous. Here, the court found that the
10 Plaintiffs had been unable to obtain new financing or raise
11 additional capital because of the alleged conversion of
12 their property by Defendants. Lost profit damages suffered
13 in consequence were held recoverable. Damages for
14 impairment of capital are particularly important to a
15 construction contractor. It goes on about that. But the
16 point is that that loss of personal credit is also of a
17 major impact to a client in my class, and that that is not
18 an unknown set of circumstances.

19 THE COURT: Thank you.

20 MR. BORNHORST: I --

21 THE COURT: Oh, I thought that you were done.

22 MR. BORNHORST: Yes, I think I am. Thanks.

23 THE COURT: Okay. Do you have any rebuttal
24 argument?

25 MS. TRUHE: Yes, Your Honor.

1 THE COURT: Will you be long?
2 MS. TRUHE: Very brief.
3 THE COURT: Okay. Go ahead.
4 MS. TRUHE: Just a couple of points. First of
5 all, with respect to excise taxes and prohibited transaction
6 penalties, I disagree with Mr. Bornhorst that these
7 categories of damage, even though they were contingent at
8 the time the Court of Appeals rendered its decision, I
9 disagree with Mr. Bornhorst that they got lost in the crowd.
10 The Court of Appeals, on page 109 of its reported decision -
11 -

12 THE COURT: Excuse me.

13 (Brief pause.)

14 THE COURT: I'm sorry, go ahead.

15 MS. TRUHE: On page 109, under Roman Numeral V,
16 "The respondents have argued that certain features of this
17 case make Shofer's claim based on Maryland malpractice law
18 related to the plan. Our holding in Part 4, supra, that the
19 malpractice claims in Counts 1 and 2 are not preempted,
20 denies preemptive effect to those features with one
21 exception to be discussed in Part 5(b), infra."

22 In other words, Mr. Hack was making the argument
23 that various features of the Plaintiff's state law claims
24 for negligence and breach of contract made those claims so
25 related to the plan as to be preempted, as to make the

1 claims themselves preempted. And one aspect of those claims
2 was were these two categories, actually three categories at
3 the time of damage, excise taxes, prohibited transaction
4 penalties and possible plan disqualification.

5 Because these types of damages are clearly related
6 to the plan, and in fact but for the plan they would not
7 even be damages, the court was, I would submit, very
8 impressed with that argument. And it was because of the
9 court I think leaning in the direction of preemption by
10 virtue of those categories of damage that Mr. Pelagos
11 (phonetic), who was representing the Plaintiff at the time,
12 told the court those damages are now out of the case. Call
13 that a concession or whatever else, he told the court those
14 damages are not in the case, which gave the court what it
15 wanted, namely the exclusion of those damages, those pension
16 related damages, so as to permit the state law claims to go
17 forward because they were no longer plan or pension related,
18 thus warranting preemption.

19 And the court stated on 109 that they were denying
20 preemptive effect to all of the various arguments which Mr.
21 Hack was making about the Plaintiff's claims "with one
22 exception", namely these three above-described contingent
23 liabilities, the prohibited transaction penalties, excise
24 taxes and possible plan disqualification.

25 So I believe the court has made a definitive

1 statement that these types of damages would be preempted,
2 possibly requiring preemption of the entire case if they
3 were still in the case. But the court picked up on Mr.
4 Pelagos' concession that they were no longer in the case.
5 That gave the court or mooted the need for the court to
6 further address the issue of whether Plaintiff's entire
7 claims should be preempted because those damages were in the
8 case because at that point they were no longer in the case.

9 Now, as far as --

10 THE COURT: Well, just let me go through this
11 under Roman Numeral V. "Our holding in Part 4 that the
12 malpractice claims in Counts 1 and 2 are not preempted --

13 MS. TRUHE: Right.

14 THE COURT: -- denies preemptive effect to those
15 features --

16 MS. TRUHE: In other words, what the court was
17 referring to there was the features which Mr. Hack was
18 arguing called for a preemption. In other words, the plan
19 would have to be wed, that it involved the pension plan,
20 that this involved a plan administrator and a trustee, in
21 other words parties in the pension area. Hack was making
22 numerous arguments and pointing to numerous different
23 factors that show how related this entire case was to the
24 plan. And one of the things that Hack talked about,
25 actually three of the things that Hack talked about were

1 these three damages, the excise taxes, prohibited
2 transaction penalties and possible plan disqualification,
3 very pension related and, as Hack believed, requiring
4 preemption of Shofer's entire case, both state law claims.
5 But the court denied preemptive effect to all of the
6 arguments which Hack was making with one exception, namely
7 the damage argument with respect to excise taxes, prohibited
8 transaction penalties and possible plan disqualification.
9 There, the court did see preemption. I think the court is
10 saying on page 109 that there is possibly preemption there
11 because they are not denying preemptive effect.

12 Then they go on, on page 111, saying, well, since
13 Mr. Pelagos is saying they are no longer in the case, we
14 don't have to cross that bridge. Because they are not
15 pension related, we have nothing else in this case that is
16 because the court has denied preemptive effect to all of the
17 other arguments which Mr. Hack was making. The court didn't
18 see the pension relatedness of all of these other factors
19 but the court did see the pension relatedness of those three
20 categories of damage and was not going to deny preemptive
21 effect to those three categories until Mr. Pelagos conceded
22 them out of the case. At that point they were no longer in
23 the case, so the court didn't have to address Mr. Hack's
24 argument of whether they were preempted or not.

25 Now, coming to the last category of damage which

1 is actually two categories of lost profits and --

2 THE COURT: I must say, I think it's unclear. I
3 think the court probably intended the way you said it, but
4 if you just look at the actual words that are used, you
5 could construe it to mean -- well, it doesn't say that they
6 are tossing these out because they are contingent.

7 MS. TRUHE: Right, exactly.

8 THE COURT: They were categorized as contingent
9 but it doesn't say in there that the reason they are making
10 this ruling is because they are not yet mature, to use Mr.
11 Bornhorst's words.

12 MS. TRUHE: Right. The court wasn't bothered with
13 that one way or the other.

14 THE COURT: It doesn't seem like they were
15 bothered by it. I still struggle though to understand what
16 the difference is in effect between an income tax that is a
17 consequence of improper borrowing and an excise tax or
18 prohibited transaction penalty that is a consequence of
19 improper borrowing. So I don't know if this was fleshed out
20 enough but I'm not sure what I'm supposed to do about it in
21 this posture.

22 MS. TRUHE: I think it is splitting hairs although
23 I think the Court of Appeals was more comfortable with
24 allowing just the ordinary income tax to be assessed on
25 money which Mr. Shofer had earned, and put in his pension

1 and then took right back out again, than it was with
2 permitting recovery of very special taxes assessed solely
3 because it was pension money that was being dealt with here.
4 I think an argument could be made that it was all pension
5 related.

6 THE COURT: Or all not pension related, either
7 one.

8 MS. TRUHE: Exactly.

9 THE COURT: But they are not the same.

10 MS. TRUHE: Exactly. But, nevertheless, the court
11 did deny preemptive effect to all the various arguments and
12 features which Mr. Hack was pointing out that he contended
13 made this case pension related with one exception, as the
14 court said, and that was in the case of these three damages
15 which we have discussed. And then Mr. Pelagos took the
16 court off the hook at that point by saying, oh, well, but
17 they are not in the case anymore. And that was all the
18 court needed to not have to wrestle further with whether the
19 Plaintiff's entire case should be preempted because those
20 three damages were in the case, because that was going to be
21 the next step for the court at that point.

22 THE COURT: Is that your rebuttal?

23 MS. TRUHE: One more point on the lost profits and
24 salary. Mr. Bornhorst, if I understand the gist of what he
25 is saying, is contending that Mr. Hack somehow should have

1 known that the Plaintiff was a financial house of cards,
2 that he would have no money to fix things, as he put it,
3 when his tax debt came due. But that's no different from
4 the lawyers in the Stone case who were also unaware that the
5 plaintiff would have no money to correct things when his
6 stock market deal fell through, and that he would have
7 nowhere else to turn in an emergency for cash but his home
8 which, unfortunately, because the lawyers had mishandled the
9 settlement, was not going to be a source of cash for him.

10 So I think the leap is the same in this case as it
11 was in Stone, that somehow the negligence on the part of Mr.
12 Hack in '84 caused lost profits from the business beginning
13 in '88, and I think it is the kind of highly extraordinary
14 result, even assuming one did cause the other, and that's a
15 big if, which the court in Stone held could not be
16 recovered. Thank you.

17 THE COURT: Thank you. Counsel, we still have the
18 motion to consolidate to argue. I don't know how much time
19 you want to spend on that. I do have a 4:30 pretrial
20 conference and I wanted to just take a very short recess for
21 some housekeeping matters before we go on.

22 Okay. Let's take a very brief recess.

23 THE CLERK: All rise.

24 (Brief recess.)

25 THE CLERK: All rise. The Circuit Court for

1 Baltimore City, Part 20, resumes its afternoon session, the
2 Honorable Ellen L. Hollander presiding.

3 THE COURT: Be seated, please. All right. I
4 believe we were up to the motion to consolidate. Counsel, I
5 should mention to you some news I think you will be unhappy
6 about and I wanted to let you know when you came in. We
7 were expecting this case to be tried in July and the
8 procedures of the court require me to complete forms to send
9 to the assignment office to designate the trial period. I
10 did all of the things that I am supposed to do. What
11 happens, just so you know, is first it goes to Mr.
12 Ignatowski, who is the Assignment Commissioner, and he then
13 looks at the number of judges who will be available for a
14 particular category of assignment if one judge is
15 essentially taken out of commission. We had a mid July
16 trial date I believe. He notified Judge Heller, based on
17 this, that he did not feel there were going to be enough
18 judges available to try civil cases when we had picked. As
19 a matter of fact -- well, in light of that, Judge Heller
20 notified me that she couldn't really approve the trial date.
21 I then called Mr. Ignatowski to see if there were other
22 dates that would be suitable. The concern on his part is,
23 just so you know, there have to be certain courts that are
24 always covered. We have to have a judge doing domestic
25 miscellaneous. We have to have a certain number of judges

1 doing criminal cases. We have to have a certain number of
2 judges hearing the routine civil cases, et cetera. So I
3 called him back immediately and I said, okay, well, could
4 you give me some other dates because Judge Kaplan assigned
5 this case to me and I only got it when I got it, called you,
6 and set up the pretrial. I mean, I have done everything
7 pretty quickly I think. I picked this date -- well, it
8 turned out to be June 1 -- I picked May 31 because it was
9 for the hearing, for this hearing, because I already had a
10 specially set civil case that I had gotten clearance on, and
11 that settled. So I knew that I could squeeze in this
12 hearing on that day, it would already be approved.

13 To make a long story short, Mr. Ignatowski
14 basically said there is no time the entire summer when they
15 could spare me to take the time to try this case, which I
16 think I estimated, based on what you told me, was about ten
17 days. I then called Judge Kaplan, who is the judge, as you
18 know, the boss judge, and he is the one who assigned the
19 case to me, and I said, well, Judge Kaplan, you gave me this
20 case to try this term and I am happy to try it, I'm trying
21 to try it, and this is what I have been told by Mr.
22 Ignatowski, then Judge Heller, and I'm trying to find out
23 what I'm supposed to do. And he said, well, they are right,
24 we can't spare you to try this case over the summer -- and
25 the summer is basically June, July and August -- because

1 there are not enough judges, with leave and other issues,
2 and other judges who have already longstanding commitments
3 for protracted and complex cases that have already been
4 approved.

5 So the long and the short of it is I can't try
6 this case this summer. In September, right after -- well,
7 I'm on leave from late August until like September 7th and
8 when I come back I'll be going into felonies. So I will not
9 be trying the case, period. I didn't really feel very happy
10 about that but I called, as I say, Judge Kaplan, and I have
11 basically two options. One is to send this back to him to
12 reassign. I told him, no, I was keeping the motions, that I
13 had already gotten into it and I wanted to keep the motions
14 hearing. I thought that made sense. And he would have to
15 reassign it to a judge who would be available in the fall
16 term.

17 Alternatively, I could try to trade with a judge
18 in civil in the fall and give that judge my felony rotation
19 and keep this, but I really don't think I want to do that
20 because I really enjoy -- not that I don't like civil, I do,
21 but I gave up my felony rotation last term on Judge Kaplan's
22 request to serve as the felony arraignment judge, and I
23 don't really want to give it up again. I was kind of
24 looking forward to it.

25 So the long and the short of it is I don't think

1 you are going to trial in July. The reason I mention it now
2 is that this may have an impact on the motion to
3 consolidate. I wasn't, quite frankly, inclined to grant the
4 motion to consolidate, the posture of the case being this
5 case is set for trial, we are ready to go, and it's July.
6 And in a way, I'm not sure I should rule on the motion to
7 consolidate. I don't think it's a very complex motion.
8 It's not that. That's not the problem. The problem is that
9 I don't know when you will go to trial, and if you get
10 reassigned to another judge, that judge then within the six
11 month period picks the trial date. For all I know, it might
12 well be around the time that the Blum, Yumkas case is set,
13 which is March of '95.

14 Now, the March '95 does put it into the spring
15 term and, incidentally, I'll be back in civil if all goes
16 well by March of '95. So maybe you would like me to keep
17 the case or maybe you don't want me to keep the case. I
18 mean, I really don't know. I'm just trying to have this
19 open dialogue with you about this mess. But I know that --
20 I mean, I felt terrible but I wasn't sure, when I revisited
21 everything, Judge Kaplan sent me this case I think March
22 31st, we had a hearing in April, and I set the date for this
23 in May. I think we moved as fast as I could be expected to
24 go. Any date I would have picked apparently, June, July or
25 August, I never would have gotten approved, which one might

1 wonder why did it get sent to me but, you know, it did, and
2 that's where we are.

3 So in a way I'm inviting you to tell me what you
4 want in terms of -- I still intend to rule on these motions
5 and I'm still available after I do that to participate, if
6 now you particularly think it might be helpful regarding
7 possible settlement discussions. That's still out there. I
8 also can suggest it, if you want me to keep the case, and
9 then maybe it would just have to wait until the March '95
10 term. That means, you know, that's a pretty long
11 postponement of this portion but if the cases are kept
12 together, the other portion wasn't going to trial until
13 March of '95 anyway.

14 So I don't know what your feelings are about it.
15 If somebody wants to say anything, this would be the time.

16 MR. SPIEGEL: Your Honor, the other thing that
17 bears upon that is if Your Honor were to grant the damages
18 portion of the motion for summary judgment, that would moot
19 the motion to consolidate anyway because the only issues of
20 commonality pertaining to the categories of damages that
21 were argued should be removed from the case.

22 So at this point what I think might make the most
23 sense --

24 THE COURT: Well, the issues of commonality are
25 the damages meaning what?

1 MR. SPIEGEL: The excise taxes, the loss of
2 inventory for the automobile dealership, and the inability
3 to earn the salary, and the loss of income from the
4 business. If those were to be out of the case, there would
5 be no basis for the insufficient --

6 THE COURT: In a way, yes, and in a way, no. I
7 mean, there is still the history of the case. But it's your
8 motion, so if you don't want it --

9 MR. SPIEGEL: Well, the other thing, Your Honor,
10 that I was going to get to is, in light of that, we think
11 what might be appropriate is if we just stay consideration
12 of the motion to consolidate at this point pending receipt
13 of the order, and then we will make a decision if we want to
14 go forward consolidated or separate.

15 THE COURT: Okay. That's fair. Now, the next
16 question would be -- let me just make a note of that.

17 MR. KOZLOWSKI: Your Honor, if I may be heard
18 briefly on behalf of Blum, Yumkas, what Mr. Spiegel had to
19 say with respect to damages that are at issue and connected
20 to the consolidation motion, I think based on Shofer's
21 complaint against Blum, Yumkas, the only damages at issue in
22 that case are excise taxes and prohibited transaction fees.
23 It has nothing to do with these other damages that are
24 subject to Hack's motion for summary judgment. To that
25 extent, I think the damages are different. In fact, I agree

1 with him that if the excise taxes are, in fact, out of the
2 Shofer litigation against Hack, then there are no common
3 issues.

4 I just wanted to make that clear because, to my
5 knowledge, the underlying or the malpractice case against
6 Blum, Yumkas has nothing to do with allegations of lost
7 revenue or the other type of damages.

8 THE COURT: Well, I think, you know, we can all
9 dissect everything and say, well, this isn't exactly the
10 same and that isn't exactly the same. But to tell the
11 story, if you will, one time would be enough, and you really
12 can't -- I mean, I don't know how I was going to rule. I'm
13 telling you that. And one problem I had was the big
14 difference in the trial dates. I didn't want to
15 particularly hold up the trial of the case that is ready to
16 go that was sent to me originally in order to catch up with
17 the Blum, Yumkas case. And Blum, Yumkas' case, in fairness
18 to Blum, Yumkas, I thought it was a little unreasonable
19 to -- I couldn't expedite Blum, Yumkas, so I would have to
20 delay the Hack case. Blum, Yumkas was basically just sued,
21 as these things go. I mean, I have got Hack, and I'll refer
22 to them that way because Shofer is common to both, but the
23 Hack litigation has been around since '88 and Blum, Yumkas
24 is since '93.

25 So clearly I understand that Blum, Yumkas isn't

1 ready to go to trial and, if the other one was, I didn't
2 really want to hold them up. But if I do end up -- for
3 example, if you tell me, all of you, that you would like,
4 and I'm not even asking you to tell me this, but I'm just
5 saying if you all said we want a trial date as quickly as
6 possible on the other case, well, then fine, I'm just going
7 to send it to Judge Kaplan and let him reassign it and you
8 will get your date from the new judge. But if you all said,
9 you know, it makes sense for you to keep it, the Blum,
10 Yumkas case is going to be ready in March of '95 and I'll be
11 back in civil in March of '95, assuming there are no
12 changes, which can happen, but then obviously I think I
13 would consolidate because I only think that whoever hears
14 the story needs to hear it once and it's hard to parcel it
15 out. I mean, it doesn't seem likely that when the whole
16 story is told and whatever damages are in here that you can
17 separate out who the original lawyers were, why they didn't
18 file in federal court, what happened as a result of never
19 filing in federal court until the statute had run. I mean,
20 you know, there is one story throughout this whole thing and
21 maybe the liabilities, if any, that flow from various acts
22 or omissions may differ as to each defendant if there is
23 liability at all. But I think one judge could hear it all
24 at once much more efficiently than two judges.

25 MR. KOZLOWSKI: Your Honor, I think Mr. Spiegel's

1 suggestion that we await the ruling or the disposition on
2 the motion for summary judgment before there is any
3 particular ruling on the consolidation motion in all
4 practicalities is perhaps the best course of conduct at this
5 point.

6 THE COURT: Okay. Well, it's your motion, so if
7 you are not --

8 MS. TRUHE: Yes, Your Honor. Given that it's
9 Hack's and Grabush's motion, I think we can put that on hold
10 completely pending receipt of The Court's ruling on the
11 motion for summary judgment and partial summary judgment
12 because at that point Hack and Grabush will be in a much
13 better position to evaluate whether we even want to press
14 for consolidation, whether there is even a necessity for it.

15 THE COURT: Okay.

16 MS. TRUHE: And as far as whether to keep this
17 case with Your Honor or not, it would be the position of at
18 least the Hack defendants that we would have no problem
19 waiting until March of '95 to try this case. Your Honor is
20 familiar with the case. I think, you know, we are going to
21 be delayed until the fall as it is and, given the pros and
22 cons, we might as well leave it with you.

23 THE COURT: Let me ask, just before I invite you
24 all to speak to that, did you, Mr. Bornhorst, actually file
25 an opposition to the motion to consolidate, because I don't

1 think I saw one.

2 MR. BORNHORST: No.

3 THE COURT: Do you oppose it?

4 MR. BORNHORST: It seemed like an unlikely outcome
5 at the time. My feeling about it now is that I can
6 certainly go along with other recommendations that the
7 decision on that be stayed. I was going to address that
8 because, quite frankly, Your Honor, until The Court rules
9 upon the Plaintiff's right to go forward and at least
10 present evidence on economic damages, and until it makes the
11 ruling which it has the opportunity to make concerning
12 excise tax damages, the chances of this case settling are
13 zero. They go up considerably whatever The Court decides.
14 And I think that these litigants really need --

15 THE COURT: I mean, you can argue that both ways.

16 MR. BORNHORST: I mean, you know, we seem to be
17 pretty far apart as far as how we think about it but I don't
18 think the case -- I think the case should be settled and I
19 think it can be settled. I think what the Plaintiff would
20 accept is reasonable enough that we don't need anything
21 close to the best case scenario in order to settle this
22 case. Yet, there are certain issues that won't go away,
23 i.e. the excise tax thing. Maybe we can overcome those with
24 some other damages if they are willing to consider them if
25 we are going to be permitted to even argue.

1 So if we can understand now that the July trial is
2 off, that obviously the pretrial would be also postponed
3 because that would take a great deal of time in the coming
4 months, as far as preparation is concerned for the whole
5 trial itself for one thing, and if Your Honor could keep
6 this case for the time being, make a ruling, stay its
7 decision on this other, and then give the parties a chance
8 to talk to each other and see where we stand, that would
9 probably be as much as we could hope for under the
10 circumstances.

11 THE COURT: Well, what I would do is -- I mean,
12 from my point of view, of course, I don't want to be tardy
13 in turning it over to be assigned to another judge. But
14 even if I do that, it doesn't mean anything will affect your
15 game plan. I am going to keep the motions. I told Judge
16 Kaplan that. That's my job, as far as I am concerned, to
17 resolve at least the summary judgment portion, not
18 necessarily the consolidation question.

19 I had written a letter to all of you and then I
20 decided I will wait until you come in. I wanted to hear
21 what you had to say. I wanted to be able to talk about it
22 and not just send you a letter and then let the chips fall
23 where they may, and that's why I decided to wait knowing you
24 were coming. But in any event, no matter what you all would
25 like to do after I rule, you can go ahead and do that and it

1 will at least be assigned and somebody, in case you don't
2 settle, will be responsible for getting you in and getting a
3 trial date.

4 Now, my only concern really would be whether -- I
5 don't want to suggest that I want it and I don't want to
6 suggest that I don't want it, that's really up to you -- but
7 if you would like to at least preserve, if you will, the
8 option to possibly go to trial sooner, then obviously you
9 want me to send it on to Judge Kaplan for reassignment for a
10 trial date in the fall term commencing September of '94
11 which ends roughly early March of '95. That's when we
12 switch again. There are six-month rotations on our court.
13 And if what you say is, if that's the earliest you can go to
14 trial, the judge then to whom it is assigned will pick a
15 time. He or she would meet with you and you will pick a
16 date. It could be September or it could be February.

17 MR. SPIEGEL: Your Honor, if I may, I have a very
18 self-serving reason but I'll put it on the record because I
19 speak for both Mr. May and myself. We are obviously from
20 out of town. We would prefer to go in March and
21 particularly because I would hate to be in a position where,
22 God forbid, there was snow and --

23 THE COURT: Where do you come from?

24 MR. SPIEGEL: I live in Gaithersburg and Mr. May
25 lives in Northern Virginia. I mean, I could get up here

1 without a problem but Mr. May is going to be lead counsel
2 once we actually launch the trial. Plus, again, speaking
3 off the top of my head, there is an attractiveness to --

4 THE COURT: Well, remember that the last major,
5 really truly major snowstorm was I think March 12th.

6 MR. SPIEGEL: I am just going on percentages. But
7 there is also an attractiveness to preserving the option of
8 having it, since there is a March trial date already,
9 preserving that option, rather than if we announce now we
10 are going forward.

11 THE COURT: Well, that wouldn't be foreclosed, you
12 see.

13 MR. SPIEGEL: Well, but we would have to bump it
14 again if --

15 THE COURT: Well, if I send it to Judge Kaplan in
16 the fall for assignment to a judge in the fall term, and
17 that judge rules that the consolidation should take place,
18 he is not going to move up the Blum, Yumkas but he will move
19 this back to March.

20 MR. SPIEGEL: Right.

21 THE COURT: But if you say, no, you want it to
22 stay here, for example, then you are basically saying there
23 is no way it can go earlier. So basically I think it will
24 be more sensible for me to send it to Judge Kaplan for a
25 trial in the fall term. If that judge denies the

1 consolidation, you may go to trial. The judge, of course,
2 may have an interest in consolidating to get rid of it but
3 who knows.

4 MR. BORNHORST: Not only that, Your Honor, but
5 knowing that in the Stone case, by the time the thing was
6 litigated, papers had been filed and the thing was fixed
7 long ago. My client's problems have never been fixed. They
8 are still continuing and he needs --

9 THE COURT: Well, that was a reason why I wasn't
10 inclined to grant the consolidation.

11 MR. BORNHORST: As much as I'm inclined, you know,
12 to want Your Honor to hear this case and all of that, you
13 know, I --

14 THE COURT: Though I believe you, I'm not offended
15 no matter what you say. I appreciate what you are saying
16 and that's why I wondered why you did not oppose the
17 consolidation because not opposing the consolidation
18 suggested to me that you didn't care and if you didn't care
19 it could end up being delayed on the tax portion at least
20 until March. So I wondered why you didn't oppose it and
21 that's why I thought maybe something got filed that we just
22 didn't get.

23 MS. TRUHE: Well, Your Honor, while the Hack
24 defendants certainly would have a preference to Your Honor
25 hearing it in March, we have no objection to your sending it

1 back to Judge Kaplan for assignment in the fall either.

2 THE COURT: Okay. Well, basically then what I
3 will do is I will send it to Judge Kaplan for reassignment
4 and I will rule on the motion I have heard. I will wait
5 until you tell me if you want me to rule on the motion to
6 consolidate and then either we will have a hearing or the
7 next judge in line will hear it or whatever, but I guess,
8 just to respond to what you said a moment ago, Mr.
9 Bornhorst, on settlement, I could easily make the argument
10 that it's better to settle before I rule since it means that
11 everybody is gambling and they don't know if they will win
12 or lose, and that's usually why cases settle. I mean, once
13 I rule, everybody's bargaining position is gone, I think.
14 For example, of course, if you win on excise damages, then
15 you are in great position maybe for purposes of settlement
16 but, on the other hand, if you lose on excise damages, you
17 are going to be in a terrible position for settlement. If
18 you talk right now, then none of you know what I will do.
19 Even I don't know what I will do. So this is the time. I
20 mean, that's what compromises are made of. I realize the
21 money we are talking about is of large proportions here and
22 obviously that makes settlement all the more difficult. You
23 answered a big question on Grabush, Newman but, without
24 commenting on responsibility here, from a legal point of
25 view, I can't help but revisit what I said last time which

1 is had you filed a direct claim against Grabush, Newman, it
2 would seem to me, forgetting whether or not these are even
3 viable state claims and all of that, it just seems like,
4 from what I have understood about the case, if Hack did
5 anything wrong, Grabush, Newman could have nipped it in the
6 bud if they would have, in fact, done their job. Certainly
7 there is a concern there if I were Grabush, Newman.

8 I, in fact, just had a medical malpractice case
9 today where one of the issues was intervening and
10 superseding negligence on causation. I don't think this
11 would be that case but it is out there I suppose as an
12 issue. I mean, if that letter from Hack was enough to
13 create all these problems for years down the road, I don't
14 know, in a way I think that might be asking a lot, but
15 nevertheless, whatever Mr. Shofer ultimately did do,
16 certainly his accountants the very next year would have been
17 aware I think and could have said, whoa, this is not the
18 proper course of conduct. I mean, that's why you go to
19 accountants, just as much as why you go to plan
20 administrators, if you go to anybody.

21 So I do see, frankly, Grabush, Newman I think has
22 to wake up and smell the roses too. I see their liability,
23 frankly, leaving aside what damages are recoverable, I see
24 them as having some serious exposure. So I don't know how
25 we will leave it except to say I'm not going to bother you,

1 you are going to have to bother me. If you want me to help,
2 I am happy to do it. I told you that before. If it's not
3 my case, then you don't even have to worry about that. I'm
4 still happy to help. I'm still here to serve and my role
5 will be defined by what you ask of me on that basis. If you
6 want to wait until after I have ruled, that's your choice.
7 I did mention that time when -- in my Pimlico case -- when I
8 had the opinion ready and still called the lawyers to say,
9 well, now it's ready but somebody is going to be unhappy and
10 this is the time, I'm here, and nobody wanted me to -- they
11 wanted to see the ruling, and somebody was very unhappy. So
12 I think this is the better time, personally, but I can't say
13 it more explicitly. But as they say, don't call me, I'll
14 call you, that kind of thing, I'll wait until you call me.

15 So, counsel, I think it's probably, if you want to
16 make predictions, it seems likely that on the basis of
17 Mertens, The Court will not say that the state claims are no
18 longer viable. As to damages, I think that's much thornier.
19 I understand the issues I think very clearly. The answers
20 are much more difficult. I am going to hold the whole thing
21 sub curia. I might as well have an opinion come out that
22 addresses everything. I am not going to spend a lot of time
23 probably in that opinion on the Mertens aspect. But the
24 damages are far trickier. The one easy issue was the Virgin
25 Islands but that's now out.

1 So I hope to get to it as soon as possible but I
2 want to alert you that there are an awful lot of things in
3 the hopper. I've already started working on this but I
4 don't want to predict when. But obviously with a July trial
5 date out, the pressure is off as far as I am concerned, and
6 you already have a sense of the main issue, that is that the
7 state claims will survive. That was a big one. Now you
8 have to focus on what exactly is in. I think the excise
9 damage question is very interesting. We have all agreed I
10 don't get the distinction but I'll have to look at it. I'm
11 obviously just, as I've said already, the mere trial judge,
12 and I can't rewrite the Court of Appeals' decision.

13 So on that happy note, counsel, I'll be calling
14 Judge Kaplan this week, probably tomorrow. Actually, I'm
15 going to be a witness in District Court tomorrow on a B&E
16 where I actually am the victim, so as soon as I get back
17 I'll call him.

18 Have a nice evening. We will stand in recess.

19 THE CLERK: All rise. This court stands
20 adjourned.

21 (Whereupon, the proceedings were concluded.)
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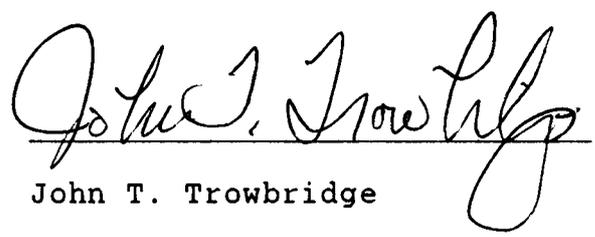
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REPORTER'S CERTIFICATE

I, John T. Trowbridge, an Official Court Reporter of the Supreme Bench of Baltimore City, do hereby certify that I stenographically recorded the proceedings in the matter of Richard Shofer vs. The Stuart Hack Company, et al, in the Circuit Court for Baltimore City, Case No. 88102069/CL799993, on June 1st, 1994, before the Honorable Ellen L. Hollander, Judge.

I further certify that the page numbers one through ninety-three constitute the official transcript of the proceedings as transcribed by me from my stenographic notes to the within typewritten matter in a complete and accurate manner.

In Witness Whereof, I have affixed my signature this 18th day of March, 1995.


John T. Trowbridge
Official Court Reporter

01502-

IN THE CIRCUIT COURT FOR BALTIMORE CITY

FILED
JUN 01 1995

RICHARD SHOFR, *

Plaintiff *

vs. * Case #88102069/CL79993

THE STUART HACK COMPANY and *
GRABUSH, NEWMAN & COMPANY, *

Defendant *

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REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS
(Motions)

Baltimore, Maryland

Monday, January 30, 1995

BEFORE:

THE HONORABLE ANDRE M. DAVIS

APPEARANCES:

For the Plaintiff:

THOMAS H. BORNHORST, ESQUIRE

For Defendant Stuart Hack:

JANET M. TRUHE, ESQUIRE

For Defendant Grabush, Newman:

DEBORAH M. WHELIHAN, ESQUIRE

JOHN T. MAY, ESQUIRE

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1 If I may, I'd like to ask you something of an
2 unfair question. But if in this case from your point of
3 view, and I'm not asking you to help out the Plaintiff here
4 at all, I'm really not. But if liability were to be
5 established on the basis that your client failed to afford
6 certain advice that should've been afforded, and I take it
7 that's really what this case is about.

8 MS. TRUHE: Exactly, Your Honor.

9 THE COURT: What non-preempted foreseeable
10 damages do you believe are in the case, if any?

11 MS. TRUHE: Okay. Under the Court of Appeal
12 opinion in Shofer One, here is what Mr. Shofer can recover
13 in this state law action. As a result of withdrawing all
14 of this money from his pension sooner rather than later
15 when he would otherwise do it, he had to pay taxes, taxes
16 now versus taxes later. Of course, it costs more to pay
17 taxes now than taxes later when he'd be in a different
18 bracket and so on, and the money would've grown.

19 So what we're essentially looking at is a timing
20 difference in having to pay taxes now versus paying taxes
21 later. And there is some money involved in that, and the
22 experts have calculated that damage figure. Then the Court
23 of Appeals also held that Mr. Shofer can recover some
24 consequential damages in the form of professional fees as a
25 result of having to straighten this whole tax situation

1 out. His accountants, his tax attorney, those people. And
2 that figure is up to, I think, about \$50,000.

3 So those are the two things, really, that the
4 Court of Appeals has held Mr. Shofer can recover as a
5 result of the entire transaction in this case. Borrowing
6 huge sums of money from his pension and having to pay taxes
7 now when he hadn't bargained for that versus later. All of
8 the other kinds of damages --

9 THE COURT: And by the way, so your position is
10 he's not entitled to recover all of the taxes that he has
11 actually paid.

12 MS. TRUHE: That's right. 'Cause you'd have to
13 pay taxes on that money eventually.

14 THE COURT: Okay. So you expect to have expert
15 testimony establishing the difference between what would've
16 been paid had he begun to withdraw at what, 59 and a half,
17 and/or age 65, and/or age 70, whatever it may be, and
18 comparing that to what he's had to pay as a result of the
19 '84 through '86 withdraws.

20 MS. TRUHE: Yes, Your Honor.

21 THE COURT: Okay. All right, now on the question
22 of interest, I understand full well your contentions in
23 that regard. But it occurs to me that since this is
24 borrowed money, and unlike some of the cases that you cite
25 from New York, I think this is not money that is already in

1 the hands of the taxpayer for which he or she is not
2 already paying interest.

3 And so I wonder if on the question of interest,
4 we don't need to be concerned with the possibility of a
5 double interest charge, so to speak, in the sense that to
6 the extent he paid, and I understand that there were some
7 adjustments made and maybe he never paid any interest at
8 all back to the plan as a result of these loans, but to the
9 extent that he did pay interest or to the extent that the
10 interest that he didn't pay was attributed to him as
11 additional income which I understand was done in part at
12 least, and therefore taxes on that money eventuated. Is he
13 not entitled to, potentially, to the recovery of some
14 interest in the form of either interest on taxes, or
15 interest on borrowed funds, or taxes on interest that
16 wasn't paid, and therefore, was treated as income?

17 MS. TRUHE: It's interesting. He might be
18 entitled to a credit, assuming he paid it, on interest on
19 the money he borrowed from the pension. He determined his
20 own rate of interest, he determined when he was going to
21 pay it, and we have yet to really receive any figures from
22 the Plaintiff as to whether, in fact, he ever did pay this
23 money back with interest to the pension, and if so, how
24 much. We don't know that.

25 Right now all we know is that he took this money

1 out, he had the use of this money all along, and now the
2 IRS is coming back and saying well, the amount you
3 should've paid in taxes that you didn't, there's been some
4 interest on that through the years that you have had and
5 enjoyed and presumably used, and we want that back now.

6 The second component of the interest is when his
7 tax debt came due and the accountants finally figured out
8 that he underpaid, he wasn't able to pay that tax
9 immediately. So interest has continued to run. Those are
10 really the two kinds of interest that we're talking about
11 here. But Your Honor does raise an interesting issue with
12 respect to wouldn't there be some credit if Mr. Shofer was,
13 in fact, paying interest on the money back to the pension.
14 And that we don't know. We simply -- there is nothing in
15 the record about that thus far.

16 THE COURT: I seem to recall seeing something in
17 the record where there was interest due and owing to the
18 fund, to the plan, that was not paid, and therefore, he
19 took it into income.

20 MS. TRUHE: That's right. Presumably, he's had
21 it, used it, enjoyed it and not paid it back. He was
22 handling the entire transaction himself, and perhaps Mr.
23 Bornhorst can clarify that.

24 THE COURT: I'm sure he'll address it. All
25 right. Those were the specific questions I had. Well I

1 actually -- there was one other on penalties. Now it seems
2 to me that your position seems to be that he's entitled to
3 no penalties at all.

4 MS. TRUHE: Yes, Your Honor. Because during the
5 time period at issue, from August of '84 to September of
6 '86 when the accountants discovered their mistake, Mr. Hack
7 did not know he was borrowing this money from his pension.
8 Mr. Shofer has admitted in his deposition testimony that he
9 never advised Mr. Hack that he was taking this money out.
10 Mr. Hack was also not involved in the actual preparation of
11 the returns.

12 That was all handled between Mr. Shofer and his
13 accountants, and it was strictly his accountant's decision
14 not to treat some of this loan money, and they were
15 perfectly aware of everything that Mr. Shofer was taking,
16 not to treat some of this loan money as additional income
17 on the returns. Mr. Hack has not been sued for negligent
18 preparation of the returns. He was not in any way involved
19 in them.

20 And therefore, any negligence, independent
21 negligence on the part of the accountants in their
22 preparation of the returns is not something that we feel
23 can be attributed to Mr. Hack. The accountants are third
24 party Defendants, someone we brought into the case because
25 we feel mistakes were made in the preparation of the

1 returns that are over and above what Mr. Hack may or may
2 not have done in August of '84.

3 But in any event, it's a factual matter and,
4 therefore, it's a legal matter. We don't believe the
5 penalties, the tax penalties which have been assessed, are
6 in any way to do with our failure to warn him about
7 potential tax consequences in August of '84. The
8 accountants had full information when they sat down to
9 prepare these returns. Any error they may have committed
10 in under-reporting Mr. Shofer's income is strictly their
11 problem.

12 THE COURT: Well but wouldn't you agree, or would
13 you agree, let's say hypothetically, because I don't know
14 the facts in this regard, but if he made a loan in '84 that
15 was discovered in '86 to have been taxable to him
16 personally and individually for the tax year '84, I presume
17 from my limited knowledge of the tax code that the
18 penalties would have accrued from '84 until the taxes were
19 paid, not simply from the filing of the amended tax return.

20 MS. TRUHE: That's correct, but I don't think
21 they're actually accruing, I mean they were assessed for
22 the years '84 and '85.

23 THE COURT: Well you're right. They're not
24 accruing in the sense that anybody knows he's going to have
25 to pay them until they're assessed. But the assessment

1 goes back to the date of the original filing, not to the
2 date of the amended filing.

3 MS. TRUHE: It certainly does, that's right.

4 THE COURT: So even if he had paid the taxes in
5 full as soon as the accountants discovered that they were
6 owed, he still would've owed some penalty on that money.
7 Correct?

8 MS. TRUHE: Oh, no. When the --

9 THE COURT: A late payment penalty?

10 MS. TRUHE: No. When the accountants sat down to
11 prepare that first return, and it would've been the 1984
12 return, when they sat down to prepare that --

13 THE COURT: No, I mean the '86.

14 MS. TRUHE: Oh, in the '86.

15 THE COURT: In other words, the accountants
16 didn't learn until '86 that the '84 return was incorrect.

17 MS. TRUHE: Right. They didn't figure that out
18 themselves, right.

19 THE COURT: Okay. Now apart from any question of
20 contributory negligence, assumption of the risk and all of
21 that, once they -- when they found out, when they learned
22 in '86 that the '84 return and the '85 return as well, I
23 guess, were incorrect, at that moment, everybody knew that
24 there would be a penalty on those unpaid taxes.

25 MS. TRUHE: That's right.

1 THE COURT: So there's a -- presumably from the
2 record, I gather that there's a portion of penalty that,
3 again I'm using the word accrued, accrued from the filing
4 of the '84 return, presumably in the Spring of '85, until
5 the taxes were paid. Now my question is it seems to me
6 there's a good argument to be made that until the
7 accountant said you owe these taxes, then the accrued
8 penalties, up until that point, probably are non-preempted,
9 foreseeable consequences of the negligence, if there was
10 negligence in failing to disclose the tax consequences.

11 MS. TRUHE: Exactly.

12 THE COURT: Okay.

13 MS. TRUHE: You're right. When the accountants
14 finally discovered their error in September of '86, that
15 was when a new accountant had joined the firm and happened
16 to be sitting down and reviewing Mr. Shofer's file --

17 THE COURT: Is that how it actually happened?

18 MS. TRUHE: That's how it happened, yeah. Mr.
19 Alan Marble, who is now deceased, happened to have joined
20 Grabush in the Fall of '86, and was reviewing Mr. Shofer's
21 file for other purposes. And he had had other clients who
22 had done what Mr. Shofer had done, and he went to Kenneth
23 Lorash at Grabush and another accountant who had actually
24 prepared the returns at issue, and said Ken, do you realize
25 Mr. Shofer has not paid income tax on all of this.

1 THE COURT: So Grabush knew from the very
2 beginning that he was doing it, they just didn't understand
3 the legal consequences, or didn't appreciate --

4 MS. TRUHE: Exactly. They knew in --

5 THE COURT: Ms. Whelihan is shaking her head.

6 MS. TRUHE: Your Honor, they knew in, first of
7 all, June of '85 when they sat down to prepare the tax
8 returns, exactly how much Mr. Shofer had borrowed from his
9 pension because they were handling the pension ledger.

10 THE COURT: Okay. So it wasn't a question of
11 where he didn't disclose it?

12 MS. TRUHE: Oh, no. Not at all. No, the
13 accountants had full information. They just viewed it as a
14 loan from the pension, and did not realize the tax
15 consequences. And that's why I have third-partied them
16 into the case. I believe that when you hold yourself out
17 as a tax preparer, you have to know what's taxable and what
18 isn't. And --

19 THE COURT: And it's absolutely undisputed that
20 Mr. Hack did not know until he got this letter from --

21 MS. TRUHE: That's correct. Mr. Hack did not
22 know until the Fall of '86 because Mr. Shofer was
23 perpetually late in supplying information to him, and he
24 was really late during the years in question in supplying
25 information to Mr. Hack about what was being withdrawn from

1 the pension. So there was nothing, certainly, Mr. Hack
2 could've done in '85.

3 And then when the '84 return was being prepared
4 and when the '85 return had been prepared, he was not on
5 notice that these loans had been made. And both David Lane
6 and Kenneth Lorash, who prepared the returns at issue, have
7 testified that they did not consult Mr. Hack. So no one
8 knew except the accountants during the time period in
9 question that this money had been borrowed.

10 And certainly it was the accountant's decision
11 totally to reflect this money as loans rather than its
12 additional income. So -- and that's all over and above
13 anything that Mr. Hack may or may not have done or should
14 or should not have done in August of '84 when he's advising
15 Mr. Shofer. This is a negligence that's between Mr. Shofer
16 and his accountants, and not one that can be attributed to
17 Mr. Hack.

18 And because you've got third-party Defendants in
19 this case and no direct claim against them, Mr. Shofer
20 never amended his complaint to bring a direct claim against
21 the accountants. The penalties, as a practical matter,
22 will not be recoverable from anyone in this case, because
23 you can't get to the accountants except through Mr. Hack.
24 And this is not something that can be pinned on Mr. Hack.

25 THE COURT: Is that out of some sense of loyalty

1 and --

2 MS. TRUHE: Well this gets --

3 THE COURT: You don't have to speculate about
4 that.

5 MS. TRUHE: Well, no. There has been testimony.
6 Mr. Shofer was having all kinds of problems with his credit
7 line with the bank as far as his business was concerned.
8 And his accountants were still his accountants through the
9 time period at issue, and they essentially refused to do
10 any more work for him. He was in the middle of a big
11 credit deal with his bank, and the accountants refused to
12 do any more work for him unless he signed an agreement that
13 he would not sue them in connection with this matter.

14 He did, and he hasn't. So there you go in terms
15 of why the accountants have never been pursued. There it
16 is. He has chosen to go solely against Mr. Hack for his
17 own reasons.

18 THE COURT: All right. Thank you, Ms. Truhe. Is
19 there anything else? I don't really need to hear you on
20 the, at least not at this point, on the \$76,600 voluntary
21 account.

22 MS. TRUHE: Okay. Just very quickly, we believe
23 assumption of risk is the short answer to that issue as
24 well as preemption and foreseeability. Assumption of risk,
25 Mr. Shofer has stated unequivocally in his deposition

1 testimony, that he knew when he withdrew the, at least the
2 76, six portion, to which there were no -- or regarding
3 which there were no tax consequence, these were after-tax
4 dollars that he had contributed to the pension. He knew
5 when he took that money out that he would be losing the
6 tax-shelter affect of the pension.

7 He chose to take it out and spend it on other
8 things. It was a knowing and voluntary decision. And
9 under Maryland Law, that's the end of it right there. It
10 was a risk he assumed, he knew what he was giving up, and
11 he obviously had something else he would rather have spent
12 that money on than leave it in the pension growing tax
13 free.

14 And with that, Your Honor, unless The Court has
15 any further questions, those are the three areas, tax
16 penalties, interest and the 76, six. And we filed the
17 Motion for Partial Summary Judgement in order to streamline
18 the issues that would be presented to The Court at the
19 upcoming trial.

20 THE COURT: Thank you. It's really almost in the
21 nature of a Motion in Limine as much as a Motion for
22 Summary Judgement. Mr. Bornhorst, I'll be glad to hear
23 from you, sir, in any order you want to take up those
24 issues.

25 MR. BORNHORST: Thank you, Your Honor. Before

1 that, with the -- in the motion sincere --

2 THE COURT: I'm sorry. Before you get started,
3 let me see if I can take care of counsel in Jiranek versus
4 Bentley.

5 (Off the record briefly.)

6 THE COURT: I'm sorry, thank you, Mr. Bornhorst.
7 I just wanted to get them out of here.

8 MR. BORNHORST: Certainly. Before I continue the
9 argument in the case, Your Honor, in the most sincere
10 terms, I want to apologize to The Court and to counsel and
11 to my client for the inconvenience and lack of, apparent
12 lack of consideration in filing my memorandum in this case
13 a day late. I understand The Court's concern about matters
14 like that, and I assure The Court that it was not due to
15 any disrespect for either this case or The Court.

16 THE COURT: That's understood.

17 MR. BORNHORST: In continuing, to the degree that
18 I was able to understand the arguments that the Defendant
19 is making concerning the recovery of interest and
20 penalties, those arguments, as The Court has indicated,
21 seem to rest on mitigation of damage issues. That's my
22 term, assumption of risk arguments, and I have difficulty
23 following the statements made by Defendants counsel in this
24 case, Your Honor, because most of them were arguments
25 concerning facts which are really not in evidence yet, that

1 belong in the evidence of this case in the context where
2 the facts of this case arise, and that is the fundamental
3 relationship between Mr. Shofer and Mr. Hack. I don't feel
4 that The Court can make assumptions in this regard. But in
5 any case --

6 THE COURT: But doesn't that -- don't those
7 questions, and issues and concerns go solely to liability?

8 MR. BORNHORST: No, Your Honor. They don't go
9 solely to liability. But if I can make my arguments in
10 order, I was going to present an additional argument to The
11 Court regarding the partition of taxes, interest and
12 penalties. And basically, the argument that I'd like to
13 make is that implicit in the position of the Plaintiff, in
14 the Defendant's position is that the Plaintiff should have
15 the right to present evidence of his tax liability.

16 If there's a diminution of that liability in some
17 way because of interest and penalties, those arguments
18 would be made in mitigation. I think that summary
19 judgement is inappropriate, because it's the Defendant's
20 affirmative duty, after the Plaintiff puts on the case, to
21 say that this number that the Plaintiff has asked for,
22 these things which are clearly attached directly to the tax
23 burden, as The Court has observed, should now be diminished
24 in some way because of the case that needs to be presented
25 against the accountants, or because of some other legal

1 principles involved.

2 If they concede that the Plaintiff can put on
3 damages concerning taxes, then I think it's inappropriate
4 on summary judgement for The Court to take a quantum leap
5 to assume that on some argument of mitigation or assumption
6 of risk, that those damages can --

7 THE COURT: But it's not assumption of the risk
8 in mitigation. It is the proper measure -- the question is
9 what is the proper measure of damages? What is the proper
10 measure? That's a legal question, properly presented on
11 summary judgement.

12 MR. BORNHORST: But it has everything to do with
13 the relationship between the Plaintiff and the Defendant.
14 Your Honor, in the --

15 THE COURT: But see, it doesn't. The question of
16 whether the Defendant is liable to the Plaintiff at all, at
17 all, whether there has been a breach of duty which
18 proximately caused foreseeable damages to your client which
19 are not preempted is the question in this case. And part
20 of your evidence on liability, obviously, will turn on a
21 course of dealing or a relationship or certain expectations
22 that your client and a professional such as the Hack
23 Company should have about their relationship and about the
24 exchange of information.

25 I don't see that as going to the damages in the

1 case at all, I really don't. I don't understand why you
2 think it does.

3 MR. BORNHORST: Because, because Your Honor,
4 there are other arguments in this case about
5 foreseeability, and about a 76, six, and there are other
6 arguments that are not made by the Defendant that bear
7 directly on The Court's decision, namely that Mr. Shofer
8 had to have some vehicle, once these loans were created
9 within the pension, it wasn't simply a matter of tax
10 liability, it was a question of the literal, and at that
11 moment, the superimposed, the coincidental loss of a tax
12 shelter, and the implications within Mr. Shofer's pension
13 of those events.

14 THE COURT: But those are preempted, Mr.
15 Bornhorst.

16 MR. BORNHORST: They are not preempted in this
17 case, Your Honor. They are not preempted in this case.
18 And I say that --

19 THE COURT: Well --

20 MR. BORNHORST: I say that, Your Honor, because,
21 because there's no foundation for them to be preempted.

22 THE COURT: What about Judge Radowski's opinion?

23 MR. BORNHORST: Judge -- what you're hearing,
24 what I've read from counsel and what I've heard in
25 counsel's argument does not address that issue. Those are

1 conclusions that this, that counsel is drawing. It isn't
2 statements made by The Court. It's not statements made by
3 The Court. Can I draw The Court's attention to the -- just
4 two things?

5 THE COURT: I know that argument. I don't mean
6 to cut you off. I'm going to give you a full opportunity,
7 sir, but I know your position on what Judge Radowski did
8 with your concession. I think that's what you were going
9 to. Correct?

10 MR. BORNHORST: No, no.

11 THE COURT: All right.

12 MR. BORNHORST: As a matter of fact, no, it
13 wasn't my concession. It was prior counsel. It wasn't my
14 concession in this case, but --

15 THE COURT: Well counsel for --

16 MR. BORNHORST: No, no, excise taxes are out of
17 this case. That's not a problem.

18 THE COURT: More than just excise taxes are out
19 of the case.

20 MR. BORNHORST: But my point is that the decision
21 of the Court of Appeals means nothing if it doesn't mean
22 that the facts of this case involving a Federal ARISA
23 pension can proceed to allow this person to recover
24 reasonable damages which he would've ordinarily been able
25 to recover in a state action in tort and contract.

1 THE COURT: Which are not preempted.

2 MR. BORNHORST: Which are not preempted.

3 THE COURT: I read Judge Radowski's opinion, and
4 maybe I'm wrong, but it seems to me that Judge Hollander
5 has read it exactly the same way, to have carved out of
6 your ad damnum damages that are preempted, damages that are
7 preempted. Not just claims, but he went further. And he
8 said even as a measure of damages, he can't get these
9 items.

10 MR. BORNHORST: And none of the items that you're
11 referring to are in this case.

12 THE COURT: Okay.

13 MR. BORNHORST: I agree with, entirely with The
14 Court on that point. As a matter of fact --

15 THE COURT: You don't think the lost --

16 MR. BORNHORST: No, as a matter of fact --

17 THE COURT: You don't think the lost income from
18 the \$76,600 are included in preempted damages in this case?

19 MR. BORNHORST: No, Your Honor. Because what's
20 been ruled in the past in this case was that as soon as
21 the, the factual basis, and I still do have some formal
22 statements I've prepared that I really do want to get into
23 the record on these issues --

24 THE COURT: Okay. Go ahead, I'm going to give
25 you an opportunity to do that.

1 MR. BORNHORST: But as far as the -- and I've
2 just, and I've -- okay. What happened --

3 THE COURT: Take a moment, take a moment and find
4 your place. I didn't mean to disrupt your presentation.

5 MR. BORNHORST: I need a drink. Your Honor, Your
6 Honor, what happened in this case was that when the taxes,
7 when the taxes became apparent, there were instant audits.
8 There were tax liens. The credit negotiations --

9 THE COURT: I'm sorry. What you mean by that
10 is --

11 MR. BORNHORST: There were tax liens against my
12 client.

13 THE COURT: Grabush filed an amended return for
14 those years?

15 MR. BORNHORST: Yes, based on the amended --

16 THE COURT: And then IRS said take a look at
17 this?

18 MR. BORNHORST: Based on, said whoa, we got to
19 look into this.

20 THE COURT: Okay.

21 MR. BORNHORST: So did the Labor Department,
22 because it involved ARISA pension. However, in the
23 immediate --

24 THE COURT: By the way, how many participants are
25 in the plan? Do you know off the top --

1 MR. BORNHORST: In -- I'm sorry?

2 THE COURT: Other than your client, he's got
3 other employees who were --

4 MR. BORNHORST: There have, from time to time
5 it's 12 to 14 in the plan.

6 THE COURT: Okay. And what's the total asset
7 base of the plan, as of -- just roughly. I mean are we
8 talking about a \$7 million plan, which I'm sure we're not.

9 MR. BORNHORST: No.

10 THE COURT: Are we talking about a \$1.5 million
11 plan?

12 MR. BORNHORST: That's close.

13 THE COURT: Okay. All right. Go ahead.

14 MR. BORNHORST: \$2 million plan, something,
15 perhaps.

16 THE COURT: All right.

17 MR. BORNHORST: But it had grown, and that
18 pension had grown and it was the growth of that pension in
19 Mr. Shofer's personal account that prompted him to find out
20 whether or not there were other advantages in using those
21 funds. And that's why the initial call was made to Mr.
22 Hack for advice concerning loans.

23 THE COURT: Okay.

24 MR. BORNHORST: But in the wake of the tax liens,
25 the credit negotiations that counsel referred The Court to

1 were ones for an expanded credit line which suddenly became
2 no credit. The plan had lost all its bank credit, and
3 suffered enormously both as personally and on behalf of his
4 business. I tried unsuccessfully to introduce economic
5 claims into this case. And in Judge --

6 THE COURT: Judge Hollander?

7 MR. BORNHORST: Judge Hollander's Memorandum and
8 Opinion highlights her decision that those damages were not
9 foreseeable as a matter of law. Excise tax damages have
10 been out of this case along with all other contingent
11 damages. Contingent damages was the specific group of
12 damages that the Court of Appeals addressed when they said
13 these are no longer in the case. But they did allow in
14 this case Mr. Shofer to get taxes, interest and penalties
15 and whatever the other cost of fixing this thing would be
16 through professionals.

17 THE COURT: That's your -- well go ahead, go
18 ahead.

19 MR. BORNHORST: Okay. Now there is no reason
20 otherwise to partition damages out, because there was a
21 cancer that was suddenly created in this man's account.
22 The only question was whether those damages would've been
23 foreseeable by Mr. Hack had Mr. Hack realized that those
24 loans would become distributions and prohibited
25 transactions. These words are allowed, we can use these

1 words in this case, Your Honor, because of the Court of
2 Appeals' Opinion. The facts superimpose.

3 There's no way to separate the Internal Revenue
4 Code or ARISA definitions, or even Mr. Hack's
5 responsibilities as a pension professional under ARISA
6 standards. There's no way to separate any of those out
7 from this case.

8 THE COURT: But that's why Judge Radowski wrote
9 the opinion that he wrote. That's exactly what he did
10 because he said, unless you separated it out, you were out
11 of Court with no remedy.

12 MR. BORNHORST: But he was correct as far as the
13 ARISA claims that had been presented by the Plaintiff --

14 THE COURT: But see, you're calling an ARISA
15 claim a claim that relies expressly upon the statute. And
16 that's not what the case law provides. The preemptive
17 effect is far broader than that.

18 MR. BORNHORST: But there's no words in the
19 opinion that say that. There's no reasoning in the opinion
20 that say that. What The Court was --

21 THE COURT: Do yo believe that if you had not
22 included -- do you believe that if you had included the
23 \$76,600 claim in this case, if that had been included in
24 the Second Amended Complaint that went up before the Court
25 of Appeals, you're arguing, and it's your belief and your

1 contention that Judge Radowski would have expressly
2 permitted you to pursue that claim. Correct? I mean
3 that's what you're saying.

4 MR. BORNHORST: Yes. As well as another class of
5 damages which counsel doesn't really draw The Court's
6 attention to, but which have been presented in ongoing
7 discovery and is certainly before The Court on this same
8 issue.

9 THE COURT: Which is what?

10 MR. BORNHORST: And that is the fact that
11 something had to be done with those loans in the pension.
12 They had to be undone. The only way they could be undone,
13 Your Honor, without expert testimony about what a pension
14 is and how it's set up and what the expectations of Mr.
15 Shofer are, this is not a claim for pension benefits --

16 THE COURT: Mr. --

17 MR. BORNHORST: -- that were going to be paid --

18 THE COURT: That claim belongs to Catalina.
19 That's not Mr. Shofer's claim.

20 MR. BORNHORST: Your Honor, all of this requires
21 evidence.

22 THE COURT: It doesn't require evidence to know
23 whose claim a claim is.

24 MR. BORNHORST: Well no one lost it but Mr.
25 Shofer. Catalina doesn't have any interest here.

1 THE COURT: What you just said -- of course they
2 do, of course it does. To the extent you're arguing that
3 the plan has been damaged --

4 MR. BORNHORST: No, the -- Mr. Shofer's plan
5 inside the pension was damaged the moment it came to light
6 that instead of taking loans, they were distributions.
7 Instead of having tax-sheltered funds, they were no longer
8 sheltered and there were continuous taxes, interest and
9 penalties. That situation, Your Honor, had to be fixed.
10 That is what needed to be fixed, not collateral damages,
11 not something else, not economic damages which are out.

12 Okay. Yes, I can have arguments concerning the
13 excise tax damages and other things, but that's not before
14 The Court. That's not before The Court. There is no
15 language in the opinion that makes that synapse, that makes
16 that leap between counsel's argument of the preemptive
17 effect and of even, of even mentioning it. I mean counsel,
18 for instance, has mentioned in this case to me, at least,
19 that she had expected to file a motion in limine that no
20 person, no witness in this case is going -- should be
21 allowed to mention the term prohibited transactions,
22 because as soon as prohibited transactions are mentioned,
23 suddenly we're into the area of preemption.

24 It is precisely the ruling of The Court of
25 Appeals. While they threw out everything connected with

1 the fiduciary, they connect, they said look, they're aren't
2 any ARISA claims here. And if you were trying to make
3 them, you belong in Federal Court anyway. They
4 congratulated the lower Court, this Court on its, on
5 realizing that this subject matter, this subject matter was
6 the pension. And according to Federal preemption, anything
7 "related to a pension" is preempted.

8 The Court of Appeals congratulated the trial
9 Court on correctly interpreting that law. Then they
10 changed it. That's the whole point of Shofer versus Hack
11 because everything is superimposed on itself here. There's
12 no way the Plaintiff's -- the Defendant's liability can be
13 seen or that evidence can be rendered to The Court outside
14 of the criteria of ARISA or the ARISA -- or the Internal
15 Revenue Code, both of which are married to each other.
16 That's the whole purpose. They're aren't any -- there are
17 no -- Your Honor, the Defendant --

18 THE COURT: That's why Justice Galia said what he
19 said in Mertens, Mr. Bornhorst. And that's why Justice
20 White said what he said in the dissent in response to
21 Justice Galia. You're climbing a mountain, and you think
22 it's --

23 MR. BORNHORST: Your Honor --

24 THE COURT: You think it's a 5,000 foot mountain,
25 and it's Everest. It's Everest. That's what I'm getting

1 from your discussion here, I really am. Shofer One didn't
2 break any new ground.

3 MR. BORNHORST: Your Honor, it did in Maryland.
4 It accepted a trend in the Federal Court that resurrected
5 certain State claims where, in fact, there was pension
6 subject matter. That's what Shofer versus One did.
7 Without that, there's no rationale for it. In Mertens
8 case, in the Mertens case, there were State --

9 THE COURT: Well they used the sharpest scalpel
10 they could find to do that.

11 MR. BORNHORST: In the Mertens case, Your Honor,
12 there were State professional malpractice claims in that
13 case which were remanded by the Circuit Court of Appeals
14 back for trial. They didn't go up. They were limitations
15 arguments.

16 THE COURT: I understand.

17 MR. BORNHORST: And there's no suggestion that
18 the fact that by the original argument of preemption that
19 those State claims couldn't proceed on their own merit.
20 They are entitled to proceed on their own merit. There's
21 no new category of claim. The Court of Appeals didn't try
22 to create a new category of tort or contract claim in this
23 case. They didn't say anything like that. They said that
24 this Plaintiff should be permitted to proceed. And just to
25 get to certain things which I have prepared that I'd really

1 like just to be in the record, the Court of Appeals was
2 also -- had these things as well to consider.

3 Okay. In the complaint, paragraph 16, facts
4 common to all counts. In paragraph 16, which was then and
5 now a factual matter pleaded in this case. "The Stuart
6 Hack Company continued to render incorrect advice
7 concerning the loan transactions --"

8 THE COURT: Excuse me one second, please.

9 (Off the record briefly.)

10 THE COURT: Go ahead.

11 MR. BORNHORST: Thank you, Your Honor. Paragraph
12 16 alleges the Stuart Hack Company continued to render
13 incorrect advice concerning the loan transactions as late
14 as December 16, 1986 when Stuart Hack Company issued a
15 memorandum attempting to persuade Shofer's accountants that
16 the risk of tax liability was very low. This was explained
17 in the joint record extract in Stuart Hack's deposition of
18 August 18, '89, page 408, Exhibit 360.

19 His statement at deposition was "The general law
20 that I thought existed and what I suggested to Richard and
21 his accountant and the attorney representing him was that
22 it was not necessary for him to report it because he had
23 done nothing fraudulent. He relied on the expert advice
24 that I had given him that they not report it and allow the
25 statute of limitations to run," meaning that they should

1 not file amended complaints in this case --

2 THE COURT: You mean amended tax returns.

3 MR. BORNHORST: Amended tax returns in this case.

4 And further, not only does Mr. Hack in this statement admit
5 as plainly as it can be said that Mr. Shofer relied on his
6 expert advice, as a result of which, there were taxes,
7 taxable and unintended consequences. The question, why was
8 it Mr. Hack's recommendation that the correct treatment of
9 the loans should not be reported to the Internal Revenue
10 Service?

11 The argument that deserves further attention by
12 the fact finder in this case was that Mr. Hack was, in
13 deed, able to see the many-layered consequences if Mr.
14 Shofer's loans were actually distributions. The Defendant
15 himself was even more clear in a letter on the record in
16 this case referring to a letter dated April 8th, 1987.
17 I've got a separate copy for The Court if I may approach.

18 THE COURT: I don't think I need it. I don't
19 think I'm going to permit you to supplement the summary
20 judgement record, all of which in any event goes to
21 liability, sir. It goes to liability.

22 MR. BORNHORST: But, Your Honor, this is a case
23 of the unique professional. This is not an automobile
24 case. There's --

25 THE COURT: Believe me, I'm glad it's not an

1 automobile case. I hear enough of those.

2 MR. BORNHORST: And before you can determine what
3 is it and is not foreseeable in this case, how is it
4 possible, with the exception of economic damages, other
5 things which have been eliminated in this case, how is it
6 possible for The Court to reach an opinion on damages when
7 bad loans -- because what happened is not just 76, six, not
8 just \$76,600 was reclassified and literally became a
9 redistribution to Mr. Shofer.

10 The only way he could extinguish those loans
11 under the circumstances, all based on evidence necessary to
12 his financial condition. Was he able to pay those taxes
13 right away? It raises those questions which have to be
14 before The Court.

15 THE COURT: He wasn't able to pay taxes, in part,
16 because the assets that he used the loan proceeds to
17 acquire, he didn't want to turn over.

18 MR. BORNHORST: Your Honor, there are very strict
19 rules --

20 THE COURT: In part.

21 MR. BORNHORST: Your Honor, there are -- this
22 Court requires expert testimony concerning how pensions
23 work. Without that information, I can't argue. I'm
24 not -- I can't testify as a pension expert.

25 THE COURT: I'm not suggesting to you, Mr.

1 Bornhorst --

2 MR. BORNHORST: But there are mechanics that
3 one --

4 THE COURT: -- for one second that you're not
5 going to be permitted to introduce evidence touching on
6 ARISA and explaining how pensions work. I think that's
7 necessarily part of the background of the case. There's no
8 question about that. The question is whether any element
9 of damages will be permitted in the case on the basis of
10 such evidence.

11 MR. BORNHORST: It's all, all of it --

12 THE COURT: And I'm telling you the way I read
13 the opinion, Judge Radowski has said that related to must
14 be given its ordinary meaning within the context of final
15 preemption under ARISA, and he's carved out this really
16 narrow, small area for your client to have some relief,
17 assuming the elements of a claim for professional
18 malpractice are made out.

19 MR. BORNHORST: Your Honor, with every bit of
20 respect I can muster for this Court --

21 THE COURT: I understand that.

22 MR. BORNHORST: You have just undone Shofer
23 versus Hack, what the Court of Appeals did.

24 THE COURT: Well I think you're entitled to know
25 what my understanding of the law is given Judge Radowski's

1 opinion in this case, given Judge Hollander's opinion in
2 the case and given the record that's been created. I don't
3 think that should be kept a secret. Obviously, I have to
4 be very careful at this stage, closet to trial, where I'm
5 going to be the fact finder. I don't want to be understood
6 as making any findings. I'm not making any findings at
7 this stage. It would be utterly improper for me to make
8 any findings. But I have to let you know what my view of
9 the law is.

10 MR. BORNHORST: I understand.

11 THE COURT: I think you're entitled to that.

12 MR. BORNHORST: Yes, Your Honor.

13 THE COURT: And that's all I'm doing. If you
14 have a different interpretation of Judge Radowski's
15 opinion, then I respect your interpretation, and I'm sure
16 I'll be hearing more from all counsel on --

17 MR. BORNHORST: Your Honor, maybe a simpler, a
18 simpler synopsis might be that the damages we're now
19 arguing were not damages that were in this case or argued
20 before the Court of Appeals.

21 THE COURT: Right.

22 MR. BORNHORST: And we've added these damages,
23 and under procedure in Maryland, that's allowable to the
24 extent that it's trackable.

25 THE COURT: Oh, absolutely in terms of including

1 it in your Amended Complaint, sure.

2 MR. BORNHORST: And well that gets to the
3 difference between general and special damages and other
4 things which really haven't been argued in an exclusionary
5 way.

6 THE COURT: Well that's why Ms. Truhe filed a
7 Motion for Summary Judgement.

8 MR. BORNHORST: Well, I mean that may be, but not
9 with any of those legal arguments. She did not -- those
10 arguments haven't been made to The Court.

11 THE COURT: You mean to the Court of Appeals?

12 MR. BORNHORST: No, to this Court.

13 THE COURT: Well they have to be.

14 MR. BORNHORST: No, I don't mean that. I mean
15 that I should be precluded at some point from introducing
16 damages because of a procedural issue. What The Court is
17 saying, procedural issue meaning my right, my right to
18 amend and supplement damages as they arise, the interest
19 and penalties in this case are still accumulating. My
20 client's still not in any better position to solve the
21 underlying --

22 THE COURT: Tell me a little bit about that, if
23 you would, please. What is the present status of your
24 client's obligations to the Internal Revenue Service?

25 MR. BORNHORST: Presently, he's --

1 THE COURT: Just in broad outline.

2 MR. BORNHORST: He owes excise taxes as a result
3 of these loans being prohibited transactions.

4 THE COURT: So they have been assessed?

5 MR. BORNHORST: Yes. And he owes the original
6 taxes, interest and penalties from 1984, 1985 and 1986
7 which --

8 THE COURT: So he's paid none of that?

9 MR. BORNHORST: Well as he pays taxes, he always
10 paid his taxes before, the record would show that, but --

11 THE COURT: That's what I'm trying to get an
12 understanding --

13 MR. BORNHORST: Yeah, he didn't have any tax bill
14 with the Internal Revenue Service. Things were going well
15 up until this point.

16 THE COURT: Okay. And I guess what I'm really
17 asking you is what, for example, has he not extinguished
18 his additional tax liability for tax year 1984?

19 MR. BORNHORST: As he paid his taxes in
20 subsequent years and managed that obligation that he had
21 from year to year, the same time, Your Honor, that this
22 case, the facts of this case hit, so did the tax liens, so
23 did the end of all commercial credit with Maryland National
24 Bank, so did his ability to make a living.

25 THE COURT: There was an --

1 MR. BORNHORST: On the basis of all of that, he'd
2 been hard pressed. He has arrangements with the Internal
3 Revenue Service and the State of Maryland to pay taxes on,
4 to pay taxes on a continuous basis, a monthly basis.

5 THE COURT: Okay, so he's --

6 MR. BORNHORST: So there are arrangements with
7 that.

8 THE COURT: All right.

9 MR. BORNHORST: But in addition, the -- but what
10 happens is that as you, he's met his tax obligations for
11 subsequent years. But the way the Internal Revenue Service
12 works is that all those payments are applied to back taxes.
13 That is, '84, '85, '86.

14 THE COURT: So that technically, he's paid '84
15 and '85 --

16 MR. BORNHORST: He paid what he could, right, he
17 paid what he could. All of his future, all of his
18 subsequent payments were credited back to that so that he
19 owes taxes for future years which just simply by the way
20 that the accounting system down there works.

21 THE COURT: Why didn't he sue the accountants?

22 MR. BORNHORST: Your Honor, the facts, the
23 evidence will show in this case it was, the accountants in
24 this case were the ones that referred Mr. Shofer to Mr.
25 Hack. Mr. Hack sells tax shelters, Mr. Hack gives seminars

1 on loan transactions from pensions.

2 THE COURT: Yeah, but my question is why didn't
3 he sue the accountants in '86 when he discovered that
4 despite what he'd been giving them concerning information
5 about his loans, they didn't treat him right?

6 MR. BORNHORST: Well he didn't feel that they did
7 treat him wrong, Your Honor, and doesn't to this day.

8 THE COURT: Well apart from his feelings, why
9 didn't he sue the accountants?

10 MR. BORNHORST: Because I guess he felt, Your
11 Honor, and he directed his attorneys in this matter at the
12 time, but I'm sure that -- I mean my translation is that if
13 he can't make a case against Stuart Hack, he's not going to
14 make a case against his lawyers, against his accountants.

15 THE COURT: That's not the only view that one can
16 take of it, at all.

17 MR. BORNHORST: Obviously.

18 THE COURT: By the way, are you representing him
19 in the malpractice case against --

20 MR. BORNHORST: Yes, Your Honor.

21 THE COURT: Is that a Jury trial or a Court
22 trial?

23 MR. BORNHORST: Court trial.

24 THE COURT: Court trial? And it's scheduled for
25 next month -- or for March?

1 MR. BORNHORST: Yes, Your Honor. I mean we don't
2 know when this case might be finished if we start trial on
3 the 27th.

4 THE COURT: I don't think you responded to the
5 motion for consolidation. Did you?

6 MR. BORNHORST: I don't think any of the parties,
7 we've discussed that prior to Court today. I don't think
8 any of the parties feel that consolidation is a responsible
9 action.

10 THE COURT: That's going to be withdrawn, Ms.
11 Truhe?

12 MS. TRUHE: Yes, Your Honor.

13 THE COURT: Okay, fine. All right. Anything --
14 I don't mean to cut you off, sir, but obviously, we have a
15 good faith disagreement about the interpretation of the law
16 applicable to this case, most particularly Judge Radowski's
17 opinion on the appeal. I'll be hearing more from you and
18 from other counsel on that issue, obviously, as we go into
19 the trial. But as I say, I think you're entitled to know
20 what my interpretation is, and I've tried to give it to you
21 here today.

22 MR. BORNHORST: Thank you, Your Honor.

23 THE COURT: Was there anything else you wish to
24 say?

25 MR. BORNHORST: Just that I don't think that the

1 Court of Appeals, Your Honor, intended to write the rules,
2 rewrite the Rules of Procedure. I think they --

3 THE COURT: Can you explain to me what you mean
4 by that?

5 MR. BORNHORST: Yes.

6 THE COURT: What do you mean by that?

7 MR. BORNHORST: Because it's my opinion that if
8 the same facts, and if the same events -- if the problem
9 was created by the Defendant, and if the Plaintiff has a
10 right to sue the Defendant because of those facts, that the
11 Court of Appeals must have intended that he has -- he also
12 has the ability to undo those transactions, to undo them.
13 Excise taxes, special category, contingent damages, damage
14 to the pension, dissolution of the plan, all of that is out
15 of this case. That doesn't apply.

16 If this Plaintiff is not able, because of -- The
17 Court was not looking at a trial record. It had plenty of
18 information in front of it concerning the relationship
19 between Mr. Shofer and Mr. Hack. And the truth is, Your
20 Honor, on the face of this joint abstract record, it's very
21 clear that most of the arguments concerning the facts in
22 this case are just that, that counsel's presented.

23 They were arguments, minimizing in The Court's
24 opinion, obviously, hopefully in their view, to influence
25 The Court on the subject. They're all liability arguments.

1 They have been made continuously. That is the substance of
2 the motion in this case that Mr. -- that Mr. Hack was a
3 consultant to the plan only, that he had no responsibility
4 to Mr. Shofer. The implication is that the wrong Plaintiff
5 is in this case. And yet --

6 THE COURT: Well that's a serious concern.
7 That's a very serious concern. Are you suggesting that
8 that's not a very serious concern?

9 MR. BORNHORST: I'm only suggesting that it's not
10 an issue, that it's not an issue that was raised on summary
11 judgement.

12 THE COURT: I'm going to ask you to put a pin
13 right there and hold it for just one second. I must take
14 this call. It will be very brief.

15 MR. BORNHORST: Yes.

16 (Brief recess.)

17 THE COURT: All right. Thank you, Mr. Bornhorst.

18 MR. BORNHORST: Your Honor, I can't factually, I
19 can factually disconnect economic damages in certain ways
20 from the facts of the case, but the Court of Appeals
21 recognized that Mr. Shofer was entitled to the cost of
22 whatever the professional advice was that he needed to try
23 to undo these circumstances. Directly behind that is a
24 class of damages that his attorneys had overlooked. And
25 that class of damages was okay, how do you undo those

1 transactions themselves, the ones concerning which I'm
2 entitled to put on evidence of damages? How do you undo
3 that? You create a cancer. How do you undo the cancer?

4 Not whether or not excise taxes is not, is not
5 going to be considered, nor other contingent damages that
6 might occur to the pension. But The Court of Appeals
7 pointed out that it's the Defendant is going to pay the
8 damages in this case, not the pension. This is not a claim
9 by the pension. This is a claim between Mr. Shofer and his
10 pension consultant.

11 THE COURT: So your theory is that Mr. Shofer is
12 entitled to damages in a sufficient amount that would pay
13 him precisely the same annuity when he retires as if he had
14 never made these loans. That's really what you're saying.

15 MR. BORNHORST: Well the issue --

16 THE COURT: That the Defendant should be requires
17 to invest a sum of money today that when he retires, he's
18 going to get exactly the same amount of money he would've
19 gotten had he never made these prohibited loans.

20 MR. BORNHORST: As part of what we proffered to
21 the Defendants through discovery, Your Honor, there's
22 actuarial tables --

23 THE COURT: Can you answer my question?

24 MR. BORNHORST: Yes, yes.

25 THE COURT: Isn't that exactly what you're

1 saying?

2 MR. BORNHORST: There are actuarial --

3 THE COURT: And isn't that an ARISA claim?

4 MR. BORNHORST: No, Your Honor. Because what
5 happened was that there had to be distributions. There had
6 to be distributions from Mr. Shofer's pension in order to
7 end his tax liability. There was no way for him to do it
8 otherwise. These are not, they're not ARISA claims.

9 THE COURT: He could've sold the place in St.
10 Thomas, perhaps.

11 MR. BORNHORST: Yeah, it's on the market, Your
12 Honor.

13 THE COURT: Okay.

14 MR. BORNHORST: But those loans, Your Honor,
15 represented a benefit to Mr. Shofer. It represented an
16 obligation, but when you reach into your own pension and
17 borrow tax-sheltered funds, you are -- you are enjoying a
18 benefit which people in the marketplace don't normally
19 have. And when you suddenly realize that that benefit no
20 longer exists, it no longer exists at the time you realize
21 what you just did was create prohibited transactions and
22 distribution tax liability. There's no way to separate the
23 two.

24 THE COURT: Okay. Anything else?

25 MS. TRUHE: No, Your Honor.

1 THE COURT: All right. It seems to me that the
2 Defendants have the better of the arguments, as I've
3 suggested. I read Judge Radowski's opinion as one where,
4 as the Defendant has suggested, The Court of Appeals,
5 canvassed the law, anticipated the dicta in Mertens, and
6 concerned about the gap in remedy for persons in Mr.
7 Shofer's position, took a razor to the preemption doctrine
8 and carved out a very narrow remedy available under State
9 tort law.

10 And I think that's what this case is about now.
11 And I don't understand there to be a viable theory under
12 which Mr. Shofer, in his personal capacity, can recover the
13 potential income stream of the \$76,600. Just don't see it.
14 And I'm convinced, I'm persuaded that if that claim had
15 been before the Court of Appeals, that it too would've been
16 vented from the case by the Court of Appeals.

17 I don't think that the opinion can be read any
18 other way rationally. We're dealing here with foreseeable,
19 non-preempted damages from common-law malpractice. It's a
20 very difficult concept, but one that we're going to have to
21 struggle with to make sense out of. In all honesty, I kind
22 of read Mertens the way the Defendants read Mertens.
23 That's some very powerful dicta, and it's very interesting
24 that Judge Radowski goes on and on about Judge Monahan's
25 creation of some Federal common law to fill the gap.

1 And if I were a betting person, and I'm not on
2 such things, my guess would be that that's the way the
3 Court of Appeals are ultimately going to go in view of
4 Justice Galia and Justice White in Mertens. I think the
5 Federal Courts are going to have to fill that gap through
6 implied causes of action or something, because there's just
7 nothing left after ARISA, and this case so shows it.

8 MR. BORNHORST: Begging The Court's pardon --

9 THE COURT: Yes, go ahead.

10 MR. BORNHORST: Without exhausting, without
11 looking very closely at the record in Mertens at the trial
12 level where the State malpractice claims are, in fact,
13 continuing or continued or are now finished as we speak,
14 what the Supreme Court said about the preemption doctrine
15 goes beyond an issue that this Court, in my opinion, has to
16 concern itself with.

17 THE COURT: Oh, I understand that.

18 MR. BORNHORST: Because just --

19 THE COURT: I'm just, I'm just speculating on the
20 dicta. That's all.

21 MR. BORNHORST: I think they took -- there's no
22 question that in the Mertens case, the narrowest possible
23 interpretation was given. Because of the closeness of the
24 fiduciary with the non-fiduciary, that connection between
25 the fiduciary and the non-fiduciary in ordinary trust law

1 was enough to drag both of them into Court.

2 THE COURT: Well but that's what we have here.
3 That's exactly what we have here. Mr. Shofer is a
4 fiduciary. Mr. Hack is not.

5 MR. BORNHORST: He's not the Defendant, Your
6 Honor.

7 THE COURT: I understand he can't sue himself.
8 But if one of the other participants of this plan were to
9 bring suit, you better believe the suit would be brought
10 against Mr. Shofer and Mr. Hack. It's joint and several
11 liability under ARISA.

12 MR. BORNHORST: I understand. But the only
13 damage was to Mr. Shofer's personal account. And that's
14 what the Court of Appeals allowed him to proceed factually
15 on in this case, with knowing that in fact it involved a
16 pension and it definitely related to a Federal ARISA
17 pension that was qualified and that relied on all the
18 Federal definitions.

19 THE COURT: By the way, I mean to ask you
20 earlier, you don't -- you don't make any claim here, or do
21 you, for any of the permitted loans, the --

22 MR. BORNHORST: The \$50,000?

23 THE COURT: The 50,000 plus the 76, six.

24 MR. BORNHORST: No, no. Oh, no.

25 THE COURT: So all of your tax liability arose

1 from the amounts in excess of those amounts.

2 MR. BORNHORST: Yeah. There has been no tax
3 liability assessed for 50,000 and below.

4 THE COURT: All right. So I'm going to grant the
5 Motion for Summary Judgement which, again, it's in the
6 nature of a motion in limine, insofar as the Motion for
7 Summary Judgement seeks to preclude, as an element of
8 damages in this case, the lost opportunities for
9 tax-sheltered asset growth, however you want to articulate
10 it, arising from the \$76,600. I believe it's preempted. I
11 don't believe it was foreseeable. And I think as a matter
12 of law, Mr. Shofer, in deed, assumed the risk and, in deed,
13 it really isn't assume the risk. He voluntarily
14 relinquished those funds. So that claim is out of the
15 case.

16 Now with respect to penalties and interest, as I
17 suggested to Ms. Truhe, it seems to me that we do need to
18 wait for a factual basis to be established so that we know
19 exactly what interest we're really talking about here,
20 'cause that's not really clear, and what penalties we're
21 really talking about here. That is, penalties for what
22 period of time on what taxes? So I'm going to deny the
23 motion without prejudice as to interest and penalties.
24 Because I just don't have enough facts here fully to
25 understand the nature of the claim.

1 But as I see it, Plaintiff, if he establishes a
2 breach of duty owed to him by the Defendant, which
3 proximately caused injury, the measure of damages will be
4 an amount of taxes. And again, I'll have to hear the
5 evidence, the battle of the experts here concerning whether
6 the taxes are, as you claim, all of the taxes that he had
7 to pay, or as Ms. Truhe claims, is really just an increase
8 in his tax liability between what he had to pay in the 20th
9 century, as opposed to what he would've had to have paid in
10 the 21st century, and the difference, and reducing the
11 present value and all of that.

12 And that's -- we're going to have to work those
13 numbers out on the basis of the expert testimony and my
14 findings. Likewise, with respect to penalties, likewise
15 with respect to interest. Whether or not the interest
16 accrual on the above funds was somehow less or more than
17 the interest paid to the Internal Revenue Service. We're
18 just going to have to do the calculations based on the
19 expert testimony to figure out exactly what the measure of
20 his loss is. But I think that's all the Court of Appeals
21 has given the Plaintiff. I really do.

22 And obviously, I haven't been asked to reconsider
23 Judge Hollander's decisions under Stone, but even if I
24 were, I would not touch those conclusions. I think that
25 Judge Hollander was quite right in her assessment of the

1 foreseeability issue. Recognizing as you contend,
2 apparently from your point of view, the negligence was
3 continuing in nature somehow.

4 And that the negligence continued straight
5 through 1986 from that excerpt you just read. Whether
6 you're going to be able to convince The Court of that is an
7 open question, very much an open question. I think it's
8 Everest and not a 5,000 foot mountain. But we'll just have
9 to see.

10 Now, so Ms. Truhe, if you will prepare an order
11 embodying my conclusion with respect to the \$76,600 on the
12 one hand, and the denial of the motion without prejudice
13 with respect to the interest and penalties.

14 MS. TRUHE: Yes, Your Honor.

15 MR. BORNHORST: Your Honor?

16 THE COURT: Yes?

17 MR. BORNHORST: I've raised this, and the
18 Defendant didn't raise this, but it seems to me The Court
19 has met the substance of these arguments. And I, because
20 there's an enormous preparation required for the trial of
21 this case, I think this is very relevant. We have
22 proffered to the Defendants in this case that in addition
23 to the 76, six, when the Department of Labor and so forth
24 got done with their investigations and there were
25 recommendations made for what Mr. Shofer needed to do with

1 these loans in order to satisfy them, one of the affects of
2 not, of not making further distributions in order to get
3 rid of all the funds, as if these loans could've been
4 completely paid off.

5 Since Mr. Shofer never had the funds to pay them
6 off, the only other option for him was distributions.
7 Under an agreement with the Department of Labor, as of July
8 31st, 1994, there is a -- some of it's still tentative, but
9 there's an agreement with the Department of Labor, pending
10 excepting by the Internal Revenue Service, that further
11 distributions be made from Mr. Shofer's pension to
12 completely extinguish the loan amounts.

13 As one of the incentives for Mr. Shofer to do
14 that, the excise tax liability in this case, which I know
15 we can't ask the Defendant for, but it's still relevant to
16 the factual issues in the case, those excise tax damages,
17 if they are not -- if at the time of assessment, those
18 excise tax damages, these loans were not already
19 extinguished, and I'll explain that, there's a 100 percent
20 penalty that the Plaintiff was facing, which was over
21 \$310,000 by itself, which was an additional excise tax
22 burden in this case.

23 The reason is this. The day those loans were
24 taken, the prohibited transactions occurred. The excise
25 tax clock started ticking. The law is written in such a

1 way that if you are an interested party in your pension,
2 which Mr. Shofer is by being a major shareholder and also
3 the trustee, if you force the Government to wait to
4 extinguish those prohibited transactions until excise taxes
5 are actually assessed, under the Internal Revenue Code,
6 there is an additional 100 percent penalty which in this
7 case would've been over \$310,000.

8 This Plaintiff had no choice in this matter other
9 than to accept the recommendations and the agreements of
10 all the accountants and the attorneys and the other people
11 that we can -- we're supposed to be able to get some of
12 their professional fees in this case according to the
13 language in the Court of Appeals' opinion. However, and
14 The Courts just ruled we can't go beyond that as far as the
15 fix is concerned.

16 But as evidence we've given the Defendant, part
17 of that fix was not just 76, six that got redistributed,
18 but also the subsequent distributions that are necessary
19 for Mr. Shofer's account to literally extinguish his
20 obligation for Federal Taxes. And so -- which continue,
21 interest, penalties and so forth and so on. And the point
22 I'm raising to The Court is this. That the ruling
23 concerning the 76, six, that The Court has just made, also
24 appears to apply to any other distributions that the
25 Plaintiff might make.

1 And I'm asking The Court, if it's The Court's
2 impression that the additional distributions which are
3 necessary for Mr. Shofer's account, the 76, six didn't
4 solve anything. All it did was, all it did was to try to
5 reduce the amount of tax liability that was there at the
6 time. Mr. Shofer took some personal funds, he tried to pay
7 the loans back the best he could. Then he took what funds
8 he had in the pension that he could reclassify. This was
9 just an entry transaction. That's how this distribution
10 took place, he reclassified that 76, six. Those were
11 voluntary personal contributions that he had made along the
12 way.

13 In addition to that, there's outstanding loan
14 balance. That outstanding loan balance has to be
15 extinguished somehow before Mr. Shofer's liabilities end.
16 The agreement then was for further distributions as of July
17 31st, 1994 --

18 THE COURT: How old is Mr. Shofer?

19 MR. BORNHORST: Pardon?

20 THE COURT: How old is Mr. Shofer.

21 MR. BORNHORST: Sixty. Sixty years old, Mr.

22 Shofer?

23 THE PLAINTIFF: Sixty-one.

24 MR. BORNHORST: Sixty-one, Your Honor.

25 THE COURT: So these are lawful distributions at

1 this point.

2 MR. BORNHORST: No, Your Honor. Pensions are
3 very complicated things. They're --

4 THE COURT: Tell me something I don't know.

5 MR. BORNHORST: Well they're not complicated,
6 they're not complicated when you ask the pension consultant
7 and the account holder who went to him what they had in
8 mind. The term pension speaks for itself.

9 THE COURT: Let me make sure I understand you.
10 Let me make sure I understand you. When you keep talking
11 about these new distributions to pay off the loan --

12 MR. BORNHORST: Yes, yes.

13 THE COURT: Explain what you mean. Because I
14 thought what you were saying was that he was actually
15 taking distributions through a paper transactions. Taking
16 it, incurring a tax liability, or at least taking it into
17 income, ordinary income. And then using it to replenish
18 the borrowed funds. Now your client's back there raising
19 his hand. I'd rather you answer the question then have
20 him, although he could probably answer it quicker than you
21 can. What is it you're actually saying about that, and
22 what are you asking me if my ruling encompasses? I'm not
23 clear on what you're getting at.

24 MR. BORNHORST: There was a stream of income that
25 was loss from the 76, six transaction.

1 THE COURT: Right. He took that out back in '84,
2 '85. Right? The 76, six.

3 MR. BORNHORST: Yes.

4 THE COURT: So what does that have to do with the
5 present arrangement with the Department of Labor?

6 MR. BORNHORST: There was -- the loans never went
7 away. There were still a loan -- there was still a loan
8 balance, there were still loan balances in his pension
9 account which he was unable --

10 THE COURT: In '86.

11 MR. BORNHORST: Now.

12 THE COURT: Even now. In '86 and continuing now.

13 MR. BORNHORST: Even now that he's unable to pay.
14 When the Department of Labor got done with their audit
15 concerning prohibited transactions and the rest --

16 THE COURT: Right.

17 MR. BORNHORST: Okay. Fortunately for Mr.
18 Shofer, because of their audit over the years in this case,
19 they work very slowly, he was not assessed 100 percent
20 penalty.

21 THE COURT: Okay, but --

22 MR. BORNHORST: And as part of the settlement, he
23 needed to avoid the 100 percent penalty, so he said okay,
24 they will no longer exist as a result of our settlement
25 because I will take further distributions. There's an

1 additional income stream that's lost because he literally
2 has to accept other paper transactions to extinguish his
3 liability within the pension.

4 THE COURT: Okay. So what are you asking me
5 about?

6 MR. BORNHORST: Is whether your ruling on the 76,
7 six encompasses arguments that we can make under the --
8 under the additional distributions necessary.

9 THE COURT: Yes, it does. Yes, it does.

10 MR. BORNHORST: Thank you, Your Honor.

11 THE COURT: Again, so that I'm clear, I do not
12 understand, contrary to your understanding, I do not
13 understand Judge Radowski to have said that your client is
14 entitled to a make-hold remedy. I do not understand Judge
15 Radowski to have said that. That is the ordinary rule
16 applicable in tort litigation. A Plaintiff, a Claimant is
17 entitled, ordinarily to a make-hold compensatory damage
18 award. The problem here for Mr. Shofer is that the
19 make-hold award would violate Federal law, because it's
20 preemptive for this Court to entertain or to make a
21 make-hold award would run a file of ARISA.

22 That's what the Court of Appeals has said. His
23 claim was in Federal Court, it was filed in Federal Court.
24 Limitations barred the claim. That's where we are in this
25 case. So their entire elements of his damages to which

1 he's clearly entitled if he proves liability on the part of
2 the Defendants, which he can't get now. That's why you
3 sued Blum Yomkis. I understand that. The allegation there
4 apparently is that they waited negligently so in going into
5 Federal Court.

6 I don't know if that's true or not. That's not
7 my case. I have this case. But there's no question, I'm
8 not suggesting for one second that your client isn't
9 entitled to a compensatory damage award that, in deed,
10 would permit him what you want him to be able to do, which
11 is to restore the status-quo anti. Yes. Judge, put it all
12 back to where we were on August the 8th, 1984. That's what
13 the law ordinarily would require.

14 But here, your remedy is in Federal law, not in
15 State law. And Judge Radowski has left you a little piece
16 of your damages is the way I see it. I understand you
17 disagree with that.

18 MR. BORNHORST: Thank you. Thank you for your
19 additional consideration in that last summary, Your Honor.
20 That was very -- I think that was significant.

21 THE COURT: Okay.

22 MR. BORNHORST: Thank you.

23 THE COURT: Again, I want you to know what my
24 understanding of the law is. All right. So Ms. Truhe,
25 you'll submit the proposed order, please. Now we have a

1 pretrial conference scheduled for Friday. I thought that,
2 perhaps, we could avoid that, but maybe not.

3 Maybe we need to get together. Did you folks
4 leave that in, leave that time blocked out? I think I'm
5 going to have to ask you to bring a proposed pretrial
6 order. Please confer, in view of my recent rulings, I
7 assume that the case can really be narrowed down,
8 understanding the additional expense that it may entail,
9 consider whether you want to bifurcate liability and
10 damages.

11 This is a non-Jury trial. I will tell you now we
12 are scheduled for February 27th, Monday the 27th, and we
13 will -- we rescheduled it to accommodate one of counsel. I
14 forget who it was, doesn't matter who it was. My point is,
15 I only have three days that week to hear the case. And so
16 it is not likely we're going to finish the case in three
17 days. How long do you think your case is going to take,
18 Mr. Bornhorst? I'm not going to pin you down now. Just, I
19 mean it's really been narrow -- whittled down --

20 MR. BORNHORST: I understand.

21 THE COURT: Between Judge Hollander's decision
22 and my ruling today, I mean we are really down to just --

23 MR. BORNHORST: Your Honor, I would expect, I
24 would expect my case on liability to take at least three
25 days. I can't diminish my case on liability.

1 THE COURT: Of course not. I'm not asking you to
2 do so.

3 MR. BORNHORST: I mean --

4 THE COURT: Why is it going to take three days?
5 Again, there doesn't appear to be very much in the way of a
6 dispute of material historical fact concerning the exchange
7 of -- the phone call and the letter, I mean all of that can
8 be stipulated to, I would think. And I understand you want
9 to put on evidence concerning your client's relationship
10 with Mr. Hack and the Hack Company, and you'll be permitted
11 to do that, certainly.

12 But again, I strongly suspect that much of that
13 can be done by stipulation or through documents. I just
14 don't know that we need hours and hours and hours of
15 testimony describing a relationship, a business
16 relationship that's going to be embodied in documents. Now
17 having said that, again, I'm not going to cut you off.

18 MR. BORNHORST: To the extent, Your Honor, that I
19 can satisfy myself, and my client and The Court, I'll make
20 every effort.

21 THE COURT: Okay. So you think three days on
22 liability. But surely not much more than a half day on
23 damages in view of where we are now. And again, I
24 understand that the damage testimony is very intricately
25 bound up with the liability --

1 MR. BORNHORST: I think it's moot. I think most
2 of those arguments are moot. You've just made them moot.

3 THE COURT: All right. Ms. Truhe, how long do
4 you anticipate?

5 MS. TRUHE: I think it'll probably be a day and a
6 half.

7 THE COURT: Day and a half.

8 MS. TRUHE: There's one main witness, Stuart
9 Hack, and then there are two experts, a pension expert and
10 an accounting expert which will be testimony vis-a-vis my
11 third-party claim against Grabush.

12 THE COURT: All right. All right, let's get
13 together Friday at 2:00. And if you want to bifurcate
14 damages, we can consider that. We may be able to get it
15 all done in three days. If you don't, if you'd rather not
16 do that, and again that's fine with me, we'll do the three
17 days, and then we'll find another three days sometime in
18 March or April when you can come back and finish the case.

19 MR. BORNHORST: If --

20 THE COURT: Yes, go ahead. And I should say,
21 you're the only thing I have those three days. So we can
22 start at nine and go 'til six or 6:30 or seven, whatever it
23 takes to get the case finished.

24 MR. BORNHORST: Does counsel, does other counsel
25 have an opinion on bifurcation?

1 THE COURT: You can discuss it. Think about it.
2 I mean it may only take a half a day off the trial. And if
3 that's the way it's going to go, we probably don't want to
4 do it. But if we're talking about another two days, then
5 maybe we want to bifurcate.

6 MR. BORNHORST: The requirements for the pretrial
7 of --

8 THE COURT: I'd really like you to put together
9 an order.

10 MR. BORNHORST: Based on what list of
11 requirements?

12 THE COURT: Well the normal exhibits, list of
13 exhibits, list of witnesses, your theory. Which again, as
14 I understand the Plaintiff's theory here, it's really that
15 Mr. Hack should've made disclosures concerning the tax
16 consequences to Mr. Shofer, of Mr. Shofer's borrowing from
17 the pension fund back in 1984. I mean that's the nut of
18 your case, correct?

19 MR. BORNHORST: Yes, Your Honor.

20 THE COURT: All right. Okay. So I'll see you at
21 2:00 on Friday. Thank you.

22 MS. TRUHE: All right, thank you, Your Honor.

23 THE COURT: Thank you very much. Thank you for
24 your patience.

25 (Whereupon, the proceedings were adjourned.)

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I hereby certify that the foregoing transcript is a true and accurate record of all proceedings in the matter of Shofer vs. Hack taken by me before The Honorable Andre M. Davis on Monday, January 30, 1995, thereafter reduced to typewriting under my direction pursuant to request.



JOHN TROWBRIDGE
Official Court Reporter
Baltimore Circuit Court


TREVY LITTLE
Transcriber

105 3/16

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

RICHARD SHOFER

Plaintiff

vs.

THE STUART HACK COMPANY, P.A., et al.

Defendants

Case No. 88102069

CL799993

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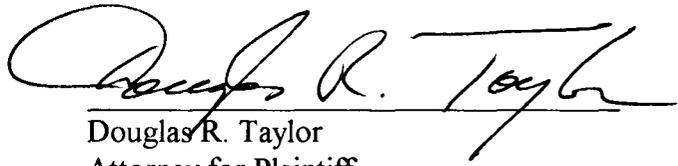
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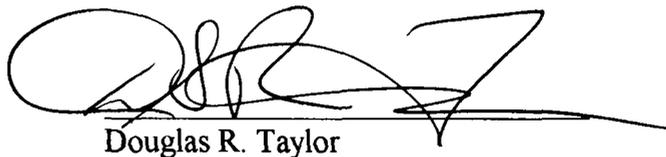
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Technical support provided by Wei Yang, Dan Knight, Tony Darden, and Matt Davis.
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