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 CORPORATION, THOMAS EDMIRE, INDIVIDUALLY, WILLIAM EDMIER, INDIVIDUALLY, 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,

Respondents.

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

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases:

Cited Authorities

Statutes:

SUMMARY OF ARGUMENT

The Trustees' Brief In Opposition ("BIO") illustrates both how the Seventh Circuit's decision will be misused to subvert the Constitutional guarantee of due process and create other issues. This Court needs to intervene.

At issue is the right of ERISA recipients of a notice of withdrawal liability under the due process standards established in *Mullane v. Central Hanover Bank and Trust*, 339 U.S. 306 (1950). The Trustees argue due process notice is not required of them under *Concrete Pipe and Products of California v. Construction Labors Pension Trust Fund*, 508 U.S. 602 (1993) BIO 7-8 ("due process notice requirements are inapplicable"). This Court's ruling in *Concrete Pipe* involved a vastly-different issue, whether bias of pension plan administrators was resolved by the neutrality of the arbitrator. This verbal sleight of hand by the Trustees illustrates how due process will disappear.

The Trustees' other arguments lead to future problems which will arise from the Seventh Circuit's decision and inaction by this Court:

> They argue that notice is not required because the ERISA-required arbitration is not a "final" determination, even if not requested, BIO 7-8, despite the language of the Statute and case law;
>
> They argue that the contents of their so-called notice were adequate, BIO 7, 10, while not disputing they misstated the basis of control

> group liability and failed to specify the right to arbitration; and
>
> They argue that Seventh Circuit's decision in *Central States Sothwest and Southwest Area Pension Fund v. Stolky*, 956 F.2d 1369 (7th Cir. 1992), *cert. denied*, 511 U.S. 1018 (1994) controls notice merely because 25 years ago certiorari was denied, BIO 2, 9-10, despite the obvious flaw that *Slotky's* purported standards conflict with *Mullane*.

ERISA defendants need notice, reasonable and complete notice, to protect their statutory rights under the Statute and their Constitutional right to property. The Trustees' arguments demonstrate the serious issues which will arise from this Court's inattention.

I. THE DECISION BELOW CONFLICTS WITH *MULLANE*

The Trustees seize on this Court's conclusions in *Concrete Pipe* that plan sponsors merely engage in an "assessment" of withdrawal liability under ERISA and that their role is "enforcement" of the Statute, similar to that of prosecutor or civil plaintiff. (BIO 4-7) They argue the Court's holding that the plan sponsor was not subject to due process standards for bias in *Concrete Pipe* compels the conclusion that they are not subject to the due process requirements of *Mullane*. (*Id.* at 7-8)

The issue in *Concrete Pipe* was bias, whether the defendant received a fair and impartial determination on the merits of the withdrawal liability claim. This Court

resolved the issue under its existing authorities, which distinguished between whether a party was preforming a judicial function or not. It found due process was satisfied because ERISA provides a neutral adjudicator of the merits, even if the plan sponsor was biased in assessing the liability. 508 U.S. 602, 615-619.

Notice presents a different issue, whether the defendant was provided a reasonable opportunity to appear and object in matters involving possible deprivations of life, liberty or property. The issue arises because Congress delegated the duty of providing notice of the withdrawal liability claim solely to the plan sponsors, rather than establishing another vehicle for service of notice. A neutral adjudicator does not remedy the problem of a defendant's loss of his Constitutional rights, when he is not supplied with sufficient information to appear and present his objections to the plan sponsor's claim. *Concrete Pipe* therefore does not provide a vehicle for harmonizing the Seventh Circuit's decision below with notice; certainly not with *Mullane's* guiding principle that due process requires "in any proceeding which is to be accorded finality . . . notice reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . ." 339 U.S. 306, 314

The Trustees also argue that the arbitration proceeding are not an event "accorded finality" under *Mullane*, even if arbitration is not demanded (BIO 7-9) This arguments ignores the express intent of Congress in Section 1401(a)(1) of ERISA that "any dispute between the employer and the plan sponsor . . . shall be resolved through arbitration." The plain language of Section 1401

(b) (1) leaves no room for a determination of the claim in the courts when no arbitration is initiated. Instead, it forbids a court determination under such circumstances, specifying that "the amounts demanded by the plan sponsor . . . shall be due and owing."

Despite this statutory mandate, Trustees submit their assessment is not final because "the statue requires" them to seek collection in the courts. (BIO 8) The finality of the provision is well settled, as the courts have held that arbitration is mandatory and all defenses are waived by not requesting it. *E.g., Robbins v. Chapman Trucking, Inc.* 866 F.2d 899, 902 (7th Cir. 1988); *IUE AFL-CIO pension Fund v. Bartier & Williamson,* 788 F.2d 118, 129-130 (3rd Cir. 1986); *IAM Nat. Pension Fund v. Clinton Engines Corp.*, 825 F.2d 415, 429 (D.C. Cir. 1987). Also, the Statute actually reads that the Trustees "may bring" a collection proceeding. Further, they ignore the usual rules of statutory construction, including the one requiring a common sense construction, since in the absence of a voluntary payment, how is one to collect the obligation without resort to the courts?

Arbitration, rather than the courts, is the forum which Congress has chosen for the resolution of withdrawal liability claims for their finality. The Trustees' argument reveals how far the Trustees must stray from the statutory scheme in their attempt to reconcile the decision below with *Mullane* and the danger of inaction by this Court.

II. THE TRUSTEES FAILED TO PROVIDE PETITIONERS WITH REASONABLE NOTICE

The Trustee do not, and cannot, dispute that their notice misstated the basis of control group liability under ERISA (See Petition 6) or that it hid the right to an arbitration behind a curtain of citations to the section numbers of the bill in Congress. (*Id.* at 7) Instead, they submit that the Seventh Circuit's decision in *Stolky* "provides the proper standard for evaluating the adequacy of notice" (BIO 2) and that their withdrawal notice comported with the statutory requirements of ERISA. (*Id.* at 7) This is an outrageous statement for several reasons.

First, it does not really address the misstatement of control group liability or the hiding of the right to arbitration in a string of citation of legislative cites. Second, the oblique reference to the statutory remedies alone would seem to invalidate this Court's decision in *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 14 (1978).

Third, the only explanation of control group liability was completely wrong and is indefensible. It equated liability to "*other companies under common control . . . if those companies have also contributed to the Pension Fund*" (Pet. 6) Since the Notice also stated that only the "contribution history of those companies should be considered in calculating withdrawal liability" and none of their other businesses had contributed, the Edmiers were misled into believing they had no risk of liability. (Pet. 17)

The importance of this misstatement of the basis of liability cannot be overlooked. Even accepting the Trustees' contention that the Seventh Circuit's

statements in *Slotky* dictate the adequacy of notice, the misinformation about control group lability explains the Edmiers' failure to appreciate their risk and to ascertain the available remedies to them. The Edmiers inaction under the circumstances could have been easily avoided, if the Trustees had exercised reasonable care in describing control group liability and simply been forth coming in advising the Edmiers about arbitration. (Pet. 14-15)

The Seventh Circuit's opinion leaves one with the impression, as argued by the Trustees, that the Court simply did not want to saddle plan sponsors with any responsibility other than sending out the statutory notice proscribed by ERISA. However, the issue of due process cannot be avoided under the notion originally embraced by the Court that *Mullane* is only applicable to lawsuits (Pet. 12-15) nor the Trustees' notion that *Concrete Pipe* excuses plan sponsors from the dictates of *Mullane*. (Part I, *supra*)

It is time for the Court to revisit the issue of the contents of the notice under the Due Process Clause. Uncertainty should not be tolerated any longer. The Court should expressly state that due process requires an accurate and reasonable description of the basis of liability. This request is consistent with the historic origins of the Due Process Clause. As Justice Gorsuch pointed out in his concurring opinion in *Sessions v. Dimaya*, 584 U.S. ___, 138 S. Ct. 1204, (2018), common law writs afforded English subjects "with what legal requirements they were alleged to have violated and what would be the basis in Court." 138 S. Ct. at 1225. This has been the law for countless generations in America and ERISA litigants deserve as much guidance as English subjects under the common law.

III. SLOTKY IS IRRELEVANT

The Trustees argue that this Court denied *certiorari* 25 years ago in *Slotky* and nothing has changed. (BIO 9)

The Trustees fail to mention that *Slotky* was not treated as substitute for the due process standards of *Mullane* back then, but has been now, at the urging of the Trustees in the District Court.

Technically, the purported standards promulgated in *Slotky* are nothing but dicta because the opinion sustained constructive notice under the facts, distinguishing this Court's decision in *Tulsa Professional Collection Service, Inc. v. Pope*, 485 U.S. 478 (1988), a case decided under the *Mullane* standards. See 956 F.2d 1375. The purported standards which the Trustees now tout (BIO 2) clash with those of *Mullane* which this Court has consistently adhered for seventy years. (Pet. 20-24)

In short, *Slotky* was not intended to and does not provide a reasonable and well thought out substitute for *Mullane*. Further, the Trustee are unable to offer any support for their argument about *Slotky* except another mention of *Concrete Pipe* (BIO 10), an authority never raised to support *Slotky* prior to this Petition and which does not support a departure from *Mullane*. (See Part I, *supra*)

While *Slotky* expresses a deep suspicion of claims of a lack of notice, that concern is obviated by *Mullane's* balancing of the interests of the parties and recognition that the required notice only has to be "reasonably calculated" to provide recipients effective notice, rather

than a guarantee of notice. *Mullane's* standards have been the law and served the Country well. *Slotky* is irrelevant.

IV. PETITIONERS WERE INJURED BY THE LACK OF NOTICE

In *Peralta v. Heights Medical Center*, 485 U.S. 80 (1988), this Court held that invalid notice under *Mullane* voids a judgment, regardless of whether a defendant could show a meritorious defense. (Pet. 24-25) The Trustees argue that *Peralta* is inapplicable, since by utilizing the exception to mandatory arbitration recognized in *Slotky*, the District Court had actually adjudicated the issue of Petitioners' membership in the control group. They claim that Petitioners were not deprived of due process, therefore, because they were not injured. (BIO 11-13)

There are very serious flaws in the Trustees' argument. First, it depends on their tortured reasoning, discussed above (Part I *supra*), that *Mullane's* standards are inapplicable to arbitrations under ERISA, because of this Court's description in *Concrete Pipe* of the role of plan sponsors under the Statute. (BIO at 11, 13)

Second, it ignores the fact that an adjudication or review under *Slotky* is a narrow one concerned only with control group membership, rather than other issues. 956 F.2d at 1378. The Petitioners' complaint relates to the Trustees' delay in issuing the notice of withdrawal liability for two years after the last contribution to the pension plan. During this hiatus the Petitioners spent $650,000 in an attempt to salvage their corporations. The failure to provide Petitioners with Constitutional notice in turn deprived them of the opportunity to prove to an arbiter that all or part of this expenditure resulted from

the Trustees' failure to abide with Section 1399 (b)(1) of ERISA. That provision states "as soon as practicable after an employer's complete or partial withdrawal, the plan sponsor shall" issue the notice withdrawal liability. 29 U.S.C. §1399(b)(1). Two years is not "as soon as practicable."

The Trustees argue that Section 1399 (b) (1) does not provide Petitioners with a viable challenge to the liability claim. (BIO 13-14) None of the cases which they cite, however, are analogous to this case. In none, did the defendant point to a discrete injury occurring before the issuance of the notice of withdrawal; the defendants relied on only the passage of time. In each case, therefore, courts correctly found that injury could not be assumed given the complexity of plan sponsor's tasks and the general purpose of the Statute. *See, ILGWU National Retirement Fund v. Levy Bros. Fracks, Inc.*, 846 F.2d 879, 887 (2nd Cir. 1988); *Brentwood Financial Corp. v. West Conference of Teamsters Pension Fund, Inc.* 902 F.2d 1456, 1460 (9TH Cir. 1990); *Board of Trustees of Trucking Employees of North Jersey Welfare Fund, Inc.- -Pension Fund v. Canny*, 900 F. Supp. 583, 594-95 (S.D.N.Y. 1995)

Congress used the word "shall" in Section 1399(b) (1) in describing the plan sponsor's duty act "as soon as practicable" after a complete or partial withdrawal. Notwithstanding its general intend to help pension funds, Congress certainly expected plan sponsors to act reasonably and responsibly. When a plan sponsor's delay in issuing a notice withdrawal liability causes or contributes to an injury, as here, the plan sponsor should not be accorded blind immunity. The delay here was two years and the cost was $650,000, as much as the liability claimed by the Trustees.

The Trustees implicitly acknowledge as much, arguing that the withdrawal took place in 2014 and their notice was sent to Petitioners within a year. (BIO 13) The 2014 withdrawal date was attributed to Petitioners in the withdrawal notice. See Dkt. # 48-1 at 51. It presented another issue which was not within the scope of *Slotky* and which Petitioners were barred from raising because of the mandatory character of arbitration under ERISA. Still, there was evidence in the record which contradicts the Trustees'claim about the two years.

This case illustrates the wisdom of this Court in recognizing in *Peralta* that a violation of *Mullane's* standards warrants "wiping the slate clean." Petitioners should not have been deprived of the opportunity to marshall and present their proof to an arbiter.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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