SUPREME COURT OF THE UNITED STATES

No. 92–1074

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, PETITIONER *v.* HARRIS TRUST AND SAVINGS BANK, AS TRUSTEE OF THE SPERRY MASTER RETIREMENT TRUST NO. 2

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[December 13, 1993]

JUSTICE THOMAS, with whom JUSTICE O'CONNOR and JUSTICE KENNEDY join, dissenting.

Insurance companies hold more than $332 billion in their general accounts pursuant to group annuity contracts with pension plans. See American Council of Life Insurance, 1993 Life Insurance Fact Book Update 27. Today, the Court abruptly overturns the settled expectations of the insurance industry by deeming a substantial portion of those funds "plan assets" and thus subjecting insurers to the fiduciary regime of the Employee Retirement Income Security Act of 1974 (ERISA). Although I agree with the Court that the guaranteed benefit policy exception, §401(b)(2) of ERISA, 29 U. S. C. §1101(b)(2), does not—as petitioner Hancock contends—exclude all general account assets from ERISA's coverage, the Court, in making the exception depend upon whether investment risk is allocated to the insurer, *ante*, at 19, proposes a new test that bears little relation to the statute Congress enacted. The relevant question under the statute is not whether the contract shifts investment risk, but whether, and to what extent, it "provides for benefits the amount of which is guaranteed." 29 U. S. C. §1101(b)(2)(B). In my view, a contract can "provide for" guaranteed benefits before it actually guarantees future payouts—that is, before it shifts the investment risk as to those benefits to the

insurer. Accordingly, I respectfully dissent.

The guaranteed benefit policy exception, §401(b)(2) of ERISA, excludes from the scope of ERISA's fiduciary requirements assets held pursuant to "an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer." 29 U. S. C. §1101(b)(2)(B). In interpreting this exception, I begin, as in any case of statutory construction, with "the language of the statute," *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U. S. ___, ___ (1992) (slip op., at 5), and with the assumption that Congress "says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank* v. *Germain*, 503 U. S. ___, ___ (1992) (slip op., at 5). Unlike the Court, I see no need to base an understanding of §401(b)(2) on principles derived from the interpretation of dissimilar provisions in the Securities Act of 1933, see *ante*, at 14–17, or from a sense of the policy of ERISA as a whole, see *ante*, at 8. The meaning of the provision can be determined readily by examining its component terms.

First, the insurance contract must "provide for" guaranteed benefits. Because "provides for" is not defined by the statute, we should give the phrase its ordinary or natural meaning. See *Smith* v. *United States*, 508 U. S. ___, ___ (1993) (slip op., at 5). Looking at the contract, the Court observes that there is "no genuine guarantee of the amount of benefits that Plan participants will receive in the future." *Ante*, at 18. The Court apparently takes "provides for" to mean that the contract must currently guarantee the amounts to be disbursed in future payments. That is not, however, what "provides for" means in ordinary speech.

When applied to a document such as a contract, "provides for" is "most natural[ly]" read and is "commonly understood" to mean "`make a provision for.'" *Rake* v. *Wade*, 508 U. S. ___, ___ (1993) (slip op., at 8–10) (interpreting a section of the Bankruptcy Code that applies to "`each allowed secured claim *provided for* by the [reorganization] plan'") (emphasis added). See also Black's Law Dictionary 1224 (6th ed. 1990) (defining "provide" as "[t]o make, procure, or furnish for future use, prepare"). If "provides for" is construed in this way, the insurance contract need not guarantee the benefits for any particular plan participant until the benefits have vested, so long as it makes provision for the payment of guaranteed benefits in the future. See *Mack Boring & Parts* v. *Meeker Sharkey Moffitt, Actuarial Consultants*, 930 F. 2d 267, 273 (CA3 1991) ("Section 401(b)(2)(B) does not, on its face, require that the benefits contracted for be delivered immediately, and we will not read into the statute such a requirement. Rather, it is enough that the . . . contract `provided' guaranteed benefits to plan participants at some finite point in the future").[1]

Had Congress intended the meaning the Court

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[1]Even Harris Trust, which argues that benefits are not "provided for" until they have vested in plan participants, see Brief for Respondent 15, cannot avoid this common meaning of the phrase. In describing the original contract between Sperry and Hancock, Harris Trust states that "the contract *provided for* the annual purchase of individual deferred annuities . . . ." *Id.*, at 2 (emphasis added). Certainly, one would not say—and Harris Trust did not mean—that the contract only "provided for" such annuities after they were purchased. Common sense and usage dictate precisely the sense in which Harris Trust used the phrase: the contract made provision for the purchase of annuities. Similarly, after 1968 the contract made provision for the payment of guaranteed benefits.

suggests, it easily could have applied the exception to an insurance contract "to the extent that benefits, the amount of which is guaranteed by the insurer, are vested in plan participants." The concept of vested benefits was familiar to Congress, see, *e. g.*, 29 U. S. C. §1001(c), and it knew how to require vesting when it intended to do so. See ERISA §1012(a), 26 U. S. C. §411 (1988 ed. and Supp. IV). In the guaranteed benefit policy exception, however, Congress, rather than requiring that benefits be vested, required that guaranteed benefits be *provided for*.[2]

The second requirement under the statute is that the "amount" of benefits be guaranteed. The relevant "benefits" under the statute are payments to plan participants, not any payments to the pension plan itself. See *Mack Boring, supra,* at 273 ("the term `benefit,' when used in ERISA, uniformly refers only to payments due to the plan participants or beneficiaries"). The Court recognizes that the term "benefits" does not include payments to the plan but concludes that the reference to "the amount of" benefits means the *aggregate* amount of benefits.

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[2]Giving "provides for" its ordinary meaning as outlined here would not, as the Court suggests, see *ante,* at 17–18, exempt from ERISA's fiduciary rules any contract "in its entirety" if it allows for the payment of some amount of guaranteed benefits in the future. As the Court implicitly acknowledges, that potential misconstruction of the exception results, not from a misreading of the term "provides for," but from a misunderstanding of the limitation imposed by the phrase "to the extent that." As I discuss below, see *infra*, at 8–9, I agree with the Court that by limiting the exception to policies "to the extent that" they provide for guaranteed benefits, Congress did not mean that any contract would be completely exempted "if" it provided for any guaranteed benefits. *Ante,* at 18.

Ante, at 19. The Court cites neither authority nor reason for its interpretation, and with good cause. Given that “benefits” refers to payments to individuals, “amount” standing alone most naturally refers to the amount owed to each individual. If, on the other hand, “amount” means aggregate amount, benefits to individuals could vary so long as the insurance company guaranteed that a fixed total amount would be paid. That is hardly consistent with ERISA's focus on protecting plan participants and their beneficiaries. See *ante*, at 8, and n. 5; 29 U. S. C. §1001(c).

The Court's focus on the aggregate amount of benefits, combined with its understanding of “provides for” as requiring a current guarantee, shifts the inquiry from the nature of the benefits that the policy will provide to individuals to the nature of the return that the policy provides to the plan as a whole. In the Court's view, this is precisely the inquiry demanded by the statute. As it makes clear by its citation to *Peoria Union Stock Yards Co. Retirement Plan* v. *Penn Mutual Life Ins. Co.*, 698 F. 2d 320 (CA7 1983), from which it takes its “lead,” *ante,* at 14, the Court sees the guaranteed benefit policy exception as requiring a guaranteed return on all monies paid to the insurer—that is, the guaranteed benefit policy exception is really an exception for “insurance contract[s] with a fixed payout.” *Peoria Union, supra,* at 327.[3] In reaching this result, the Court is driven by its gloss on the guaranteed benefit exception as a

[3]To be sure, the payouts must be in the form of guaranteed benefits to plan participants, but the Court's focus remains on an overall fixed return. Thus, in its view, any funds not immediately committed to the payment of guaranteed benefits (through the purchase, for example, of fixed annuities) must be invested at a guaranteed return and converted to guaranteed benefits at a rate fixed by contract. *Ante,* at 19–20.

provision demanding an “examination of risk allocation in each component” of the policy. See *ante*, at 15. But Congress nowhere mentioned allocation of risk, fixed payouts, or guaranteed investment returns in the statute, despite the obvious superiority of those terms in conveying the meaning the Court ascribes to the text. Instead, Congress directed our attention to the provision of guaranteed benefits—that is, to the type of payments the policy provides to individual participants.

The Court derives its gloss on the guaranteed benefit policy exception from extra-textual sources that lead it to a reading divorced from the statute's language. First, the Court begins its analysis not with an examination of the terms of §401(b)(2), but with a discussion of cases decided under the Securities Act of 1933, 48 Stat. 74, as amended. For example, the Court looks to a case in which we addressed whether a variable annuity was an “investment contract” covered by §2 of the Securities Act, 15 U. S. C. §77b, or an “insurance or endowment policy or annuity contract or optional annuity contract” exempted by §3 of that Act, 15 U. S. C. §77c(a)(8). See *SEC* v. *United Benefit Life Ins. Co.*, 387 U. S. 202, 204–205, 211 (1967). Were it disputed that GAC 50 is an “insurance policy or contract,” it might be useful to consider how this Court has defined an insurance policy under federal securities law and the extent to which GAC 50 meets that test. Here, however, no one denies that GAC 50 is an insurance policy. If it were not, §401(b)(2) would not apply at all. Because GAC 50 is concededly an insurance policy, its allocation of risk is irrelevant to the distinct inquiry demanded by the statute into the provision of guaranteed benefits.

The second source from which the Court distills its “risk of loss” test is the premise, based on ERISA “as a whole,” that “Congress commodiously imposed fiduciary standards on persons whose actions affect

the amount of benefits retirement plan participants will receive." *Ante*, at 8. Even were that true, there is no need to resort to such general understandings of the policy behind a statute when the language suggests a contrary meaning. Cf. *Connecticut Nat. Bank*, 503 U. S., at ___ (slip op., at 5); *Park 'N Fly, Inc.* v. *Dollar Park and Fly, Inc.,* 469 U. S. 189, 194 (1985) (statutory construction begins with "the assumption that the ordinary meaning of [the] language accurately expresses the legislative purpose"). The text of §401(b)(2) gives no reason to think that Congress meant to protect pension plans from all risk or to impose a fiduciary duty on the insurer whenever the pension plan faced a possibility of loss. Congress easily could have required that all funds credited to a pension plan be guaranteed, but it did not.

Moreover, contrary to the Court's assumption, in the statute "as a whole" Congress did not impose fiduciary duties on all persons whose actions affect the amount of benefits plan participants receive. In the same section that contains the guaranteed benefit policy exception, for example, Congress exempted pension plans' investments in mutual funds from ERISA's fiduciary provisions. See 29 U. S. C. §1101(b)(1); H. R. Conf. Rep. No. 93–1280, p. 296 (1974). Obviously, pension plans bear a significant risk with respect to such investments, yet Congress allowed them to bear that risk without imposing fiduciary duties on the companies that manage the funds.

In any event, as long as a policy provides for guaranteed benefits as I have described them, the connection between the return to the plan and the amount of benefits individual plan participants receive is remote. The insurer's investment performance would influence the amount of benefits if participants received either variable benefits or fixed benefit payments that were not guaranteed, *e. g.*, benefits paid for a fixed amount of time unless

the fund from which they were paid was depleted sooner. In both cases, ERISA imposes fiduciary duties on the insurer. But as long as the benefits will be guaranteed, a variable return to the plan entails no such risk for plan participants. Whether the insurer earns 2% or 20%, or even loses 20% on its investments, participants will receive the same amount of benefits.[4]

In short, the provision of guaranteed benefits does not require the provision of a guaranteed return to the plan, nor does it require that all amounts to be provided in the future be currently guaranteed. In my view, an insurance policy "provides for benefits the amount of which are guaranteed" when its terms make provision for fixed payments to plan participants and their beneficiaries that will be guaranteed by the insurer. The policy need not guarantee the

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[4]In this case, Sperry's retirement plan, not the insurance policy, specifies the amount of benefits to which a plan participant is entitled. App. 119, 121. The return on the funds held under GAC 50 has no effect on that amount. Thus, even if the free funds fell to zero and the policy terminated, see *ante*, at 19, plan participants whose benefits had not yet vested would be entitled to the same amount of benefits under the plan itself, and would have an action against the plan if it failed to pay. See 29 U. S. C. §1132(a). For this reason, it is simply wrong to suggest, as some *amici curiae* do, that reversing the decision below would leave millions of pensioners unprotected by ERISA. See Brief for Senator Howard Metzenbaum et al. as *Amici Curiae* 15. If the plan, on the other hand, is "trapped" by an unwise insurance contract, the trap is one of its own making. Those *amici* are in a far better position than this Court to persuade Congress to protect pension plans from their own mistakes and misjudgments. Nothing in either the text or the logic of the guaranteed benefit policy exception provides such protection.

aggregate amount of benefits that will ultimately be returned from the plan's contributions or insulate the plan from all investment risk to accomplish that more limited goal.

Of course, as the Court correctly observes, §401(b)(2) excludes an insurance company's assets from fiduciary obligations only "to the extent that" the policy provides for guaranteed benefits. That limitation does not mean that the exception is available to a contract "if" it provides for guaranteed benefits. Cf. *ante*, at 17. Rather, the term suggests that a contract may provide for guaranteed benefits only to a certain extent. In the Court's view, to the extent that a policy allows a pension plan a variable return on free funds not yet committed to providing guaranteed benefits to participants, it falls outside the §401(b)(2) exception. Once again, however, the Court's understanding of the statute is controlled by its focus on the allocation of risk. The difficulty the Court sees with the variable return on any component of the contract is that a variable return ensures no guaranteed aggregate amount of benefits. If all of the funds attributable to the policy are allocated to purchasing guaranteed benefits, however, whether those funds come from pension plan contributions or investment return, the contract is "provid[ing] for benefits the amount of which is guaranteed" in its entirety. Only if one assumes, as the Court does, that overall returns are critical would one read the "to the extent that" limitation more narrowly.

In its effort to insulate Harris Trust from all risk, the Court radically alters the law applicable to insurance companies. The Department of Labor has taken the view that general account assets are not plan assets. See, *e. g.*, Interpretive Bulletin 75–2, 40 Fed. Reg. 31598 (1975), 29 CFR §2509.75–2 (1992) (concerning

prohibited transactions); §2510.3–101 (same).[5] In reliance on that settled understanding, insurers have set up general account contracts with pension plans and have managed assets theoretically attributable to those policies, not in accordance with ERISA's fiduciary obligations, but in accordance with potentially incompatible state law rules. See *Mack Boring,* 930 F. 2d, at 275, n. 17. Most States treat the relationship between insurer and insured as a matter of contract, not a fiduciary relationship. See, *e. g.*, *Benefit Trust Life Ins. Co.* v. *Union Nat. Bank of Pittsburgh*, 776 F. 2d 1174, 1177 (CA3 1985) (generally, relationship between insurer and insured is "solely a matter of contract"); *New Hampshire Ins. Co.* v. *Foxfire, Inc.*, 820 F. Supp. 489, 497 (ND Cal. 1993) (implied covenant of good faith and fair dealing does not create fiduciary relationship between insurer and insured under California law). And state law generally requires that the insurer not discriminate among its policy holders. See, *e. g.*, N. Y. Ins. Law §4224(a)(1) (McKinney 1985). ERISA, on the other hand, will require insurers to manage what the Court deems plan assets "solely in the interest of the participants and beneficiaries" of the plan, 29 U. S. C. §1104(a)(1), and will impose a host of other requirements. These conflicting demands will place insurers in a difficult position: "Whenever an insurance company takes actions to ensure that under state law, it is treating its policy holders fairly and

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[5]I agree with the Court that Interpretive Bulletin 75–2's exemption of all general account assets from fiduciary requirements is at odds with the text of §401(b)(2) and is therefore not entitled to deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). Rejecting the Department of Labor's interpretation of the guaranteed benefit policy exception, however, does not require adopting the Court's extreme approach.

equitably, it runs the risk of violating ERISA's fiduciary requirements." *Mack Boring, supra,* at 275, n. 17.

Although the Court attempts to limit the fiduciary duty to the free funds—it dubs only the free funds "plan assets," see *ante*, at 20—the duty it imposes on insurers extends much farther. The free funds are not identifiable assets at all, but are simply an accounting entry in Hancock's books. The amount of the free funds, and hence their "management," *ibid.*, depends on the management of all of the assets in Hancock's Group Pension line of business. See Agreed Statement of Facts ¶43, App. 91. To impose fiduciary duties with respect to the management of the free funds is essentially to impose fiduciary duties on the management of the entire line of business. Although insurers in reaction to today's decision may be able to segregate their assets and allocate certain assets to free funds on specific contracts, that will not help insurers like Hancock in this case who now find themselves potentially liable for past actions.[6]

The Court's decision may also significantly disrupt insurers' transactions with companies whose pension plans they fund. The Court's interpretation of §401(b)(2) will impose on insurers not only general fiduciary duties under 29 U. S. C. §1104, but also restrictions on prohibited transactions under §1106. The guaranteed benefit policy exception expressly applies to both. See §1101(b) (applying subsections (b)(1) and (b)(2) "[f]or purposes of this part," that is, Part 4,

[6]It will be especially difficult for the lower courts in this case to limit application of fiduciary duties to the free funds, as the Court appears to desire, because the pension plan claims that Hancock breached its fiduciary duty by understating the amount of the free funds. See Amended Complaint ¶¶29, 30, 40, App. 55–56, 58–60. Thus, it will not be possible to determine the extent of Hancock's fiduciary duty without first ascertaining whether Hancock violated it.

which comprises §§1101–1114). Indeed, this case concerns alleged violations of both sections. Amended Complaint ¶40, App. 58. Among the previously innocent transactions now potentially prohibited will be an insurer's investment in stock issued by any of the employers whose pension plans the insurer funds, a lease of a building owned by the insurer to one of those employers, or the purchase of goods or services from any of those employers. See Hearings on Public Law 93–406 before the Subcommittee on Labor Standards of the House Committee on Education and Labor, 94th Cong., 1st Sess., 390–391 (1975) (testimony of the Assistant Secretary of Labor). Thus, large insurance companies that may have sold policies to thousands of pension plans could suddenly find themselves restricted in contracting with the corresponding thousands of employers whose goods and services they may require. See *id.*, at 391.

I do not intend to suggest that the Court should give dispositive weight to the practical effects of its decision on the settled expectations of the insurance industry (and its customers, the pension plans, who stand to lose much of the benefit that these contracts presumably offered them). Such considerations are a matter for Congress. But surely the serious and far-reaching effects that today's ruling is likely to have should counsel caution and compel the Court to undertake a closer examination of the terms of the statute to ensure that Congress commanded the result the Court reaches. As discussed in Part I, *supra*, I believe Congress did not mandate that result.

Application of the standards I have outlined above to GAC 50, prior to its amendment in 1977 to allow for payment of nonguaranteed benefits, is relatively straightforward. In its pre-1977 form, GAC 50 provided for guaranteed benefits in its entirety. Plan

participants would be guaranteed to receive the amount of benefits specified in the contract if the contract was in operation when they retired, regardless of the contract's subsequent termination, App. 137, or any other contingency. Hancock's entire general account, not simply the funds Hancock credited to the pension plan, stood behind that guarantee. Moreover, GAC 50 provided that all investment return remained in a fund allocated exclusively to the payment of guaranteed benefits, and all of the free funds were available to pay such benefits. We therefore are not faced with a contract that uses a pretextual option of guaranteed benefits to disguise an ordinary investment vehicle. Apart from an asset withdrawal mechanism that imposed a significant charge, the contract provided for no other way to use those funds. See 767 F. Supp. 1269, 1274–1275 (SDNY 1991).[7]

Indeed, that is precisely why this litigation arose. Hancock had not squandered the pension plan's funds, as one might expect in the run-of-the-mill breach of fiduciary duty case. The Pension Administration Fund, and thus the free funds, had grown beyond the parties' expectations. The pension plan, however, was unhappy with the bargain it had struck in its contract. By 1977, it had discovered that it could get cheaper guaranteed benefits and a better return on its investment elsewhere, see *id.*, at 1273–1274, but GAC 50 posed several obstacles to moving the uncommitted funds. Terminating the contract would require the plan to "repurchase" annuities for the benefits already guaranteed. The repurchase price set by the contract depends on assumptions

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[7]GAC 50 made no provision for the rollover mechanism that Hancock allowed the pension plan to use on several occasions to reduce the surplus in the Pension Administration Fund. See 767 F. Supp., at 1274–1275. See also Agreed Statement of Facts ¶77, App. 96.

concerning the interest rate that would be earned on the funds over the term of the annuity. See Agreed Statement of Facts ¶¶33–34, 41, App. 89, 90–91 (2½–3% for benefits vested before 1968; 5% for those vested after 1968).[8] Because those interest rates turned out by the late 1970's to be relatively low compared to prevailing market rates, the contractually determined price for purchasing the annuities was correspondingly high and the pension plan considered the option of terminating the contract to be "prohibitively expensive." Brief for Respondent 5. Withdrawing assets, as already mentioned, entailed a significant asset liquidation adjustment. Therefore, before the 1977 amendment the only other way the free funds could be used was to purchase guaranteed benefits for plan participants. It is difficult to see how a policy that provided for nothing but guaranteed benefits could be said not to provide for such benefits in its entirety.

The extent to which GAC 50 "provides for" guaranteed benefits is more complicated, however, because the 1977 amendment discontinued the automatic provision of guaranteed benefits and permitted the payment of "Non-Guaranteed Benefits." See Agreed Statement of Facts ¶¶80, 82, App. 96–97. Proper resolution of this case ultimately depends on the operation and the effect of that amendment. Because the courts below did not discuss its relevance and should be given the opportunity to consider it in the first instance, I would remand.

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[8]The "artificially low interest rate assumptions," *ante*, at 5, in the contract were last amended in 1968. See Agreed Statement of Facts ¶¶105, 111, App. 100, 101. The pension plan alleged that Hancock breached its fiduciary duties by refusing to amend the contract again to take into account changed conditions. Amended Complaint ¶40(b), App. 58.

In the judgment of both the Court and the Second Circuit, to the extent that the contract "`provides no guarantee of benefit payments or fixed rates of return, it seems to us that [Hancock] should be subject to fiduciary responsibility.'" *Ante*, at 16–17 (quoting 970 F. 2d 1138, 1144 (CA2 1992)). Perhaps it should. But imposing that responsibility disrupts nearly 20 years of settled expectations among the buyers and sellers of group annuity contracts. I do not believe that the statute can be fairly read to command that result. I therefore respectfully dissent.