OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC., Petitioner v. CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA

CASE NO: 91-904

PLACE: Washington, D.C.

DATE: Tuesday, December 1, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

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CONCRETE PIPE AND PRODUCTS OF :

CALIFORNIA, INC., :

Petitioner :

v. : No. 91-904

CONSTRUCTION LABORERS PENSION :

TRUST FOR SOUTHERN CALIFORNIA :

- - - - - - - - - - - - - - - - - - -X

Washington, D.C.

Tuesday, December 1, 1992

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

DENNIS R. MURPHY, ESQ., Sacramento, California; on behalf of the Petitioner.

JOHN S. MILLER, JR., ESQ., Los Angeles, California; on behalf of the Respondent.

CAROL C. FLOWE, ESQ., Washington, D.C.; on behalf of the amicus curiae supporting the Respondent.

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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 91-904, Concrete Pipe and Products of California v. Construction Laborers' Pension Trust.

Mr. Murphy, you may proceed.

ORAL ARGUMENT OF DENNIS R. MURPHY

ON BEHALF OF THE PETITIONER

MR. MURPHY: Mr. Chief Justice, and may it please the Court:

Although it was fully cognizant of the decisions in Gray and Connolly, Concrete Pipe and Products asked for hearing because it believes the assessment of withdrawal liability under the Multiemployer Pension Plan Amendment Act is unconstitutional when applied to the facts of this case.

Concrete Pipe and Products requests the Court rule that the Multiemployer Pension Plan Amendment Act is unconstitutional under the substantive due process and takings provisions of the Fifth Amendment. It also asks the Court rule that the presumptions that are set forth in 29 U.S.C. 1401 deprive CP&P of the guaranteed right to procedural due process.

The facts which distinguish Concrete Pipe and Products from Gray and Connolly are the lack of connection

between Concrete Pipe and Products and those who will benefit, the imposition of liability without responsibility, the imposition of liability without regard to the employee's expectations, the fact that the act uses an irrational formula of increasing liability on the basis of the amount of contribution, and the retroactivity involved in this case.

With respect to the first fact, the lack of relationship between Concrete Pipe and Products and those who will benefit, it should be noted that this act would require Concrete Pipe and Products to use its funds for the generalized benefit and needs of members of society who have never had any relationship with CP&P.

QUESTION: Yes, they have had a relationship. They were involved in the same base of companies that joined together in this plan. That's a voluntary relationship. Your client voluntarily went into that relationship with the other companies.

MR. MURPHY: Justice Scalia, our company voluntarily went into the relationship, and the relationship was defined that they went into at the time was a defined contribution -- the plan held itself out to be a defined contribution plan to the extent allowed by ERISA. ERISA allows defined contribution plans. The plan --

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QUESTION: At the time. At the time it did. Does it still?

MR. MURPHY: Oh, yes. ERISA still allows defined contribution plans. Yes, Justice White.

QUESTION: But the plan that you entered, your company entered into, is not acknowledged, I gather, as a defined contribution plan under ERISA.

MR. MURPHY: In 1976, when they entered the plan, it was considered to be a defined contribution plan. I should take note that there are certain allegations --

QUESTION: Well, it since then decided that it is not, correct?

MR. MURPHY: I do not believe that is correct. I think that is an unresolved issue. The Nachman decision by this Court discussed a case and held that a particular plan was a defined benefit plan, but that case is distinguishable in many respects from this particular plan.

QUESTION: Well, I thought you didn't raise the issue here or argue this case or present it to us on the basis that it's a defined contribution plan.

MR. MURPHY: We did not --

QUESTION: I thought we took it on the assumption that it was not --

MR. MURPHY: That it's --

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QUESTION: That it's a defined plan. You didn't raise that.

MR. MURPHY: We did not raise it, but we do not necessarily concede that it is a defined benefit plan. This is not an issue that is before the Court as we argue the case today. However --

QUESTION: Well, I guess as we take it, we have to consider that it is not, even though perhaps it could have been argued differently below.

MR. MURPHY: Perhaps it could have been argued differently below, and it is -- certainly to assess liability under the statute it has to be a defined benefit plan, and certainly it has been considered, I presume, by the deciding parties that it is a defined benefit plan in assessing liability, since the statute clearly states that there is no withdrawal liability with respect to a defined contribution plan.

And we are not here asserting that it is not a defined benefit plan, but we are asserting elements of it as it gave notice in 1976, because I believe as the original question was, what was the intent of the parties in 1976.

QUESTION: Well, the only thing I can see that you might not have assumed the risk for back in joining the plan was that the withdrawal liability might take up

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to 50 percent of your net worth instead of 30 percent, as ERISA had limited.

MR. MURPHY: In -- it was a very contingent risk under the original statute.

QUESTION: Under the original statute there was a contingent withdrawal liability of amounts up to 30 percent of the net worth.

MR. MURPHY: But not as to defined contribution plans, and it's clearly conceded that in 1976 everyone believed this to be a defined contribution plan, so if you're asking what the intent of the parties were in entering this relationship and whether they agreed to become liable for this type of debt when they entered the plan on December 1, 1976, they did not agree to assume liabilities to other employees in 1976. They had no notice of that.

The court from the very jurisdiction of which this case arises, the Central District of California, had just held that similar types of plans were defined contribution plans. The allegations in our complaint, paragraph 14, alleges that it was a defined -- understood to be a defined contribution plan, and the answer did not deny that. The answer said that is basically true until 1978.

QUESTION: They were wrong about that. They

were just wrong about that.

MR. MURPHY: But if you -- if the issue is when they -- there was no --

QUESTION: Well, the issue is what their reasonable expectations were, and you don't have a reasonable expectation that's contrary to the law.

MR. MURPHY: Well, you have a reasonable -- they entered a plan and they did nothing contrary to the law.

QUESTION: No, but you're telling us you thought it was a defined benefit plan and it turned out not to be, or vice versa, and I mean, that's your problem. I don't see how that renders the Government's ability to deal with you as someone charged with that knowledge who entered into that arrangement, I don't see how it changes the Government's ability to deal with you in that capacity.

MR. MURPHY: Well, I think the Government's ability to deal with us depends -- I think what we are pursuing in this action is that the Government has been recognized to be limited in its ability to deal with us, and the Government's ability to deal with us is that it can't charge one member of society for debts with which it is unrelated, and there must be some reasonable relationship in the legislation.

And in this instance we assert that there is no reasonable relationship between CP&P and those employees

who -- or those employees of other employers who will receive the benefit of these payments, and that is one of the primary thrusts of our argument before you, Justice Scalia.

As a matter of fact, it was interesting that in the Connolly argument Mr. Felner, arguing on behalf of the PBGC, indicated that it required the employer to pay for consequences of its own conduct, and when he was asked by one of the members of the court, what if it was not the fault of the employer, and he specifically stated that's not before us, and the takings clause involves transfers of the property between unrelated parties.

QUESTION: Well, Mr. Murphy, let me put it this way. Suppose -- just suppose -- that instead of your situation there had been a defined benefit plan and that's what the company entered into --

MR. MURPHY: If the --

QUESTION: And -- and entered into on the date that was applicable here after ERISA had been enacted.

MR. MURPHY: I believe the case --

QUESTION: Now, under that assumption, I assume that you would acknowledge that the company could be liable for withdrawal liability up to 30 percent of its net worth.

MR. MURPHY: If they understood at the 1976 that

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they were a defined benefit plan, they would have therefore, under force of statute, been constructively -- had constructive knowledge that they would have been liable up to 30 percent.

QUESTION: You acknowledge that.

MR. MURPHY: Correct.

QUESTION: Well, since you didn't raise the question about this not being a defined benefit plan, isn't that precisely how we have to view it here?

MR. MURPHY: Well, we can view it as a defined benefit plan here, but what we are trying to do here as I understand it is to determine whether the application of the Multiemployer Pension Plan Amendment Act that was passed in 1980 is applicable -- is constitutional under the substantive due process clause and the takings clause, and I think that that --

QUESTION: Well, the only thing that added was that they could go up to 50 percent of the net worth. Now, maybe you didn't anticipate that all right, but --

MR. MURPHY: Actually, it added it go up to any amount well over 50 percent --

QUESTION: In your circumstances --

MR. MURPHY: In our circumstances.

QUESTION: It amounts to 50.

MR. MURPHY: But to assess us with the

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responsibilities under this act, we believe that they have to establish a nexus between our conduct and our promises and these payments, and what we're trying to demonstrate is that there was no reasonable -- and as we state in our reply brief, if you were going to analogize to a joint venture or an insurance fund, there has to be some promise made, and there's no reasonable basis for asserting a promise.

The trust fund itself at that point in time was representing itself to be a defined contribution plan. The trust fund itself represented to the employers that they would have no obligation for this. The trust fund itself represented to the employees that there were no guaranteed benefits, and that was the -- those were undisputed facts in this case, and based on those facts, there was no knowing or no constructive promise by Concrete Pipe and Products to pay the unfunded liability of employees of other employers.

Your Honor, I also -- we've -- I've touched upon it, we also assert that the fact that the statute imposes liability based on the amount of contributions is itself as demonstrated by the facts of this case unconstitutional and irrational.

We have demonstrated by the facts of this case that Concrete Pipe and Products has paid over two times

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the amount of money necessary to fund the credits earned by its employees, and that assumes all of its employees vest, and we know, of course, under the Ponds case that 96 percent don't ever vest, and we didn't have enough time in business for them to vest while on our employment.

QUESTION: Isn't it also the case that the more you pay indicates the more likelihood of proportionately large claims down the road? Isn't that fair to say?

MR. MURPHY: If it was related -- the more we pay related in some way to the credits or the vesting of employees, but --

QUESTION: Well, you're now -- if I understand you, you're now turning to a second argument, and that is, during the period in which we paid our employees did not work long enough to have vested benefits, but it seems to me that that argument is foreclosed by the fact that the very point of the act was to aggregate the periods of employment, so I don't see how you can make that argument.

MR. MURPHY: The argument I'm making with that fact is that the point of the act and the point of prior decisions is that an employer must pay for the liabilities that arose as a result of its participation, and this formula does not determine or even come close to determining liabilities that arose as a result of its participation.

They concede in their opposing brief that as a result of our participation the employer not only funded all the credits earned by its own employees, but also twice that.

QUESTION: Well, isn't it enough if you have a reasonable plan that, in most cases, on average would indeed hit the employer with the liabilities that arose by reason of its participation?

Now, in some instances the scheme might not work out that way, as in your case, because your employees quit before the 10-year cliff vesting, but that doesn't make it an irrational scheme, does it, just because in some cases it won't work out perfectly?

MR. MURPHY: Well, the law does not have to work out perfectly, but the law has to have some relationship between the harm -- the legislation has to have some rational relationship between the harm that it is trying to address and the remedy that is provided.

QUESTION: In each case, or just generally.

MR. MURPHY: Well, I would think that in general the statute has to, but in general this formula does not address that. The formula says that you simply give money.

We don't have any nexus between how much money you gave and how much the liability is, and the more you

give the more you owe, so in our case if we had just paid enough to fund our credits, the withdrawal liability would have been approximately $55,000, but they don't even try and make a relationship. It doesn't address it.

QUESTION: As Justice Souter says, ordinarily the more you pay the more you do expose the -- the more your operation does expose the fund to greater liability. As a general rule that's true, isn't it?

MR. MURPHY: I don't think so. As a general rule there has to be a relationship with how many hours of credit or how many months and years of credit are earned. As a general rule, at this point in time most employers are paying far more than the credits that are being earned, as a general rule.

QUESTION: Are you suggesting the payments should only relate to vested benefits? Is that your point?

MR. MURPHY: The -- we are suggesting the payments should -- and the formula should only relate to vested benefits.

QUESTION: So that if you're in business less than 10 years, you'd have no withdrawal liability.

MR. MURPHY: Well, I would even go so far as relate to vested credits.

QUESTION: Am I right about -- under your theory

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you should have no withdrawal liability if you contribute for less than 10 years?

MR. MURPHY: No. My theory would be that we would have no withdrawal liability if we contribute enough to fund the credits that are being earned, because these employees may perhaps go from our employment to another employer and then finish their --

QUESTION: Well, assume all of your employees had no prior employment within the industry. Then I think under your theory you would have no withdrawal liability until after a 10-year period.

MR. MURPHY: That is one theory, but we don't have to go that far, because our proof is --

QUESTION: It seems to me that's where your argument takes you, if I understand it.

MR. MURPHY: No. We believe that we can step back one step and say if we have fully funded all the credits, assuming they will vest --

QUESTION: Well, but if your employees have no vested benefits, they're fully funded by zero.

MR. MURPHY: Well, there is no vested -- there is no -- by definition, there is no vested liability at that moment in time, but there are 2-1/2 years of credits toward the 10 years, and we have fully paid for those 2-1/2 years of credits.

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QUESTION: Yes, but you would then therefore have no withdrawal liability.

MR. MURPHY: We would have no withdrawal liability.

I would also like -- I believe that while we are discussing this, address the presumptions issue, too, since that is a significant issue.

Under 29 U.S.C. 1393, the trustees are to determine the unfunded liability by using their best estimate of anticipated experience in determining the interest rates to apply.

Under the presumptions that are used in deciding the issue, there is no opportunity to determine whether they did or did not use their best estimate.

Under the presumptions, an employer could be forced to pay hundreds of thousands of dollars in withdrawal liability when, under the most likely evidence, there is no underfunding at all, and this can occur because the trustee's determination as to the interest rate must be accepted unless the employer proves by a preponderance of the evidence that their determination is unreasonable.

So while the statute says they're supposed to use their best estimate, the statute does not allow Concrete Pipe and Products to prevail in this case by

going in and addressing the proof issue that they did not use their best estimate.

Because of that, this is not truly a presumption.

QUESTION: You say that the Constitution requires that Congress say that if the trustees are going to use their best judgment that they must prove by a preponderance of the evidence?

MR. MURPHY: I don't -- I have no problem with merely switching the burden of proof and allowing us to address best estimate, Chief Justice Rehnquist, but the statute does not allow us to do that. We could not go into that arbitration and present to the arbitrator Concrete Pipe and Products should win because the best estimate is this.

We were limited before the arbitrator to attacking their presumptions on, is it within the realm of reasonableness, and of course they all concede, including the trust funds themselves in their brief, that liability can vary widely depending on the assumptions, and that they further concede that the assumptions can be reasonable and yet result in no underfunding whatsoever, or large amounts of underfunding, and given the nature of what they're allowed to determine --

QUESTION: I thought you said you could prove by

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a preponderance of the evidence that they were in error, and then you would prevail under the statute.

MR. MURPHY: We cannot prove by a preponderance of the evidence that they did not use their best estimate. At no point is there a proceeding where we can present that proof.

All we can attack, and all we can focus on, is are they in this conceded, everybody concedes there's a wide range of reasonableness and that on the one hand has no underfunding and on the other hand has huge amounts of underfunding, and this is not a presumption, it is a barrier to proof. It will not allow us to go in and say the best estimate, as required by 1393, is this interest right here.

That is not the issue in the arbitration, and there in fact have been numerous arbitration decisions where the result was that the arbitrator has found that it's within the realm of reasonableness, maybe not the most reasonable, but that it has to be upheld because it's within this wide range that varies from no liability to huge liability, and that is --

QUESTION: That is simply the estimate of the interest rate.

MR. MURPHY: That is the estimate of the interest rate, and then they apply that interest rate to

the presumptive formula and come up with their unfunded liability determination, and in so doing -- in so doing they have prevented Concrete Pipe and Products from addressing the issue, and they've --

QUESTION: What is open to you at arbitration to prove with regard to the interest rate?

MR. MURPHY: We have to prove that it is not -- with respect to the interest rate, that it is not within this wide range of reasonableness, that in this case they used 6 percent for future funds which their actuary admitted that it was on the low end of reasonable, it was lower than their last year's 10 years experience, but he also figured in that there might be future increases in the benefits and so therefore used that, which is not in the statute at all.

Had he used 9 percent, which was the Government fund at that time, the liability would have been significantly less. Had he used 10 percent or 11 percent there would have no liability.

QUESTION: Are you talking about the trustees or the actuary?

MR. MURPHY: Well, this is -- the trustees hire actuaries. The actuaries make these calculations and come up with their recommended formula.

QUESTION: So it's the actuaries' judgment that

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you seek to challenge, the best estimate.

MR. MURPHY: It is --

QUESTION: Is that made by the actuary or by the trustees?

MR. MURPHY: It is originally made by the actuary, and the actuary is hired by the trustees, and the trustees are well aware of the various philosophies of the actuaries when they hire them, so they can go hire actuaries who are very conservative and use very low rates, they can hire actuaries that are known to be more liberal and use higher rates, or they can use actuaries they know have been -- used more moderate rates, and it's their determination as to which actuary they use.

QUESTION: That's okay. You don't challenge that as being in any way unconstitutional, do you?

MR. MURPHY: I don't challenge the fact that they go hire the actuary.

QUESTION: Right.

MR. MURPHY: I challenge the fact that I can't go into the arbitration and establish that the actuary's low 6 percent interest rate is not the best estimate of the plan's anticipated experience.

QUESTION: Not that actuary's best estimate, is that what you want to be able to show -- that the actuary was acting in bad faith --

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MR. MURPHY: No, I want to show --

QUESTION: Or that he was just in error?

MR. MURPHY: I want to show that that is not the best estimate of the anticipated experience, and I am prevented from doing that.

QUESTION: Are you saying a presumption of reasonableness is per se a denial of procedural due process?

MR. MURPHY: In this -- Justice Souter, in this case the presumption of reasonableness is because of the nature of what we are dealing with. We are dealing with a prediction of the future, and we are dealing with a range that --

QUESTION: So as a utility rate, wouldn't the same argument apply in a utilities appeal?

MR. MURPHY: Well, certainly a same scheme might apply, but I have no problem with Concrete Pipe and Products having go prove that it is not the best rate, and this is the best rate, but I want to be allowed the opportunity to do that.

QUESTION: In other words, it is the presumption of reasonableness which is per se a denial of procedural due process.

MR. MURPHY: It is the presumption that it is within the range of reasonableness, the wide range of

reasonableness that we are attacking.

QUESTION: I thought you had a perfect opportunity to prove that it was beyond the range of reasonableness. If you can present convincing evidence to that effect, then you're going to carry your burden.

MR. MURPHY: But it is conceded that the range of reasonableness when using these investment funds go from very low to high and from no liability to large liability, and there is no opportunity to have any realistic determination of what is the most likely result.

QUESTION: So you're saying that the concept of reasonableness that the actuaries use and the arbitrators accept is itself unreasonable.

MR. MURPHY: The concept, the range of reasonableness and if it's within the range of reasonableness it's okay, is being attacked by us.

QUESTION: Mr. Murphy, isn't the sort of a fact of life in this area that the picking the interest figure does involve some area of judgment and prediction about unknown economic conditions in the future, so necessarily it has to be a range figure, doesn't it?

MR. MURPHY: It does not necessarily have to be a range --

QUESTION: Do you think -- and you think it would be susceptible of proof at a particular point in

time what the exact proper figure was.

MR. MURPHY: I think that proof of what the most likely proper figure is is something we can discuss or present in arbitration --

QUESTION: Now, what if you have four experts come in before -- and each of them picks a different figure, one takes 6, one 7, one 8, and one 9, what is the arbitrator to do?

MR. MURPHY: The arbitrator is to determine what is the best estimate in view of prior performance and likely experience.

QUESTION: He has to say one of the four is right and the other three are wrong.

MR. MURPHY: I believe that that's what -- unless they do that --

QUESTION: That assumes a degree of certainty about future economic conditions it seems to me quite unrealistic.

MR. MURPHY: It is a difficult standard, but then again, the results of such a determination are the difference between losing half of your assets and on the other hand -- and certainly, due process --

QUESTION: I know it's a very important decision. I'm not suggesting otherwise, and I can see why it -- you know --

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MR. MURPHY: Due process has never turned on the easy, whether it's easy or not easy, it's turned on whether it is fair, and it gives a just opportunity --

QUESTION: For example, in this particular case, 6 percent probably looks a little more reasonable today than it did at the time when it was made, because interest rates have gone down, I guess.

MR. MURPHY: Interest rates have gone down, but if they went back and determined based on the 10 preceding years, they have to use some evidentiary standards, and that's all we're asking, is that we be allowed to show that this isn't their best estimate, and we are prevented from doing that.

QUESTION: Would you make the same due process argument if the trustees were neutral?

MR. MURPHY: If the trustees were neutral, this obviously springboards you into the biased decisionmaker, and we contend that they are a biased decisionmaker. If we had access --

QUESTION: But would you make -- if the trustees were neutral, would you make the same argument --

MR. MURPHY: If the trustees were neutral --

QUESTION: With reference to the reasonableness of the presumption.

MR. MURPHY: It was go to defeat our argument,

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because then we would have an unbiased decisionmaker, and we do not have an unbiased decisionmaker.

QUESTION: Couldn't Congress place exactly the same obligation on you to act as your own trustee for the benefit of the employees that it places upon these independent trustees?

MR. MURPHY: Well, in single employer plans they're usually --

QUESTION: No, I'm just talking if Congress had simply written the law differently, and said that you the employer may act as the trustee of a plan for your employees, Congress could put exactly the same obligation on you by statute that it puts on these trustees, doesn't it?

MR. MURPHY: It would put the same --

QUESTION: You then wouldn't be a biased decisionmaker, you would simply have an obligation not to yourself, but to your employees, or to the beneficiaries.

MR. MURPHY: We would, but these particular people aren't my clients, they are under 29 U.S.C. 1104 to have their fiduciary obligations solely to the beneficiaries for the exclusive purpose of providing benefits and deferring expenses and under the NLRB Amax Coal case it is specifically held that these trustees' duty is antithetical to the interest of the contributing

employer -- I had to look that up, that -- the definition being in direct and unequivocal opposition to.

So it has been already determined that their bias is for the beneficiaries in the trust and not in opposition to that of the employer.

Thank you. I'll save the rest of my time for rebuttal, if I may.

QUESTION: Thank you, Mr. Murphy. Mr. Miller, we'll hear now from you.

ORAL ARGUMENT OF JOHN S. MILLER, JR.

ON BEHALF OF THE RESPONDENT

MR. MILLER: Thank you, Mr. Chief Justice, and may it please the Court:

There are two -- the issues before the Court today fall into two groupings. One is the extent to which the statute imposes upon Concrete Pipe and Products a biased decisionmaker in the form of the trustees. The other issues before the Court really all group into whether the product which Concrete Pipe and Products purchased was what it thought it purchased.

Whether the statute constitutes a taking, whether it constitutes a denial of substantive due process, or whether the actuarial presumption is unconstitutional, depends on the nature of these kinds of plans, and these plans are not as Concrete Pipe and

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Products represents.

The Connolly v. PBGC and Gray cases validated the statutory scheme that the Laborers Pension Trust operates under. The original premise of that pension trust was that employees -- employers would begin contributing today, they would grant pensions for employees who had years of service prior to the existence of that plan, in this case all the way back to 1937.

That was made possible by acts of Congress as it went forward, and Congress had experience with the failures of those plans. It enacted ERISA.

Prior to ERISA, this plan agreed with -- the employers and the union agreed that the risk of loss would be on the participants in the plan. If there were inadequate funds to pay, then those who thought they had pensions would not have pensions.

Congress saw fit to change that in 1974. It adopted the original title IV which had a 30 percent net worth risk on the contributing employer. That's 30 percent net worth on the employer defined as the control group, not defined as Concrete Pipe and Products, a subsidiary in Shafta, California. It would be the entire company.

There is the -- when Concrete Pipe and Products came on board in 1976, after ERISA was in place, in 1980,

the Multiemployer Pension Plan Amendments Act did alter the nature of its liability from a contingent risk of 30 percent of its control group assets to what Concrete Pipe and Products estimates is a 50 percent liability for that subsidiary. There's no evidence that it is more than 30 percent of the control group.

QUESTION: Well, why didn't ERISA as it was originally promulgated create a distinct investment base backed expectation in the petitioner that its withdrawal liability, if any, would not exceed 30 percent of its net worth?

MR. MILLER: The answer to that, I believe, is --

QUESTION: That was the expectation under ERISA.

MR. MILLER: The contingent liability of 30 percent, that's correct. And in Gray and Connolly v. PBGC, it was acknowledged that the 1980 act was a prophylactic extension which Congress had the ability to adopt because of the considerations of --

QUESTION: But on an as-applied challenge, it seems to me you may run into trouble on the excess over the 30 percent.

MR. MILLER: That argument is equally availing on a facial challenge, because every employer who contributes to the plan and chooses to leave the plan has

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that same exposure, and I suspect --

QUESTION: But unless it's applied and assessed in an amount over that, you don't really have the problem, but here it has been, apparently.

MR. MILLER: Well, that is not in the record, as I understand it. What is estimated is that the liability of Concrete Pipe and Products exceeds 30 percent of the subsidiary net worth, not necessarily the parent company which is the -- which wholly owns that subsidiary, so they have not shown on an as-applied basis that there is even that differential.

Secondarily, the other misperception is that the plan which they purchased did not have benefits that would warrant that kind of adjustment of economic cost by Congress.

These kinds of plans, the change that Congress wrought upon the industry was to say from here forward not only do you have to -- you, the employers, have to pay in sufficient contributions to provide pensions for those who are already vested, already retired, who'd worked from 1937 on, you're going to have to speed up the funding that future employers would otherwise have paid to provide retirement for your employees.

So beginning in 1974, a compression began to take place in the industry where employers had to fund the

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past contributions and they had to fund the contributions, the service credits that were being earned currently.

That is reflected in the table that is reproduced in our brief that shows that today, or that as of 1982, the employers who remained in the plan were paying $3 an hour for funding of previously promised benefits and the projected cost of the current hour that was worked was merely 55 cents, or thereabouts.

Now, those employees who earned -- such as Concrete Pipe and Products who earned a contribution that was worth 55 -- that would cost 55 cents today to pay it in the future have an expectation, and Concrete Pipe has an expectation, that when those employees actually retire, they won't be receiving whatever the dollar -- unit dollar amount is for the monthly credit that they're paid today (in the record it shows $43.12 a month per year of service).

Rather, as the years go by and contributions render it possible and inflation occurs, trustees have the discretion to make further changes. That was the attraction to a plan like this. It is not a plan that is a percentage of your final year's salary, it is a plan where the monthly credit is specifically defined on a year-by-year basis and it increases over time.

Concrete Pipe and Products says there's no

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relationship to us; we got no benefit from this plan. That is not in the record. They have not seen fit to adduce evidence as to the value of the benefits that their employees earned, how many of their employees are retired, how many of their employees are vested, what the actuarial cost of those employees may be on the plan.

The actuarial cost of the service that they contributed for may well exceed not only the $100,000 that they paid in in contributions, it may also exceed the $200,000 that they're being charged on withdrawal liability. On an as-applied basis, it's simply not before the Court.

The actuarial presumptions are a part of this package that an employer purchases. The actuary that made the withdrawal liability calculation is the actuary that was the actuary for the plan in the year that Concrete Pipe and Products became a contributing employer.

Part of the package that they acquired was that actuary. The actuarial assumptions about which they complained today are the actuarial assumptions that that actuary was using when they began, and the methods that that actuary was using, when they began contributing and when they left contributing.

The record shows that the changes in actuarial assumptions that were applied to Concrete Pipe and

Products by the actuary as a matter of withdrawal were actually more generous than the assumptions that were strictly being used by the actuary for the plan, because they gave credit for higher interest rates being earned on assets on hand reflective of PBGC's single employer termination rates, and they only retained the 6 percent actuarial investment return assumption for the unfunded portion of the plan and even as to that, they excluded from that the assumption that that 6 percent would cover the expenses of operating the plan.

QUESTION: Mr. Miller, you're saying that the actuary who made the interest rate determination was the actuary who was employed by the plan at the time the petitioner here got into it?

MR. MILLER: Yes. They came on board at approximately the same date that this employer began participating in 1976.

QUESTION: But their expectation was not that the same interest rate would apply. It doesn't seem to me to be very persuasive to say that indeed, the interest rate he applied later was even a little better for them than the interest rate he applied earlier.

Their expectation was not that he'd use the same interest rate, but that he would choose the best estimate. It may well have been that 6 percent was a good estimate

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earlier, but when interest rates went down from 12 percent to 7 percent, maybe he should have gone down to 4.

MR. MILLER: Well, what I'm suggesting, Justice Scalia, is that the methods that the actuary uses to arrive at the 6 percent factor are -- the methodology is on-going.

It is the same methodology from the day that they began to present, and when withdrawal liability became a factor and an employer left, the contention is not that the actuarial assumptions are wrong for an on-going plan, the contention is that a withdrawing employer is being unconstitutionally impaired by being unable to challenge the actuary's assumptions, and what I'm suggesting is that those assumptions, the only assumptions that are different from a withdrawing employer than an employer who purchased the plan are the five assumptions that are set forth in the record, and those are generally more favorable to the withdrawing employer than they are for the ongoing employers.

QUESTION: The date that the employer withdrew from the plan is also something that's determined by the trustees, is it not?

MR. MILLER: In terms -- the date that the -- our perception of withdrawal is that whether or not an employer withdrew from the plan is a matter of law. It is

objectively determined. We may not know that the employer --

QUESTION: So do the -- do the trustee's determination of the withdrawal date, is that entitled to any deference in the reviewing court or deference before the arbitrator?

MR. MILLER: The presumption would apply -- the presumption in favor of the trustee's determination does apply to all determinations. That's in this case --

QUESTION: So assuming the trustees are biased decisionmakers, you then have a presumption being given in favor of the biased decisionmakers.

MR. MILLER: That begs the question as to whether or not they are decisionmakers. We contend that they are clearly not decisionmakers, they are in the nature of a prosecutor who simply investigates, ascertains that a complaint needs to be issued, and then proceeds --

QUESTION: And whose judgment is entitled to a presumption of reasonableness.

MR. MILLER: Whose -- yes, who has the burden of proof accorded to it under this particular statutory scheme, which is not -- we submit is not an issue of constitutional moment, and that in reality what is happening is that the law says if you quit contributing to a plan, you owe that plan your share of the unfunded

vested liability unless you, the employer, can qualify for an exception. It is your burden to prove that you are entitled to an exception, and viewed in that fashion, the burden is placed entirely appropriately upon the employer --

QUESTION: No, but it isn't just a matter of burden, they -- it is not enough for them to prove that it's wrong. They have to prove that it's unreasonable.

MR. MILLER: They -- unreasonable, or they have to prove --

QUESTION: That doesn't mean just wrong. It can be wrong but reasonable, you know. Somebody could have --

MR. MILLER: If it is still a burden, it is -- we submit that it doesn't rise to a constitutional deprivation to have a stronger burden for them to carry.

This case is illustrative, however --

QUESTION: To have a biased decisionmaker make a decision against you that is wrong, and you can't overturn unless it is in addition to being wrong, unreasonable.

MR. MILLER: The -- we submit that the trustees are not decisionmakers. They hold no hearings, they adjudicate nothing.

The arbitrator is the first adjudicator. The arbitrator decides questions of law which -- these tend to

be mixed questions of law and fact de novo. That is reviewed de novo in the district court on the questions of law. The presumptions are -- accord facts, are with respect to facts, and those are -- I will let PBGC address that.

Thank you.

QUESTION: Thank you, Mr. Miller.

Ms. Flowe -- is it Flowe, or Flowe?

MS. FLOWE: Flowe, Your Honor.

QUESTION: Ms. Flowe, we'll hear from you.

ORAL ARGUMENT OF CAROL C. FLOWE

ON BEHALF OF THE AMICUS CURIAE

SUPPORTING THE RESPONDENT

MS. FLOWE: Thank you, Mr. Chief Justice, and may it please the Court, PBGC did not participate in this case below, but when we learned that the Court had agreed to hear it, we did ask to participate because of the importance of this act to the financial stability of multiemployer plans as well as to our insurance program which protects the pensions of the millions of workers in those plans.

At the outset, I'd like to talk a little bit about these presumptions and what is and isn't properly before the Court today. Section 1401(a)(3) has two presumptions applicable in arbitrations under the act.

The first presumption in subsection (a) applies to determinations made by the plan trustees. I'll refer to that as the trustee presumption.

The second presumption is a more specialized presumption in subsection (b) and applies to the establishment of actuarial assumptions by the plan's actuary.

QUESTION: How was that involved in the Young case, the 4 to 4 split case?

MS. FLOWE: Only the trustee presumption was found unconstitutional by the third circuit in Young and McDonald.

QUESTION: Our 4 to 4 split affirmed that.

MS. FLOWE: That's correct, Justice White -- left that decision standing.

QUESTION: And the withdrawal date's a trustee assumption, not an actuarial assumption, of course.

MS. FLOWE: That's correct, to the extent that it involves disputed issues of fact. The trustee presumption does apply only to factual determinations of the trustees.

QUESTION: Why is that presumption couched both in terms of reasonableness and clear error?

MS. FLOWE: Because, Justice Souter, there are different kinds of determinations that have to be made

under this act by the plan trustees, and while we certainly acknowledge that this language is inartfully drawn, we believe that Congress chose those different terms to apply to different kinds of determinations.

For example, there are some determinations the trustees have to make that just don't have a right or wrong answer. They're questions of judgment, factual judgment, and so they can only be evaluated on whether their judgment was reasonable.

As far as the clearly erroneous part of that language, there are other determinations which the trustees will make and that will apply to all employers who withdraw in a particular year from that plan. We believe in order to ensure uniformity and consistency and so that arbitrators wouldn't reach compromise decisions, that Congress wanted the employer to have to show that those determinations were clearly wrong and not just simply wrong.

QUESTION: Now, what's the relationship between those two standards and the de novo review standard that Mr. Miller was speaking of at the time his time expired?

MS. FLOWE: The -- this entire presumption applied only to factual determinations of the plan trustees. Questions of law, or mixed questions of law and fact, are determined de novo.

QUESTION: Well, is the ultimate --

MS. FLOWE: Those that the --

QUESTION: Excuse me. Is the ultimate determination that the withdrawal date was August 15th rather than September 30th, is that a mixed question?

MS. FLOWE: Again, it would depend on the facts and circumstances of the particular situation. In this case, the facts were stipulated. All the facts were stipulated and undisputed, and so all the arbitrator did here was interpret the law as applied to those undisputed facts --

QUESTION: So that the appeal --

MS. FLOWE: And he didn't have --

QUESTION: I'm sorry. I didn't mean to interrupt.

MS. FLOWE: I was just going to -- so he didn't use the presumption in deciding the question here, and appropriately so.

QUESTION: And therefore the arbitrator reviewed it on a de novo basis as a mixed question as to which there was no factual dispute.

MS. FLOWE: He independently analyzed how the acts should be interpreted as applied to these facts and reached a decision without regard to any presumption at all in this particular instance, and in fact this trustee

presumption was applied to no issue --

QUESTION: So --

MS. FLOWE: In this case.

QUESTION: So the trustee presumption really, as it comes to us, isn't involved in this case at all.

MS. FLOWE: That's correct, Justice White. Just as the Court said only 2 weeks ago in Church of Scientology, the Court just lacks authority to declare rules or principles of law where it won't affect any matter at issue in the case.

QUESTION: Did the arbitrator specifically disclaim reliance on the presumption?

MS. FLOWE: The arbitration was bifurcated. The first arbitration proceeding addressed the date of withdrawal question. He doesn't even so much as mention the presumption, even its existence, in that part of his decision, in that first decision.

QUESTION: Is it your position that there is no presumption as to matters of law?

MS. FLOWE: That's correct.

QUESTION: Is there a presumption as to mixed matters of law and fact?

MS. FLOWE: Not to mixed questions either, that those two --

QUESTION: There's no presumption as to this.

MS. FLOWE: Correct.

QUESTION: Well, what was the decision below on these presumptions?

MS. FLOWE: The -- in the 9th Circuit there was a precarium one paragraph decision issued referring back to a previous decision of the 9th Circuit in a case called Thompson, where they had upheld all of the act's provisions.

QUESTION: Well, so they actually ruled on the merits of the presumptions, so they didn't say that the presumptions -- that either -- they didn't say the trustee presumption was not implicated here.

MS. FLOWE: They just didn't say.

QUESTION: They actually ruled on it.

MS. FLOWE: Correct. To the extent --

QUESTION: How about the district court?

MS. FLOWE: The district court considered itself bound by the 9th Circuit's prior decision in Thompson as well.

QUESTION: So they ruled on it, too.

MS. FLOWE: In effect, that's correct.

Arguably, we would think that the actuarial presumption is also not before the Court here today. While the arbitrator did in fact recite the existence of that presumption in reaching his decision, it seems pretty

clear in analyzing what he did in that opinion, is that he weighed the evidence and the other testimony that was presented to him and concluded on that basis alone that the plan's assumptions were reasonable, but the thing that seems clear to us is that in any event these actuaries who do plan assumptions are in no way either biased or adjudicators.

I mean, they're not doing an adjudicative function. This isn't a case-specific kind of task that they perform. Rather, they are required by law to set these assumptions in advance of the withdrawal of any employer to whom they will apply, and then they have to be applied across the board for the period that they're in existence uniformly.

And contrary to the company's attempt here to impugn some purported bias of the trustees to the actuary, in fact the Congress made it plain that the assumptions have to be the actuary's best estimate. If they're not, they're unreasonable as a matter of law and the arbitrators and courts have so found.

And moreover, these actuaries have all kinds of rules they have to follow, and if they don't do that, their licenses can be suspended or even revoked.

I think it's important to note that the scheme that Mr. Murphy suggests here would simply be unworkable

in terms of how this situation might work.

QUESTION: By the way, I meant to ask you, you weren't involved in this case until it got to this Court, is that it?

MS. FLOWE: That's correct, Justice White, after the Court --

QUESTION: So -- but do you happen to know whether the opposition to certiorari suggested that the trustee presumption was not at issue in the case?

MS. FLOWE: It did not.

QUESTION: Okay. Thanks.

MS. FLOWE: The scheme that Mr. Murphy is suggesting be used with respect to these assumptions simply wouldn't work. This is a very technical and complicated process, the establishment of actuarial assumptions. There's a good reason that Congress assigned this task to actuaries. It had first done so in 1974 as a part of its enactment of ERISA, where the assumptions were to be set by the actuary for purposes of funding all kinds of defined benefit pension plans, and after 6 years of experience in using the actuaries in that fashion, it again assigned this task to them in 1980.

The -- there is a range of reasonableness, that's true, but it's not by no means as broad a range as Mr. Murphy would suggest. What the actuary has to do --

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and there's many assumptions here, not just the interest rate assumption to be examined, but what the actuary has to do is really consider what liabilities are going to have to be paid by this particular plan over 30, 40, 50, maybe even 60 years into the future, as the various participants retire.

Also in a plan like this one that was very seriously underfunded, the actuary can't simply pick an interest rate that may reflect what the current day's investment returns are going to be, because he knows that there's going to be money coming into the plan to make up for that underfunding over all of that many years into the future, and that he has to be very conservative about what the rate of return might be able to be 40 years down the road.

If there wasn't some presumption of reasonableness afforded these actuarial assumptions, what we would be talking about is a situation where the employer could make the plan have to come in and prove every element of these complicated determinations in every single case, and it would completely defeat Congress' purpose in trying to limit the amount of unnecessary litigation in these withdrawal liability collection actions to let the plans do the matter expeditiously.

Turning, then, briefly to petitioner's other

constitutional challenges today, in response to a question you raised earlier, Justice O'Connor, it was clear in ERISA in 1974 when ERISA was enacted what a defined benefit plan was and what a defined contribution plan was. Congress plainly provided that a defined contribution plan was a plan that provided an individual account for each employee and that a defined benefit plan was any other plan -- that is, any plan that didn't provide an individual account for individual employees.

Contrary to Mr. Murphy's contention here this morning, it was never conceded, certainly by PBGC, that this plan was anything other than a defined benefit plan. The same disclaimer clause that's quoted in the briefs that was in the plan in 1976 and thereafter, also noted that the plan was paying premiums to PBGC's insurance program, which of course it had to do only as a defined benefit plan, but under protest.

I believe it was Justice Scalia who noted that yes, there were a couple of erroneous district court decisions early on, but the law was clear, and we believe that Concrete has to be charged with notice of what the law was and what the plan was it was joining.

We would simply suggest that the substantive due process and takings challenges in this case are both governed by and resolved by the Court's prior decision in

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Connolly and Gray, and I thank you.

QUESTION: Thank you, Ms. Flowe. Mr. Miller, you have -- pardon me, Mr. Murphy, you have a minute remaining.

REBUTTAL ARGUMENT OF DENNIS R. MURPHY

ON BEHALF OF THE PETITIONER

MR. MURPHY: Your Honor, the SDA presumptions, the -- page 54 of the appendix clearly shows that the trustees made a determination that the withdrawal occurred in 1981 and the issue was whether the plant was mothballed or permanently closed, and that was a determination that the trustees made and it was challenged throughout the entire proceedings and the presumptions -- there is no disclaimer that the presumptions were not issued in their favor and clearly the arbitrator was aware of the presumptions because he cited the presumptions at page 400 and 401 of the joint appendix in issuing his second decision, so it was a decision of fact, it was raised, it is before the Court, and it needs to be determined whether the trustee's decision on the A presumption is appropriate.

With respect to the statement that Concrete Pipe is on notice of the actuaries in 1976, there was no multiemployer Pension Plan Amendment Act even at the time they closed their plant, and there was no presumptive

formula to apply it to at that time, so there was -- obviously to say that at the time they entered the plan they were fully aware of all the unfunded liability calculations is not accurate.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Murphy, the case is submitted.

(Whereupon, at 12:02 p.m., the case in the above-entitled matter was submitted.)

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BY Ann-Marie Federico

(REPORTER)