No. 19-170

IN THE

Supreme Court of the United States

THE E COMPANY, A DISSOLVED ILLINOIS CORPORATION, T & W EDMIER CORP., A DISSOLVED ILLINOIS CORPORATION, EDMIER CORP., AN ILLINOIS CORPORATION, K. EDMIER & SONS, LLC, AN ILLINOIS LIMITED LIABILITY COMPANY, THOMAS EDMIER, INDIVIDUALLY, WILLIAM EDMIER, INDIVIDUALLY, THE WILLIAM EDMIER TRUST, LAKE STREET REALTY, INC., A DISSOLVED ILLINOIS CORPORATION AND E & E EQUIPMENT & LEASING, INC., AN ILLINOIS CORPORATION,

Petitioners,

v.

TRUSTEES OF THE SUBURBAN TEAMSTERS OF NORTHERN ILLINOIS PENSION FUND,

Respondent.

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

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

All parties to the proceedings are listed in the caption. The Trustees of the Suburban Teamsters of Northern Illinois Pension Fund are all natural persons, no Trustee is a corporation and there are no parent corporations or publicly held corporations owning 10% of more interest in any Trustee.

STATEMENT OF RELATED PROCEEDINGS

The proceedings in federal trial and appellate courts identified below are directly related to the above captioned case in this court.

Trustees of the Suburban Teamsters of Northern Illinois Pension Fund v. The E Company, et. al, Case No. 1:15-cv-10323 (N.D. IL). The United States District Court for the Northern District of Illinois entered final summary judgment in favor of respondent on liability on March 21, 2018, (App. C to Petition, 17a) and a final judgment awarding respondent damages and other relief on May 9, 2018. (App. B to Petition 8a).

Trustees of the Suburban Teamsters of Northern Illinois Pension Fund v. The E Company, et. al, Case No. 18-2273 (7th Cir.). The Court of Appeals for the Seventh Circuit entered judgment in this matter on January 29, 2019. (App. A to Petition, 1a). The Seventh Circuit denied Petitioners' request for rehearing with a suggestion for rehearing *en banc* on March 4, 2019 (App. D to Petition 37a).

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SUMMARY OF ARGUMENT

There is no basis for granting the Petition for Writ of Certiorari in this case. The Petitioners have established no split between Circuits regarding any matters raised in their Petition. Indeed, all Circuits have agreed with the notice rules established in the Seventh Circuit's decision in *Central States Southeast and Southwest Area Pension Fund v. Slotky,* 956 F.2d 1369, 1372-1375 (7th Cir. 1992), *cert. denied,* 511 U.S. 1018 (1994).

Notice of Withdrawal Liability provided by the Trustees fully accorded with the requirements of the statute and of the Due Process clause. Under this Court's analysis in *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust Fund,* 508 U.S. 602, 617-620 (1993) the assessment of withdrawal liability is an "enforcement" rather than "adjudicative" proceeding. Due Process requirements are satisfied as a result of the later adjudicative proceedings subject to Due Process standards. While the Petitioners failed to avail themselves of the arbitration process, which would have been the first "adjudicative" proceeding in this matter, the Seventh Circuit properly held that the Petitioners were adequately notified of the District Court proceeding which was the first adjudication in this case. In addition, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), is limited to state action and "any proceeding which is accorded finality." *Mullane*, 339 U.S. at 314. A Trustee initial determination of withdrawal liability is an act of a private party which is not accorded finality as it is subject to full review in arbitration and, in the event

arbitration is not pursued, requires a judgment of a state or federal court in order to be accorded finality. This contrasts with all of the cases cited by Petitioners which involved final governmental action.

The Seventh Circuit's analysis in *Central States Southeast and Southwest Area Pension Fund v. Slotky,* 956 F.2d 1369, 1372-1375 (7th Cir. 1992), *cert. denied,* 511 U.S. 1018 (1994), followed by the Seventh Circuit and the Northern District of Illinois in this case, provides the proper standard for evaluating the adequacy of notice. This Court denied certiorari 25 years ago in *Central States Southeast and Southwest Area Pension Fund v. Slotky,* 956 F.2d 1369, 1372-1375 (7th Cir. 1992), *cert. denied,* 511 U.S. 1018 (1994), and there has been nothing in the interim to suggest that consideration of the holding of that case is now worthy of this Court's consideration. As all trades or businesses are a single employer, notice to one entity satisfies the statutory and due process requirements regarding notice to the employer. In addition, as discussed above, *Mullane* is inapplicable to a private Trustee assessment of withdrawal liability.

The Petitioners suffered no injury in this matter because they were provided the opportunity to obtain a full review of their position that they were not a trade or business which was part of the control group of trades or businesses liable for withdrawal liability. This case differs from *Peralta v. Heights Medical Center*, 485 U.S. 80 (1988), where there was not proper notice in the judicial adjudicative proceeding in which the determination was made. In this case the determination was made by the United States District Court for the Northern District of Illinois and the Petitioners received proper notice of that proceeding.

ARGUMENT

I. THERE IS NO SPLIT BETWEEN CIRCUITS REGARDING ANY QUESTION RAISED IN THE PETITION.

The Petition fails to identify any split between Circuits on any question raised in the Petition. No Court of Appeals case is cited that decided a case differently than did the Seventh Circuit on any of the three questions presented in the Petition. With respect to the second question, the Seventh Circuit's adherence to the rule adopted in its decision in *Central States Southeast and Southwest Area Pension Fund v. Slotky,* 956 F.2d 1369, 1372-1375 (7th Cir. 1992), *cert. denied,* 511 U.S. 1018 (1994), that "notice to one is notice to all" with respect to provision of notice to a controlled group of businesses, it should be noted that the long standing rule in every other Circuit to have decided that issue is also that notice to one member of a control group of businesses is appropriate service to all members of that controlled group of businesses. *See Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. H.F. Johnson, Inc.,* 830 F.2d 1009, 1013-1014 (9th Cir. 1987); *IUE AFL-CIO Pension Fund v. Baker & Williamson, Inc.,* 788 F.2d 118, 126-128 (3rd Cir.1986). Therefore, a split between circuits does not support granting the Petition for Certiorari.

II. THE SEVENTH CIRCUIT'S DECISION DID NOT DECIDE IMPORTANT FEDERAL QUESTIONS IN A MANNER IN CONFLICT WITH DECISIONS OF THIS COURT.

The Petitioners assert that the Seventh Circuit's decision conflicted with decisions of this Court.[1] This is incorrect.

A. *Mullane* is Inapplicable to the Trustees' Notice to the Petitioners.

The Seventh Circuit properly held that this Court's decision in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) is inapplicable to the notice the Pension Fund provided to the Petitioners. (App. Ex. A at 5a-6a). The Seventh Circuit concluded that due process standards were satisfied by the service of process upon each of the Petitioners in the judicial proceedings in the United States District Court for the Northern District of Illinois. (App. Ex. A at 6a).

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1. The only issues raised in the Seventh Circuit concern the constitutional appropriateness of the application of liability to Petitioner control group members, K. Edmier and Sons, LLC, Thomas Edmier, Individually, William Edmier, Individually, the William Edmier Trust, Lake Street Realty, Inc., and E & E Equipment & Leasing, Inc. based on the alleged insufficiency of notice to these Defendants under constitutional procedural due process standards. (Brief of Defendants-Appellants at 2, Dkt #92 at 1 (challenging notice only on behalf of the six "Additional Defendants" set forth in the preceding sentence)). No challenge was made to the sufficiency of notice to T & W Edmier Corp, the E Company and Edmier Corp. or their attorney agent. (*Id.)*

In *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust Fund,* 508 U.S. 602, 617-620 (1993); in the context of resolving whether due process' requirements of an impartial decisionmaker were applicable to a pension plan's withdrawal liability assessment, this Court explained that due process standards were inapplicable to such proceedings. Relying upon the Court's analysis in *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 243-250 (1980); involving the Secretary of Labor's assessment of child labor penalties, this Court concluded that withdrawal liability assessment was an "enforcement" rather than an "adjudicative" proceeding and that due process requirements are satisfied through later proceedings subject to due process standards. This Court observed:

> Not all determinations affecting liability are adjudicative, and the " 'rigid requirements' ... designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity." [*Marshall*], 446 U.S., at 248, 100 S. Ct., at 1616. Where an initial determination is made by a party acting in an enforcement capacity, due process may be satisfied by providing for a neutral adjudicator to "conduct a *de novo* review of all factual and legal issues." Cf. *id.,* at 245, 100 S.Ct., at 1614; see also *id.*, at 247-248, and n. 9, 100 S. Ct., at 1615 and n.9; cf. *Withrow v. Larkin,* 421 U.S. 35, 58, 95 S. Ct. 1456, 1470, 43 L.Ed.2d 712 (1975) ("Clearly, if the initial view of the facts based on the evidence derived from nonadversarial processes as a practical or legal matter

> foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised").

Concrete Pipe, 508 U.S. at 618. This Court quoted *Marshall*, in noting that:

> Of the administrator there we said, "He is not a judge. He performs no judicial or quasi-judicial functions. He hears no witnesses and rules on no disputed factual or legal questions. The function of assessing a violation is akin to that of a prosecutor or civil plaintiff." [*Marshall,* 446 U.S.] at 247, 100 S. Ct., at 1615.

The Court went on to conclude that pension fund trustee withdrawal liability assessments were also purely assessments rather than adjudications, to which due process requirements required for adjudications were satisfied through their application in subsequent adjudication:

> This analysis applies with equal force to the trustees, who, we find, act only in an enforcement capacity. The statute requires the plan sponsor, here the trustees, to notify the employer of the amount of withdrawal liability and to demand payment, 29 U.S.C. § 1399(b)(1), actions that bear the hallmarks of an assessment, not an adjudication. The trustees are not required to hold a hearing, to examine witnesses, or to adjudicate the disputes of contending parties on matters of fact or law.

> In *Marshall,* we observed that an employer "except[ing] to a penalty ... is entitled to a *de novo* hearing before an administrative law judge," 446 U.S., at 247, 100 S. Ct., at 1615, and we concluded that this latter proceeding was the "initial adjudication," *id.,* at 247, n. 9, 100 S.Ct., at 1615, n. 9. Likewise here, we conclude that the first adjudication is the proceeding that occurs before the arbitrator, not the trustees' initial determination of liability.

Concrete Pipe, 508 U.S. at 619-620 (footnotes omitted).

In this case the Trustees complied with the applicable legal requirements by notifying the employer of the amount of withdrawal liability and providing a schedule of payment, 29 U.S.C. § 1399(b)(1), thereby fulfilling the requirements of an entity providing an assessment in an enforcement capacity. The Petitioners failed to avail themselves of the opportunity afforded them for a fair adjudication through a demand for arbitration.[2] However, despite neglecting their right to a fair adjudication in arbitration, as discussed in Section II-C, *infra,* they were provided with an additional full adjudication of their liability by the District Court who found that they were members of the control group of employers against whom withdrawal liability could be assessed. (App. Ex. A, at 6a-7a; Ex. B, at 27a-35a).

In addition to the conclusion compelled by *Concrete Pipe* that the due process notice requirements of *Mullane*

2. *See Concrete Pipe,* 508 U.S. at 620-630 (holding that arbitration provided a fair adjudication for employer for purposes of Due Process).

are inapplicable to the Trustees' enforcement of their withdrawal liability assessment, the language of *Mullane* itself, quoted by Petitioners at pages 12-13 of the Petition for Writ of Certiorari, demonstrates that the Due Process clause's notice requirements are inapplicable to the Trustees' withdrawal liability assessment. This language provides that these notice requirements are to apply "in any proceeding which is accorded finality." *Mullane*, 339 U.S. at 314. As discussed above, the Trustees' withdrawal liability determination is not one "which is accorded finality." Rather, it is an assessment which is subject to full review by an arbitrator. Even if arbitration is not demanded, the assessment is still not final, as the statute requires that the Trustees obtain a final judgment of a state or federal court in order for the amount of the assessment to be collected and accorded "finality." 29 U.S.C. § 1401(b)(1) ("If no arbitration proceeding has been initiated pursuant to subsection (a), the amounts demanded by the plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in State or Federal court of competent jurisdiction for collection.") As the Seventh Circuit observed, *Mullane* was satisfied because all parties received notice of the judicial proceeding required before "finality" was accorded to the Trustees' assessment. As this case also demonstrates, it is possible that the Court may choose to review a party's liability for the Trustees' withdrawal liability in cases where the Court determines there was not a waiver of an issue due to a failure to arbitrate. (App. Ex. B at 27a-35a). *See also Slotky*, 956 F.2d at 1372-1373 (noting that in certain cases Court may resolve issue of controlled group membership even if party failed to arbitrate).

The non-final nature of a Trustee withdrawal liability assessment, conduct which does not involve final state action and which is subject to arbitral and possible judicial review, contrasts starkly with the cases cited by Petitioners at pages 13-14 of their Petition, all of which involved significant state involvement and did not require a subsequent hearing subject to due process standards before becoming final. Compare *Jones v. Flowers,* 547 U.S. 220 (2006) (final government tax sale of property); *Tulsa Professional Collection Services v. Pope,* 485 U.S. 476 (1988) (state judicial involvement in final bar on bringing estate claim); *Mennonite Board of Missions v. Adams,* 462 U.S. 791 (1983) (final government tax sale of property); *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1 (1978) (termination of electrical service by government owned utility). Each of these cases is vastly different from a Trustee assessment of withdrawal liability, an action of a private party performed in an enforcement capacity, rather than a state actor in an adjudicative capacity, and which does not become final and collectible until after arbitration or judicial proceedings are instituted.

B. The Standards for Notice Set forth in the Seventh Circuit's *Slotky* Decision Were Properly Applied and Do Not Violate Due Process

This Court denied certiorari 25 years ago in *Central States Southeast and Southwest Area Pension Fund v. Slotky,* 956 F.2d 1369, 1372-1375 (7th Cir. 1992), *cert. denied,* 511 U.S. 1018 (1994), and there has been nothing in the interim to suggest that consideration of the holding of that case is now worthy of this Court's consideration.

Petitioners' arguments concerning *Slotky* are in many respects a reformulation of their position regarding notice considered in Section II-A, *supra*. They urge that *Mullane* rather than *Slotky* provides the proper standard for evaluating the notification the Trustees provided them of the withdrawal liability assessment. But, as thoroughly discussed in Section II-A, *supra*, *Concrete Pipe* holds that the standards applicable to a final adjudication under the due process clause are inapplicable to a pension plan Trustee assessment of withdrawal liability which is subject to full arbitral review. The Trustees complied with the requirements of the statute in providing the contributing employer with notice conforming to the statutory requirement of 29 U.S.C. § 1391(b)(1) by notifying the employer of the amount of the withdrawal liability, the schedule for payment and demanding payment in accordance with the schedule. Because all trades or businesses are treated as a single employer, 29 U.S.C. § 1301(b)(1), the statute does not require notice to be provided to every possible trade or business which could be required to pay the controlled group of trades or businesses' withdrawal liability. *Slotky,* 956 F.2d at 1375. *Mullane* requires no further notice to individual parties of the assessment, which *Concrete Pipe* holds is not an adjudicative proceeding entitled to finality. Further, nothing in the Due Process clause requires that the pension plan seek and find individual trades or businesses and explain to them the legal provisions applicable to withdrawal liability and the possibility that one business comprising the employer could be jointly liable for the withdrawal liability of the employer, *see Slotky*, 956 F.2d at 1375, and the Petitioners present no case law, statute or regulation requiring this type of notice.

Because *Mullane* is inapplicable to pension plan Trustees' assessment of withdrawal liability, *Slotky* is actually a rule providing additional protection to trades or businesses which might not be aware that they are part of a control group of businesses required to litigate control group membership through the arbitration procedure that provides the initial adjudication proceeding in a withdrawal liability case. *Concrete Pipe,* 508 U.S. at 620 (arbitration is the first adjudication in a withdrawal liability proceeding, not the trustees' initial determination of liability). Thus, *Slotky* actually provides a protection in addition to that afforded under the due process clause by relieving certain trades or businesses from the obligation to commence the initial adjudication of arbitration if they could be determined to be unaware of their obligation to commence arbitration to challenge the assessment made by the Trustees in their enforcement capacity.

C. The Petitioners Suffered No Injury Because the District Court Determined the Merits of Their Claim and Determined That They Were Part of the Control Group

None of the Petitioners were injured in this matter as the District Court determined the merits of their claim and determined that they were part of the control group of trade or businesses subject to withdrawal liability. Once again this question is largely determined by *Concrete Pipe.* As previously discussed, the Trustees' initial determination made in their enforcement capacity, satisfies due process if there is a later proceeding in which a neutral adjudicator decides the factual issues and legal issues on a *de novo* basis. *Concrete Pipe*, 508 U.S. at 618. The Petitioners chose not to institute the arbitration

procedure available to them to review the Trustees initial determination and received a default notice for this failure. (App. Ex. C at 21a-22a). But, the District Court, in a judicial proceeding in which the Seventh Circuit found all Petitioners were properly provided notice, (App. Ex. A at 6a), chose to apply *Slotky* to permit a *de novo* consideration of their position that they were not liable as part of the control group of employers. (App. Ex. C at 27a-35a). The Petitioners never presented in their appeal to the Seventh Circuit a challenge to the merits of this determination, (Dkt. #14, at 11-23), but argue that this *de novo* determination on the merits by the District Court did not remedy the Trustees' failure to properly notify the individual defendants of the withdrawal liability assessment while admitting that the other parties received notice.

In rejecting the argument that failure to receive appropriate initial notice of a withdrawal liability assessment from the Pension Fund invalidated the District Court's judgment, the Seventh Circuit held, at the very end of its Opinion:

> [A]s for the defendants who did not receive the notice of withdrawal liability but nonetheless found themselves named in a federal lawsuit, the district court provided them a full and fair opportunity to litigate their liability as members of a controlled group. Nothing about the path those defendants traveled offends due process.

(App. Ex. A at 6a-7a). As noted above the Seventh Circuit also found that the Petitioners were all properly notified

of the District Court case in which the determination was made. (App. Ex. A at 6a). This satisfied due process standards, as enunciated in *Concrete Pipe*, through the extension of due process protection in the subsequent adjudicative proceeding. *Concrete Pipe,* 508 U.S. at 618, 619-620. Because proper notice was received in the adjudicative proceeding in which the determination was made, the District Court case, this case differs from *Peralta v. Heights Medical Center*, 485 U.S. 80 (1988), in which the parties failed to receive proper notification in the judicial adjudicative proceeding in which the determination was made.

It should also be noted that the District Court's determination on the merits that the Petitioners were members of the controlled group of trade or businesses relieved them from the only prejudice they would have suffered from lack of notice, the inability to receive a full and fair opportunity to contest their status as a trade or business in a proceeding before an impartial adjudicator due to their waiver of the arbitral remedy. As the Seventh Circuit recognized, the full and fair opportunity to litigate their status as a trade or business that was part of the control group provided them with due process. (App. Ex. A at 6a-7a).

The Petitioners also argue that they were prejudiced by a two year delay in providing notice. Initially, this is factually incorrect, as the District Court found, based on the summary judgment record, that the withdrawal took place during 2014 (App. Ex. C at 20a-21a) and that notice of withdrawal was provided to the Petitioners on April 30, 2015, essentially within a year of withdrawal. Further, courts have found comparable delays appropriate "in light of the complexity of the tasks imposed on the Fund

under the statute and Congress' clear intent to *help* plans collect withdrawal liability." *ILGWU National Retirement Fund v. Levy Bros. Frocks, Inc.*, 846 F.2d 879, 887 (2d Cir. 1988) (one year delay) (emphasis in original). *See also Brentwood Financial Corp. v. Western Conference of Teamsters Pension Fund,* 902 F.2d 1456, 1459-1460 (two year delay); *Board of Trustees of Trucking Employees of North Jersey Welfare Fund, Inc.---Pension Fund v. Canny*, 900 F. Supp. 583, 594-595 (N.D. N.Y. 1995) (six year delay would not support laches claim had it been raised). As the Ninth Circuit further noted in *Brentwood Financial Corp.,* 902 F.2d at 1460, no harm is suffered from such a delay because interest does not accrue until the date notice of withdrawal is provided.

CONCLUSION

The Petition for Writ of Certiorari does not warrant Supreme Court consideration as the Petition fails to establish that the Seventh Circuit's decision is either in conflict with those of other Circuits or conflicts with decisions of this Court. Therefore, the Writ of Certiorari should be denied.

Respectfully submitted,

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