GEORGE CLIVE HOOK

REQUEST FOR

PRESIDENTIAL PARDON

GEORGE C. HOOK
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BARACK H. OBAMA
President of the United States
The White House
Washington, D.C.

Re: Petition to Pardon George Hook Now
More than Five Years after Completion of Sentence

Dear President OBAMA:

My name is George Hook. I am 71. I am an attorney who had been practicing law in Chicago, primarily corporate and securities law, for more than 35 years. I was wrongly convicted by a Peoria jury of unlawful conversion of pension fund assets to the use of another (18 USC 664) and related wire fraud (18 USC 1343) and money laundering (18 USC 1956) charges in May 1997, and sentenced, in May 1998, contrary to applicable sentencing guidelines, to concurrent sentences of seven years' incarceration for the money laundering and wire fraud and to five years for the pension conversion.

As I am innocent of these charges and my constitutional rights were egregiously violated by the prosecution and the federal district court sitting in Peoria, I have vigorously contested these wrongful convictions by appeal, mandamus, petition for writ of certiorari to the United States Supreme Court, petition to President Clinton for Pardon, petition to President Bush for Pardon, Commutation, and Remission of Restitution, and now Petition to you.

Unfortunately, the opinion of the 7th Circuit Court of Appeals itself outrageously violated my appellate rights, and the Supreme Court declined to correct it by denying my petition for certiorari. As a Constitutional Lawyer, yourself, you know, its denial is not a reflection on my appeal, merely a reflection of its inability and unwillingness to accept for review more than about one percent of the cases that come to it. My petition to President Clinton was ignored. My petition to President Bush for pardon was denied on two bases, one, that it was premature, since five years had not yet elapsed since my release from incarceration, a hurdle which has been overcome by the passage of time beyond 7/26/09, and two, because innocence was not deemed by him or his Pardon Attorney to be a proper basis for pardon. With respect to my petition to President Bush for Commutation and Remission of Restitution, on 12/18/08, I was advised by the new Pardon Attorney, Ronald L. Rodgers, who remains in that position, that "it would be carefully considered, and [I] will be notified when a final decision is reached." I am still waiting.

Accordingly, I hereby apply to you personally for a pardon from my convictions for the following reasons:

1. I am innocent. A conscientious and experienced corporate and securities lawyer, in 1992, I structured a loan which ultimately the client could not repay through no fault of its own, and certainly no fault of mine, and due to the misconduct of others, including the courts' refusal to protect the real estate securing the loan from judicial sale to satisfy bogus liens which were, in any event subordinate to the security interest of the lender. I have been prosecuted because this loan was not repaid. It could have been repaid had the courts protected the security. Neither I nor my co-defendant received any money from the pension plan's secured loan. Furthermore, its loss was made whole through insurance provided by the Pension Benefit Guarantee Corporation for which premiums had been paid since 1974. The PBGC was made whole by my firm's insurer and Harris Bank, my co-defendant's co-trustee, which would not have happened had our conduct been criminal since that would have excluded coverage under the insurance policies. Neither the plan participants nor the government lost anything. (See Tab #l).

2. I am not guilty. The indictment was based on a highly technical misinterpretation of the complex ERISA and money laundering laws. However, even from this purely technical legal standpoint, my conduct did not violate any federal criminal laws. (See Tab #2)

3. My trial was constitutionally flawed and unfair. I was prevented by Judge Michael M. Mihm, generally acknowledged to be an unimaginative, inflexible and overly harsh Federal District Court Judge of the Central District of Illinois (sitting in Peoria), from presenting significant aspects of my defense. I was prevented from exposing the defects of the prosecution's case because Judge Mihm improperly limited cross examination whenever something adverse to the prosecution or beneficial to the defense was about to be revealed to the jury. (See Tab # 3)

4. My appellate rights were desecrated by the 7th Circuit Court of Appeals opinion of Judge Kanne, who is ill-regarded by the legal profession[1] the denial of an *en banc* rehearing by the entire court, and the denial of my Petition for Certiorari by the Supreme Court. The appellate court turned the estoppel doctrines, which would have prevented my conviction, on their heads, affirming that the government could

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[1]For example, his competence, and, indeed, impartiality in civil rights, criminal and employment cases is questionable [See **Evaluation of the United States Court of Appeals for the Seventh Circuit** by the Chicago Council of Lawyers (1994) 43 DePaul Law Review 673 (1994); in part explained by a record as one of the least liberal (21.6%)and most in lockstep with the Government (100%) upon which President Reagan elevated him. See Promotion of District Court Judges to the U.S. Courts of Appeals: Explaining President Reagan's Promotions of His Own Appointees, Karen Swenson, The Justice System Journal, Vol. 27, Number 2 (2006), pp. 216, 222.

take basic positions in my prosecution (that "the 6141 Plan had not terminated by 2/13/91"), that were the opposite of the basic positions taken by it in prior litigation (that "the 6141 Plan had terminated by 2/13/91") and that I could not even present the government's prior case positions, favorable to me, on which it prevailed in the prior case (that "the 6141 Plan had terminated by 2/13/91"), as a part of my criminal case defense. (See Tab #4)

5. Even ignoring that I am innocent and not guilty, my sentence was outlandish. My appropriate sentence range was 0 to 6 months. However, due to the prosecution's metamorphosis of unlawful pension plan asset conversion into money laundering, my sentence was 14 times the appropriate range maximum. Had funds been stolen from the pension plan, the maximum sentence would have been two years. I got seven years for structuring a lawful loan transaction because the prosecution was able to miscast it as money laundering. The average sentence for violent criminals in the federal system is seven years. Although I have a minimum security classification, I have spent all but six weeks of my seven year prison sentence in a maximum security facility, which, in terms of aggravation and stress, is like serving ten times as much time. As I received nothing from the alleged conversion, wire fraud and money laundering, indeed spent substantial time and effort to protect the loan and collateral for the pension plan, and neither the plan participants nor the government lost anything, my sentence is extreme, cruel and unusual punishment. (See Tab #5).

Not having been pardoned I have served more time that the average murderer, rapist, or robber, according to the Justice Department figures, for nothing more than having structured a loan transaction in the ordinary course of my legal practice, which, ultimately the client could not repay through no fault of mine or my client.

By granting me pardon, Mr. President, you will set to right the Boschian injustice that I have suffered. For me to be convicted and imprisoned was an outrage which must cause all who, like me, have devoted their careers to the law, and who would never even entertain the thought of violating the law, to quake. If it can happen to me, it can happen to everyone.

The judicial system, as administered by judges such as Mihm and Kanne and ignored by the Supreme Court, has failed. Pardon is necessary to confirm the principles of Fairness, Justice, Decency and the Rule of Law, which were the foundations of American Society, and without which American Society will quickly crumble.

It is time for this nightmare to be put behind so that I may resume the enjoyment of life as an active and contributing participant in American Society.

I urge you to Pardon me for all of the reasons herein.

Previously, I had urged that my co-defendant, Carmen Viana, a citizen of Brazil, also be pardoned. She returned to Brazil after her company was driven into bankruptcy and more than a year before the initial indictment. Although described as a "fugitive from justice," she knew nothing about the indictment and was not within its statutory or common law definition. I had especial fear, that, she, as an elderly woman with a history of heart attacks, might suffer severe injury were she someday to be surprised by a marshal with an arrest warrant outstanding for her in hand, possibly a deadly shame.

I no longer urge her pardon myself because I have been admonished for petitioning on behalf of my former client. Instead, fortuitously, I have been contacted recently by a niece, who had not seen her aunt since childhood, and wondering why, sought me out. She wanted to know if her aunt was innocent. I assured her that she was. She wanted to know what she could do to set things right. I said I had done everything I could in the past without result because, according to Roger Adams, the Pardon Attorney during the Bush Presidency, neither of us could be pardoned, me because my petition was premature and I refused to admit guilt; she, additionally, because she was a "fugitive from justice," she had not been convicted, and she was not petitioning on her own behalf. Through her niece, I am providing appropriate materials for her to petition and protest her innocence, while protecting herself from harm by the United States Government in her waning years. Should she petition you, should she not, in either case, I urge you to Pardon her too. Thank you.

Respectfully submitted,

George C. Hook

W/attachments

WHO IS
GEORGE HOOK?

WHO IS GEORGE HOOK?

George C. Hook II, b. 11/30/38 Chicago, Admitted to Illinois Bar 1963;
Specialties: corporate, securities, insurance regulatory, and partnership law, litigation, criminal law.

Education: Missouri Military Academy, 1956; Knox College (A.B., English Composition, Political Science, cum laude) 1960, Bookfellow Creative Writing Scholarship for senior year; University of Chicago (J.D.) 1963, full tuition three year scholarship; Armor Officer School – Fort Knox, Kentucky 1964; Judge Advocate General's School – Charlottesville, Virginia 1964.

Honorary Societies: Delta Phi (academics), Quill and Scroll (journalism), Phi Beta Kappa (academic), Scabbard and Blade (military), Pi Sigma Alpha (political science).

Authorship: "Managing Limited Liabilities Companies", IICLE, 1995, "What is Wrong with Takeover Legislation", 8 NIU Law Journal 293, 1988; Co-authored: Revised Illinois Limited Partnership Act and Illinois Limited Liabilities Company Act; Editor: The Illinois Business Corporation Act Annotations (abandoned before publication due to criminal indictment); short stories and poems, currently writing Burdens of Innocence, Memoirs of My Criminal Case; working on eight novels based on experiences in the Federal Judicial System and with the Federal Government.

Legal Career: Captain, Judge Advocate General Corps, U.S. Army 1964-1967 (Fort Knox, Charlottesville, Fort Gordon, USARV – Saigon, 1st Cav. Division, Ankhe, Bronze Star recipient); Schiff Hardin Waite Dorschell & Britton, Chicago, associate 1967-1973, partner 1974-1978; Partner, Much Shelist Freed Denenberg Ament & Eiger, 1978-1985; Partner, McBride Baker & Coles, 1985-1992; Principal, George C. Hook, P.C. 1985 – 1998; Law Clerk, MCC-Chicago Law Library, 1999-Present.

Pro Bono Activities: Defense of battered babies, Children's Memorial Hospital, Chicago; Post-conviction petitions for Illinois state convicts; General Counsel, Glenview Helping Hands; Illinois Vietnam Veterans Board of Directors; Chairman, Board of Visitors of Missouri Military Academy; Board of Trustees Missouri Military Academy; President, Knox College Alumni Association; Member, Illinois Secretary of State's Corporation Acts Advisory Committee; Member and Chairman, Illinois Secretary of State's Revised Uniform Limited Partnership Advisory Committee; Member, Illinois Secretary of State's Limited Liability Company Advisory Committee; Chairman and Member, Chicago Bar Association Corporation Law Committee; Member, Chicago Bar Association Securities Law Committee; Member, Illinois Bar Association Corporate and Securities Law Sections; Member, American Bar Association Corporation, Banking and Business Law Section; ABA General Partnership Act Revision Project; First President, 2650 Lakeview Condominium Association.

While incarcerated (at Oxford Comp - 6/22/98 - 8/6/98 and MCC - Chicago - 8/6/98 to present) assisted hundreds of pretrial and other inmates to research and analyze their case options and defenses, civil litigation and other legal, business, personal and educational matters.

Lectureships: Chicago Bar Association lectures on: "Partnership Formation", "Partnership Dissolution", and "Partnership Litigation"; "Structuring Partnership Agreements – Service Partnerships"; IICLE: "Alternative Remedies, Dissolution and Litigation", IICLE Program Chair and Moderator: "Officers and Directors Liability" and "Directors Obligations and Risks."

Personal: Children: Dana Hook, 25, and George Hook III ("Jay"), 23

I - INNOCENT

PART I – INNOCENT

Proof of Innocence

The following demonstrates that there was bona fide innocent reason for the conduct of Viana and Hook and also that but for at least questionable conduct of others, creating events beyond the control of the defendants, the loan transaction which was characterized as "pension theft", a "scheme to defraud" and "money laundering" would have been a ho-hum, ordinary course successful loan transaction. To equate a failed loan with criminality is outrageous, especially when it is without fault, and, indeed, every effort was made to protect and preserve it, including appeal to the courts in North Carolina (including the federal 4th Circuit Court of Appeals) and petition to the Supreme Court for writ of certiorari.

Lawful Purpose

In June, 1992, Carmen Viana, the CEO of Wittek Industries, Inc., the world's leading manufacturer of hose clamps, engaged McBride Baker & Coles, of which George Hook's professional corporation was a general partner, to represent Wittek as outside General Counsel. Hook was responsible for this engagement and representation of Wittek. During the course of this representation, which lasted from June 1992 to November 30, 1992, McBride, through Hook, nine other partners, fifteen associates and three paralegals, handled a myriad of issues running the civil legal gamut. One of these was Viana's inquiry of Hook about Wittek selling real estate to the 6141 Pension Plan to provide additional working capital for Wittek and to diversify and increase the 6141 Plan's yields and upon resale cure a potential underfunding of the 6141 Plan (the "Goals").

Intent to Comply with the Law

As McBride was not expert in ERISA matters, Hook referred Viana to C. Drake Boutwell, an ERISA expert and Hook's former partner at McBride. Boutwell advised that the sale of real estate by Wittek to the 6141 Plan would constitute a "prohibited transaction" under ERISA. Boutwell's opinion was based upon certain unstated assumptions which turned out to be wrong, i.e. that as of June 1992 the 6141 Plan remained subject to any provision of Title I of ERISA, that the Wittek-pensioner employment relationship continued and that Wittek remained an employer of employees who remained covered by the 6141 Plan.(See Tab #2)

A "prohibited transaction" could result in the imposition of a 5% excise tax if the Internal Revenue Service and Department of Labor jointly issued a "prohibited transaction" determination and notice of deficiency. Also, there was the possibility of a 100% penalty. To avoid these potential tax consequences, Boutwell recommended a loan structure which would accomplish the same " Goals" and yet minimize the potential

of the excise tax and penalty. This is nothing different from what lawyers typically are called up to do in their practice. As Hook learned in the course of later criminal trial analysis and conferences with Albert Grasso, a nationally recognized ERISA Expert, there would have been no need for this special structuring to minimize "prohibited" transactions characterization because in 1992 those provisions would not have applied to the 6141 plan.

Legal Structuring to Minimize Tax Risks Not Commit Crimes

McBride was engaged by Wittek to structure the loan pursuant to Boutwell's advice, which it did. A "real estate operation corporation" as defined in the DOL plan asset regulations (DOL reg. 2510.3-101) was formed. Its assets would not be "plan assets". Therefore, its assets would not be subject to the "prohibited transaction" provisions of ERISA (26 USC 4975 and 29 USC 1106).

As one of our most respected jurists (Justice Holmes) said, there is nothing wrong with the adjustment of one's affairs to minimize the payment of taxes. Indeed, this is the essence of tax practice and an important element of transactional practice. If it were criminal, all lawyers, excepting prosecutors, could be prosecuted, as was Hook, merely for practicing law whenever the object of that practice is unsuccessful.

Another project assigned to Boutwell was to determine the status of all the pension and profit sharing plans for which Viana had apparently assumed responsibility when she acquired Wittek. This had been assigned previously to Jay Hedges, Wittek's executive vice president, and Sam Lillie, Hedges' college chum, an insurance agent who had been designated insurance broker of record. By the time McBride came on the scene, Hedges had recently been fired for his suspected role as leader of an attempted coup involving other executives, Wittek's in-house General Counsel and a local law firm which also represented Wittek's local lenders, to throw Wittek into bankruptcy and thereby oust Viana and take over the company, repeating a pattern which had succeeded in the past for that law firm with the local airport and assorted manufacturing facilities owned by outsiders. Lillie was withholding information needed by Boutwell because he was disgruntled about the loss of Hedges, his Wittek meal ticket, about slow repayment of Wittek premiums which he had financed, and because he had not been given Viana's personal insurance business, including her Long Island mansion and boat slip.

Hook contacted Detroit Bank, the custodian of the pension and profit sharing plans, to determine the status of the plans and to apprize it of the impending $700,000 loan transaction. Joe Fanelli, the plans manager at Detroit Bank, informed Hook there would not be enough money for the loan as $660,000 was to be paid to Jackson Life imminently as the premium for annuities for 43 of the 200 plan participants of the 6141 plan and that a $225,000 premium had already been paid to Jackson Life to annuitize 12 pensions, leaving only $320,000 for the remaining 145 participants. This disaster had been engineered by Fanelli, Hedges, and Lillie based on Lillie's assertion, a libelous fabrication, that Viana planned to abscond with the Plans' funds to Brazil. The prospective ruinous annuitization was stopped. Finelli "took early retirement" and

disappeared. Detroit Bank was fired for misfeasance and malfeasance. Lillie was removed as broker of record. Viana ordered the transfer of all pension and profit sharing assets to a successor custodian. McBride's bank was Harris Bank, which agreed to assume custody of the pension and profit sharing plans' assets.

Detroit Bank threw up various obstacles to these transfers, including speciously asserting that it was the trustee. As Hook overcame each obstacle, Detroit Bank threw up another. Finally, Detroit Bank acceded to the transfer when Harris Bank agreed to accept the assets as a trustee, a distinction without a difference under ERISA as custodians and trustees are treated as fiduciaries.

Implementation of the Loan

Eventually all funds were transferred from Detroit Bank to Harris Bank. The 6141 loan to the real estate operation corporation was funded, the transfer of the 8.66 acre tract in Pineville, North Carolina ("Pineville") already having been conveyed from Wittek to the real estate company July 7, 1992, awaiting resolution of the transfer problems with Detroit Bank. The 6141 Plan loan was secured by a first mortgage on Pineville and recorded. The real estate operation corporation's note to Wittek was secured by a second mortgage on Pineville specifically subordinated to the 6141 Plan mortgage and not recorded so as to preclude potential priority as a purchase money mortgage. Both as reward for Harris Bank, which otherwise would receive no significant compensation, and to provide as much separation of the 6141 Plan loan to the real estate operation corporation from the real estate operation corporation loan to Wittek, thereby minimizing the potential for IRS/DOL characterization of the transaction as a "prohibited transaction" subject to excise tax and penalty, the real estate operation corporation, instead of lending the funds to Wittek, purchased certificates of deposit from Harris Bank and pledged the CD's as security for loans from Harris Bank. The proceeds of this loan were used to fund the real estate corporation's loan to Wittek.

Meanwhile former management and key employees (the "Biggers Group" and Breitwieser) of EC Manufacturing, a division of J.D. Industries, Inc., Wittek's former owner, had filed suit in federal court for recovery of vacation and termination pay against J.D. Industries, its owner John Darrah, Wittek, Viana and Chrysler Corporation, as obligees for payment of plant closing costs. EC had been closed December 20, 1990 and last pay checks issued February 13, 1991 in compliance with the Warn Act (29 USC 2102). Interlocutory judgments in the consolidated cases were filed with the Clerk of Court in a North Carolina Court and the lienors were attempting to subject Pineville to sheriff's sale in satisfaction of the interlocutory judgments. Hook stopped the judicial sale because of defects in the State proceeding and documentation. Thereafter, the interlocutory judgments became final upon the entry of the final order by the District Court, but not before the deed conveying Pineville to the real estate operation corporation and the 6141 Plan's first mortgage thereon were recorded. This gave the deed and mortgage priority over the judgment liens. Under federal law, only final judgments are subject to execution unless the District Court makes an appropriate

pronouncement under Federal Rule of Civil Procedure 54, which it had not done.

As demonstrative of how professionals, as distinguished from the judiciary, dealt with such an issue note the experience with Wittek's property in LaGrange, Illinois, which the interlocutory judgment holders had also liened. Chicago Title & Trust Company withheld funds from sale proceeds in escrow sufficient to satisfy those liens initially. However, upon obtaining the opinion of McBride Baker & Coles authored by Frank Keldermans, MBC's real estate expert and Hook, stating that judgments were interlocutory, that there was no declaration pursuant to FRCP 54 (b) that would have made them final and that under federal law these federal liens could not be filed or accorded priority over the prior sale resulted in CT&T releasing the funds. Ironically, had these funds not been released as was proper, they would have been paid over to the interlocutory judgment lienors and then there would have been no liens against the Pineville property, the courts would have had no opportunity to decide the priorities contrary to established law and Hook could not now be in prison.

As Viana had been dissatisfied with the representation she and Wittek got in the Biggers/Breitwieser litigation using John Darrah's counsel, she had Hook take over the appeal. Hook got Breitwieser reversed, but not Biggers, even though he should have prevailed there too had the 4th Circuit Court of Appeals applied the law properly. (See Excerpts of Brief and Petition for Rehearing, Exhibits A & B).

Numerous attempts were made by the lienors pending appeal of Biggers/ Breitwieser and thereafter to effect a sheriff's sale of Pineville, all of which Hook scuttled until after suit in the federal courts, Viana, as 6141 Plan Trustee, et al. v. Michael, Biggers, Breitweiser, et al., 32 F. 3rd 88 (4th Cir. 1994), cert. den. 130 Led. 2nd 880, a total of 3 years. As demonstrated by Hook's Petition for Certiorari (Exhibit C) to the Supreme Court, there was federal jurisdiction on numerous grounds because federal judgments against Wittek were the sole basis for the lienors' claim against Pineville. However, the federal courts disavowed jurisdiction.

Even thereafter Hook worked with the Pension Benefit Guarantee Corporation, which had assumed trusteeship of the 6141 Plan, to preserve the 6141 Plan's investment in Pineville. While the PBGC contemplated bidding in the sheriff's sale, the sheriff's sale was postponed several times. Ultimately, the PBGC opted against bidding, and for collection against defendants and a venal federal criminal prosecution instead.

Today Pineville, an 8.66 acre property in Mecklenburg in the thriving Charlotte-Mecklenburg area, has been developed with shops and the former manufacturing facility has become a public storage facility. This property, which had been appraised in 1991 in excess of $1,500,000 and which went at the sheriff's sale for the $400,000 in liens, has more than proved its value. This property is currently assessed on the local Tax Assessor's books in excess of $2,500,000. This bonanza could have benefited the 6141 Plan had the PBGC, DOL, IRS and Assistant U.S. Attorney had patience.

II - NOT GUILTY

PART II – NOT GUILTY

None of Hook's federal criminal convictions are legally viable.

18 USC 664 ("Pension Theft") is not legally viable.

Viana and Hook were charged with violating 18 USC 664 because of an alleged taking from the 6141 Plan of $36,800. To avoid the dispositive issues, all in Hook's favor, Judge Kanne, the author of the appellate opinion, 195 F.3rd. 299, asserts that Hook was found guilty of theft from a pension plan. Instead the Indictment was for criminal conversion because "certain provisions of ERISA prohibited the transfer of pension funds to or for the benefit of a party in interest, such as an employer (Wittek)".

Not Theft. There is no federal statutory definition of "theft". There is no federal common law. Erie v. Tompkins, 304 U.S. 64 (1938) As generally understood, however, theft would have had to be alleged in the indictment to sustain a conviction therefor, a taking without consent or without color of right and with intent to convert to Hook's or Viana's own use. None of this pertains. Viana, as trustee, had the color of right to direct transfer and invest the $36,800, which she did.

Not Embezzlement. There is no federal statutory definition of embezzlement, nor any common law upon which to support a definition. As generally understood, however, embezzlement would have required such allegations in the indictment, and entrustment and appropriation to Hook's or Viana's own use. None of this pertains, except that, obviously, there was an entrustment to Viana, as she was a trustee and there was an entrustment to Hook for the short time the $36,800 was in McBride, Baker & Coles' client trust account. There was no appropriation to Hook's, or Viana's own use.

Viana and Hook's Conduct was Proper. Viana, as trustee, had the color of right to direct the transfer and to invest the $36,800. As the trustee, she was entrusted with the funds and had authority over them. In an initial letter of direction to Detroit Bank, the former custodian, she directed that any earlier transfers than Detroit Bank had scheduled in July and August, 1992, due to its archaic investment procedures, be sent to the McBride Client Trust Account. This was an interim measure pending receipt of information from Detroit Bank as to allocation of funds among the numerous (possibly 16) pension and profit sharing plans for which Viana had assumed responsibility when she acquired Wittek, all of which Detroit Bank was holding in its common trust fund, and the opening of separate custodial accounts for each pension and profit sharing plan at Harris Bank, the successor custodian. This information and segregation of funds were required to open the separate accounts at Harris Bank. Unexpectedly and contrary to Viana's instructions, instead of drawing $510 out of the 6141 Plan Short Term Fund and forwarding it to Hook as a check for the 6141 Plan's subscription to a 51% equity interest in the real estate operation corporation, Detroit Bank liquidated the entire short term fund,

net of its fees and commissions, and wired $36,800 to the client trust account. Upon discovering this, Hook sought Viana's further instruction and followed it, sending the fund to a Wittek trust account set up for COBRA payments to its employees. Shortly thereafter this money was allocated as the first funding of the loan to Wittek from the real estate operation corporation and included in the note and loan documentation.

Not Unlawful Conversion. "Unlawful conversion" is not known in common law and not defined by federal statute. Although unlawful conversion was alleged in the Indictment, it was not viable against Hook and Viana because there was never any unauthorized assumption and exercise of the right of ownership of property belonging to the 6141 Plan by Hook or Viana, never any unauthorized alteration of the condition of such property by them, or unauthorized exclusion of the 6141 Plans' property rights. The loan amount was acknowledged by the 6141 Plan and the real estate operation corporation. The prosecution chose to recharacterize it as a direct loan from the 6141 Plan to Wittek and, accordingly, a direct "prohibited transaction". However, a "prohibited transaction" is not "unlawful". It is merely a transaction that generates excise taxes and occasionally a 100% penalty. Annually, the Internal Revenue Service includes in its budget receipt of excise tax from prohibited transactions in the millions.

Furthermore, treated as a direct loan to Wittek, the $36,800 would have been within the exemptive ambit of 29 USC 1107-8, which exempts from the "prohibited transaction" provisions (26 USC 4975 and 29 USC 1106) loans and other transactions of limited amounts automatically. Under this provision, the 6141 Plan could have held "employer securities", i.e. loan notes, of approximately $100,000 at the date, July 24, 1992, of the transaction, based upon the financial evidence adduced by the prosecution as well as the defense at the trial. Motion was made for judgment notwithstanding the verdict as to this count. Judge Mihm, the trial judge, denied it without comment. On this basis alone, the 18 USC 664 count is not viable. Judge Kanne ignored this count and basis for vacating it altogether in his appellate opinion. Also, the $36,800 was a part of the approximately $700,000, that was eventually loaned and constituting the entire loan obligation of the real estate operation corporation to the 6141 Plan, which was an exception to the "prohibited transaction" provisions of ERISA in consequence of the legal structuring pursuant to the plan asset regulations of ERISA, DOL Reg. 2510.3-101. Thereunder the 6141 Plan assets consisted of 6141 Plan's 51% equity interest in the real estate operation corporation, the secured note evidencing the loan from 6141 Plan to the real estate operation corporation and the first mortgage interest in the Pineville securing the Note; nothing else; the purpose of the DOL plan asset regulations being to disconnect the underlying assets of the real estate operation corporation from the restrictions of the plan asset regulations so that broader investments could be made than otherwise permitted under the plan asset regulations with respect to the assets of the plan itself. Therefore there was not even a "prohibited transaction", let alone an unlawful conversion as alleged in the Indictment.

Based upon Mr. Grasso's expert analysis in preparation for Hook's trial, Hook sought to establish that in view of the termination of employment by 2/13/91, not only

had the 6141 Plan ceased to be a plan subject to any provision of Title 1 of ERISA as required for conviction under 18 USC 664, Wittek had ceased to be an employer any of whose employees are covered by the Title 1 plan as required for it to be a "party in interest" as to which the "prohibited transaction" provisions would apply. So, contrary to Boutwell, there never had been a "prohibited transaction" problem in the first place and a direct sale of real estate by Wittek to the 6141 Plan would not have been at risk of an excise tax or penalty. His assumption did, however, lead to a complex structure to solve a problem that did not exist. Grasso testified that he would have counseled for the direct sale transaction, had he been consulted, because of its simplicity compared with the loan transaction, even if it were to be deemed a "prohibited transaction" by the IRS/DOL and because it too was not illegal. The complexity introduced by the attempt to minimize the possibility of characterization as a prohibited transaction and thereby minimize the personal 5% excise tax was pounced upon by the prosecution as a complex money laundering scheme. Nothing could have been further from the truth. Hook and Viana chose the wrong expert. That should not make them criminals!

18 USC 1343 ("Wire Fraud") is not legally viable.

Without ever specifying the "scheme to defraud", the Indictment charged three fax communications with the Detroit Bank in which alleged misrepresentations were made in furtherance of the "scheme to defraud". A scheme to defraud must have as its purpose the taking of property from the owner by fraud. It is not a crime for the robbery victim to cause the robber to drop the victim's wallet and run by falsely exclaiming that an armed policeman is behind him. In the circumstances, there were only two parties who could be "defrauded", as posited by the prosecution: the 6141 Plan and the Detroit Bank, the custodian. As the 6141 Plan could function solely through the direction of its trustee, fraud upon the 6141 Plan by the trustee or her agents under her direction could not legally or factually occur. It makes no legal or factual sense to say that Viana could defraud herself by making misrepresentations to herself. As the Detroit Bank had no right to remain the custodian, its removal by the trustee and the transfer from it even by fraud would not be a violation of 18 USC 1343. Detroit Bank had been terminated by the trustee for misfeasance and malfeasance. It had no right to retain possession of any pension and profit sharing assets. The communications were prepared by Hook (Wittek's counsel) and Boutwell (6141 Plan's counsel) for the purpose of effecting transfer of such assets from Detroit Bank, the former custodian, to Harris Bank, its successor, a perfectly legitimate transaction.

"Wire fraud" requires a fraud upon someone who can be deprived of a tangible property right. Cleveland v. U.S., 531 US 12 (2000), citing McNally v. U.S., 483 U.S. 350 (1987). The communications contained no misrepresentations. Even if they had, they would not have been actionable under 18 USC 1343 for the aforesaid reasons.

Not disclosing that the interim account was McBride Baker & Coles' client trust account was asserted at trial to be a misrepresentation because Detroit Bank would not have transferred 6141 Plan Short Term Funds to it had it known that fact. Sheer

speculation. The communication did not say the trust account was anyone's; it just gave a number. Had this been such an issue with Detroit Bank, it could have made inquiry before wiring funds to that account. The trial assertion was specious. A client trust account is a trust account for the client. In Fact, as set forth hereinbefore, the wire to the client trust account was not authorized by Viana nor expected by Hook. Detroit Bank did it by mistake on its own instead of sending a check payable to the real estate operation corporation for $510 out of the short term fund for purchase of 6141 plan's 51% equity interest in that corporation. A client trust account is a trust account for the client. Detroit Bank Vice President Ronald testified at trial that he did not know what a law firm client trust account was or its purpose.

The client trust account "misrepresentation" was a prosecution trial fabrication. Albert Grasso, Hook's ERISA expert, testified at trial that a pension fund deposit to a client trust account was authorized by statute (29 USC 1103), and quite common and routine, and, in fact, his firm's client trust account often held pension funds on an interim basis. The $36,800 was held in McBride's client trust account only a few days and then transferred pursuant to the trustee's direction.

The other two communications which supposedly contained misrepresentations were identical, one was to Detroit Bank, the other a courtesy copy to its outside counsel. Therefore the prosecution double charged 18 USC 1343. This communication was a letter from Harris Bank accepting the 6141 Plan assets as trustee, as Detroit Bank, illegitimately, had demanded. Whether a custodian or a trustee, both are fiduciaries under ERISA. The alleged misrepresentation, according to the prosecution, was that Harris Bank did not have trust powers. The problem with this prosecution assertion is twofold. First, anyone can be a trustee under ERISA (29 USC 1103 and 1112), provided there is a fiduciary bond in an appropriate amount. There was such a bond ten times the required amount. It had been presented to Detroit Bank when demanded to satisfy itself that the Wittek Board had acted appropriately in appointing Viana trustee of the 6141 Plan. Second, the National Banking Act (12 USC 92a) provides that National Banks can have trust powers to the full extent of State Banks within their State of Domicile. According to the Office of the Comptroller of Currency, Harris Bank's federal regulator, Harris Bank had trust powers. However, stating that he did not know what "trust powers" meant, Judge Mihm excluded the statement of the OCC's general counsel from evidence at trial. After trial, pursuant to subpoena, Hook obtained the OCC's actual Harris Bank Profile which stated that Harris Bank had "full trust powers". Hook attached this as an exhibit to his motion for acquittal notwithstanding the verdict. Without comment, Judge Mihm denied the motion. These truthful documents, which were faxed to Detroit Bank, constituted the full basis for the prosecution's wire fraud case.

Faced with this silly record, on appeal, Judge Kanne took a different, but equally specious tack, asserting that Harris Bank had not accepted trusteeship and the communication to Detroit Bank was a misrepresentation for that reason. There is no evidence to support Judge Kanne's bizarre assertion. The communication came, not from Hook or Viana. It came directly from Marcia Schneider, Harris Bank Vice President,

on Harris Bank stationery and letterhead. It stated that Harris Bank accepted the trusteeship. The Wittek Board of Directors had appointed Harris Bank as trustee and a certified copy of that resolution was also sent to Detroit Bank and its counsel.

Assuming arguendo that Harris Bank (part of Harris Trust and Savings Bank) somehow did not have the legal capacity to be a trustee of a pension trust, how can a bank customer (Viana) or her attorney (Hook) be criminally responsible for the legal capacity of the bank? Furthermore, misrepresentations must be of facts not law. The bottom line is there was no misrepresentation by anyone as to Harris Bank's legal capacity to be a trustee. The issue is so preposterous that no one ever thought about making any such representation to Detroit Bank. Furthermore, Detroit Bank did not rely on the wire communication. It made its own independent inquiry to satisfy itself that Harris Bank had a trust department. It did not act on the fax communication that Harris Bank sent or the certified resolution that Hook sent via fax. Rather, it acted solely on the mailed originals, which mailings were not and could not have been charged under 18 USC 1343 because they are not wires but rather would have had to be charged under 18 USC 1341, mail fraud. Viana and Hook were not charged with mail fraud.

Had Detroit Bank contacted the OCC as to the status of Harris Bank, which it could have done had it been so concerned about whether Harris Bank was a trustee, it would have obtained the same information that Hook obtained through the First National Bank of Chicago, which was that Harris Bank had trust powers."

All documents faxed and forming the basis for the wire fraud convictions were typical transactional documents: letter of direction to former bank custodian, requisite certified corporate resolutions evidencing necessary legal action taken by the Board of Directors, letter of new bank custodian accepting assets as trustee, as demanded, improperly, by the former bank custodian. These documents contained no misrepresentations. They were the necessary constitutive documents of the transaction. They implemented the bona fide transfer of plan assets to a new custodian from a former custodian that had been terminated for misfeasance (low yield investing in its common trust funds, unresponsiveness to Wittek and to plan participants) and malfeasance (unauthorized and highly detrimental annuitization of 6141 Plan by taking $225,000 for annuitization of 12 of 200 plan participants and attempted unauthorized and ruinous annuitatization of 43 of 200 plan participants with $660,000, which, disasterously, would have left only $320,000 for the remaining 145 pensions).

These truthful documents which were faxed to Detroit Bank constituted the full basis for the prosecution's wire fraud case.

18 USC 1956 ("Money Laundering") is not legally viable.

"Money laundering" is based on nothing more than the deposits by the real estate operation corporation of the proceeds of its loan to Wittek, its borrower, into Wittek's bank account by wire transfer. The Indictment alleged that the unlawful predicate act of the

"money laundering" was the "wire fraud". For the reasons set forth above, there was no "wire fraud". The essence of money laundering is the concealment of funds from an unlawful predicate activity. There was no concealment; no intent to conceal. The transaction was in the banking system throughout, all of it within the purview of Harris Bank until the deposit of funds via wire into the account of the borrower. Interbank wires are processed through the Federal Reserve Banking System. Short of a tombstone in The Wall Street Journal, there could be no more complete openness about a transaction than existed here.

Also, 18 USC 1956 requires a financial transaction that is not necessary to establish the predicate unlawful activity as a separate element. The alleged "scheme to defraud" consisted of unlawful conversion to the use of Wittek. The deposit was the conversion to the use of Wittek. It was the financial transaction necessary to establish the predicate unlawful activity. It was also the financial transaction that constituted the money laundering. Such double duty eliminates money laundering as a viable charge under the law. Since the acts alleged to violate Section 1956 were the same as for Section 1343, they cannot support a violation of 1956. U.S. v. Jackson, 935 F. 2d 932, 941-2 (7th Cir. 1991).

PART III – TRIAL CONSTITUTIONALLY FLAWED AND UNFAIR

Judge Michael M. Mihm, who presided over Hook's trial, behaved as an auxiliary prosecutor rather than an impartial judge. His modus operandi was to accede always to the prosecution and never to Hook, even though Hook's presentation was more thorough, better supported in law and fact, and correct, and the prosecution's was always slipshod, perfunctory and wrong. Almost never did he support his decisions with reasons, contrary to 7th Circuit Rule 50. When he did give "reasons", they were irrational or contrary to fact and law. So numerous were Judge Mihm's prejudicial rulings that the mere aggregate constituted structural constitutional error mandating reversal. Only a few of his most egregious decisions are highlighted herein as examples of his misconduct.

Motion was made to dismiss the indictment because a key element of 18 USC 664, that the plan be subject to Title l of ERISA, could not be asserted or proven because negated by PBGC v. Wittek, Civil No. 3:95 CV 117, the decree of the U.S. District Court for the Western District of North Carolina, which judicially and collaterally estopped such assertion or proof and also was res judicata under the administrative decision doctrine of Nevada v. U.S., 263 U.S. 110, 138-9 (1983). The 664 allegations constituted the 18 USC 1343 wire fraud "scheme to defraud", and therefore a key element of 1343, which wire fraud was the alleged "predicate unlawful activity" for the 18 USC 1956 "money laundering" and therefore a key element of 1956. (CR # 95-10010, Dkt. #s13, 31, 36, 166). Judge Mihm denied the motion without explanation.

Having thus denied Hook the preclusive effect of PBGC v. Wittek, contrary to well established doctrines of res judicata, judicial estoppel and collateral estoppel, Judge Mihm next granted a prosecution motion to prevent Hook from presenting as a part of his defense that the 6141 Plan was not subject to Title l of ERISA at 6/92. While acknowledging that this was a key element that the prosecution would have to prove beyond a reasonable doubt, Judge Mihm prevented Hook from presenting this determining defense at trial. (SA 533-58) He also prevented Hook from cross-examining the prosecution's expert witness regarding termination of the plan by 2/13/91 and lack of Title l status at 6/92. (Tr. 527) Judge Mihm prevented Albert Grasso, a nationally recognized ERISA expert, from testifying that the 6141 Plan had terminated at 2/13/91 , that it was not a Title l plan at 6/92, and that this key element of the charges necessary for conviction was absent. (Tr. 1716-21, HXs 29-9, 29-9A, 29-6, 29-4) Judge Mihm prevented Hook even from arguing that this key element was missing.

The prosecution's theory was that Hook had committed wire fraud because he had satisfied the demand of the terminated custodian that its successor also be a trustee by arranging that with Harris Bank even though Harris Bank did not have trust powers. Judge Mihm refused presentation to the jury of the reports of the Office of the Comptroller of the Currency stating that Harris Bank had "trust powers", (Hxs 31-2, 56) asserting as his basis that he did not know what that meant and the report was

ambiguous therefor. In essence, Judge Mihm denied trial by jury on these issues. Hook's inability to cross or present his expert's contrary opinion or to argue the issue gave the jury the false impression that the issue was always uncontested. This was tantamount to Judge Mihm deciding the issue himself and directing a verdict. When the defendant has demanded a trial by jury, this is egregious error, mandating reversal. Furthermore, Judge Mihm denied without comment, as usual, Hook's post trial motion for acquittal notwithstanding the verdict, which had attached as an exhibit thereto the actual OCC Harris Bank Profile stating Harris Bank had full trust powers. (A-1709-15)

In numerous rulings, Judge Mihm prevented Hook from establishing the bona fides of his conduct and the absence of mens rea (SA 443-5, 456-8, 460, 469-70, 501, 502, 514-5, 516-21, 524-31, 533-40, 556-76, 587-90, 592, 596, 606, 621; HXs 28-15A, 28-24, 31-2, 31-10, 32, 35, 29-11 through 29-13), including his reputation as a highly competent, ethical attorney of 35 years standing, his efforts in the courts, including the 4th Circuit Court of Appeals and the Supreme Court, to protect the real estate security for the loan he had structured on behalf of his client for the parties, including the 6141 Plan, and the harmful conduct of Detroit Bank, a former Wittek executive (Hedges) and an insurance broker (Lillie) which compelled Hook and Viana to much of their conduct, which was the subject of the prosecution, in order to preserve and protect the majority of the 6141 Plan pensions from disaster. He obstructed Hooks' legitimate challenges to prosecution testimony. (SA 442, 561-2, 463, 477-82, 483-5, 502-3, 504-13, 522-3, 562-4, 568-76, 607-18, 619-20, HXs 6, 31-10, 32, 36A-C)

These are egregious violations of the Defendant's most basic right - to defend himself, constituting constitutional structural error and requiring automatic reversal (6th Amendment to the Constitution, U.S. v. Gaudin, 515 US 506, (1995), Cheek v. U.S., 498 US 192, 202 (1991), Mathews v.U.S., 485 US 58, 63 (l988), Davis v. Alaska, 415 US 308 (1974), assuming that one can catch an intelligent appellate judge's eye.

Another egregious error was Judge Mihm's refusal to give the jury the reasonable doubt pattern criminal jury instruction that Hook proffered, the one promulgated by the Federal Judicial Center and recommended by Justice Ginsburg, in Victor v. Nebraska, 511 US 1 (1995). He refused to give any instruction.

IV - APPEAL

PART IV – WAIVER WAS EXCUSE FOR AVOIDING ADDRESS OF ISSUES AND REVERSAL

The appellate process was a cruel joke. Judge Kanne is ill regarded in legal circles. His analytical abilities are regarded as nil. This is confirmed in U.S. v. Hook, 195 F3rd 299 (1999), which he authored.

Waiver was Phony Excuse for Avoiding Address of Issues and Reversal by Lazy Appellate Court Prejudiced Against "Failed Attorney"

Despite preservation of all issues in the trial court and adequate presentation of all issues on appeal by their inclusion in the initial brief, Judge Kanne asserted that they had been waived by Hook. This permitted Judge Kanne to ignore issues which otherwise would have resulted in reversal of Hook's convictions. The juxtaposition of Hook and U.S. v. Marion Santos, 201 F.3rd 953 (7th Cir. 1999), authored by Chief Judge Posner is revealing. In Santos, her asserting a "torrent of error" was the basis for reversal. In Hook, his asserting the "torrent of error" was the basis for waiver. The torrent was too much for Judge Kanne to deal with. In fact, he used it as his excuse to avoid addressing issues that required reversal by asserting that each was not sufficiently developed and hence the whole had been waived.

Appellate Court Violated Kyles Duties

Judge Kanne acted contrary to the duty imposed by Kyles v. Whitley, 514 US 419, 455-6 (1995) on the appellate court to review the record for errors in a criminal case because otherwise the defendant's due process right to appeal is lost, the Supreme Court's review being discretionary and fortuitous. In fact, Hook's appellate briefs tightly argued each issue, supported each issue with citation to the relevant cases and the specific facts as set forth in the 15 volume trial court record, the multi-volume mandamus records and the multi-volume sealed prosecutorial misconduct record. Judge Kanne ignored his Kyles duties.

Kanne's Assertion of Waiver Ignored Appellate Court Precedent

The cases Kanne cited did not support waiver. Quite the contrary. None of his cited cases are remotely comparable to Hook. In Kauther v. Sternberg, 149 F. 3d 659 (7th Cir. 1998), appellant completely failed to challenge the trial court's '33 Act Sec. 20 claim and merely incorporated by reference his '33 Act Secs. 12 and 17 argument at trial in a brief footnote.

In Sere v. Trustees, 852 F.2d 285 (7th Cir. 1988), the claim waived was not mentioned except in the statement of the case which in an appellate brief is nothing more than a recitation of what happened before appeal. Direct method Title VII analysis was not briefed and not obvious and therefore it was waived in Insurance v. Local 705, 160

F3d 363 (7th Cir. 1999). In Pitsonbarger v. Gramery, 141 F. 3d 728 (7th Cir. 1998), there was merely a statement that the standard instruction was given rather than the proffered one without analyzing why this was prejudicial. In U.S. v. Cusimano, 148 F. 3d 824 (7th Cir. 1998) only passing reference was made to the inadmissibility of an uncharged offense. Even so, Judge Kanne resolved that issue on its merits unfavorably to the defendant, thus revealing his biased bent in Hook by asserting waiver where to do otherwise would have been favorable to a criminal defendant.

Kanne's Analysis of Judicial Estoppel was a Butchery of Well Established Legal Doctrine and Precedent

Judge Kanne's analysis of the two issues he did address in Hook was a legal disaster. He acknowledged that a terminated plan was not a Title l plan under ERISA. Completely ignoring the factual and contractual bases of termination stated by Albert Grasso, Hook's ERISA expert, Judge Kanne asserted that Hook solely relied on PBGC v. Wittek and estoppel doctrines to establish that the 6141 Plan was not a Title 1 plan at 6/92, PBGC v. Wittek, which was brought by the government, having held that the 6141 Plan terminated 2/13/91. Judge Kanne ruled that PBGC v. Wittek did not have preclusive effect and that "the 6141 Plan was terminated 2/13/91" and "the 6141 Plan was not terminated 2/13/91" were not conflicting because "the purpose of such an action is to set a proper date for administrative use. . . ." 195 F 3d 299, 306. This turns the estoppel doctrines on their heads, in fact, destroys them.

Judge Kanne's holding is in direct conflict with Supreme Court and 7th Circuit precedent. Nevada v. U.S., 463 US 110, 138-9 (1983) held that proceedings brought by the U.S. on behalf of all parties and persons are in the nature of administrative proceedings to resolve all issues definitively with respect to the res -- in PBGC v. Wittek, the 6141 Plan -- and must be given res judicata effect with respect to everyone, including the government. U.S. v. Dixon, 509 U.S. 688, 697-8 (1999) held that facts of a prior contempt proceeding are to be given estoppel effect - estoppel applies irrespective of the purpose of the prior proceeding. Grady v. Corbin, 495 US 508 (1990) held that a homicide prosecution was barred by the estoppel effect of a prior traffic offence prosecution where a necessary element was necessarily litigated. Turner v. Arkansas, 407 US 366 (1972) held that conviction was precluded by finding in prior murder trial that defendant was not present. Wilson v. Chrysler, 172 F. 3d 500 (7th Cir. 1999), held that a party's prevailing position in previous litigation or quasi-judicial proceeding was dispositive and irreversible in subsequent proceedings. U.S. v. Brackett, 113 F.3d 1396 (5th Cir. 1997), precluded criminal prosecution on collateral estoppel grounds. DiGuiseppe v. Village of Bellwood, 68 F. 3d 187 (7th Cir. 1995) held that judicial estoppel effect was to be given a prior pension board decision to preclude a contrary position in a civil rights suit. Astor Chauffeur v. Runnefeldt, 910 F. 3d 1549 (7th Cir. 1990) held that a workman's compensation administrative finding that a supervisor acted beyond the scope of his employment precluded another employee who was with him "on his lark" from bringing a tort action thereafter against the employer. Smith v. Pinner, 891 F. 2d 784 (10th Cir. 1989), U.S. v. Kalish, 880 F.2d 506 (5th Cir. 1986), and U.S. v. Lee, 622 F. 2d 787

(5th Cir. 1980) all precluded criminal prosecution on collateral estoppel grounds. Chaveriat v. Williams Pipe Line Co.11 F. 3d 1420 (7th Cir. 1993) explained that "though called judicial estoppel, the doctrine has been applied, rightly in our view, to proceedings in which a party to an administrative proceeding obtains a favorable order that he seeks to repudiate in a subsequent judicial proceeding . . . the objective of the doctrine of estoppel is not just to protect the party in the suit in which the party seeks to repudiate an earlier position asserted. It is also to prevent situations from arising in which one of two related decisions has to be wrong because a party took opposite positions and won both times."

Kanne's Analysis of Expert's Opinion was a Butchery of Facts and Supreme Court Precedent

Merely because Judge Mihm disagreed with Hook's ERISA expert's opinion and thought it would not be helpful to the jury, obviously because it would have precluded the jury from finding Hook guilty, Judge Mihm, the trial judge, prevented Albert Grasso, a nationally recognized ERISA and pension plan expert, from testifying on Hook's behalf that it was his opinion that as a matter of fact, based on circumstances and events at 12/20/90, as a matter of contract, based on the pension plan documents of the 6141 Plan, including the trust agreement, and as a matter of law, based on the events and circumstances, and also based on PBGC v. Wittek, the 6141 Plan was not a plan subject to any provision of Title I of ERISA at 6/92, that Wittek was not an employer any of whose employees were covered under a Title 1 plan at 6/92 and that defendants Hook's and Viana's conduct in structuring the loan at 6/92 could not constitute an unlawful conversion of pension plan assets for the use of Wittek. Therefore 18 USC 664 (pension theft) was not violated because key elements were missing, 18 USC 1343 (wire fraud) was not violated because there was no unlawful conversion as a matter of law to constitute a "scheme to defraud" and 18 USC 1956 (money laundering) was not violated because the predicate unlawful activity, wire fraud, did not occur as a matter of law.

Opinions of Ignorant Judges Aren't to Prevail over Expert as to Preclude Presentation to the Jury

Judge Kanne upheld Judge Mihm's exclusion of Grasso's opinion on the ground that Grasso's opinion was inaccurate as a matter of law. 195 F. 3d 309. This is in direct conflict with the Supreme Court's pronouncements about expert testimony. It is not proper to exclude an expert's opinion because the judge disagrees with it. Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 US 579 (1993) and Kumho Tire Company v. Carmichael, 526 US 137 (1999). Judge Mihm's mere unsupported and unsupportable conclusions as to his different opinion from ERISA expert Grasso's opinion does not begin to comply with the law. That Judges Mihm and Kanne, neither of whom is an ERISA expert, could blithely preclude the jury from the well analyzed and factually documented opinion presented by a nationally recognized ERISA expert merely because Judge Mihm had a different opinion is an absurdity and absolute unmitigated

judicial tyranny.

Judge Kanne failed to address Judge Mihm's outrageous error in precluding Hook from cross examination of Gregory Brown, the government's ERISA expert of little reputation, regarding termination and Title I status.

Except to Kanne, Ambiguity in a Criminal Statute is a Basis for Acquittal

Illustrative of Judge Kanne's prejudice is his reference to the issue as one of first impression in the 7th Circuit and his castigation of Hook for exploiting an ambiguity. 195 F. 3d 307. Why should a criminal defendant not exploit an ambiguity? More pointedly, why should a person be subject to criminal prosecution when the issue is ambiguous? In such circumstances, how can one be found guilty beyond a reasonable doubt? An ambiguity is supposed to invoke the law of lenity, which results in interpretation most favorable to the criminal defendant. Rewis v. U.S., 401 U.S. 808, 812 (1971). Why should Judge Kanne's puerile mentation keep Hook in prison?

Kanne Ignores Universal Legal Distinction Between Termination and Liquidation as Well as the Foundations of Title IV of ERISA

While Judge Kanne concedes that termination ends Title I status, he finesses the necessary conclusion that at 6/92 the 6141 did not have Title 1 status by holding that the 6141 Plan was "undergoing termination under Title IV" but still subject to Title I because a plan never terminates until it is liquidated. This is facially outlandish. It would mean that termination could not occur until the last surviving participant or participant's beneficiary was deceased. This could be more than a century, even potentially exceed the rule against perpetuities. Termination is one legal concert and liquidation is another, under ERISA, PBGC v. Heppenstall, 633 F. 2d 293 (3d Cir. 1980), the seminal case, and its progeny, as in all other legal contexts, including taxation, trusts, corporation and partnership law. Termination of an entity always precedes liquidation. Why should Judge Kanne's misunderstanding of legal basics keep Hook in prison?.

Kanne Fabricated the Facts to Suit His Own Conclusions to Avoid Reversing Hook's Convictions

Judge Kanne also affirmed Judge Mihm's exclusion of Hook's reports from the Harris Bank's regulator that Harris Bank had trust powers, and which would have gutted the wire fraud charges under 18 USC 1343, and thence money laundering under 18 USC 1956. He does so on his misstatement that the OCC provided the files which established that Harris Bank did not have trust powers. The regulator did not produce its file until after trial and then only pursuant to subpoena. Contrary to Judge Kanne's assertions, the file confirmed the reports that Hook had sought to admit at trial. Judge Mihm also denied without comment Hook's post trial motion for judgment notwithstanding the verdict and for a new trial to which was attached as an exhibit the Office of the Comptroller of the Currency's computer profile of Harris Bank which showed that Harris Bank had "full trust powers". This is the document that Hook got from his subpoena of the OCC. Judge Kanne ignored this abuse of judicial discretion altogether,

V - SENTENCE

PART V—OUTLANDISH SENTENCE

The Judiciary was Heartless and Injudicious

Sentence was based unlawfully on money laundering. Money laundering has a base guideline sentencing level of 20 (+4 levels for the $700,000 “value” of the loan instruments, +4 levels for “obstruction of justice”, i.e. Hook did not plead guilty and testified in conflict with prosecution witnesses). Wire fraud has a base guideline sentencing level of 6 without level increase because the pensioner “victims” suffered no “loss” according to the probation officer who prepared the pre-sentence report. Pension theft has a base guideline sentencing level of 4 without level increase because the pensioner “victims” suffered no “loss” according to the probation officer who prepared the pre-sentence report. The consequence of using the money laundering guideline sentencing level was that Hook was sentenced to 84 months in prison instead of a maximum of 6 months. This was a consequence of a biased judge who believed that one should be punished for defending himself, even where the defendant bona fide believed he is innocent, as here. Hook is outside the “heartland” for money laundering because (1) defendants left tracks of their involvement, which demonstrates lack of intent to conceal, U.S. v. Smith, 186 F.3rd 290, 299 (3rd Cir. 1998), U.S. v. Hemmingson, 157 F. 3rd 347, 361 (5th Cir. 1998), U.S. v. Cuba, 911 F. Supp. 630 (SDNY 1996) affd. 104 F.3rd 354 (2nd Cir. 1996), and (2) defendants’ concealment, if any, was of their own conduct, not that of others, U.S. v. Malfrici, 1992 WL 127196 (SDNY 1993). “Heartland” analysis focuses initially on what type of case a particular sentence guideline is intended to cover, U.S. v. Hofer, 995 F 2d 746 (7th Cir. 1993), which requires examination of the legislative history. That Hook is well outside the heartland of money laundering is absolutely clear. Money laundering was enacted as part of the Anti-Drug Abuse Act of 1986. [Commentary to U.S. sentencing guidlines 2S1.1] The legislative debates reveal that Congress intended to affect the billions “laundered” by the organized drug trade. (Senate Rept. #433, 99th Cong. , 2d Session 4 (1986).

Commentaries to the U.S. Sentencing Commission Guidelines applicable to 18 USC 664 - unlawful conversion of pension plan assets - (USSG 2B1.1) and 18 USC 1343 - wire fraud - (USSG 2F1.1) make abundantly clear that the activity for which Hook was indicated and convicted as “money laundering” - 18 USC 1956 - is encompassed within those provisions and hence should not have been indicated additionally and seperately as “money laundering” under USSG 2S which is to be used for larger scale laundering of the fruits of organized crime, not a simple single loan transaction as here.

USSG 2B1.1 references the USSG 1B1.1 definition of “more than minimal planning” which applies if “... significant affirmative steps were taken to conceal the offense...” and in which case the judge may impose a 2 level enhancement. This would have increased Hook from level 4 (0 to 6 months) to level 6 (0 to 6 months) except that if the resulting level is less than 12, the judge may increase it to level 12 (10 to 16 months). USSG 2F.1 encompasses “...transactions to conceal the true nature or extent of fraudulent conduct...” It increases the level from 6 to 12 if the level is otherwise less than 12 (10 to 16 months). Even if there were a “victim” who had a “loss” neither of which were alleged in the indictment nor proved at trial, as required by the 5th

amendment to the Constitution, Apprendi v. New Jersey, 530 US 466 (2000), Russell v. U.S., 369 US, 749 (1962), the sentence range would have been 21 to 27 months. Hook entered Oxford camp 6/22/98. He was transferred to MCC - Chicago to serve as work cadre where Hook served his entire "term of imprisonment" until release to half-way house on 2/26/04.

Hook is Sentenced as if He were a Violent Criminal

The average sentence for violent crime in the federal system is 84 months. Had $700,000 been stolen from the pension plan, the maximum sentence would have been two years. Hook's seven years was for structuring a lawful loan transaction because the prosecution was able to miscast it as money laundering, something he could not do , of course, with a simple theft. Based on the latest Justice Department statistics, Hook's seven years is almost twice the average for violent crime sentencing in all states. Hook will serve more time by years than the average murderer, rapist or robber for nothing more than having structured a loan transaction in the ordinary course of his legal practice, something he has done numerous times during his 35 year legal career, simply because the client could not repay the loan through no fault of his or his client. In fact the default was, in no small part, due to the federal courts ignoring the law and refusing to decide Viana, et al. v. Michael, et al., 32 F 3rd 88 (4th Cir. 1994), cert. den. 130 Led. 2 880 (1995) in accordance with applicable law. The 6141 Plan mortgage and Wittek deed had priority over the judgment liens filed by the judgment lienors under applicable law. The conveyances occurred on 7/7/92 before the judgments were filed. Although liens were asserted for interlocutory judgments before the conveyances were recorded on 9/25/92, interlocutory judgments cannot be the lawful basis for liens. By the time the judgments became final and the liens therefor had been filed on 10/10/92, the conveyances had priority be virtue of their prior recording on 9/25/92. As outlined above and demonstrated in the brief and motion for reconsideration to the Fourth Circuit Court of Appeals (Exhibits A & B), the judgments were bogus and should never have been confirmed in the first place. The next failure of the federal courts came in Michael when the Fourth Circuit and the Supreme Court declined to accept jurisdiction over an outcome dictated by federal law, contrary to law, as set forth in the Petition for Certiorari (Exhibit C), contrary to law based even on the Fourth Circuit's ruling that a court rule, as distinguished from a federal statute, does not confer federal jurisdiction. Such sophistry is a distinction without a difference as Congress enacts the rules, which must be presented to it by the courts, into Title 28 pursuant to the Constitution, Article II, which provides in pertinent part in Section

1:

> "The judicial Power of the United States, shall be vested in the Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

and in Section 2, paragraph 2:

> ". . . the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make."

The final failure of the courts in this tragedy was the prosecution, conviction and sentencing of Hook and their mindless appellate confirmation.

EXHIBIT A

IN THE
UNITED STATES COURT OF APPEALS
For The Fourth Circuit
- Richmond, VA -

No. 92-2139

GLENN BREITWIESER,

Plaintiff-Appellee

vs.

WITTEK INDUSTRIES, INC.

Defendant-Appellant

RONALD BIGGERS, et al.,

Plaintiffs-Appellees

vs.

WITTEK INDUSTRIES, INC.,

Defendant-Appellant

APPEAL
From the United States District Court
For the Western District of
North Carolina Charlotte Division

APPELLANT'S BRIEF
Filed On Behalf of
WITTEK INDUSTRIES, INC.

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EXHIBIT A

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This is an appeal from judgments entered against Appellant-Defendant Wittek Industries, Inc. by the United States District Court For the Western District of North Carolina, Charlotte Division in the consolidated cases of Biggers, et al. vs. Wittek Industries, Inc., et al. C-C-91-96-P and Breitwieser vs. Wittek Industries, Inc. et al., C-C-91-98-P. The Court entered judgment against Defendant Wittek with respect to two of the numerous issues, vacation pay and Breitwieser's contract claim, on May 19, 1992 and against Plaintiff Breitwieser with respect to his bonus claim. Wittek filed a motion for judgment notwithstanding the verdict or, alternatively, for a new trial on June 5, 1992, which the Court denied on August 6, 1992. Also on August 6, 1992, the Court entered judgment against Defendant Wittek with respect to the Biggers Plaintiffs' severance claims and reasonable attorneys fees and costs based upon an affidavit to be submitted by August 16, 1992 and entered judgment against Plaintiffs with respect to their claim for exemplary damages against Defendant Wittek. All claims against other defendants were either then or had earlier been denied. The Court entered judgment for Attorneys' fees on August 21, 1992 without having afforded Defendant Wittek any opportunity to respond. Defendant Wittek filed a response to Plaintiffs' fee application on August 27, 1992 and on September 3, 1992, the Court vacated its judgment for attorneys fees of August 21, 1992 to afford that opportunity by September, 21, 1992. Unaware of the Court's order Defendant Wittek filed its notice of appeal on September 4, 1992. In response, the Court vacated its order of September 3, 1992. Accordingly, the appeal is from the orders of May 18, 1992, August 6, 1992 and August 21, 1992, which together disposed of all claims with respect to all claims with respect to all parties.

Consolidation Of Biggers and Breitwieser For Trial Resulted In Reversible Prejudicial Error

Consolidation of the Biggers and Breitwieser cases resulted in extreme prejudice to Wittek Industries, Inc., the Defendant. There were 18 Plaintiffs in the Biggers case. Their claims were for severance and vacation pay based upon policies relating thereto. Breitwieser was the sole Plaintiff in the case brought by him. His claim was based upon an alleged contract for severance pay. The Biggers underlying claims were to be decided by the judge, the Breitwieser claim by the jury. The jury had also to determine whether the Plaintiffs were third party beneficiaries of a contract between Wittek and Chrysler which provided that Chrysler would pay for the "deactivation costs" of EC Manufacturing which employed Plaintiffs. Solely because of this latter nexus, presumably, the Court consolidated the two cases for trial.

Wittek does not dispute that the consolidation resulted in judicial convenience because the issue of Chrysler's liability had to be exposed only once, to one jury. However the Court had a duty to weigh this judicial convenience against the potential for confusion and prejudice. Hendrix v. Raybestos Mahaller, Inc. 776 F.2d 1492 (11th Cir., 1985), Southwest Marine, Inc. v. Triple A Machine Shop, Inc., 720 F.Supp. 805 (N.D. Cal., 1989), which duty the Court did not discharge. Such failure is ground for reversal, particularly here, where actual prejudice and confusion did occur. The only basis for the consolidation was Plaintiffs' claim as third party beneficiaries against Chrysler for the payment of the Breitwieser and the Biggers severance and vacation pay as items included as "deactivation costs" within the meaning of that term in a contract between Wittek and Chrysler, a claim which the Court itself characterized as weak. (Tr. 318.)[1] Instead of focusing on the jury issues before the jury, Plaintiffs devoted essentially all of their efforts attempting to establish through the Biggers claim that Defendant Wittek's chief witness was an autocratic liar who in "a rear guard action" changed the severance and vacation pay policies after the fact in

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1 However, by the time of trial Wittek had absolved Chrysler of any liability for deactivation costs by agreement entered into between them in February, 1992, [a fact which was brought to the Court's attention in the brief filed by Defendant Wittek in opposition to consolidation.] Accordingly, whatever benefit might have obtained as a result of the original contract was eliminated by the subsequent release.

order to “cheat these people out of their money which they rightfully were owed and that they should be paid under the 1987 policies. . ..” (Opening Statement of Plaintiffs’ Counsel, Tr. 17). Of the nine pages of the transcript devoted to the opening statement of Mr. Michael, counsel for Plaintiffs, Mr. Michael took more than four on the non-jury Biggers claims and under one on the Breitwieser claim. Of the twenty witnesses that Plaintiffs called, only one did not testify as to the Biggers claim (John Darrah, by deposition) and only one testified as to both the Breitwieser and the Biggers claims (Breitwieser).

Against this background, it was humanly impossible for the jury to deal fairly and exclusively with Breitwieser’s claim, particularly when they were not apprised by the judge until the very end that the Biggers claims were not theirs to decide.

It would have been an easy matter for the Court to have heard the Biggers non-jury claims without the jury present as part of the trial and either advised the jury in a sentence or two if his instructions as to the basis and amount of the Biggers claims or obtained a stipulation thereof from the parties so that the issue whether the Breitwieser and Biggers claims constituted “deactivation costs” could be resolved by the jury. Other means of avoiding prejudice also come readily to mind which would not have required undue delay or inconvenience.

Sending the Breitwieser Claim
To the Jury Was Prejudicial Error

Breitwieser was asked if he would accept the position of Vice President of Wittek Manufacturing and relocate to Illinois (TR. 91-93). Breitwieser conditioned his acceptance by imposing five conditions, which he set forth in a letter (Plaintiffs' Exhibit 20). In the letter he indicated that he would consider accepting Vice President of Manufacturing at Wittek Industries if the five conditions were agreed to and concluded the letter by indicating that if the above items were agreeable Human Resources should confirm with a letter. One of those conditions was a salary increase retroactive to May 1. Two of the conditions were to occur upon relocation from North Carolina to Illinois, which never occurred. Instead, Breitwieser went back and forth between North Carolina and Illinois as he had before (TR. 76). The condition central to this appeal was that Breitwieser received a "Letter of guarantee of severance protection for one year." Although the President signed Breitwieser's letter, approving his condition, there is no evidence that his letter was returned to him with the President's approval. Indeed, as requested by Breitwieser, what was delivered to him was Human Resource Director Keegan's letter (Plaintiffs' Exhibit 21), which said, among other things, "Letter of agreement regarding severance will be written with your input." Breitwieser describes one brief discussion with Keegan in a hallway after a staff meeting as providing what Breitwieser could only testify he believed to be the basis for a letter of guarantee of severance protection for one year (TR. 95).

By Breitwieser's own admission, he never received such a letter. When asked, "did you ever get a letter?" He responded "No. I assumed it was written. Probably in my personnel file" (TR. 95-96, 100, 120-123). Linda Cornwell, Plaintiffs' document reviewer for the litigation (TR. 204), confirmed that there was no such letter in Breitwieser's personal file (Tr. 213). None was produced by Plaintiffs and Keegan, Wittek's Human Resources Director, testified that no such letter was ever prepared (Tr. 342).

Accordingly, the only potential contract between Breitwieser and Wittek was

contained in Breitwieser's and Keegan's words, on the one hand demanding a "Letter of guarantee of severance for one year" and on the other hand advising that a "Letter of agreement regarding severance will be written with your input." Clearly, if anything, this so-called agreement is nothing more than an agreement to agree which is not enforceable as a matter of law. Academy Chicago Publishers v. Cheever, 144 Ill.2d 24, 578 N.E.2d 981 (Ill. 1991), 17 Am. Jur.2d, Contract §26. Therefore the Court erred in denying Defendant Wittek's Motion for Judgment as a matter of law that no enforceable contract existed (TR. 297.) Again, the Court erred in submitting this matter of law to the jury (TR. 451.)

The jury's decision in favor of Breitwieser was manifestly contrary to the evidence.

The jury had no rational basis for finding that Wittek owed Breitwieser $99,187.50. The evidence submitted to the jury makes no mention of pay. Common sense indicates that "severance protection for one year" means that Breitwieser could not be terminated for a year, not that when he was terminated he would be entitled to a full year's salary. If the commencement date of such protection were May 1, 1990, the effective date of his promotion, the severance protection for one year might well mean that he was entitled to employment until April 30, 1991, and since he was terminated on February 15, 1991, he would be entitled to pay for March and April or, $8,265.63 per month.

> However, Breitwieser testified that he sought the severance protection "under the expectation that I would relocate. If after relocation I was severed or terminated I would find myself in a new city, correct without means or without contacts and I felt I needed the coverage of one year's severance to be sure that my family and I were protected while I did a job search" (TR. 123).

Breitwieser admitted that he had not relocated (TR. 93-94, 117-122). Keegan confirmed that Breitwieser had not relocated (TR. 343). Based upon Breitwieser's own testimony severance protection was not to begin until the date of Breitwieser's relocation, which never occurred. Accordingly, the reason for severance protection never occurred and Breitwieser had no entitlement to severance protection.

What "severance protection" meant is unstated. When the one year of protection was to commence is unstated.

What the Breitwieser language meant and how it was to be implemented were unstated. There was no agreement as to these matters. In the absence of agreement as to so basic provisions, there can be no enforceable agreement between the parties. Academy Chicago Publishers v. Cheever, 144 Ill.2d 24, 578 N.E.2d 981 (1991), Trittipo v. O'Brien, 204 Ill.App.3rd 662, 561 N.E.2d 1201, 1207 (1st Dist., 1990), Lal v. Naffah, 149 Ill.App.3rd, 245, 500 N.E.2d 699 (1st Dist. 1986), (where parties intend written or formal contract to follow negotiations, there can be no agreement until written document is exercised).

The interpretation of Breitwieser's language selected by the jury is clearly not supportable. It is a finding that Breitwieser was entitled to a year's pay no matter when he was terminated, whether after nine months or ten years.

The Court Erred In Its Instructions To The Jury Regarding Breitwieser's Contract Claim.

That contracts are to be construed against their author is a well-known and universally accepted legal maxim. Saddler v. National Bank of Bloomington, 403 Ill. 218, 85 N.E.2d 733, 740 (1949), Scheduling Corp. of America v. Massello, 119 Ill.App.3rd 355, 456 N.E.2d 298, 303 (1st Dist. 1983), Am. Jur.2d, Contracts §276.. However, Judge Potter asserted an exception "when a contract term is the result of negotiations in joint efforts of attorneys, experienced drafters or negotiators in which case the contract terms are not to be construed against either party." Giving this instruction is highly prejudicial. It is a judicial assertion that such an exception has application to this case where there was absolutely no evidence that Breitwieser's language was the result of any negotiation whatsoever. On the contrary, the evidence was that Breitwieser unilaterally proffered the language. As a result, the jury was instructed that it need not construe the ambiguities of Breitwieser's language against

him. As a consequence, obviously, the jury did not. The result was an award of $99,187.50, the conclusion most favorable to Breitwieser and the least rational of the conclusions which conceivably might be derived from the evidence. An instruction should be given only where the evidence supports the theory it expresses.

Furthermore, Judge Potter prejudiced the jury by confining his instructions on "contract," "meeting of the minds," "the role of the jury" and "the Plaintiffs' burden of proof" to the term "deactivation costs," and thereby excluded from their ambit "severance protection for one year." Thus, the judge directed the jury to apply these principles to the one term, but not to the other. Had the jury been properly instructed to apply these principles equally to the term "severance protection for one year," their conclusion to award Breitwieser $99,187.50 as "severance protection for one year" under the circumstances of his having been employed already for nine months and his not having relocated could not have been reached.

The Court Erred In Ruling That
Plaintiffs Were Entitled To Severance Pay
Under JD Industries 1987 Severance Pay Policy

Judge Potter's ruling that the Plaintiffs were entitled to severance pay under JD Industries 1987 severance pay policy is clearly erroneous. Wittek ceased to be a J.D. Industries company on December 20, 1990 (TR. 325). From that point, Wittek's policies would apply, not J.D. Industries. Sejman v. Warner-Lambert Co., 889 F.2d 1346, 1348 (Fourth Cir., 1989) ("... once PMP took over management of the Medical Services Division [from Warner-Lambert], its severance policy, not that of Warner-Lambert, was controlling.") The policy in effect at the time Wittek ceased to be a JD Industries Company was Wittek's 1989 policy. It was the applicable policy, whether the salaried employees had notice of it or not before their termination. They became subject to it in December, 1990. The only notice requirement even arguably applicable would be pursuant to ERISA Section 104 (b)(1) [29 U.S.C.] §1024(B)(1) which provides that modifications or amendments to employee

welfare benefit plans may be distributed to plan beneficiaries as much as 210 days after the planned year in which the change is adopted. Clearly, the Plaintiffs had notice, at the latest, within approximately two months after the 1989 Wittek policy became applicable to them. If, as Judge Potter held, this policy did not apply to Plaintiffs, then there was no policy of record applicable to them and they would be entitled to nothing.[2]

The Court's Decision In Favor Of The Biggers Plaintiffs Was Manifestly Contrary To the Evidence

Judge Potter entered judgment for the Biggers Plaintiffs on their severance pay claims based solely on the false premise that "Wittek failed to adopt written amendments to the 1987 policy" contained in the J.D. Industries, Inc. Management Guide [Plaintiffs Exhibit 1] prior to the closing of EC Manufacturing plant. (Memorandum of Decision dated August 6, 1992, p. 10.) In doing so, he discredited the testimony of Ray Keegan, Wittek's Human Resources Director, to the contrary and relied on the testimony of Plaintiffs Dunn, Breitwieser and Husch, whose testimony he found "credible and consistent." Apparently, Judge Potter did not recognize that one must conclude from their testimony that Wittek did adopt written changes to its severance policy, the 1989 policy, prior to the closing of EC.

In his testimony, Dunn, the Plant Manager of EC with some responsibility for human resource (Tr. 35), identified the 1987 policy, upon which Judge Potter relied, as its severance policy contained in the J.D. Industries, Inc. Management Guide (Tr. 36-37, 58). Dunn described a telephone conversation with Keegan the day before the plant closed in which Keegan stated that the personnel transaction forms had to be changed (Tr. 48-50). As a consequence, on February 14, 1991, Dunn and his assistant Ms. Stanton changed the personnel transaction forms to reflect the 1989 Wittek severance policy rather than the 1987 J.D. Industries, Inc. policy upon which Dunn and his assistant had originally prepared them and done them on February 15, 1991 (Tr. 51, 61).

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2 Wittek's prior policy, adopted on May 31, 1979, was not introduced at trial. The 1989 policy had superseded this 1979 policy, not the J.D. Industries policy, which did not apply to Wittek, except pursuant to the renegade conduct of EC, if it was a Wittek division, which is by no means clear.

Dunn's testimony establishes that Wittek applied the 1989 policy before the EC plant closing.

Breitwieser, who had been promoted to Vice President of Manufacturing and whose testimony Judge Potter also found credible and consistent, testified as to the same telephone conference with Keegan on February 14, 1991 a day before the plant closing. It began with Breitwieser alone, "initiated by Keegan to discuss the calculations based on the severance policies. The point that he made was the calculations and the personnel transactions would have to be changed." "Keegan went through the fact or the position that the policies had been changed." Breitwieser testified to the changes made in the personnel instruction forms on February 14 to reflect the 1989 policy. (Tr. 72-73.)

Breitwieser also testified that after the plant closed on February 15, 1991, he, and Plaintiffs under Cornwell, Debbie Stanton and Betty Griffin remained at work and on the company payroll (Tr. 74). Breitwieser also testified that the chief executive officer issued a memorandum dated February 13, 1991 advising that the vacation and severance checks should not be distributed until she had personally authorized them (Tr. 80) and that these checks were to be sent to Illinois, which was a departure from what had been the policy. (Tr. 81.) Breitwieser testified that all employees received notice of the policy, initialed a copy of it, upon which severance and vacation pay were calculated when they received that final pay check on February 22, 1991. (Tr. 84.)

Marge Husch, Personnel Administrator in LaGrange, Illinois, testified that Keegan was her boss (Tr. 175), that in 1987 a Mr. Hood revised policies that were necessary for severance, hiring of relations and vacations, [the 1987 J.D. Industries, Inc. policies] that these were kept in a book separate from the big [Wittek Industries] policy book, that Keegan went through the big book and began to rewrite them sometime after January, 1989. She described how he went through this process and how she retyped the revised policies. She indicated that there were 61 new policies as a result and all 152 polices were retyped. After all the corrections were made and the policies were renumbered, the originals were

kept under lock and key in a file cabinet in her office. (Tr. 176-177.) She testified that "before Mr. Keegan left [for Galesburg, Illinois] in December [1990], he asked me to start preparing the hourly or the union employees' PT so that they'd be ready as they were to leave. I was still in LaGrange. I started making out -after I finished them, I started on the salaried. I gave him a couple for signature and he said they were wrong that the severance was different and I said I was going by the policy and he says you don't have the new one. I said no, I only have the ones Mr. Hood had [the 1987 Policy of J.D. Industries]. The book was still intact when my office was moved to Galesburg of the 1987 Policy [of J.D. Industries]. He told me to use the new severance. I took the copy out of the drawer. Put my writing on the top 6/1/89 because that's what he said and then I proceeded to make out the others, the other personnel transactions. I started the personnel transactions probably in January, 1991. (Tr. 178-179.) Approximately the beginning of February, Mr. Keegan mailed me a copy of the signed severance [the 1989 Wittek Policy, Exhibits 9 and 10]. Although on direct she testified that this was an entirely separate document from the one she had typed and had in her file with a different number also (Tr. 181), she admitted on cross-examination that the revised severance pay policy, was typed by her in 1989 (Tr. 182-183) and that the terms of the signed policy that Marge Husch got in January, 1991 were identical to the one she had typed.

She struggled to avoid the fact that the policy she typed in 1989 was substantively identical to the signed policy she received in January, 1991, but she could not. She admitted that all the language in these two policies was identical, the one she typed up in 1989 and the signed policy she saw in January, 1991. (Tr. 183-184.)

In addition, most of the Plaintiffs who testified, stated that they had been aware of the change of policy on February 14 (Tr. 49-52, 72-73, 78, 80-85, 260-261, (270, 272) and they had all gotten written notice of it by February 21, a day before they received their last pay check. Some indicated that they were not terminated until February 22. (Tr. 73-74, 200, 276.)

The Court seemed to base its decision that there was no written policy before 2/15/91 on his finding of fact that Ms. Husch had not received a signed copy of the 1989 policy prior to the termination of her employment in March, 1991. (Memorandum of Decision, P. 5) The Court's elevation of Ms. Husch to arbiter of Wittek policies is contrary to law. There is no legal requirement that severance policies be signed by anyone. However, one need not even get to this issue. The Court's finding of fact was clearly and demonstrably erroneous as Ms. Husch testified that she had gotten the signed policy well before 2/15/91. Tr. 180-181, 182, 185.

In light of this testimony by these persons whose testimony Judge Potter deemed to be credible and consistent, Judge Potter's decision is manifestly contrary to the very evidence upon which he relied and therefore his decision must be reversed.

The Court Erred
In Awarding Attorneys' Fees to Plaintiffs

The Court erred in awarding attorneys fees and costs to Plaintiffs.

Under ERISA, 29 U.S.C. §1132(G)(1), a Court may award attorneys fees to the prevailing party. Upon this Court's reversal of the Biggers decisions in the District Court, the award of attorneys fees should fall. However, even if the ERISA decision is not reversed, the District Court, by its own admission, abused its discretion in awarding attorneys fees and such decision must be reversed (District Courts Opinion dated September 21, 1992). The District Court rendered its decision with respect to attorneys fees without giving opportunity to the Defendant to address the factors that should have governed and other matters that Defendant might raise. These factors include (1) the degree of culpability or bad faith; (2) the ability to satisfy the award of attorneys fees; (3) the deterrent effect on others in similar circumstances; (4) the motivation of fees petitioners to benefit all participants and beneficiaries of an ERISA plan; (5) whether a significant legal question regarding ERISA is resolved as a consequence of the suit; (6) the relative merits of the parties' positions. Nachwalter v. Christie, 805 F.2d 956 (11th Cir., 1985).

CONCLUSION

Based upon the foregoing, the Court should (1) reverse the judgment of the District Court that Wittek owes Breitwieser severance pay pursuant to a contract with respect thereto; (2) reverse the judgment of the District Court that Wittek owes severance pay pursuant to the 1987 severance pay policy of JD Industries, Inc.; (3) reverse the award of attorneys fees.

_____

George C. Hook
Attorney for Appellant,
Wittek Industries, Inc.

EXHIBIT B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPEAL NO. 92-2139

RONALD BIGGERS, et al.,
Plaintiff-Appellees

vs.

WITTEK INDUSTRIES, INC.
Defendant-Appellant

and

J.D. INDUSTRIES, INCORPORATED;
CHRYSLER CORPORATION; CARMEN VIANA;
JOHN W. DARRAH
Defendants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA, CHARLOTTE DIVISION
THE HONORABLE ROBERT D. POTTER PRESIDING

MOTION FOR REHEARING

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EXHIBIT B

APOLOGY

Counsel for Defendant-Appellant Wittek Industries, Inc. ("Wittek") apologizes to all for his egregiously inadequate representation of his client and the misrepresentation of his client's position to the Court as evidenced by the Opinion that this Court rendered in this case. Apparently, counsel presented what is so clear in such a way that the Court did not see it. The consequence was a substantial waste of the Court's time, not only in writing the Opinion but also in having to review this Motion for Rehearing and then rewriting its Opinion. Clearly, counsel's presentation was woefully inadequate. Otherwise, the Court could not have overlooked, as it did, that "two opposing positions" (Opinion, p. 7) did not exist in fact, but only in the rhetoric and fertile imagination of Plaintiffs' Counsel. Otherwise, the Court could not have overlooked, as it did, that Wittek Industries never adopted J.D. Industries severance pay policy, so that it had no need and no power or authority to amend or terminate it; that it had application to EC up to that point in time, December 20, 1990, when it was still a J.D. Industries company but that after that tie was severed J.D. Industries' severance policy had no relevance and no application except at J.D. Industries with respect to J.D. Industries' employees. Otherwise, the Court could not have overlooked, as it did, that Sejman v. Warner-Lambert Co., 889 F.2d 1346 (4th Cir. 1989) required that the Court reverse either Sejman or the judgment of Judge Potter. Otherwise, the Court could not have overlooked, as it did, that either the Wittek severance policy had been adopted before severance and controlled at the time of severance, in which case the severed employees were entitled to receive the severance pay provided therein, or, Wittek had not adopted a severance policy before severance and the severed employees were not entitled to receive any severance pay from Wittek.

It is counsel's hope that the unforgivable deficiencies of his representation and presentation to the Court can be remedied by this Motion for Rehearing and that, as a result, the Court will be able to rule correctly with respect to the Biggers claims, either by ordering that nothing further is owed by Wittek or by ordering the Plaintiffs to return that

which they received pursuant to a policy that, according to the Court, was never adopted.

DEFENDANT-APPELLANT SUGGESTS THE APPROPRIATENESS OF A REHEARING EN BANC.

INTRODUCTION

In the judgment of counsel for Defendant-Appellant Wittek, material law and facts were overlooked in the decision and the opinion of the Court is in conflict with another decision of the Court and the conflict is not addressed in the opinion. Therefore, counsel urges the Court to reconsider its decision that severance pay is owed certain plaintiffs by Defendant Wittek. Based upon the decision of the Court, severance pay would be owed, if at all, by defendant J.D. Industries, not by Wittek. Indeed, the Plaintiffs would be required to refund to Wittek the amounts that they received under the Wittek policy which the Court has declared was never adopted.

Material Law Overlooked. The Court overlooked the law that a contract between one person and another cannot be legally amended or terminated or otherwise affected by a third person, absent a provision therefor in the contract itself. Therefore, J.D. Industries' employee welfare benefit plan could not have been amended or terminated by Wittek. There is no concept of law that would have given Wittek any such power or authority. Therefore, the Court imposes an impossible burden, one which is contrary to law and reality, on Wittek by holding that Wittek is bound by J.D. Industries' contract unless Wittek amended or terminated it. The Court also overlooked the proposition of law that a finding of fact is clearly erroneous which is contradicted by the very testimony upon which it is based.

The Opinion is in Conflict with Another Decision of the Court. This opinion is in conflict with Sejman v. Warner-Lambert Co., supra, in that the Court there held that the predecessor severance policy was not controlling in essentially identical circumstances. Although the Court cited Sejman in the Opinion, the citation was for a different proposition.

Here, the policy that the Court held was applicable was the severance pay policy adopted by J.D. Industries in 1987. Under Sejman, this policy could have applied to the EC Manufacturing Division of J.D. Industries only until the sale of the EC Manufacturing Division to Atwood Industries on or about December 20, 1990, at which time Wittek Industries, Inc. was also sold by J.D. Industries to Carmen Viana. J.D. Industries' severance policy could have no application to the severance of employees from Wittek in February, 1991. If a severance policy was not adopted, as the Court has found, by February, 1991, when the employees were terminated, there was no severance policy at the time of their termination and they are not entitled to any severance pay, at least from Wittek.

Material Facts Overlooked. The Court overlooked material facts in rendering its opinion. The Court overlooked facts which establish that the Wittek 1989 severance policy was adopted timely. These facts are set forth in the testimony of all witnesses upon whom Judge Potter, the District Court Judge, relied for the opposite proposition. They are judicial admissions against interest and control over any contrary statements that they made, of which there were none that were competent.

The Court held that J.D.'s severance pay policy bound Wittek to make payments to Wittek's employees pursuant to it because Wittek did not amend or terminate J.D.'s severance pay policy. Not only is this contrary to well established contract and corporate law and the Court's own ruling in Sejman as set forth above; it is also contrary to the facts. There were no facts presented at the trial which show that Wittek agreed, or even intended, to be bound by the severance pay policy of another corporation. Absent such facts, it is clearly erroneous to find that Wittek was so bound.

The Court should also note that the award of $112,526.37 was the entire amount of the severance pay claim under the J.D. policy (A-268-286) without deduction for the amount ($22,930.14) of the severance pay under the Wittek policy (A-288-306). The net amount is $89,596.23. Counsel apologizes for not bringing this discrepancy to the Court's attention previously. He completely overlooked it, expecting that it would be irrelevant because of

what he perceived to be the overwhelming evidence that the Biggers Plaintiffs were not entitled to be paid by Wittek under J.D. Industries' old policy.

DETAILED ANALYSIS

The Opinion states at page 4:

> Because of financial difficulties, the plant was closed on February 15, 1991, and its assets were sold.

Counsel apologizes for somehow inadvertently leading the Court reach this incorrect factual conclusion, which, perhaps, at least, in part, led it to the broader erroneous conclusions that the Court reached. It is clear from the record that all of the EC's assets were sold to Atwood Industries on December 20, 1990 and that the North Carolina plant was not closed until sometime after February 15, 1991. Most importantly, both EC and Wittek ceased to be J.D. Industries companies on December 20, 1990.

The Court states at page 5:

> Keegan's assistant, Marge Husch, testified that she typed the new policies to give to Viana to look at, approve and sign. To Husch's knowledge, as of March 19, 1991, more than a month after the plant in Pineville had been closed, none of the new policies <u>that she had typed</u> had been approved and signed by Viana. (Emphasis supplied.)

Counsel apologizes for not more specifically bringing the Court's attention the disingenuousness of this statement—she did testify that she saw an identical policy, but not the one she had typed and put in her cabinet by January, 1991. She locked the manuscript that she had typed "in a file cabinet in my office" where it stayed, unsigned and ignored by all, according to her (A-34) until many months after it had any relevance (other than in connection with the litigation that her colleagues were then contemplating). This is the testimony that Judge Potter and the Court rely on for the erroneous conclusion that the Wittek severance policy was not adopted. Husch also testified on <u>direct</u> (A-178-182) as follows:

> Before Mr. Keegan left in December [1990], he asked me to start preparing the hourly or the union employees' PT [personnel transaction forms[1]]...after I finished them, then I started on the salaried. I gave him a couple for signature and he said they were wrong that the severance was different and I said I was going by the policy and he says you don't have the new one. I said no, I only have the ones Mr. Hood had. The book was still intact when my office was moved to Galesburg of the '87 policy. He told me to use the new severance. I took the copy out of the drawer. Put my writing on the top 6/1/89 because that's what he said and then I proceeded to make out the others. The other personnel transactions. I started the personnel transactions probably in January, 1991
>
> ***
>
> No, he just said we were following the new severance. I knew there was a new severance because I had typed it but I didn't know it had ever been signed. I had never seen a signed copy.

On cross-examination, Husch makes it even more clear that the Wittek severance policy had been adopted and implemented before the severances which are the subject of this litigation (A-182-184):

> Yes, sir, all the policies were retyped in 1989. Yes, it would have changed it. But none of them were signed. [Keegan] had me make copies of all of the new policies for Carmen Viana [the chief executive officer]. Yes. For her to approve them and sign them. It probably would have been in late summer of '89 by the time they were finished.
>
> ***
>
> Q. And you made copies of those policies for Ms. Viana?
> A. For Mr. Keegan.
> Q. For Mr. Keegan to give to Ms. Viana.
> A. Right.
> Q. And then you never saw a signed copy of the severance pay policy, the revised severance pay policy up until January of 1990.
> A. '91. The signed policy, no, sir.
> Q. And the terms of that policy that you saw in January of 1991 were identical to that which you typed up in June of '89, is it not?
> A. The one that was signed?
> Q. Yes.
> A. The one I got through the mail was different.
> Q. What was different about it?
> A. A different number. Different typewriter. The pages are different, things are on different pages.

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1 As stated in testimony throughout the transcript and as is obvious from the personnel transaction forms which are attached as exhibits, the personnel transaction form was the official vehicle through which actions with respect to personnel transactions were implemented and the company's policies carried out. The PTs prepared by the EC renegades on January 24 were rejected personally by Ms. Viana before February 14, obviously, because Mr. Keegan called on that date and demanded that correct PTs be prepared and executed, which Dunn and Stanton did on the 14th and 15th. That concludes the matter.

Q. But my question was were the terms of the policy identical?
A. Yes.

The Court states at page 5 of the Opinion:

> Our review of the record confirms that the district court's factual findings are clearly supported by substantial evidence. The district court was confronted with two opposing positions, each supported by testimony. The court credited the testimony supporting one of these positions and found facts consistent with this decision. Accordingly, we conclude that the findings are not clearly erroneous.

It defies credulity that the Court could reach this conclusion if counsel for Defendant-Appellant had adequately performed his job. He should have pointed out that without any rational justification, Judge Potter discredited the testimony of Wittek's witness Keegan that the policy had been signed, even though there was nothing incredulous about his testimony. However, counsel did bring to this Court's attention that testimony that Judge Potter relied on, the testimony of Dunn, Breitwieser and Husch, whose testimony Judge Potter found "credible and consistent." Counsel pointed out by page reference that in each case, each individual testified to facts that demonstrated that the policy must have been adopted prior to their severance because it was implemented prior to the severance and in connection with their severance. The only testimony that any of them gave to suggest that the policy had not been adopted were their statements that they had not seen it. But in each case, they testified to facts which clearly demonstrated that it had been implemented and payments made pursuant to it. That is the best evidence of the adoption of the policy, outweighs the incompetent self-righteous and self-serving statements that they did not see it, as if that has any relevance whatsoever, and cannot be ignored by the Court.

In Dunn's testimony, which Judge Potter found "credible and consistent," Dunn described a telephone conversation with Keegan the day before the plant closed in which Keegan stated that the personnel transaction forms which Dunn and his assistant Ms. Stanton at EC had prepared on January 24, which had just been submitted to Wittek at

Chicago in February, only a few days before the plant was to close, had to be changed (A-5-7) because they reflected the J.D. Industries policy (the "1987 policy") because it was the wrong policy and to reflect the Wittek policy (the "1989 policy") because it was the correct policy. Specifically, Dunn was requested by Mr. Michael to compare the January 24 "PT"s which he and Ms. Stanton had prepared under the direction of Mr. Breitwieser with the one's that Mr. Keegan insisted be prepared:

Q. On what date were those personnel transactions prepared?
A. On February 14th, 1991.
Q. How much severance pay was shown as being due to Mr. Biggers on January 24th?
A. On January 24th, he was eligible—gee I can't quite make that $14,192.30.
Q. How much severance pay was due Mr. Biggers according to the document prepared on February 14th?
A. $2128.83, substantial difference.
Q. Are there substantial differences in severance and vacation pay calculations for all of the people in all of the documents between January 24th and February...?
A. Yes, sir. Essentially there would be a major difference. I think there's one or two that wouldn't have been affected because of the lot less seniority. But essentially all would have quite an impact.
Q. Now Plaintiff's 8, the personnel transactions from February 14th, sir.
A. Yes, sir.
Q. Are you familiar with how those came to be prepared?
A. Oh, yes, sir. Yea, yes.
Q. Would you tell the jury[2] about that please?
A. Well, let's see I have to go back in time. February 14th was the day before we were to officially close. And I recall Mr. Breitwieser coming out into the hallway and saying Jim—as a matter of fact Mr. Biggers was there. He and I were talking in the hallway. And Mr. Breitwieser said will you two gentlemen please come in my office. I think we've got a problem. I've got a conference call. Mr. Keegan's on the phone from Chicago. We proceeded into his room and he put the phone on speaker and said okay, I have Jim Dunn and Ron Biggers in the office with me now, go ahead and tell them about the new policy. And he said we have to change the personnel forms.

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2 This was not a jury issue. This is just one example of the way in which this entire proceeding was conducted by Judge Potter to Wittek's prejudice.

Q. Who's he?

A. Mr. Keegan, whom I've never met. He said there's been a change and he went through and said there's a maximum of whatever it was, three weeks, so on. And my Irish temper got the best of me and I said something to the effect of bull—excuse me, B.S., we'll leave it at that. And then Mr. Biggers was also about as happy as I was and then he said well if that's true then why did we get paid five weeks vacation a year previous and there was no answer. Mr. Breitwieser was then instructed by Mr. Keegan to put in effect immediately the new personnel transactions with the new reduced rates and also I believe told him that—let's see. I think Mr. Breitwieser said well, why are we going to do this. He said you have to do it because if you don't do that, then you may not get anything. That was the end of the conversation the best I recall. Mr. Breitwieser hung up. We then got—let's see if I recall. I guess I was then instructed to get Ms. Stanton and she and I then proceeded to doing new calculations. She prepared new personnel transaction forms of which were to be signed the next day on February 15th. And I remember this specifically because I signed them as Plant Manager but I signed them under duress.

***

Q. Were the new calculations less than the old amounts?

A. Oh, by far. Yes, sir.

Breitwieser's testimony, which Judge Potter also found "credible and consistent," testified as to the same telephone conference with Keegan on February 14, 1991, a day before the plant closing. Specifically, Breitwieser testified as follows:

Q. Did you participate in a discussion which occurred on February 14th a conference call with Mr. Keegan?

A. Yes, I did.

Q. Would you tell the jury about that call, please?[2]

A. Basically the call was initiated by Keegan to discuss the calculations based on the severance policies. The point that he made was the calculations and the personnel transactions would have to be changed. When the discussion reached that point I went outside, got Mr. Dunn, got Mr. Biggers. I think basically my comment was to them I need some witnesses. We're about to be screwed. Asked them to come in. Asked Keegan to continue his conversation and review again what the conversation had been preceding their coming in.

Q. Did you identify to Mr. Keegan who else...

A. ...Yes, I did. Dunn and Biggers were in the room with me. Yes, I did. Keegan went through the fact or the position that the policies had been changed. At that point, Jim in his testimony said B.S. Biggers, of course, said well if the vacation policy has been changed why have

I been paid for five weeks previous to this. I think the discussion kind of reached the level, okay you're going to have to do this or you and the people there are not going to get anything at all... (A-11-14)

***

Q. When Ms. Viana directed that the severance and vacation checks should be sent to Illinois, was that a departure from what had been the policy?

A. Absolutely. It not only had been a departure but we went up to pick up checks and they were not available. (A-17)

In addition, most of the Plaintiffs who testified stated that they had been aware of the change of policy on February 14, 1991, the day before the plant closed. Specifically, their testimony was as follows:

Testimony of Biggers:

Q. When was the first time you received any notice of any purported change in the severance and/or vacation policies?

A. February 14th, 1991.

Q. Was that in the conversation with Mr. Keegan that's already been testified to?

A. Yes, it was. (A-44)

Testimony of Stanton:

Q. When did you first find out that Wittek was attempting to change its policies?

A. February 14th, 1991. (A-46)

Testimony of Griffin:

Q. When did you first find out that Wittek was attempting to change its severance and vacation policy?

A. I had heard the rumor on the 14th. I didn't actually see the document until the 21st of February, 1991.

Q. And when was your employment terminated?

A. February the 22nd. (A-49)

Testimony of Veillette:

Q. When did you first find out that the company was trying to change their policies for severance and vacation?

A. I heard about it on the 14th of February, 1991. (A-50)

Testimony of Sweeney:

Q. When did you first find out that this company was trying to change their policies?
A. On the 14th by word of mouth or grapevine. Hearsay. (A-51)

Testimony of Lamberth:
Q. When did you first find out that the company was trying to change their policies?
A. About the 14th.
Q. How did you find out?
A. Word of mouth.
Q. Everybody was talking about it on the 14th.
A. Yea. (A-51)

Testimony of Elliott:
Q. When did you first find out that Wittek was attempting to change its severance and/or vacation policy?
A. On the 14th?
Q. How did you find out?
A. Rumor going around the office. (A-53)

Furthermore, based upon Plaintiffs' Exhibit 48 (see SA-327), it is clear that Breitwieser, the plant manager of EC, and Dunn, EC's personnel director prior to Mr. Keegan, got the policy substantially in advance. Clearly, to implement that policy was not in their best interest because of the autonomy of EC (SA-351). They tried to get away with not implementing the policy and leave the new owner, Ms. Viana, holding the bag. As soon as their miscalculations came to the new owner's attention, correct calculations were demanded. The Plaintiffs' miscalculations were based on a 1987 policy of J.D. Industries, which was clearly not applicable because neither EC nor Wittek were a part of J.D. Industries any longer and the only policy that was in effect was Wittek's 1989 policy pursuant to which Mr. Keegan was demanding the calculations be made.

The only competent testimony with respect to signing the policy—which, in the humble opinion of counsel is irrelevant in these circumstances—is Mr. Keegan's. He testified that it was signed long before the plant closing. The policy that the Plaintiffs submitted as an exhibit is signed by Carmen Viana and dated June 1, 1989. The only

contrary testimony is incompetent in that it is merely a statement by each person that they did not see an executed policy until February 21. Most of the world did not see it either. So what. There is no requirement of law or fact that they see it. Of course, Keegan and Viana believed that Dunn and Breitwieser had seen in at least by May, 1990. Plaintiffs' Trial Exhibit 48 (A-241-243) makes out Breitwieser and Dunn to be liars in this particular. It shows clearly that both had received Wittek's severance pay policy. Finally, it defies credulity that none of the policies that the new chief executive officer was so concerned about adopting did not get adopted sometime between May 1989, when she complained so vociferously about it and February 14, 1991, when, at least with respect to the severance policy, it was relevant.

Sejman v. Warner-Lambert Co., supra, involved a division of one company being sold to another, while this case involves the parent selling the entire company to an individual. In this case and that case, the company that had the policy sought to be enforced had no further ownership interest. As a consequence of that loss of ownership in Sejman, this Court held that "once PMP took over management of the Medical Services Division [from Warner-Lambert], its severance policy, not that of Warner-Lambert, was controlling." So it should be here. Once J.D. Industries turned over ownership of Wittek to Ms. Viana, J.D. Industries' severance policy was no longer relevant or controlling. Rather, Wittek's policy, which had been adopted in 1989, or, if the Court prefers based on the testimony of the Plaintiffs, January, 1991, or February 14, 1991, and which had been applied in the actual severance of the employees, was controlling. To hold that the policy of a prior owner applies makes no sense whatsoever and, indeed, constitutes unfair treatment of the subsequent owner and an unlawful taking which would have boundless adverse repercussions in the business and financial worlds.

On the other hand, if the Court prefers: no severance policy was adopted by Wittek. Its severance from J.D. Industries resulted in their being no policy and the Court should order the return of the amounts under the Wittek severance policy that never existed.

> * “It is clear from the testimony that Ms. Viana did not believe that J.D. Industries policy was in effect still. Wittek had adopted a different policy in 1989. ‘Two or three days after she took over the presidency’ of Wittek, Ms. Viana reviewed the policies. ‘She was flabbergasted in the amount of time that was given for vacations as well as severance, maternity leave.’ Her instruction to Mr. Keegan was to ‘rewrite them,’ ‘beginning’ with ‘severance, vacation, those two particularly.’ They were revised in May, 1989. (Transcript pp. 328-9) When she became aware that the calculations done at EC were based on the J.D. Industries’ policy rather than Wittek’s policy, she brought this to Mr. Keegan’s attention and ‘she was very upset.’ (Transcript, pp.336-7)”

This was set forth in Wittek’s Reply Brief at pages 11 and 12. Counsel does not know how more clearly to show that the 1989 policy was adopted. The very person who was entirely responsible for making the determination has shown every indication imaginable that it was adopted. What more can the Court ask that is legitimate and rational? Counsel is at a loss and seeks instruction.

There was no “choice between two permissible views of the evidence.” Therefore, the Decision of Judge Potter in favor or the Biggers’ Plaintiffs was clearly erroneous. Review of the testimony of those witnesses that Judge Potter found credible leaves one with the definite and firm conviction that he made a mistake. That satisfies the “clearly erroneous” test. Anderson v. City of Bessemer, 470 U.S. 464, 573, 105 S.Ct. 1504, 1511 (1985).

The situation here is not at all like the settlor reserving the power to modify or revoke a trust and then failing to specify a method for implementing changes. First of all, the 1987 policy was contained in an exhibit proffered by the Plaintiffs. It was contained in something called the J.D. Industries Management Guide. There is no indication that it was complete or not a part of a larger document or scheme which provided for its amendment or revocation, including directors resolutions which adopted it and by-laws. In any event, Wittek would have had no access to such amending or revoking instrument and it would not be bound by it either because Wittek is not J.D. Industries. That simple fact should also make clear that Wittek is not the “settlor.” Thus the “trust law standard for determining whether an amendment has been made is thus” NOT “appropriate for

determining" anything with respect to Wittek in this case. Counsel respectfully disagrees with the Court that Wittek presented no evidence that any new policy was actually adopted. Mr. Keegan's testimony is such. More importantly, the Plaintiffs introduced ample testimony that Wittek adopted the severance pay policy. They did so in the testimony that has been set forth herein. They did so in the exhibits that set forth Wittek's policy. The Court's sole basis for concluding otherwise is embodied in the assertion that "Keegan, the company official who actually prepared the written policy, had a copy made for the president to look at, approve, and sign, clearly implying that only with the approval and signature of the president [sic][3] could the change become effective...It thus appears uncontradicted that adoption of the plan could only occur upon the approval and signature of Wittek Industries' president [sic]." The speculations of the Court should not be a substitute for the clear and unambiguous evidence that was present at the trial, upon which Judge Potter relied in reaching his opposite and unwarranted conclusion, and which has now been presented to this Court in this rehearing petition so that it cannot be overlooked. Counsel would hope that the Court will not adhere to the patently ludicrous[4] position that Ms. Viana's signature was required to cause the policy to become effective when clearly there are so many other indicia, in addition to the testimony of Mr. Keegan and Ms. Husch that she signed the policy before the severance, that the plan had become effective as set forth herein. The consequence of that conclusion would wreck havoc among employers as well, as in this case, employees who received funds based upon the plan.

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3 Wittek had no president. Ms. Viana was the Chairman/CE0, sole director and sole shareholder. Mr. Keegan was responsible for Human Resources issues.

4 If the Court is going to insist upon this position as the basis for its decision, I urge that it not do so at this juncture since the other aspects of the case are going to be remanded. I guarantee that I will then present testimony, including the testimony of Ms. Viana, who sat in her trial counsel's office waiting to testify but was not permitted by him to do so because he had not had time to prepare this busy woman, and the testimony of Mr. Keegan, in a most credible manner, and the clear testimony of Ms. Husch, and numerous others, including Mr. Dunn and Mr. Breitwieser and make it absolutely clear that the policy was signed well before the severance.

CONCLUSION

In conclusion, the decision of Judge Potter was an egregious and manifestly erroneous one. Counsel helped to perpetuate that by not emphatically and clearly presenting to this Court all of the specific evidence that must necessarily lead to a reversal of that decision once those facts are brought to the attention of the Court.

Defendant respectfully submits that the Appellate Court should reverse the award of severance pay pursuant to J.D. Industries' severance pay policy and, depending on how it finally concludes with respect to the adoption of the Wittek plan, either order that nothing further is owed by Wittek to the Plaintiffs or order that the Plaintiffs return to Wittek the amounts that they received from Wittek under the Wittek policy which the Court determined was never adopted.

Dated: September 7, 1993

George C. Hook, Attorney for
Wittek Industries, Inc.,
Defendant-Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served copies of the Defendant-Appellant's Petition for Rehearing by mailing copies by first class mail, postage prepaid, on September 7, 1993:

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Dolores M. Veninga

EXHIBIT C

In The
Supreme Court of the United States
October Term, 1994

PINEVILLE REAL ESTATE OPERATION CORPORATION, A NORTH CAROLINA CORPORATION, AND CARMEN VIANA, TRUSTEE OF THE RETIREMENT PLAN OF U.S.W. LOCAL 6141 EMPLOYEES OF EC MANUFACTURING DIVISION OF WITTEK INDUSTRIES, INC.,
vs.
Petitioners,
MARK A. MICHAEL, GLENN BREITWIESER, ERIC MEIERHOEFER, RONALD J. BIGGERS, JAMES E. BRANDON, LINDA M. CORNWELL, JAMES A. DUNN, KENNETH ELLIOTT, BETTY L. GRIFFIN, ROBERT L. JACKSON, TERRY K. JEWELL, KENNETH JORDAN, CHARLES E. LACKEY, RAYMOND E. LAMBERTH, JOHN EDWARD MILLER, JR., ROBERT A. MUNSE, DEBORAH W. STANTON, JOHN H. STARNES, GARY SWEENEY, JOANNE M. VEILLETTE, JERRY E. WINGATE and C.W. KIDD, JR., the SHERIFF OF MECKLENBURG COUNTY AND EXECUTION SALE PURCHASERS (DOES I to 10),

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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EXHIBIT C

QUESTIONS PRESENTED FOR REVIEW

The primary question presented is whether a federal judgment that is the sole basis for taking property confers federal jurisdiction with respect to an action brought in the federal court to prevent such taking.

The Court of Appeals determined instead that the question was whether federal jurisdiction was conferred by federal rules and answered that it was not.

The subordinate questions are whether federal jurisdiction exists where the interpretation of federal rules is a substantial element of the cause of action and whether there are other bases for federal jurisdiction here, such as, for example, the assertion of broad and inherent power over federal process, including judgments, to prevent their being used to abuse, oppress and do injustice, and the assertion of equitable jurisdiction ancillary to the federal action in which the federal judgment was rendered.

PARTIES

All parties to the proceeding are listed in the caption of the case.

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REPORTS OF OPINIONS DELIVERED IN THE CASE

The opinion of the United States Court of Appeals for the Fourth Circuit in this case, *Pineville Real Estate Operation Corporation, et al. v. Mark A. Michael, et al.,* No. 93-1625, is officially reported at 32 F.3d 88.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

Federal jurisdiction was invoked in federal court pursuant to 28 U.S.C. Section 1331. In this petition for writ of certiorari, jurisdiction is invoked pursuant to Supreme Court Rules 10.1.(a) and (c).

The dates of the entry of the decisions sought to be reviewed were August 8, 1994 for the decision by which the complaint was dismissed and September 2, 1994 for the decision denying reconsideration.

STATEMENT OF THE CASE

On July 7, 1992, Plaintiff Pineville purchased real estate from Wittek Industries, Inc. and mortgaged it to Plaintiff Pension Plan. However, the warranty deed and mortgage were not registered with the recorder of deeds of Mecklenburg County, North Carolina, until September 25, 1992. On October 9, 1992, the Defendants-Appellees docketed with the appropriate court of North Carolina final judgments obtained against Wittek Industries, Inc. in *Biggers et al. v. Wittek Industries, Inc.* and *Breitwieser v.*

Wittek Industries, Inc., consolidated for trial before the U.S. District Court for the Western District of North Carolina, Charlotte Division. However, as interlocutory orders had been entered in the consolidated cases on May 19, 1992 (relating to the jury's verdict in favor of Breitwieser),1 and August 6, 1992 (relating to the judge's verdict in favor of Biggers, et al.)2 Defendants-Appellees docketed those orders, treating them as if they were final judgments under federal law even though they were not, as the District Court had made no "express determination that there is no just reason for delay" and "no express direction for the entry of judgment," as required by Federal Rule of Civil Procedure 54(b). Indeed, however, the first date upon which all of the "claims or the rights and liabilities . . . of all the parties" were determined as contemplated by Federal Rule of Civil Procedure 54(b) was September 21, 1992. Therefore, no proceeding could be commenced for enforcement of the judgments arising out of the consolidated cases before October 1, 1992. Federal Rule of Civil Procedure 62(a). Nevertheless, on May 24, 1993 Defendants-Appellants sought enforcement of their federal judgments by state enforcement action against the property which had been conveyed by Wittek

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I The Fourth Circuit Court of Appeals reversed this judgment in its opinion of August 27, 1993, 4 F.3d 291, and denied Defendant-Appellant's Petition for Rehearing with Suggestion for Rehearing in Banc without opinion.

2 The Fourth Circuit Court of Appeals affirmed this judgment in its opinion of August 27, 1993, 4 F.3d 291, and denied Defendant-Appellant's Petition for Rehearing with Suggestion for Rehearing in Banc without opinion.

Industries, Inc. to Plaintiff-Appellant Pineville and mortgaged by it to Plaintiff-Appellant Pension Plan on July 7, 1992 and recorded on September 25, 1992, based upon their docketings of May and August 1992 as well as October, 1992.

Plaintiffs-Appellants sought to prevent the sale of their property to satisfy the federal judgments then outstanding against Wittek Industries, Inc. by obtaining a temporary restraining order and preliminary injunction in the very Federal district court that had entered such orders against Wittek, putting up the necessary bond therefor. That district court declined to grant such relief, Plaintiff s-Appellants appealed to the Fourth Circuit Court of Appeals and enforcement was stayed pending appeal upon the application of the bond to that purpose.

On August 8, 1994, the Fourth Circuit Court of Appeals dismissed the Plaintiffs-Appellants' complaint on the basis that there existed no federal jurisdiction and on September 2, 1994 denied Plaintiffs-Appellants' petition for rehearing and rehearing in banc without opinion.

REASONS FOR ALLOWANCE OF THE WRIT

Introductory

The Fourth Circuit Court of Appeals has decided an important question which has not been, but should be, settled by the Supreme Court.

There are no cases specifically holding that a federal judgment, which is the sole basis for claiming entitlement to Plaintiffs' property, will support federal jurisdiction;

although there are numerous cases which hold that there is such jurisdiction where federal law creates the cause of action and there are numerous cases which hold that such jurisdiction exists even in the absence of such creation if the action poses a substantial federal question.

In declining jurisdiction in this case, the Fourth Circuit Court of Appeals decision conflicts with these numerous other cases, including Supreme Court decisions, *The Fair v. Kohler Dye & Speciality Co.,* 228 U.S. 22 *(1913), American Well Works Co. v. Layne & Bowler Co.,* 241 U.S. 257 (1916), *Hopkins v. Walker,* 244 U.S. 486 (1917), *Smith v. Kansas City Title & Trust Co.,* 255 U.S. 180 (1921), *Sibbach v. Wilson & Co*., 312 U.S. 1 (1941), *Oneida Indian Nation v. Oneida County,* 414 U.S. 661 (1974), *National Farmers Union Ins. Companies v. Crow Tribe of Indians,* 471 U.S. 845 (1985), *Spallone v. United States,* 493 U.S. 265 (1990) and Willy v. *Coastal Corp.,* 112 S.Ct. 1076, rehearing denied 112 S.Ct. 2001 (1992), and other Circuit Court of Appeals decisions, *Cresswell v. Sullivan & Cromwell,* 922 F.2d 60 (2d Cir. 1990), W. *14th St. Comm. Corp. v. 5 W. 14th Owners Corp.,* 815 F.2d 188 (2d Cir. 1987), *Martina Theatre Corp. v. Schine Chain Theatres, Inc.,* 278 F.2d 798 (2d Cir. 1960), *Milan Express Co. v. Western Surety* Co., 886 F.2d 783 (6th Cir. 1989), *Smith v. U.S. District Court for the Southern District of Illinois,* 956 F.2d. 647 (7th Cir. 1992) and *Valerio v. Boise Cascade Corp.,* 645 F.2d 699 (9th Cir. 1990).

However the questions presented are answered, the Federal Judicial System would benefit greatly from their resolution by the Supreme Court. No case has been found which does that for what must be a recurring situation.

Whether federal judgments and their proper enforcement provide bases for federal jurisdiction is a question of exceptional importance. The answer should be uniform throughout the entire Federal Judicial System.

The Fourth Circuit Court of Appeals decision asserted that "when there is no federal cause of action and the application of a federal statute is but an element of Plaintiff's state cause of action, we lack federal question jurisdiction," citing *Clark v. Velsicol Chemical Corp.,* 944 F.2d 196 (4th Cir. 1991) and *Merrell Dow Pharmaceuticals, Inc. v. Thompson,* 478 U.S. 804 (1986). However, that is not the law. If state law creates a cause of action, federal question jurisdiction exists, nevertheless, if that cause of action possesses a substantial federal question. *Smith v. Kansas City Title & Trust Co.,* 255 U.S. 180, 201 (1921), W. *14th St. Comm. Corp. v. 5 W. 14th Owners Corp.,* 815 F.2d 188 (2d Cir. 1987).

The Court of Appeals decision asserts that Federal Rules of Civil Procedure "cannot be the basis for federal question jurisdiction," citing *Port Drum Co. v. Umphrey,* 852 F.2d 148 (5th Cir. 1988), *Cresswell v. Sullivan & Crom*well, 922 F.2d 60 (2d Cir. 1990) and Federal Rule of Civil Procedure 82. However, that statement is an impure derivative from cases inapposite to this one. It is not the federal rules alone that create the federal jurisdiction in this case, but rather a federal judgment which is the sole basis for the attempted taking of property, which taking Plaintiffs-Appellants sought to prevent by seeking an injunction in the same federal district court which rendered that judgment. The particular rules in those cases related to procedural aspects of previous cases, Rule 11 in *Port Drum* and the discovery rules in Cresswell. Here, the

relevant rules determined whether the Defendants Appellees had a federal right to use the judgment which they obtained against Wittek Industries, Inc. against property which belongs to Plaintiffs-Appellants, Pineville Real Estate Operation Corporation and the Retirement Plan of the United Steelworkers Local 6141. These cases, which are clearly specific to the specific rules with which they deal were misapplied by the Fourth Circuit Court of Appeals. Federal jurisdiction was exercised in *Cresswell,* in fact, on a basis, ancillary jurisdiction, that has application here.

Port Drum, upon which the Fourth Circuit of Appeals relied so heavily in this case, appears to conflict with the decision of the Supreme Court in Willy v. Coastal Corp., 112 S-Ct. 1076, rehearing denied 112 S.Ct. 2001 (1992), where the lower court was held to have jurisdiction to impose Federal Rule 11 sanctions even though it did not otherwise have jurisdiction.

The Fourth Circuit Court of Appeals ignored the fact that federal rights conferred solely by a federal judgment were being asserted as the basis for depriving Plaintiffs of their property and that the core question in the federal court proceeding to stop this was whether Defendants had those federal rights. The Fourth Circuit Court of Appeals took away some of those rights by its subsequent reversal of some of the judgments upon which Defendants relied, demonstrating Plaintiffs-Appellants' argument in a very clear and practical way that a federal question existed which provided the basis for federal jurisdiction. If it were otherwise, the Defendants-Appellees could now proceed against the property of Pineville and the Pension Plan for the entire amount of the original

judgments Defendants obtained against Wittek Industries, Inc. in their prior action merely because they proceeded to enforce those federal rights by state process without regard to whether they actually had them under federal law. Such a conclusion would render useless and irrelevant the federal appellate process and permit a circumvention of the entire Federal Judicial System through the simple expedient of state enforcement mechanisms.

Detailed Analysis

A substantial federal question exists in this case sufficient to support federal jurisdiction. The broad pronouncements extracted from the cases cited by the Fourth Circuit Court of Appeals do not have application here. Rather, *Smith v. Kansas City Title & Trust Co.,* 255 U.S. 180, 201 (1921), *Milan Express Co. v. Western Surety* Co., 886 F.2d 783 (6th Cir. 1989), W. *14th St. Comm. Corp. v. 5 W. 14th Owners Corp.,* 815 F.2d 188 (2d Cir. 1987), and *Martina Theatre Corp. v. Schine Chain Theatres, Inc.,* 278 F.2d 798 (2d Cir. 1960) are determinative in supporting federal jurisdiction.

Of the cases cited by the Fourth Circuit Court of Appeals, the following may be said. *Clark v. Velsicol Chemical Corp., supra,* was a negligence action brought by United Parcel Service employees who were injured by insecticides leaking from a shipping package. They conceded that the federal insecticide regulations were relevant only as an element of evidence to establish negligence under State law. Those regulations did not create the right as the federal judgments do in this case.

Likewise, in *Merrell Dow Pharmaceutical, Inc. v. Thompson,* supra, a federal statute was merely incorporated by reference as a standard of conduct in a state negligence action. The Supreme Court held that the Federal Judicial System would not be served by a federal adjudication of that issue. By contrast, and indisputably, the Federal Judicial System will be served by an adjudication of the issue in this case.

Bernard v. U.S. Lines, Inc., 475 F.2d *1134* (4th Cir. *1973)* and *Kenrose Mfg. Co. v. Fred Whitaker, Inc.,* 512 F.2d 890 (4th Cir. 1972), are merely examples of the proposition, clearly inapplicable to this case, that a third party action, permitted by Rule *14,* must have an independent federal jurisdictional base.

Port Drum, supra, was brought pursuant to Rule 11 by the employer of plaintiff in a prior action against the employee's attorney for falsely pleading therein and thereby damaging Port Drum because the defendant in the prior action and others ceased to be its customers in consequence of the prior suit. *Port Drum* acknowledged that a federal rule of civil procedure has the force of a federal statute, citing *Sibbach v. Wilson & Co., 312 U.S. 1 (1941),* but then held that Rule 11 "specifically" is not a "law" in the Section *1331* sense because it merely regulates a party's proceedings once that party is in federal court pursuant to another jurisdictional ground. In reaching this conclusion, the Court also noted that by its terms Rule 11 states that it can be asserted only during the pendency of the action in which the offending pleadings are a part and not by separate complaint in another proceeding. Apart from this peculiarity of Rule 11, which should have been the sole basis for the decision, *Port*

Drum is wrongly decided on the jurisdictional ground for the reasons set forth hereinafter in the discussion of ancillary jurisdiction and because it conflicts with Willy v. *Coastal Corp.,* 112 S.Ct. 1076, rehearing denied 112 S.Ct. 2001 (1992).

Cresswell v. Sullivan & Cromwell, supra, held that violation of the discovery rules in a prior action would not support federal jurisdiction of an action for which there was no other basis. However, the Second Circuit Court of Appeals found that other basis in the inherent powers of the Court to provide relief from a judgment rendered by it in previous litigation; that it had what is well recognized as ancillary equitable jurisdiction. To like effect is *Martina Theatre Corp. v. Schine Chain Theatres,* supra, where the Court stated that such an action may be brought in the federal court that rendered the initial judgment despite the absence of a federal question; and that such jurisdiction is sufficiently flexible so that action may even be maintained with respect to a person who was not a party to the original action, as was the case also in *Cresswell* and *Valerio v. Boise Cascade Corp.,* 645 F.2d 699 (9th Cir. 1990).

As stated in K *14th St. Comm. Corp. v. 5 W. 14th Owners Corp.,* supra:

> There are two tests under which an action may present a federal question. The first asks whether federal law creates the cause of action. If so, federal question jurisdiction exists. In *American Well Works Co. v. Layne & Bowler Co.,* 241 U.S. 257, 36 S.Ct. 585, 60 L.Ed. 987 (1916), justice Holmes devised this still relied upon rule writing that “[a] suit arises under the law that

> creates the cause of action." Id. at 260, 36 S.Ct. at 586; see also *The Fair v. Kohler Dye & Specialty* Co., 228 U.S. 22, 25, 33 S-Ct. 410, 411, 57 L.Ed. 716 (1913). If state law creates the cause of action, the second test asks whether that cause of action poses a substantial federal question. The lineage of this second test of "arising under" jurisdiction reaches back 65 years to *Smith v. Kansas City Title & Trust Co.,* 255 U.S. 180, 201, 41 S.Ct.. 243, 65 L.Ed. 577 (1921). In that case, plaintiff sought to enjoin defendant corporate officers from investing corporate funds in farm loan bonds issued by federal land banks because the act authorizing their issue was unconstitutional - and hence constituted an investment in an unlawful security under Missouri law. The Supreme Court found federal jurisdiction present because of the necessity to decide the constitutional issue as an element of the state law claim.

The Defendants-Appellees took the judgments that they obtained in *Biggers v. Wittek* (C-C-91-96-P) and *Breitwieser v. Wittek* (C-C-91-98-P), both tried in the U.S. District Court of the Western District of North Carolina, Charlotte Division before Judge Potter, and attempted to satisfy them from property which had belonged to Wittek a t one time, but not at the time such judgments could be executed.

Use of the state execution mechanism for federal judgments has its basis in the full faith and credit clause of the Constitution and more particularly 28 U.S.C. Section 1962, which provides:

> Every judgment rendered by a district court within a State shall be a lien on the property

> located in such State in the same manner, to the same extent and under the same conditions as a judgment of a court of general jurisdiction in such State, and shall cease to be a lien in the same manner and time ... Whenever the law of any State requires a judgment of the State court to be registered, recorded, docketed or indexed, or any other act to be done, in a particular manner, or in a certain office or county or parish before such lien attaches, such requirements shall apply only if the law of such State authorizes the judgment of a court of the United States to be registered, recorded, docketed, indexed or otherwise conformed to rules and requirements relating to the judgments of the courts of the State.

Furthermore, Article I, Section 8 of the Constitution authorizes the Congress to set up the lower federal courts and to establish rules and regulations for the conduct of litigation in those courts. Willy v. *Coastal Corp., 112* S.Ct. *1076 (1992).* The Supreme Court, pursuant to authority delegated by Congress, as head of the Federal judicial System, has an extensive power to prescribe rules of practice and procedure for civil actions. The Chief justice of the United States is the head of the judicial Conference of the United States, which is charged with, among other matters, studying the operation and effect of the various procedural rules prescribed by the Supreme Court for the other courts of the United States, and recommending changes in and additions to those rules. *28 U.S.C.* suits arise under federal law for federal question jurisdiction if founded upon federal common law as well as statutory law. *National Farmers Union Ins. Companies v. Crow Tribe of Indians, 471 U.S. 845, 105* S.Ct. *2447 (1985), Smith v. U.S.*

District Court for the Southern District of Illinois, 956 F.2d 647 (7th Cir. *1992),* MOORE'S FEDERAL PRACTICE (2d ed.) Para. 1.02a[2]. Moreover, all federal courts have a broad and inherent power over their own process, including judgments, to prevent abuses, oppression and injustice and to do substantial justice. Willy v. *Coastal Corp.,* supra, *Spallone v. United States, 493* U.S. 265 *(1990).*

The instant case is like *Milan Express Co. v. Western Surety Co.,* supra, which determined that there was federal jurisdiction, and should be applied here rather than *Port Drum,* supra, which had its peculiar origins in Rule 11 and which conflicts with the Supreme Court decision in Willy v. *Coastal Corp.,* 112 S.Ct. 1076, rehearing denied 112 S.Ct. 2001 (1992). *Milan* was brought by motor carriers against surety companies on bonds prescribed pursuant to federal statutes and regulations. The surety companies argued that because the disputed bonds must be interpreted and enforced in accordance with state law, the district court properly concluded that there was no federal question. The Sixth Circuit Court of Appeals reversed. In support of its correct decision, that Court said:

> To determine which civil actions fall within, and which civil actions fall outside, the subject matter jurisdiction of the district courts, this court has adopted a familiar definition of the statutory phrase "arising under." [In] *Ford Motor Co. v. Transport Indemnity Co.,* 795 F.2d 538 (6th Cir. 1986), we explained that:
>
> "Arising under" for purposes of Section 1337(a) [the Section in issue in *Milan] is* interpreted similarly to the analogous "arising

under" language in Section 1331, 28 U.S.C. Section 1331 [the Section in issue in the present case].

On appeal, plaintiff motor carriers contend that a substantial body of federal law - the forms, rules regulations and decisions of the ICC, in addition to the Act - establishes that they are entitled to collect past-due freight charges from the defendant surety companies who posted bonds on behalf of the delinquent brokers.

Plaintiffs continue that because their right to collect on the bonds was created by federal law and is essential to their case, their cause of action arises under an act of Congress regulating commerce and thus, should be heard in a federal forum.

However, because the bonds are created on federal forms, administered under federal regulations, and required by a federal statute, we find little merit in defendant's arguments.

[P]laintiffs'] claims for recovery under the bonds, which are clearly creatures of federal law, should not be subjected to the peculiarities of interpretation in fifty different state forums. Rather, plaintiffs' claims should be heard in a federal forum that possesses substantial expertise in matters of interstate commerce.

> *Merrell Dow* can be distinguished from the present case *[Milan]* on several grounds. First, this court declined to find federal jurisdiction in *Merrell Dow* because plaintiffs failed to prove that their relief depended necessarily on a substantial question of federal law. Thus, the jury could have easily found the defendant to be negligent, but not in violation of the FDCA. See *Thompson v. Merrell Dow,* 766 F.2d 1005, 1006 (6th Cir. 1985), aff'd 478 U.S. 804, 106 S-Ct. 3229, 92 L.Ed.2d 650 (1986). By contrast, the present plaintiffs have relied exclusively on federal law in their suit to recover on bonds required, promulgated, and regulated by the ICC. Second, the *Merrell Dow* plaintiffs did "not allege that federal law create[d] any of the causes of action they ... asserted." *Merrell Dow,* 478 U.S. at 809, 106 S.Ct. at 3233. The *Merrell Dow* plaintiffs merely asserted that the defendant's violation of the FDCA constituted proof of negligence. See id. at 809-11, 106 S.Ct. at 3232-34. The present plaintiffs, however, argue that their rights to the proceeds of the surety bonds were created by federal law and should be enforced in a federal forum. Third, in *Merrell Dow,* no specific and compelling federal interest was demonstrated. In contrast, our finding of subject matter jurisdiction in the present case is entirely consistent with the specific federal interest in the production of motor carriers and the historical federal interest in the regulation of interstate commerce.

The *Milan* analysis of surety bonds has even greater applicability to the far more integral and important federal judgments of Federal District Courts.

W. 14th St. Comm. Corp. v. 5 W. 14th Owners Corp., supra, held that there was federal jurisdiction arising under a federal statute which authorized a federal action for terminating self-dealing contracts resulting in abuses under state condominium and cooperative laws. However, the Second Circuit Court of Appeals also held that even in the absence of that basis for federal jurisdiction there was federal jurisdiction because plaintiffs' state claims encompassed a substantial federal question. Particularly germane to the present case is that Court's analysis of the necessarily federal aspect of any action of enforcement of such contracts which the defendants could bring as support for plaintiffs bringing their action in federal court. Here, of course, there was no anticipation; Defendants were minutes away from taking Pineville's property based on their federal judgments, including those that were later reversed on appeal, when they were prevented by Pineville's and the Pension Plan's intervention in the Federal District Court.

The Second Circuit Court of Appeals analyzed the issue as follows:

> [I]f . . . defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question.
>
> Owners Corp. responds that it need not have brought a federal suit, but could have sued in state court in trespass, ejectment or contract.
>
> ... [I]t is true that it could have brought a state action ... But, a well-pleaded complaint under

either of these theories would have to set forth Owners Corp.'s current right to possession ... And, because Owners Corp.'s "current right to possession [is allegedly] conferred by federal law" under the authority of Section 3607, a well pleaded complaint alleging these state law possessory actions would necessarily raise a federal question. *Oneida Indian Nation,* 414 U.S. at 666, 94 S.Ct. at 776.

The second approach leads to the same conclusion. In addition to examining defendant's "threatened" action, we examine plaintiffs' complaint to see if it raises a federal question when viewed as a coercive action apart from defendant's anticipated suit.

Viewing the complaint as an equitable action seeking coercive relief, it may properly be considered as a common law or statutory action to remove a cloud on title. Under *Hopkins v. Walker,* 244 U.S. 486, 37 S.Ct. 711, 61 L.Ed. 1270 (1917), "the existence and invalidity of the instrument or record sought to be eliminated as a cloud upon the title are essential parts of the plaintiff's cause of action." 244 U.S. at 490, 37 S.Ct. at 713. Consequently, since it is the provisions of Section 3607 that give rise to the cloud, the statute must necessarily be pleaded in a well-pleaded action to remove that cloud ... Thus considered as a common law action, the complaint necessarily raises a substantial federal question on the face of a well-pleaded complaint.

> Plaintiffs' well-pleaded complaint under the quieting title statute would have to allege defendant's adverse claim under Section 3607 and would therefore raise a federal question.

The Fourth Circuit Court of Appeals made no reference to the complaint filed in this case, whether it examined it or not, but such an examination clearly demonstrates the point being made by the Second Circuit Court of Appeals above. Throughout said complaint the federal judgment is alleged, correctly, as the sole basis for the attempted unlawful taking of the Plaintiffs' property. All of Count I of that complaint, alleging various abuses of process, is dependent upon the validity of the federal judgments. Likewise, all of Count II, alleging various interferences with prospective economic advantage, is dependent upon the validity of the federal judgments. Validity or invalidity of such federal judgments is decisive to their enforcement. If the federal judgments were final and enforceable prior to the time that the property against which they were sought to be enforced was conveyed to Pineville and mortgaged to the Pension Plan then the Plaintiffs' causes of action will fail. If, on the otherhand, such actions were not final and enforceable at the time the property was conveyed, the Defendants have no entitlement to the property of Plaintiffs and their efforts to take it from Plaintiffs is actionable. It is not germane to the core issue that Defendants sought to effect such taking by North Carolina's enforcement procedures instead of Federal enforcement procedures. Plaintiffs have a right to stop them and the sole basis for so doing depends on the question of the validity of the federal judgments.

As the Second Circuit Court of Appeals stated at 815 F.2d 196, in distinguishing *Merrell Dow* [and hence also its progeny *Port Drum* from the Condominium case and hence this case]:

> Nonetheless, assuming that plaintiffs have no private right of action . . . , we conclude that the federal element in plaintiffs' state cause of action would still be sufficiently substantial to confer arising under jurisdiction. In *Merrell Dow* the federal statute was merely incorporated by reference as a standard of conduct in a state negligence action. Here the situation is quite different. In construing the Condominium Relief Act in a state cause of action, the federal issue is decisive because upon that Act's construction the vindication of rights and definition of relationships created by federal law depends. See Gully, 299 U.S. at 116, 57 S.Ct. at 99. In light of this qualitative difference, the federal ingredient in plaintiffs' complaint in this case is sufficiently substantial to confer the arising under jurisdiction.

Professor Moore has summarized the essence of federal question jurisdiction as follows:

> [T]he often repeated test of the federal character of the action ... is whether "the title or right set up by the party, may be defeated by one construction of the Constitution or laws of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out" [citing *Osborn v. Bank of the United States,* 22 U.S. (9 Wheat) 738, 822 (1824)] MOORE'S FEDERAL PRACTICE (2d ed.) Para. 0.62 [~.-21 at p. 657.

This well-established legal principle continues to be applied in construing whether federal question jurisdiction exists. In *Westmoreland Hospital Ass'n v. Blue Cross of Western Pennsylvania, 605* F.2d 119 (3d Cir. 1979), in a dispute between hospitals and an insurer over the proper accounting treatment of certain federal grants to the hospitals, a state court action by the hospitals was removed by the insurer on the basis of federal question jurisdiction. The district court entered judgment in favor of the insurer, based on the construction of the contract with the hospitals under state law. The Third Circuit Court of Appeals reversed, holding that an action arises under the laws of the United States if the action requires construction of a federal statute or the application of federal legal principles. In *Westmoreland,* the complaint alleged that the policy of the federal grants required the hospital's accounting treatment to prevail and, therefore, the Court of Appeals held, the complaint drew legal conclusions based on federal legal principles.

Likewise, the Fourth Circuit Court of Appeals has held in *City National Bank v. Edminsten, 681* F.2d 942 (4th Cir. 1982) that federal jurisdiction exists with respect to a state created cause of action if its resolution depends on the validity, instruction or effect of federal law as a real and substantial issue.

Such is the federal issue in this case. It is integral and essential to the resolution of Defendants' attempted execution against Plaintiffs' property and the abuse of process and interference claims deriving therefrom.

WHEREFORE, the Writ of Certiorari should be granted.

Respectfully submitted,

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